

COMMERCIAL ITEMS ACQUISITION OF INFORMATION TECHNOLOGY UNDER FAR PART 12

The procedures of FAR Part 12 for acquisition of commercial items are an important tool for acquiring reliable, fully developed information technology (IT) in a comparatively speedy and simple manner. Therefore, acquisition professionals who regularly buy IT products, as well as their attorneys, should be familiar with the commercial item acquisition procedures. This paper discusses those procedures, along with some examples of practices followed by the CECOM Acquisition Center-Washington (CAC-W) in such procurements.

Authority for commercial item acquisition is found in the Federal Acquisition Streamlining Act (FASA) of 1994 (P.L. 103-355, Oct. 13, 1994), and in the Clinger Cohen Act of 1996 (formerly known as the Federal Acquisition Reform Act) (P.L. 104-106, Feb. 10, 1996). These statutes are implemented by FAR Part 12 and its DFARS and AFARS supplementation. FAR Part 12 is to be used in conjunction with FAR Parts 13, 14, or 15, as appropriate. (FAR 12.102(b).)

A lengthy definition of “commercial item” is set forth in FAR 2.101. It is important to note that “item” includes commercial services as well as concrete objects such as equipment and supplies. An item of equipment or supplies is deemed to be commercial if it is customarily used for non-governmental purposes, or if it has evolved from such an item through advances in technology or performance, even if it is not yet available in the marketplace, although it will be available to meet the Government’s delivery requirements. Such an item may have any knowledge/information modifications customarily available in the commercial marketplace, or minor modifications not customarily available. Services may be considered commercial items if they are normally provided for support of a commercial item of equipment or supplies. Such services include, but are not limited to, installation, maintenance, repair, and training. To be considered commercial, these services must be provided contemporaneously to the Government and the general public, under similar terms and conditions, and using the same work force. Services may also be considered commercial items if they are sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks. Excluded are services sold based on hourly rates without an established price for a specific task performed.

Market research is defined at FAR 2.101 as “collecting and analyzing information about capabilities within the market to satisfy agency needs.” Such research is required for acquisitions in excess of the simplified acquisition threshold (\$100,000 under most circumstances). (FAR 10.001(a)(2), 2.101.) It is essential for commercial item acquisitions. (FAR 12.202(a).) Market research is used to determine the availability of commercial items, and the nature of any customary commercial practices concerning customization, warranty, financing, discounts, and other matters. (FAR 10.002(b)(1).) To the maximum extent practicable, acquisition officials are required to define requirements to allow for provision of commercial items. If commercial items meeting the Government’s requirements appear to be unavailable, the agency must consider a

reasonable restatement of its requirements to accommodate available commercial items. (FAR 11.002(a)(2).) If such restatement is not possible, then the agency will not use FAR Part 12. However, under current Army policy, issued by the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) on 26 March 2001, almost all services are presumed to be commercial. In accordance with that policy, for those services where the results of market research indicate that the service is not commercial, the local Competition Advocate must approve that determination before the acquisition can be processed as a non-FAR Part 12 acquisition.

Contracts for commercial items may be firm-fixed-price or fixed-price with economic price adjustment. Indefinite-delivery contracts may be used, but only when the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. All other types are prohibited. (FAR 12.207.) For example, labor-hour type contracts and task orders are prohibited at this time, although there is a move afoot to amend FAR Part 12 to allow for them.

Commercial item acquisitions are synopsisized in accordance with FAR Subpart 5.3. However, the Contracting Officer may release the solicitation less than 15 days after the synopsis. (FAR 12.204.) In addition, the Contracting Officer may require proposals to be submitted less than 30 days after release of the solicitation, unless the acquisition is subject to the North American Free Trade Agreement (NAFTA) or the Trade Agreements Act. (FAR 12.205(c).) To save more time, the Contracting Officer may issue a combined synopsis and solicitation not exceeding 3-1/2 single-spaced pages. (FAR 12.603.)

Solicitations for commercial items are simpler than those for non-commercial acquisitions. The Contracting Officer normally must use Standard Form 1449, Solicitation/Contract/Order for Commercial Items. (FAR 12.204(a).) Five standard provisions, FAR 52.212-1 through 52.212-5, are provided for use. (FAR 12.301(b), (c).) Some of these provisions may be tailored, and within limits the solicitation as a whole may be tailored by addenda containing additional FAR provisions and clauses, and agency provisions and clauses. (FAR 12.301(e), (f).) By law, solicitations or contracts for commercial items shall, to the maximum extent practicable, include only those clauses required to implement provisions of law or executive orders applicable to commercial items, or determined to be consistent with customary commercial practice. (FAR 12.301(a).)

Among the required provisions, two are not tailorable. These are: FAR 52.212-3, Offeror Representations and Certifications—Commercial Items; and FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items. (FAR 12.301(b)(2) and (4).) Two other required provisions may be tailored in whole or part. These are: FAR 52.212-1, Instructions to Offerors—Commercial Items; and FAR 12.212-4, Contract Terms and Conditions—Commercial Items. (FAR 12.301(b)(1) and (3).) The second of these clauses contains some sections that may not be tailored. (FAR 12.302(b).) A fifth provision, FAR 52.212-2, Evaluation-Commercial Items, is optional and may be tailored. (FAR 12.301(c)(1), 12.602.)

Other FAR provisions and clauses may be included in the solicitation, by addendum, when their use is consistent with the limitations of FAR 12.302. These include, for example, indefinite delivery and option provisions. (FAR 12.301(e).) Any such provisions considered for inclusion must not be inconsistent with customary commercial practice for the item being acquired. (FAR 12.302(c).)

As mentioned, the clauses at FAR 52.212-1 and 52.212-4 may be tailored. (FAR 12.302(a).) In addition, discretionary FAR provisions and clauses may be tailored in accordance with the instructions for their use. All such tailoring must not be inconsistent with customary commercial practice, unless a waiver for inconsistent tailoring is approved in accordance with agency procedures. (FAR 12.302(c).) Within DOD, the head of the contracting activity is the approval authority for such waivers. (DFARS 212.302(c).)

Agencies may supplement the prescribed clauses as necessary to reflect agency unique statutes or as approved by the senior procurement executive or FAR Council representative. (FAR 12.301(f).) The DOD has exercised this authority in DFARS 212.301. Two provisions used in all solicitations are DFARS 252.212-7000, Offeror Representations and Certifications—Commercial Items; and DFARS 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items. (DFARS 212.301(f)(ii) and (iii).) Other provisions to be used when prescribed concern Central Contractor Registration, Trade Agreements, and the prohibition against award to companies owned by the People’s Republic of China. (DFARS 212.301(f)(i), (iv) and (v).)

Inspection and acceptance are discussed in the clause at FAR 52.212-4, at paragraph (a). Contracts for commercial items normally will not provide for in-process inspection by the Government, relying instead on the contractors’ quality assurance systems, unless in-process inspection is a customary commercial practice. (FAR 12.208.) However, the Government always has the right to reject non-conforming items before acceptance. (12.402(a).) The Government may require repair or replacement of non-conforming supplies or re-performance of non-conforming services at no increase in price. These rights may be exercised before or after acceptance. However, if after acceptance, they must be exercised within a reasonable time after any defect was or should have been discovered, and before any substantial change occurs in the condition of the item unless the change is due to the defect in the item. (FAR 52.212-4(a).) Alternative inspection procedures may be included in the solicitation, as appropriate, considering the complexity or criticality of the commercial item. (FAR 12.402(b).)

Paragraph (o) of FAR 52.212-4 provides for implied warranties of merchantability for ordinary purposes, and fitness for a particular purpose described in the contract. (See also FAR 12.404(a).) In addition to the warranty coverage in the clause, the FAR requires Contracting Officers to take advantage of express warranties offered by vendors. To the extent possible, the solicitation should require that express warranties provided to the Government be at least equal to commercial warranties provided to the public. The Government may specify minimum terms, such as minimum duration. (FAR 12.404(b).) Note that a contractor is permitted to offer an

express warranty that excludes the implied warranties as long as provision is made for repair or replacement of defective items discovered within a reasonable time after acceptance. (FAR 12.404(b)(2).)

Under the prescribed Changes provision, a unilateral change(s) to contract terms and conditions is not authorized. Changes may be made only by mutual agreement of the parties. (FAR 52.212-4(c).)

For commercial items, termination is governed by FAR Part 12. FAR Part 49 does not apply, although it may be used for guidance to the extent not inconsistent. (FAR 12.403(a).) In termination for cause (i.e., default), the Government is not liable for any amount for supplies or services not accepted. The Government has available against the contractor all rights and remedies available at law. (FAR 52.212-4(m).) The preferred remedy is recovery of excess procurement costs. (FAR 12.403(c)(2).) The process for convenience termination is simplified. The Government is liable to the contractor for a percentage of the price reflecting the percentage of work performed prior to the notice of termination, plus reasonable charges resulting from the termination. The contract cost principles of FAR Part 31 and the cost accounting standards are not applicable, and the Government has no right to audit the contractor's records. (FAR 12.403(d), FAR 52.212-4(l).) Generally, the parties should mutually agree on the requirements of the termination proposal. (FAR 12.403(d)(2).)

For commercial item acquisitions, certain laws have been modified or have been made inapplicable. These laws are listed at FAR 12.503 for contracts, and at FAR 12.504 for subcontracts. Examples include the Walsh-Healey Public Contracts Act, the Truth in Negotiations Act, and the Cost Accounting Standards. The FAR Part 12 provisions reflect the inapplicability, or the modified applicability, of these laws to contracts and subcontracts for commercial items.

Instructions to offerors are set forth in the clause at FAR 52.212-1. These include information about the applicable small business size standard; how to prepare an offer; the period within which the Government can accept an offer; any requirements for submission of samples; permission to submit multiple offers; rules on late submissions; evaluation, selection, and award procedures; the right of the Government to make multiple awards; and where to obtain Government-issued requirements documents. Additionally, it should be noted that, if an offer is submitted electronically, it must be received "at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for the receipt of offers." (FAR 52.212-1, para. (f)(2)(i)(A).)

As required by paragraph (b), Submission of Offers, in FAR 52.212-1, offers must show the solicitation number; the time specified for receipt of offers; the offeror's name, address and telephone number; a technical description of the items offered, including product literature; the terms of any express warranty; the price and any discount terms; a remittance address for receipt of payments from the Government; a completed copy of the representations and certifications in

FAR 52.212-3; acknowledgement of solicitation amendments; past performance information; and a statement indicating the extent of the offeror's agreement with all terms, conditions, and provisions in the solicitation.

In the clause at FAR 52.212-2, a standard evaluation provision is provided for use when evaluation criteria or factors are specified. (Ref. FAR 12.301(c)(1).) It assumes that the basis for award will be best value with a tradeoff process. The clause should be used substantially as written in the FAR (FAR 12.602(a)), but it must also be tailored to set forth the desired evaluation criteria and indicate their relative importance or weight. Depending on the complexity of the commercial items being procured, the criteria need not be more detailed than Technical, Past Performance, and Price. For the Technical factor, the Government need not list subfactors if the solicitation adequately describes the item to be acquired; it may be sufficient to consider simply how well the proposed products meet the Government's requirements. (FAR 12.602(b).)

Concerning acquisition of commercial computer software and commercial software documentation, the Government is to acquire these under the licenses customarily provided by the vendor to the public, unless the licenses do not meet agency needs, or are inconsistent with federal law. (FAR 12.212(a), DFARS 227.7202-1(a).) In addition, the Government is subject to two general prohibitions, each of which has an exception. (1) Vendors shall not be required to furnish technical information not customarily provided to the public, except for information documenting specific modifications made at Government expense. (2) Vendors shall not be required to relinquish, to the Government, the rights to use, modify, reproduce, release, perform, display or disclose software or documentation, except for a transfer of such rights by mutual agreement. (DFARS 227.7202-1(c).) In general, the Government has only the rights set forth in the license. If additional rights are needed, they must be negotiated and described in the license or an addendum thereto. (DFARS 227.7202-3.) No clause setting forth the Government's rights in commercial computer software or documentation is prescribed. (DFARS 227.7202-4.)

CAC-W has been acquiring commercial IT for many years, beginning long before passage of the commercial item statutes, and issuance of the commercial item regulations, noted above. The remainder of this paper discusses some of the practices followed by CAC-W in its conduct of those acquisitions.

Government users desire quality computers and related products. In order to provide this quality, two provisions are normally included in solicitations issued by CAC-W. (1) A preference is specified for the computer products of manufacturers listed in a "Tiering" model maintained by Gartner Group. Solicitation evaluation criteria provide that extra value will be granted for proposals offering the products of tier manufacturers, companies that, according to the Gartner Group model, manufacture quality computer products. The criteria also provide for evaluation credit for products that can be shown to be equivalent under the model that the Gartner Group uses in making its tier listings. (2) Deferred compliance is specified for International Standards Organization (ISO) 9000 or 9002 registration by the successful

contractor. In other words, the offerors are not required to be registered at the time of proposal submission or award, or sometimes even at the time of the first delivery. For offerors that have already achieved ISO registration, or have made significant progress toward achieving it, the solicitation evaluation criteria allow for the assignment of added value.

Computer processor chips are largely standardized on Intel. While Intel products are preferred by Government users, purchase of such products on a sole source basis cannot necessarily be justified. To avoid imposing overly restrictive requirements on vendors, a processor requirement is normally stated as “Intel or equal.” A specified commercial benchmark test is sometimes required and, in that event, a performance benchmark target is specified against which the offered processor is measured. Other chips exist, such as those manufactured by AMD, and Intel is not always offered, so competition is promoted by this approach.

Computer equipment is required to comply with certain standards. Examples of these standards include Federal Communications Commission Class B, Underwriters Laboratories, and EPA Energy Star. Computer technology changes continuously, and the definition of commercial items necessarily embraces newly evolved, as well as modified, products. Due to regulatory drag, newly evolved commercial products may not have confirmation that they comply with all of the standards by the date of proposal submission, or even award. In the past, disappointed offerors would sometimes seize upon such noncompliance with one of the standards at the time of award, and file a protest. To counter this, solicitations issued at CAC-W sometimes specify compliance by the date of first delivery for requirements such as these. Later compliance dates may be specified for other requirements that may be expensive or time-consuming, such as ISO registration.

Historically, some CAC-W solicitations for commercial item IT have resulted in large, fixed-price, indefinite-delivery indefinite-quantity (IDIQ) contracts that contain shopping lists of computer products. For many of these acquisitions, multiple contract awards are made. The concept behind this is to provide contractors with an incentive for competitive pricing and excellent performance, at the risk of losing business to the other awardee, order by order. The number of contract awards is limited, generally to two. To have more than two has generally been deemed undesirable as it may result in a volume of orders for each contractor that is insufficient to make the contractors responsive and cooperative.

When a contractor is preparing to ship items from its facility to the Government, a representative of the contract administration office ordinarily signs or stamps the shipping papers to release them for shipment. For shipments of commercial items, alternate release procedures are available under which the contractor assumes the responsibility for releasing the items for shipment without waiting for contract administration personnel to sign the papers. (DFARS 246.471(a).) At CAC-W, alternate release procedures have typically been authorized for IDIQ commercial item IT contracts. This makes possible the avoidance of unnecessary delays.

Most CAC-W IDIQ contracts provide for decentralized ordering, which means that ordering is generally done at contracting offices other than CAC-W. In the past, contractors had some difficulty in obtaining timely payment under such contracts because the local ordering offices did not provide the paperwork supporting payment in a timely manner. The contractors ended up with huge amounts owed to them by the Government, and concomitant cash flow difficulties. CAC-W often had to intervene to solve the problem. As a result, CAC-W's IDIQ contracts typically provide for acceptance at origin, to help contractors receive payment for their deliveries more quickly.

As mentioned above, the FAR prescribes broad, general warranties for commercial item contracts, but allows for Government specification of minimum warranty terms. (FAR 12.404.) CAC-W's large IT contracts generally set forth a number of minimum Government requirements for equipment warranty. These requirements include on-site repair or replacement within CONUS and certain key OCONUS locations, with offerors given the choice of service type (e.g., mail-in) for remote locations. The turn-around time for repairs is normally two days for CONUS, and longer times for other locations. Provision is also made that insertion by the Government of third-party components, into the system provided by the offeror, will not void the warranty. Duration of warranty periods has typically been specified as three to five years. Offerors have been able to support the five-year warranty. However, the longer term has a higher cost, and technological changes occur at a rapid pace. A shorter warranty period may, therefore, be more appropriate. For software, a commercial warranty typically provides for releases or iterations, based on the original product, which correct problems and add some functionality. CAC-W contracts normally require this level of support, as a minimum. Government warranty requirements beyond the commercial warranty are also set forth. Further, in order to distinguish a normal software release from an upgrade that is a new product and, therefore, not subject to the warranty, CAC-W solicitations typically make clear that the software warranty covers only releases that are provided at no extra charge to the public, and are not regarded by the vendor as new products.

Minimum software license rights are specified by CAC-W solicitations in accordance with FAR 12.212 and DFARS 227.7202-1. Generally, the Government's software requirements can be satisfied by a license to use one copy of the software on a single computer. Many CAC-W offerors are not manufacturers, but integrators who will buy software from the manufacturers. As a result, the CAC-W solicitation typically states that the licenses for such software will be in the name of the U.S. Government, not that of the offeror. Also, perpetual licenses are often prescribed. These permit the Government to continue using the software even after it may no longer be supported commercially, without any further payment such as an annual license fee. The up-front cost of a perpetual license, however, will typically be higher. In addition, offerors sometimes propose licenses under which computer manufacturers pre-load software onto equipment. Although these are cheaper than standalone licenses bought separately from equipment, they may not satisfy the needs of the user. If so, the solicitation should require the standalone software licenses. Finally, Original Equipment Manufacturer (OEM) commercial

licenses provided by vendors need to be carefully reviewed for provisions that are inconsistent with federal law.

Due to the rapid pace of advances in IT, and the equally rapid obsolescence of most products, a technology refreshment provision is an essential term of any IT acquisition for commercial items. CAC-W IT procurements include a provision that permits additions and substitutions that are within the scope of the contract as awarded. Additions include upgrades of existing items covered by the contract, or new advances in technology. The price for such additions is negotiable. Substitutions cover replacement of existing items, generally those that have gone out of production, or are no longer supported by the manufacturer. Substitutes must have equal or better functionality than the replaced items, and generally must be offered at no increase in price. The price cap on substitutions is intended to preserve the value of the original competition. The contractor is obliged to provide a product, at the price originally proposed, for the entire ordering period of the contract. However, the commercial marketplace is not absolutely predictable. Therefore, when through no fault of its own, a contractor cannot feasibly substitute a product at the price originally proposed, the technology refreshment provision authorizes the parties to proceed as mutually agreed. When justified, this may result in the reservation of the CLIN for the discontinued product, or the inclusion of a substitute at an increase in price.

Technical acceptability of offered products may be established by a global certification executed by the offeror. With this technique, the offeror certifies that its offer complies with all technical requirements. Global certification reduces the need for lengthy technical proposals, large numbers of evaluators, and the time needed for evaluation. The General Accounting Office has decided that global certification is an adequate substitute for a more comprehensive technical evaluation of acceptability, unless the Government has reason to know that the proposal is noncompliant in some respect. When using global certification, CAC-W does not solicit detailed proposal information on acceptability, or technical literature. If technical literature is received, however, it would have to be scrutinized for noncompliance in order to eliminate protest risk.

CAC-W solicitations often include a matrix allowing offerors to identify features of their offered products deemed worthy of favorable consideration under the evaluation criteria. Offerors fill in blanks in the matrix, identifying the benefits they believe the Government should reflect in its evaluation report.

In some procurements, offerors have been required to provide sample computer configurations. Examination of such samples can be useful when the physical durability of the system or its performance capabilities are important evaluation considerations. However, such a requirement adds time to the evaluation process. Other more efficient ways to address the underlying concerns may be available. For example, if the offers come from the Gartner Group tiering model and ISO-compliant firms, there is a strong indication of quality.

In the past, offerors have disrupted the evaluation process by unexpectedly changing their solutions without Government prompting and after the evaluation was substantially complete. CAC-W has dealt with this by occasionally implementing a “freeze” rule. The rule is intended to discipline offerors to complete their homework before proposals are submitted, and to select solutions that will not substantially change. The freeze rule forbids any change in technical solutions except in response to a specific item for negotiation or a solicitation amendment that changes solicitation requirements.

Flat pricing is a technique used by CAC-W in commercial item IT procurements to prevent offerors from unrealistically discounting out year pricing to gain a price evaluation advantage. In the past, some offerors proposed low prices for products in the later years of a contract with the expectation that they would never have to deliver those products because user demand for them would disappear as a result of obsolescence or advances in technology. At the same time, higher base-year prices ensured that these offerors would earn a larger portion of their revenue early in the lives of their contracts. In these ways, they would often obtain an advantage over offerors who seriously undertook to provide the proposed product or a substitute at a reasonable price over the entire contract period. This practice made it difficult for the Government to conduct a fair price evaluation. In response, CAC-W has sometimes imposed a requirement that a single, or “flat,” price be proposed for a CLIN over the life of the contract, usually five years or less, and that the contractor explicitly agree to provide the product proposed or an equivalent substitute over the contract term. Vendor response has been favorable, and flat pricing has worked well during contract administration.

In conclusion, it is important for acquisition professionals who acquire commercial item IT, and their counsel, to be aware of FAR Part 12. The potential benefits to the Government from use of the commercial item procedures cannot be overestimated.

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