

Commercial Practices Working Group Acquisition Advisory Panel

These slides contain proposed findings and recommendations for discussion purposes only. They have not been approved by the Acquisition Advisory Panel.

F-1. Commercial “Best Practices”

“Best practices” by commercial buyers include a clear definition of requirements, reliance on competition for pricing and innovative solutions, and use of fixed-price contracts.

F-2. Defining Requirements

Finding: Commercial organizations invest the time and resources necessary to understand and define their requirements. They use multidisciplinary teams to plan their procurements, conduct competitions for award, and monitor contract performance. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative, high quality goods and services. Procurements with clear requirements are far more likely to meet customer needs and be successful in execution.

F-3. Competition in the Commercial Marketplace

Commercial buyers rely extensively on competition when acquiring goods and services. Commercial buyers further facilitate competition by defining their requirements in a manner that allow services to be acquired on a fixed-price basis in most instances.

F-4. Contract Terms and Conditions Used in Commercial Contracts

Finding: Large commercial buyers generally require sellers to use the buyers' contracts which includes the buyers' standard terms and conditions. This allows all offerors to compete on a common basis. The use of standard terms and conditions streamlines the acquisition process, making it easier to compare competing offers, eliminating the need to negotiate individual contract terms with each offeror, and facilitating contract management.

F-5. Pricing of Commercial Contracts by Commercial Buyers

- Commercial buyers rely on competition for the pricing of commercial goods and services. They achieve competition by carefully defining their requirements in a manner that facilitates competitive offers and fixed-price bids. In the absence of competition, commercial buyers rely on market research, benchmarking, and in some cases, cost-related data provided by the seller, to determine a price range.

F-6. “Commercial Practices” Adopted by the Government

- (a) Findings: The government has implemented a number of different approaches to acquiring commercial items and services. Each approach has distinct strengths and weaknesses. The extent to which each of these approaches achieves competition, openness, and transparency varies. None of these approaches replicates the commercial marketplace.

F-6. (cont.)

(c) Findings: Federal Supply Schedules are used in some instances, for large services procurements but without the discipline and rigor of full and open competition.

(d) Findings: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.

(e) Findings: Solicitations for task and delivery order contracts often include an extremely broad scope of work that fails to produce meaningful competition.

F-6. (cont.)

(f) Orders placed under task and delivery order contracts frequently indicate insufficient attention to requirements development.

(g) The ordering process under task and delivery order contracts often does not result in meaningful competition at the task order level.

(h) Agencies frequently make significant purchases of complex services using task and delivery orders.

F-6. (cont.)

(i) Although task and delivery order contracts are supposed to be streamlined buying mechanisms, agencies use best value type competitions when placing large orders – but without any standards for such competitions.

F-7. Time & Materials Contracts

Commercial buyers use time and materials contracts minimally, preferring the use of fixed price contracts whenever practicable. Although difficult to quantify precisely due to limited data, the government makes extensive use of time and materials contracts.

F-8. Statutory and Regulatory Definitions of Commercial Services

The current regulatory definitions of commercial items and services allow goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as “commercial” and acquired using the streamlined procedures of FAR Part 12. This can put the government at a significant disadvantage.

“Commercial Services” defined in 41 U.S.C. § 403(12)(F)

The definition of stand-alone is:

Services 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.

Commercial Services as adopted in current FAR 2.101

(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 under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services –

F-9. Price as an Evaluation Factor

Finding: The use of non-price related and “responsibility” type evaluation factors may result in too much emphasis being placed non-price considerations that exceed the government’s minimum requirements and also result in price being a minimal consideration in source selection. This can result in the government paying too much for criteria that do not really add value.

SUMMARY OF RECOMMENDATIONS

Orders under GSA Schedules

Over \$100k - \$5m

- Fair Notice & Fair Opportunity to All or As Many as Practicable to Reasonably Ensure Receipt of at Least 3 Offers
- **Debriefing (if requested)**

Over \$5m

- **Fair Notice & Fair Opportunity to All**
- **Additional Competition Requirements**
- **Debriefing (if requested)**
- **Protestable**

Orders under Other Multiple Award Contracts (e.g., MACs, GWACs, Enterprise-wide Contracts, & Agency Multiple Award IDIQs)

Over \$100k - \$5m

- Fair Notice & Fair Opportunity to All
- **Debriefing (if requested)**

Over \$5m

- Fair Notice & Fair Opportunity to All
- **Additional Competition Requirements**
- **Debriefing (if requested)**
- **Protestable**

Fair Notice & Fair Opportunity (As Described In Section 803)

(b)(2) For purposes of this subsection, an individual purchase of services is made on a competitive basis only if it is made pursuant to procedures that--

- (A) require **fair notice** of the intent to make that purchase (including a description of the work to be performed and the basis on which the selection will be made) to be provided to all contractors offering such services under the multiple award contract; *and*
- (B) afford all contractors responding to the notice a **fair opportunity** to make an offer and have that offer fairly considered by the official making the purchase.

- **Proposed Additional Competition Requirements for Orders Above \$5M:**
 - a clear statement of the agency's requirements;
 - a response period of at least 10 working days;
 - a clear statement of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including the quality of the product or services to be provided (technical capability, management capability, prior experience, and past performance of the offeror);
 - cost or price to the government shall be an evaluation factor that must be considered;
 - a statement of the relative weight of the evaluation factors, including whether all evaluation factors other than cost or price are significantly more important than, equal to, or significantly less important than cost or price; and
 - where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price.