



Integrated Dual-use Commercial Companies

21 Martin Terrace, Glastonbury, CT 06033

(860) 633-6772

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OUSD (AT&L) DPAP (CPIC)
Office of the Director,
Defense Procurement and Acquisition Policy
3060 Defense Pentagon,
Washington, DC 20301-3060

Attention: Michele P Peterson
OUSD (AT&L) DPAP (CPIC)

Subject: Commercial Item Handbook Draft

Reference: Federal Register, July 1, 2009 (74, number 125) page 314161

Dear Ms. Michele P. Peterson:

On behalf of the Integrated Dual-Use Commercial Companies (IDCC), I am pleased to provide comments to the proposed Commercial Item Handbook draft. The IDCC was involved in the acquisition reform activities that led to the formulation of the commercial item procurement rules and IDCC continues to monitor changes that would adversely affect our ability to continue to offer the Government commercial items.

The IDCC was formed in 1991 as a consortium of predominantly commercial firms who seek to simplify and improve methods for doing business with the Federal Government. Member firms include Air Products & Chemicals, Corning, Dow Chemical Co., Dow Corning Corp., Honeywell International, Sherwin Williams, Energizer Battery, and W. L. Gore & Associates. These firms are industry leaders in several areas including industrial patents, R&D, and commercial sales in several fields. All sell commercial items to the Government and its prime contractors under the current FAR Part 12 commercial item provisions.

The IDCC thanks you for your efforts to update the Commercial Item Handbook. This will be a valuable tool for Contracting Officers as they seek the benefits of commercial item purchases, and an important resource for their necessary exercise of judgment. Your efforts have resulted in a well organized Commercial Item Handbook. It addresses many of the issues contracting officials face in dealing with commercial item offerors.

Our recommendations and suggestions to clarify several areas are presented below. IDCC hopes you will find them helpful.

Please note that our response to this important work is somewhat constrained by the short response period allowed. Thirty days to respond to a document of approximately 100 pages that was more than a year in the making seems a bit short.

Foreword

The Foreword sets the tone of the Handbook, and can pervasively influence the philosophical approach to commercial item determinations, pricing, and contracting processes. IDCC suggests that the last three sentences of the current draft be replaced with text which brings out the congressional mandate flowing from the Federal Acquisition Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA) to purchase commercial items when that is in the best interest of the Government. The proposed cautionary statements now in the text belong, properly nuanced, in the commercial item determination and commercial item pricing sections.

Chapter 1 – Introduction to Commercial Items

What is a Commercial Item

In this section there is a statement regarding the qualification of a minor modification. It reads, “To qualify as representing minor modification, the item must retain a predominance of nongovernmental function or physical characteristics of an item or component or change the purpose of a process.” Under FAR 2.101 the definition of a minor modification is “modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process.” Recognizing Dr. Gansler’s use of the word “predominance” in the policy memorandum at Appendix A, IDCC nevertheless suggests that consistency with the language of the regulation itself would be appropriate. IDCC would also like to ask for clarification, of the type of “process” to which the definition and handbook refer to in this sentence. Is it a process that the item performs? Is it a process that is being acquired, or a software process?

“Of A Type”

Please consider revising the opening paragraph to read as follows, “The phrase “of a type” in the commercial item definition broadens the definition so that qualifying items do not have to be identical to those in the commercial marketplace. This takes full advantage of the opportunities for modified commercial items – both commercial and non-commercial modifications - to be procured utilizing these procedures. As a caveat, it is noted that the item must always fall within the definition of a commercial item under the FAR; this leeway is not license to procure military unique items which are not within the scope of that definition.”

IDCC suggests this change in the text to make the point that whether or not an item is sole-source has no place in the determination of whether an item is commercial, and to ensure that the text does not drive contracting officials away from a finding that an item is “commercial” in nature when such a finding is warranted.

Modified Items

The proposed text contains the following paragraph:

For modifications of a type available in the commercial marketplace, factors to be considered include value, size, and the comparative value and size of the final product. Dollar value and percentage may be used as guideposts, but are not conclusive evidence that a modification is minor

IDCC asks for a reconsideration of this text. The language of the FAR regarding commercial modification is as follows, “Modifications of a type customarily available in the commercial marketplace”. Dr. Gansler interprets this in the Commercial Acquisitions Policy Memorandum, reproduced at Appendix A of the Handbook. In his paragraph entitled “Modified Commercial Items,” the memorandum states: “For modifications of a type available in the commercial marketplace, the size or extent of the modifications is unimportant.”

It is our experience, as commercial item suppliers, that many products in the commercial marketplace start with a basic product that is then customized or tailored to the particular customer requirements, such as size, shape, tolerances, outputs, ruggedness, etc. These modifications may require extensive re-engineering, resulting in a price for the modifications that is high in relation to the base product but not high in relation to other commercially sold items embodying the same types of modifications. If the same types of modifications are made for a military product, then the item should still meet the definition of a commercial item. The IDCC suggests that this breadth of interpretation is consistent with the FARA and FASA objectives of capturing the benefits of commercial initiative and entrepreneurship.

Commercial Item Exceptions

The IDCC suggests that this section might more appropriately be located in Chapter 4.

To make the subject of this section more clear, IDCC suggests the title be changed to “**The Commercial Item Exception to the Requirement for Cost or Pricing Data**”

IDCC also suggests that the legislative baseline for this issue be established with a new lead-in sentence as follows, “Cost or Pricing Data is not required for the purchase of Commercial Items. 10 USC 2306a (b)(1) provides: “In general.--Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract ... (B) for the acquisition of a commercial item”.

The section contains the following text:

When a solicitation or contract clause requires submission of cost or pricing data, a firm may request a commercial item exception. The Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification.

This language may mix the issues of whether an item is commercial and what data may be required in support of the pricing of the item. IDCC suggests that the classification of an item as being “commercial” is not related to pricing except in the case of a minor modification (non-commercial) to an item which is commercial where the determination to be made is whether the item qualifies as a commercial item. To ensure a proper separation of these issues, IDCC suggests that this language be replaced with the following:

Commercial items may be offered in response to solicitations which call for the submission of cost or pricing data. Where an item which qualifies as commercial is offered, the Contracting Officer is not to require the submission of cost or pricing data in support of the commercial item determination. Data other than cost or pricing data may be requested to support the price of a commercial item under the narrow circumstances described in Chapter 4 under the heading ‘Determining Fair and Reasonable Prices’, and as described in FAR 15.403-3(2).

When such information is requested, the Contractor may not be required to adhere to FAR part 31 or CAS; the information may be supplied from the contractor’s existing accounting records and in a format which the contractor’s existing records and systems will support. See FAR 15.403-3.

Chapter 4 – Pricing Commercial Items

Sole Source Procedures

This section addresses the difficult circumstances faced by a contracting officer in situations where there is only one source of the item desired by the Government. As participants in the commercial marketplace, IDCC’s members are buyers as well as sellers and are sympathetic to the difficulties faced by a buyer facing a sole source seller. IDCC believes it is nevertheless important to maintain clarity of thought and action regarding when and how a commercial item determination is to be made, and to separate that determination clearly from pricing issues. With this in mind, IDCC recommends changing the text of the sentence which now reads, “If the price still cannot be determined to be fair and reasonable, the item ordinarily should not be acquired utilizing commercial items procedures under FAR Part 12,” to, “If the price cannot be determined to be fair and reasonable, the Contracting Officer should consider what other items or options might meet the Government’s needs but this circumstance would not affect the status of the item as being commercial in nature.”

Determining Fair and Reasonable Prices

This section contains a reference to “cost information.” IDCC suggests that this should be changed to “information other than cost or pricing data.” This would be consistent with the FAR and the discussion noted above about the exception to requirements for cost or pricing data.

The IDCC wants to again thank you for this opportunity to participate in the revision process and welcomes future dialog to discuss these issues directly. I would like to request that you, or someone from your office, meet with the IDCC membership to discuss this Commercial Item Handbook revision in more detail. Our next meeting in Washington DC will be October 20 from 1 pm to 5:30 pm and October 21 from 9 am to noon. If you are able to meet with us during this time, please contact me at (860) 633-6772 or adayers@idcc.org to confirm the specific time and location.

Sincerely,



Alan D. Ayers
President