

# **The Future of Commercial Item Contracting**

## **Introduction**

Statutes and regulations have created a clear preference for the use of commercial item acquisitions. This paper discusses the value of such procurements, the government's commercial item contracting policy, how the government has gradually retreated from the original tenets of this policy (to its detriment), and what the government must do to put "commercial" back into commercial item contracting to reduce risk and increase efficiency for all parties involved.

## **Value of Commercial Item Contracting**

Commercial contracting practices afford the government an opportunity to streamline procurements through the avoidance of government-unique contract clauses and unnecessary regulations. These less onerous processes entice contractors to participate in the federal market, particularly commercial contractors that otherwise may avoid the federal market because of its highly regulated nature and government-unique requirements. The appropriate utilization of commercial items allows the government to leverage the research and innovation expenditures of the private sector to meet its needs, and, in the process, free up time, resources, and scarce funding that otherwise would have been dedicated to government-unique activities. Altogether, the use of commercial practices and commercial items increases market competition which increases government access to innovation and downward pressure on prices.

## **Government Policy**

Recognizing that, in a post-Cold War environment, the government could not sustain the process-intensive nature of its acquisition system, coupled with the fact that the federal government faced difficulty accessing the latest commercial technologies, the government enacted the Federal Acquisition Streamlining Act ("FASA") in 1994. Among other things, FASA authorized commercial item contracting, permitted commercial item procurements to be exempt from certain statutes (listed in subpart 12.5 of the Federal Acquisition Regulation ("FAR")), empowered the FAR Council to determine which statutes were inapplicable to commercial item procurements (*see* Pub. L. No. 103-355, title VIII, § 8003(a), now codified at 41 U.S.C. § 1906), and created preferences for commercial item acquisitions. In furtherance of this preference, FASA required the head of the agency to ensure, "to the maximum extent practicable," that commercial items are procured to fulfill agency requirements, that requirements are modified so commercial items can meet them, that specifications are stated to enable offerors to supply commercial items, and that policies are revised to reduce the impediments to acquiring commercial items.

FASA is implemented at FAR Part 12. More specifically, FAR 12.301(a) provides, in part, that "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses required by law or "[d]etermined to be consistent with customary commercial practice." Similarly, FAR 12.302(c) precludes contracting officers from tailoring any clause or including "any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures." The United States

Court of Appeals for the Federal Circuit has affirmed the aforementioned statutory proscriptions regarding the use of customary commercial practices for commercial item acquisitions, even striking down solicitation terms that are inconsistent with such practices. *See e.g., CGI Federal Inc. v. United States*, Case No. 1:14-cv-00355-MCW (Mar. 10, 2015).

## **Encroachment on the Policy**

Over the last decade or so, regulation creep and the growth of government-unique contract terms have diluted the efficiency and effectiveness of commercial item contracting. The number of policies, procedures, and requirements imposed on commercial item contracting has increased exponentially. For example, from 1996 to 2012, the provisions of law or executive orders applicable or potentially applicable to commercial item contracts have increased from 17 to over 50, and the level of oversight and data reporting associated with commercial item contracting programs, like GSA's Multiple Award Schedules program, have expanded significantly.

These increased regulatory burdens are detrimental to the procurement process, as they not only run counter to the government's efforts to reduce transactional costs across the procurement system, but they also reduce competition, limit access to innovation, cost jobs, and incentivize the creation of inefficiencies in the private sector.

The government needs to reduce the growing burden on commercial item contracting by restoring the notion of "commercial" to "commercial item" contracting across the Federal enterprise. Focusing on commercial practices, terms, and conditions will increase government access to best value products, services, and solutions from the commercial market place and reduce the expenditure of funds and resources on government-unique activities. In particular, a reinvigorated commercial item contracting paradigm will increase competition, incentivize small business participation and enhance access to innovative, cutting edge commercial technologies and solutions.

## **Recommendations**

While a recent bid protest at the Court of Federal Claims (*Palantir USG, Inc. v. United States*, 1:16-cv-00784 (Nov. 3, 2016)) suggests that some parts of the government are recognizing the value of commercial item procurements, the government needs to undertake additional efforts to restore the notion of putting "commercial" back into commercial item contracting. Accordingly, we recommend that the government:

- Engage in a wholesale review of its procurement process, focusing on commercial item contracting, including the GSA Multiple Award Schedules program, to identify and eliminate costly and unnecessary government unique terms, conditions, policies, procedures, and requirements.
- Continue to work to reduce barriers to entry for nontraditional commercial firms seeking to do business with the government, particularly the Department of Defense.
- Amend FAR 12.503 by using the FAR Council's statutory authority to add more statutes to the list of laws from which commercial item procurements are exempt.