

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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October 27, 2000

CODSIA Case No. 12-97

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVRs)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Subject: FAR Case 2000-303: FAR, Acquisition of Commercial Items

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the above proposed rule published in the Federal Register on August 28, 2000 (65 Fed. Reg. 52283). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

CODSIA members are pleased with the FAR Council's decision to withdraw the previous proposed rule FAR Case 98-304 with the publication of FAR Case 2000-303. However, CODSIA members are concerned that the fundamental issue that industry raised with the last proposed rule has once again been repeated. Most notably, that the proposed rule is inconsistent with the Congressional direction. CODSIA members recommended and continue to urge preservation of the statutory definition of commercial items. The required commercial items acquisition guidance, which is very important to the acquisition community and essential to successful implementation of Civil-Military Integration initiatives, should be addressed as supplemental guidance in FAR Part 12 and FAR Part 2. Detailed issues and recommendations are addressed below.

I. Maintain statutory commercial items definition.

In the "Background" section of the new proposed rule, it acknowledges that eight public comments were received and that a majority of these comments were substantive and had a

“common theme.” It was observed that in general the proposed rule exceeded the scope of the statute, introduced ambiguous terms, created new criteria, and narrowed the definition of a commercial item. The undersigned CODSIA members remain concerned that the comments that were acknowledged in the “background” section did not lead to restructuring the new revised proposed rule. The same fundamental issues apply to the new rule. The specific CODSIA concerns are once again submitted:

1. The scope of recent legislative direction is to provide guidance on how to interpret the statutory definition of commercial items. Neither Section 803 (a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 nor Section 805 of the National Defense Authorization Act for Fiscal Year 2000 requires, implies or directs that the statutory definition of commercial items be revised. The law states that “...regulations shall, at a minimum, provide specific guidance on...”

2. Congress and the Executive Branch carefully and deliberately crafted a statutory definition of commercial items in the FASA legislation that would provide the greatest support to the acquisition community. If Congress intended to change the statutory definition of commercial items it would have clearly and precisely altered the definition in legislation. It is clearly the intent of Congress to maintain the current statutory definition and supplement its effectiveness by providing more implementation guidance in regulations.

CODSIA members fundamentally oppose any changes to the statutory commercial items definition that are not specifically directed by Congress; however, industry supports and encourages additional FAR guidance and regulation that more precisely enhance the effectiveness of using commercial items acquisitions. The following CODSIA recommendations preserve the statutory commercial item definition while providing the necessary and appropriate guidance for its use in the contracting arena.

II. Proposed modification of FAR Part 12.209.

CODSIA RECOMMENDATION: CODSIA members believe that the recommended change is valuable to the contracting community and appropriately placed as guidance in the proposed rule. The recommended change, repeated below with minor modification, is exactly the type of additional guidance format that was contemplated by the recent legislative directives. CODSIA members urge the FAR Council to use this same format when addressing the additional issues herein addressed.

CODSIA DETAILED PROPOSAL:

Revise the revision to FAR 12.209 in proposed rule as follows:

PART 12--ACQUISITION OF COMMERCIAL ITEMS

3. Revise section 12.209 to read as follows:

12.209 Determination of price reasonableness.

While the contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or subpart 15.4, as applicable, when contracting by negotiation, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions and prices are ~~commensurate with the Government's need,~~ properly aligned with the commercial marketplace to insure the best value for the government.

RATIONALE: The foregoing recommended revision incorporates the spirit of the Money/Gansler joint Memorandum of July 14, 2000, which distributed "Commercial Item Acquisition: -- Considerations and Lessons Learned," 26 June 2000, published by OSD. Further it provides guidance to the contracting officer that is expansive rather than limiting.

III. Modify FAR Part 12.201 General, to provide guidance on the meaning of "purposes other than governmental purposes."

CODSIA RECOMMENDATION: To address the requirement of Section 803 (a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 that directed *additional guidance* [emphasis added] on the meaning of "purposes other than governmental purposes" CODSIA members recommend modifying FAR Part 12 in the same manner as the FAR Council has recommended above at FAR Part 12.209. The current proposed rule is confusing and does not provide the needed guidance to the contracting community. The provision provided under "CODSIA Detailed Proposal" below should be added to FAR Part 12.201 instead of making changes to the definition of a commercial item. Furthermore the long established principle that sales to the government means sales to the Federal Government should be included so that it is not misinterpreted. This provision would then be consistent with Section 805 of the National Defense Authorization Act for Fiscal Year 2000.

CODSIA DETAILED PROPOSAL:

1. Delete the language in the proposed rule at FAR Part 2.101 and provide guidance as directed by Section 803 in FAR Part 12.201:

2.101 Definitions.

* * * * *

Commercial item means--

(a) 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 that--

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

(2) Has been offered for sale, lease, or license to the general public;
~~Purposes other than governmental purposes are those that are not unique to a government.~~

2. Modify FAR Part 12.201 General:

Public Law 103-355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial marketplace. This subpart identifies those special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items. *To achieve the objective of providing guidance on the meaning of “purposes other than governmental purposes” a commercial item is an item that has any purpose or use that is not limited solely to the U.S. Federal Government. [*underscored text is the enhancement]

RATIONALE: As discussed above, the additional regulatory guidance should be addressed in FAR Part 12. Additionally, the language in the proposed rule is inconsistent with law and regulation by suggesting that the term “governmental” means all governments including foreign, state, county and local governments. The previous “governmental” definitions [see old FAR 15.8] and current statutory language [Section 805 of the National Defense Authorization Act for Fiscal Year 2000] clearly define “governmental” as U.S. Federal government.

IV. Implementation of Section 805.

CODSIA members note that the legislative language in Section 805 explicitly modified the statutory definition of “commercial item,” and our members endorse the changes made by the Council to FAR 2.101, paragraph (e) of the commercial item definition and FAR 52.202-1(c) (5) insofar as they faithfully repeat the exact language in the Act. However, we strongly disagree with the additional, non-statutory changes in the definition of commercial services addressed in FAR 2.101(f), i.e. “For the purposes of...” and the new definitions of catalog and market price (see section V immediately below).

V. Definitions of “catalog price” and “market price.”

CODSIA RECOMMENDATION: CODSIA members strongly disagree with adding the definitions of “Catalog Price” and “Market Price” at FAR 2.101(f)(1) and (2), respectively. Neither Section 803 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 nor Section 805 of the National Defense Authorization Act for Fiscal Year 2000 required that such a change be made to the definition of “commercial item.”

First, we reiterate our strong disagreement with regulatory modifications to the statutory definition of “commercial item.” In addition, the proposed rule would reinstate the outmoded concepts of catalog price and market price that eventually gave rise to the commercial pricing reforms under the Federal Acquisition Streamlining Act and Clinger-Cohen Act. In fact, the concept of catalog price and market price were deleted from the requirements of the Truth in Negotiations Act in favor of a more simplified basis for establishing price reasonableness:

"appropriate information on the prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price for the procurement."

CODSIA members have historically expressed concerns that the concepts of catalog price and market price, established in 1963, would not be relevant in the 1990's and beyond.¹ It appeared that Congress was sensitive to this issue when dropping the reference to catalog price and market price from the Truth in Negotiations Act. It was unfortunate that the statutory definition of commercial item was not similarly amended; we strongly believe it should have been so amended. Nevertheless, perpetuating these outmoded concepts is not in the best interests of either the Government or industry. It would, as before, serve as a barrier to market entry and make it far more difficult for the Government to acquire the professional and technical services it needs.

CODSIA DETAILED RECOMMENDATION: The proposed rule at FAR 2.101(f)(1) and (2) should be deleted.

* * * * *

PART 2--DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, amend the definition "Commercial item" by revising paragraphs (a), (c), and (f) to read as follows:

2.101 Definitions.

* * * * *

Commercial item means--

....

(f) 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 a catalog or market price for a specific service performed. ~~For purposes of these services--~~

~~—(1) 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~~

~~—(2) Market Prices mean 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~~

RATIONALE: Detailed rationale provided above.

¹ See CODSIA letters March 13, 1995 and July 19, 1995 relating to FAR Case 94-721.

VI. Modification to FAR Part 46.

CODSIA RECOMMENDATION: CODSIA members strongly support this modification to FAR Part 46:

PART 46--QUALITY ASSURANCE

4. In section 46.801, revise the last sentence of paragraph (a) to read as follows:

46.801 Applicability.

(a) * * * This subpart does not apply to commercial items.

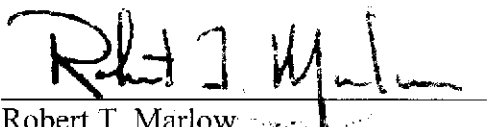
RATIONALE: Industry has argued that Part 46 is inconsistent with commercial practices.

In closing, CODSIA members wish to underscore the value of the current commercial items definition established by FASA, and modified by the Clinger-Cohen Act, and acknowledge the need to provide further enhancements to implementation guidance. The statutory language was thoughtfully and carefully drafted to maximize the Federal government's reliance on the commercial sector for goods and services. The CODSIA proposed recommendation would maintain the accuracy and integrity of the commercial item definition as well as address the emerging key concepts embraced in the definition of commercial items. It is very important to CODSIA members that the FAR Council use its authority to establish clear guidance for commercial items acquisition.

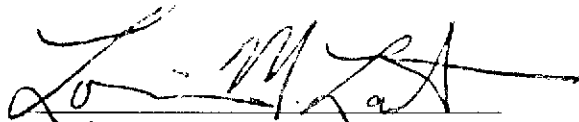
Again, we appreciate the opportunities to provide comments regarding FAR Case 2000-303, Acquisition of Commercial Items. If you have any questions on the above, please contact Mr. Jim Serafin, Project Officer for this CODSIA case at (703) 907-7585.

Sincerely,

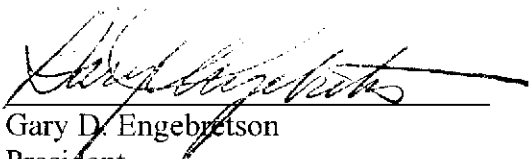
(SEE ATTACHED CODSIA SIGNATORIES)



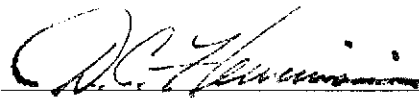
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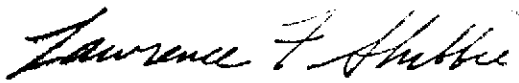
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