



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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ACQUISITION,
TECHNOLOGY,
AND LOGISTICS

MEMORANDUM FOR: COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Guidance on Commercial Item Determinations and the Determination of Price
Reasonableness for Commercial Items

On February 4, 2015, the Department issued a memorandum entitled, "Commercial Items and the Determination of Reasonableness of Price for Commercial Items." That memorandum was issued to amplify authorities provided by 10 U.S.C. §2306(a) and §2379 and to preview guidance required by Section 831 of the FY 2013 National Defense Authorization Act (NDAA). That memorandum is hereby rescinded and the following guidance is issued in its place.

The FY 2016 National Defense Authorization Act includes a number of provisions relating to commercial item acquisition. On August 11, 2016, the Department published a proposed rule in the Federal Register (81 FR 53101) under DFARS case 2016-D006 to implement Sections 851-853 and 855-857 of FY 2016 NDAA, as well as Section 831 of the FY 2013 NDAA. This rule provides guidance to contracting officers for making price reasonableness determinations, promotes consistency in making commercial item determinations, and expands opportunities for nontraditional defense contractors to do business with DoD. While that case makes its way through the rulemaking process to allow for public comments, the underlying tenets of that legislation to improve consistency and timeliness can be addressed.

Commercial products and solutions are critical contributors to mission success, and the streamlined procedures in FAR Part 12 allow the Department to meet its needs efficiently and effectively. Last year, the Department executed millions of procurement transactions for the acquisition of commercial items. In the vast majority of those cases, the procurement actions were accomplished rapidly and provided timely, cost effective support to the warfighter. However, there have been instances where it has taken the Department too long to render commercial item determinations, particularly for items not sold in the competitive commercial marketplace. Further, there have been instances where one contracting officer within the Department has reached a determination about the commerciality of an item that is inconsistent with a determination made for the same or similar item elsewhere in the Department.

To assist in both the timeliness and consistency of commercial item determinations, the Defense Contract Management Agency (DCMA) has stood up six Commercial Item Centers of Excellence (CoEs), aligned to various contractor market sectors. The Centers will be staffed with a cadre of engineers and price/cost analysts to advise procuring contracting officers (PCO) in their determinations of commerciality. These experts also will be an excellent resource to support commercial item pricing. The responsibility for commercial item determinations remains a PCO responsibility. These CoEs will support contracting officer commercial determination and pricing efforts; however, per the Department's policy (DFARS 244.402), it is the prime contractor's responsibility to determine whether a particular subcontracted supply or service meets the definition of a commercial item.

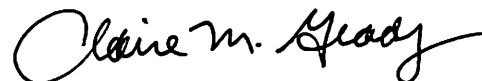
Timely and consistent commercial item determinations must be the standard for the Department. Recent legislation provides that contracting officers may presume that a prior commercial item determination made by a Military Department, Defense Agency, or field activity of the Department of Defense shall serve as a determination for subsequent procurements of such item. Similarly, recent legislation requires that prior to converting prior FAR Part 12 procurements to FAR Part 15, a written determination is required to document the decision. In time, the Department will have a robust database of commercial item determinations, providing the acquisition team access to the universe of prior determinations and the supporting rationale. In the meantime, and until the implementing DFARS rule and associated tools have been put in place, contracting officers should adopt the practice of recognizing prior known determinations. If a contracting officer believes a prior commerciality determination was without foundation, or was made in error, he or she should engage both the chain of command and the DCMA Commercial Item CoE prior to making a determination that deviates from prior decisions. Otherwise, contracting officers need only include a copy of the prior determination in the contract file along with an affirmative statement that the prior determination remains a valid determination for the instant contract.

Additionally, to streamline the process and achieve both predictable and consistent outcomes, the Director, Defense Pricing and the DCMA's Cost & Pricing Center Director are working closely with interested companies to define, through the use of advance agreements, the types of information needed to support commercial item determinations and associated pricing determinations. The intent is to define, in advance, the kinds of supporting data that the company is required to provide and would be considered sufficient. These advance agreements will not limit or usurp a contracting officer's authority, but are instead intended to proactively engage contractors to reach an understanding in advance of individual procurements of commercial items frequently purchased by many contracting officers. Based on information provided by the contractor, and reviews by DCMA, each contractor that is interested in pursuing such an agreement will identify specific products and services it seeks to be designated as "commercial items." The advance agreements will provide for a more consistent approach to the evaluation of information provided by the contractor to support a particular proposed commercial item procurement. DCMA will upload these advance agreements in the Contract Business Analysis Repository (CBAR) for use by procuring contracting officers.

Finally, section 855 of the FY 2016 NDAA reinforced the longstanding statutory preference for the acquisition of commercial items and the need to conduct adequate market research to identify commercial products and solutions. The law now requires that, by default, information technology (IT) products and services in excess of the simplified acquisition threshold should be commercial. Regulations are being developed to implement the requirement that before we acquire non-commercial IT, the head of the agency must first determine that

commercial IT is unsuitable to satisfy the Department's needs. Meaningful market research informs such determinations and can be accomplished by reviewing existing systems, capabilities and technologies in the commercial marketplace to assess the extent to which they are available or could be made available to meet the Department's needs, in whole or in part. We will issue separate guidance to implement Section 855 of the FY 2016 NDAA.

Commercial goods and services offer outstanding opportunities to effectively and efficiently meet the Department's requirements. The entire acquisition team needs to proactively engage in market research to ensure that we maximize our access to commercial products and services to meet the needs of the warfighter at fair and reasonable prices. My point of contact for these matters is Michael Canales, michael.j.canales4.civ@mail.mil, (703) 695-8571.

A handwritten signature in black ink that reads "Claire M. Grady". The signature is fluid and cursive, with a long horizontal stroke at the end.

Claire M. Grady
Director, Defense Procurement
and Acquisition Policy