



Commercial Items

Andre Early

Section Chief, CBRN BioShield

Contracting Officer



Objectives



- Definition of Commercial Items
- Advantages to Commercial Items
- Unique Solicitation and Terms
- ASPR Mission Commercial Items



What is a Commercial Item?



The Federal Acquisition Regulation Says: A Commercial item means—

- (1) Any item, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—
 - Has been sold, leased, or licensed to the general public; or
 - Has been offered for sale, lease, or license to the general public;
- (2) Any item that evolved from an item described in paragraph (1) above through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—
 - Modifications of a type customarily available in the commercial marketplace; or
 - Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.
- (4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;
- (5) Installation services, maintenance services, repair services, training services, and other services if—
 - Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
 - The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;
- (6) 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 or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—
- (7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or
- (8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.



Commercial Item Uses



- Preferred approach to acquisition for federal government
- Used in conjunction with:
 - FAR Part 13, Simplified Acquisition Procedures; FAR Part 14, Sealed Bidding; or FAR Part 15, Contracting by Negotiation, as appropriate for the particular acquisition



Commercial Item Advantages



- Offers greater efficiencies and cost savings by taking advantage of commercial practices and commodities
- Encourages leading companies to do business with the federal government
- Creates shorter solicitation periods and streamlined solicitation processes
 - Combined solicitation/synopsis may be used
- Dollar thresholds
 - No specific threshold for commercial item acquisition – contracting method determines relevant thresholds



Commercial Item Limitations



- Restricted to firm fixed-price contracts or fixed-price with economic price adjustment unless criteria met for time and material (T&M) or labor hour contracts
- Time and Material or Labor Hour Contracts
 - Must include a ceiling price in the contract or order that the contractor exceeds at its own risk; and
 - Authorizes any subsequent change in the ceiling price only upon a determination by the Contracting Officer.
- Indefinite delivery contracts may be used



Commercial Item Acquisition Special Requirements



- Market research required – Assists in determining terms and conditions customarily found in the commercial market place and items that may be suitable for Government's requirements.
 - Sources Sought
- Solicitation Process
 - May release solicitation less than 15 days after synopsis
 - Standard Form 1449, Solicitation/Contract/Order for Commercial Items required when:
 - Greater than the simplified acquisition threshold (over \$150,000)
 - Paper solicitation or contract issued
 - Combined synopsis/solicitation process is **NOT** being used
- Offers
 - Product literature preferred over unique technical proposals
 - Alternate proposals or products permitted
 - May allow less than 30 days response time to solicitation
- Past performance should be included as evaluation factor



Other Commercial Item Acquisition Special Requirements



- Rely on Contractor's existing quality assurance systems
- Price Reasonableness (knowing factors that effect price ex. delivery, warranty)
- Other considerations
 - Contract financing
 - Technical data
 - Computer software
 - Commercial practice terms and conditions
 - Cost accounting standards – do not apply to FFP or FP/EPA



Commercial Terms and Conditions



- Limit clauses/provisions to those typically found in customary commercial practices
 - Some terms and conditions may be tailored to commercial practices
- Required Clauses/Provisions
 - 52.212-1, Instructions to Offerors—Commercial Items
 - 52.212-3, Offeror Representations and Certifications—Commercial Items
 - 52.212-4, Contract Terms and Conditions—Commercial Items
 - 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items
 - 52.212-2, Evaluation—Commercial Items (**when using evaluation factors**)
- Optional Clauses/Provisions
 - Appropriate clauses/provisions for IDIQ type contracts and contracts with options
 - Other clauses/provisions unique to particular situation



Unique Requirements



- Acceptance
 - Reliance on the contractor's assurances that the item conforms with the contract
 - May reject non-conforming supplies/services
 - Unique inspection requirements may be included in contract to protect Government interests
 - Express warranties should be examined closely for impact on post-award remedies available to the Government

- Termination
 - FAR Part 49 does not apply but may be used for guidance so long as it does not conflict with 52.212-4
 - Termination for Cause
 - Termination for Convenience

- Warranties
 - Implied
 - Express



Applicability of Certain Laws



- Executive Agency Contracts and Subcontracts
Applicability
 - Refer to FAR 12.503 and 12.504 for entire listing
 - Different categories of applicability
 - Many laws are **not applicable**
 - **Certain requirements** of some laws are not applicable
 - Some laws have been **modified**



Streamlined Solicitation Procedures



- Streamlined Solicitation
 - SF 1449 shall NOT be used – synopsis should state “combined synopsis/solicitation” – see FAR 12.603(c)(2) for elements required
 - 15 days posting requirement in FedBizOpps before release of solicitation not required since combined notice
 - Amendments must be posted as well

- Streamlined Evaluation
 - Latitude in criteria for evaluating offers
 - Subfactors are not required
 - Generally technical, price and past performance
 - Capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors
 - Technical evaluation normally includes review of product literature, product samples (if requested), technical features and warranty provisions.
 - Past performance must be included
 - Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.

- **Commodities**

- Medical Supplies
- Surgical Supplies
- Dental and Veterinary Supplies
- Tent Parts
- Office Supplies
- Telecommunications
 - Radios
 - Phones
 - Satellite Support
- IT and Office System Support
- Preventative Maintenance
- Uniforms
- Pharmaceuticals
- Miscellaneous

