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FAR Regulatory Counsel proposes to expand "commercial item" definition;

The Federal Acquisition Regulations (FAR) are the result of statutory interpretations and application of regulations to allow the government to contract for goods and services. Overseeing the FAR is the FAR Council, which consists of the Department of Defense, General Services Administration (GSA) and NASA. In May 2019, the Council issued a notice of proposed rulemaking, which seeks comments on the possible expansion of the current definition of "commercial item" to include items developed exclusively at private expense if sold to multiple forgiven govement in "substantial quantities". See, 84 Fed. Reg. 91 (May 10, 2019) https://www.govinfo.gov/content/pkg/FR-2019-05-10/pdf/2019-09703.pdf. This rule making was issued to comply with the National Defense Authorization Act for FY 2018 Section 847, in which Congress directed that this item be expanded for non-developmental items (i.e., items that require no adjustment for use by the government from their commercial function).

This is an interested expansion proposed. At present, "commercial item" is defined in FAR 2.101 as:

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and--

(i) Has been sold, leased, or licensed to the general public; or,

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition 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 --

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means 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. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(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--

(i) 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

(ii) 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—
(i) "Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and
(ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.
(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.
In effect, Commercial Items are goods available to the public that results in the item's pricing being determined by the open market. Whether it is a car, a computer, cell phone or candy bar, these are items which the general public can purchase for a retail price. What this means for the government is that the price is established by that same market, so no further competition is necessarily needed. Many of the commercial items purchased by the Government come through the GSA's Federal Supply Schedule Contracts, which are pre-negotiated as to terms, delivery, quantities/volume and the like. See, www.gsadvantage.gov.
In the current situation, the FAR Council is seeking to make the first adjustment to the FAR definitions in over 15 years, by modifying subsection (b)(2) to remove "local governments" and adding "local government or to multiple foreign governments". This small, seemingly innocuous change, actually can have significant impacts. First and foremost, this language allows the U.S. Government to "piggy back" on the development efforts of foreign governments for things such as military tools and equipment, computers and the like, developed by other governments. Items such as these previously would need to have been competed for and complied with numerous FAR provisions such as the Truth in Negotiations Act (TINA) and other stringent requirements. By expanding this definition, the Government and Contactors can now reap the benefits of not only buying items that are developed with foreign money (presumably saving U.S. Taxpayer money) but also speed up those procurements by not having to perform full and open competition.
While it remains to be seen how this expanded definition works in reality, the prospects are quite positive, as any reduction in "red tape" is typically a gain for government contractors.