

WHAT ARE COMMERCIAL SERVICES?

Since 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 process of considering commercial goods and services to meet the Government's requirements has become familiar to most of us in the acquisition community. More recently, we find ourselves looking closely at the application of the commercial item definition to services. At first glance, almost all of the services we procure would seem to be commercial in nature. If we apply the "of a type test", that is, services of a type offered and sold in the marketplace, to services for installation, maintenance, repair, training, and other commonly acquired services, we could consider almost all of the services we buy to be commercial. The Comptroller General upheld this interpretation in the Aalco Forwarding, Inc. decision that an agency properly determined that household moving services for military personnel are commercial services "of a type" offered and sold in the commercial marketplace. The decision cites that the agency "reasonably concluded, based on its market research, including reviews of numerous commercial contracts, that the moving services it seeks in reengineering its current program qualify as a commercial item because they are the type of services offered and sold competitively by the moving industry in substantial quantities to commercial shippers, particularly in the national account contract market. In this regard, it is apparent that the services used for the movement of the household goods of military personnel, i.e., packing, loading, hauling, storage and other accessorial services, and delivery, are not services that are unique or provided only to the government, but are essentially the same moving services provided in the commercial market, in that movers use the same trucks, warehouses, ocean or air carriers, crews, packing materials, and other equipment to perform both DOD's and the commercial market's household goods moving requirements."¹

However, when such services are procured for support of an item not referred to in the commercial item definition, we may have a different situation. The FAR 2.101(b) definition of a commercial item includes installation services, maintenance services, repair services, training services, and other services, if such services are procured for support of an item referred to within the commercial item definition. This part of the definition applies whether or not such services are provided by the same source for the commercial item or at the same time the commercial item is acquired. Furthermore, for the services to be considered commercial, the source of the services must provide similar services to the general public within the same timeframe and under terms and conditions similar to those offered to the Federal Government.

FAR 2.101(b) further refines the definition of commercial services to include those services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. In this context, a catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or

¹ Aalco Forwarding, Inc., Comp. Gen Dec. B-277241.8; October 21, 1997

vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last made to a significant number of buyers constituting the general public. Market prices mean current prices that are established in the course of ordinary trade between buyers and sellers free to bargain, that can be substantiated through competition or from sources independent of the offeror(s). FAR 2.101(b) specifically excludes services that are sold based on hourly rates without an established catalog or market price for a specific service performed.

What about support services for equipment that does not meet the definition of a commercial item in FAR Part 2? Many fielded legacy systems are used only for Government purposes, and did not evolve from commercial or non-developmental item solutions. There may be no commercial applications for these types of systems if the systems are only used to support military requirements. In this instance, the services are not commercial in accordance with the FAR Part 2 definition, as discussed above. Furthermore, the supporting engineering and technical services may not be of a type offered and sold competitively in the commercial marketplace and the services are not based upon established catalog prices for specific services. It may also be possible that the Government may not possess sufficient technical data on the overall systems design to adequately describe the technical, logistical, or engineering support services that are required under a proposed contract to be procured as commercial services. In these cases, thorough market research will provide support for a determination that the services are not commercial in nature and are not available in the commercial market place.

FASA requires documentation of the Government's commerciality decision. Comprehensive market research must be conducted to ascertain whether any sources exist that can provide the required services, and if commercially equivalent services are available to fulfill the Government's needs. A commerciality decision is a determination of the availability of commercial items that will meet the Government's requirements. By memorandum dated 26 March 2001, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology)² 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." This is an Army policy requirement.

The Commerciality Determination provided to the Competition Advocate for approval must be sufficiently detailed in describing the timing and techniques used in conducting market research and the market research results which led to the Contracting Officer's determination that the required services are not commercial in nature and cannot be procured in accordance with standard commercial terms and conditions. The issue of whether or not the services are commercial becomes less clear when the services initially seem "of a type" that are commercial,

² Memorandum for Secretaries of the Military Departments, J.S. Gansler, 5 Jan 2001, with attached Clarification of FAR Part 12 for Consistency

but encompass specific requirements that are unusual and cannot be obtained through the commercial market place. An example of this would be services that are similar to commercially available services, such as installation of communications equipment, but because of military operating environments, unique security requirements may preclude use of commercial service arrangements. Consequently, in such instances, even though the services seem to be of a type that are commercially available, the unique military requirements preclude application of customary commercial practices and, therefore, such services would not be commercial in accordance with FAR 2.101(b). Market research must be tailored to focus on the exact requirements so that an accurate analysis can be performed to determine whether or not the required services are commercial. If the required services are commercially available, the services must be procured in accordance with the provisions of FAR Part 12. FAR 12.207 requires that contracts for commercial items be firm fixed price or fixed price with economic price adjustment (EPA); indefinite delivery contracts for commercial items may be firm fixed price or fixed price with EPA. Use of any other contract type is prohibited. This is not subject to any exception or waiver process.

In conclusion, comprehensive market research is the key to making the determination of whether the required services are commercial, whether commercially equivalent services are available, and if any sources exist that can provide the required services to fulfill the Government's needs.

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