



GOV CON

2020

BDO[®]

pillsbury

So You Want to Sell to the Government: Commercial Item Contracts 101

David Dixon | Partner
Pillsbury Winthrop Shaw Pittman LLP
david.dixon@pillsburylaw.com
703.770.7557

Toghrul Shukurlu | Associate
Pillsbury Winthrop Shaw Pittman LLP
toghrul.shukurlu@pillsburylaw.com
703.770.7533

Overview

- FAR Part 12
- What is a Commercial Item?
- Advantages of Commercial Item Contracts
- Application of Commercial Item Rules to Contracts for Defense or Recovery from Certain Events
- Debriefing and Protests

FAR Part 12

- Purpose:
 - Implement the preference for acquiring commercial items provided in the Federal Acquisition Streamlining Act of 1994
- Policy:
 - Encourage government purchases of commercial items by using rules that more closely resemble those in commercial marketplace
- Effect:
 - Includes streamlined, contractor-friendly regulations for purchasing of commercial items

What is a Commercial Item?

FAR 2.101 defines “Commercial Item” generally as:

- Any item that is of a type customarily used by the general public, and has been sold or offered for sale to the general public, or
- Any item that would satisfy a criterion above except for modifications of a type customarily available in the commercial marketplace, or minor modifications of a type not customarily available in the commercial marketplace made to meet USG requirements, or
- A non-developmental 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 or to multiple foreign governments.

What is a Commercial Item? (cont.)

What about services?

- FAR 2.101 also defines “Commercial Item” to include:
 - 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.

Advantages of Commercial Item Contracts

- Simplified Contract Types
- Special Terms and Conditions
- Fewer Compliance Obligations for Primes and/or Subs
- TINA & CAS Exceptions

Simplified Contract Types

Contract Types Allowed:

- Firm-Fixed-Price or Fixed-Price with Economic Price Adjustments
- Time and Materials or Labor Hour type contracts are allowed, but the government must take some additional steps

Other contract types are prohibited (including Cost Reimbursement), but

- Award fee and other performance incentives are allowed
- But they must be based solely on factors other than cost

Special Terms and Conditions

FAR 52.212-4

- Contains the terms and conditions that generally apply to contracts for commercial items
- Data Rights & Software (FAR 12.211, 12.212)
 - The government will receive whatever technical data, software, software documentation and rights the seller customarily provides to the public with the commercial item or software
 - Technical data is presumed to have been developed with private funds

Special Terms and Conditions (cont.)

- Warranty
 - “The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.” (FAR 52.212-4(o))
 - Additionally, FAR Part 12 requires Contracting Officers to “take advantage of commercial warranties”
 - Government will take the same express commercial warranty that the seller customarily provides

Special Terms and Conditions (cont.)

- Terminations
 - FAR Part 49 does not apply when terminating commercial item contracts
 - But may be used as guidance to the extent it does not conflict with 52.212-4.
- Termination for the Government's Convenience (FAR 52.212-4(l))
 - Contractor entitled to compensation for work performed (T&M) or percentage of the contract price reflecting work performed (fixed price), plus
 - Any charges the contractor can demonstrate directly resulted from the termination
- Termination for Cause (FAR 52.212-4(m))
 - Preferred remedy is to purchase similar items and charge excess procurement costs AND costs incidental to the termination to defaulting contractor.

Fewer Compliance Obligations

- FAR 12.503 lists numerous laws and requirements that do not apply to contracts or subcontracts for commercial items, including (among others)
 - Truthful Cost or Pricing Data and Truth in Negotiations (TINA) requirements
 - Cost Accounting Standards (CAS)

Fewer Compliance Obligations (cont.)

- TINA Exception
 - General prohibition:
 - The contracting officer shall not require certified cost or pricing data to support any action (contracts, subcontracts, or modifications) ...
 - When a commercial item is being acquired; or
 - When modifying a contract or subcontract for commercial items
 - Exceptions:
 - Certified cost or pricing data *may* be requested for modifications to commercial items if the price of the modification exceeds certain thresholds

Fewer Compliance Obligations (cont.)

- CAS Exception
 - CAS does not apply to contracts and subcontracts for the acquisition of commercial items if they are firm-fixed-price or fixed-price with economic price adjustment (provided that the price adjustment is not based on actual costs incurred) type contracts

Fewer Compliance Obligations (cont.)

- Compliance obligations are primarily listed in FAR 52.212-5, which requires compliance with these six clauses:

1	52.203-19	Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
2	52.204-23	Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities
3	52.204-25	Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
4	52.209-10	Prohibition on Contracting with Inverted Domestic Corporations
5	52.233-3	Protest After Award
6	52.233-4	Applicable Law for Breach of Contract Claim

Fewer Compliance Obligations (cont.)

- FAR 52.212-5 also list 63 additional clauses that may apply, of which the following apply in most procurements:

52.203-13	Contractor Code of Business Ethics and Conduct
52.203-15	Whistleblower Protections under the American Recovery and Reinvestment Act of 2009
52.204-10	Reporting Executive Compensation and First-Tier Subcontract Awards
52.204-14	Service Contract Reporting Requirements
52.209-6	Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment
52.219-8	Utilization of Small Business Concerns

Fewer Compliance Obligations (cont.)

52.222-21	Prohibition of Segregated Facilities
52.222-26	Equal Opportunity
52.222-35	Equal Opportunity for Veterans
52.222-36	Equal Opportunity for Workers with Disabilities
52.222-37	Employment Reports on Veterans
52.222-40	Notification of Employee Rights Under the National Labor Relations Act
52.222-50	Combating Trafficking in Persons
52.222-19	Child Labor-Cooperation with Authorities and Remedies
52.222-21	Prohibition of Segregated Facilities
52.224-3	Privacy Training
52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels

Mandatory FAR Flow-Down Clauses For Commercial-Item Subcontracts as of 9/2020

Twenty “Must Haves” FAR 52.244-6(c)(1)		
1	FAR 52.203-13	Code of Business Ethics and Conduct
2	FAR 52.203-15	Whistleblower Protections Under the American Recovery and Reinvestment Act
3	FAR 52.203-19	Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
4	FAR 52.204-21	Basic Safeguarding of Covered Contractor Information Systems
5	FAR 52.204-23	Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities
6	FAR 52.204-25	Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
7	FAR 52.219-8	Utilization of Small Business Concerns
8	FAR 52.222-21	Prohibition of Segregated Facilities
9	FAR 52.222-26	Equal Opportunity
10	FAR 52.222-35	Equal Opportunity for Veterans

Mandatory FAR Flow-Down Clauses For Commercial-Item Subcontracts as of 9/2020 (cont.)

Twenty “Must Haves” FAR 52.244-6(c)(1) (cont.)		
11	FAR 52.222-36	Equal Opportunity for Workers with Disabilities
12	FAR 52.222-37	Employment Reports on Veterans
13	FAR 52.222-40	Notification of Employee Rights Under the National Labor Relations Act
14	FAR 52.222-50	Combating Trafficking in Persons
15	FAR 52.222-55	Minimum Wages Under Executive Order 13658
16	FAR 52.222-62	Paid Sick Leave Under Executive Order 13706
17	FAR 52.224-3	Privacy Training
18	FAR 52.225-26	Contractors Performing Private Security Functions Outside the U.S.
19	FAR 52.232-40	Providing Accelerated Payments to Small Business Subcontractors
20	FAR 52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels

Contracts for Defense or Recovery from Certain Events

- Under FAR Part 12.102(f)
 - If an agency head determines that any supply or service is needed to facilitate defense against or recovery from cyber, nuclear, biological, or radiological attack
 - The contract to procure such supply or service can be treated as a contract for commercial items
- Except
 - TINA & CAS exceptions for contracts for commercial items do not apply if the contract under this provision exceeds \$20 million

Debriefing & Protests

- Protests at GAO must be filed within
 - 10 days of contract award, or
 - 5 days of a required debriefing
- A debriefing is only required in competitive negotiations
- So, protests in most procurements for commercial items will have to be filed within 10 days of contract award
 - This includes GSA Schedule procurements under FAR Part 8.4

Federal Supply Schedules – What's Going On?

Tom Fuchs | Principal
BDO USA, LLP
tfuchs@bdo.com
203-905-6249

GSA Schedules

- Multiple Award Schedule/Consolidated Solicitation
 - Has been critical priority of GSA officials since announced as a cornerstone priority
 - Single contract replaced prior program in Oct 2019
 - Combined multiple programs into one, all encompassing contract
 - All new offers since 10/1/19 submitted under new MAS template
 - First “Day One” of new MAS world

GSA Schedules

- Key benefits of consolidated schedule program include:
 - Consistent terms & conditions
 - Streamlined contract administration vs multiple contracts
 - Expiration of Part 51 deviation in favor of OLM
- GSA has largely met the timeline they originally outlined
 - 99% of contractors converted to MAS by 7/31/20 deadline
 - Phase 3 launched 8/1/20 to consolidate multiple contractor contracts to one per contractor (DUNS)
 - Could take 3-10 years to complete

GSA Schedules

- August 1, 2020 was second “Day One” of new MAS world:
 - If Mass Mod A812 wasn’t accepted by 7/31/20, contract no longer visible in GSA eTools
 - Contracts are *not* canceled, but rather hidden from view
 - All 24 legacy schedules have also been removed from eLibrary, eBuy and GSA.gov
- August 2020 also saw second Mass Mod & solicitation update
 - Implement Section 889 and other T&C changes

GSA Schedules – What's going on?

- What has been the (unintended?) effect of some of these changes?
 - Workload increased for GSA contracting team – review times are stretching
 - eMod/eOffer don't always reflect the current state of solicitation requirements
 - If modification for current contract desired, Contract Specialists pushing for requests to be submitted offline first, then loaded into eMod
 - Reference materials on GSA website not fully updated to reflect MAS

GSA Schedules – What’s going on?

- What has been the (unintended?) effect of some of these changes?
 - New offers being rejected outright for minor items that used to be dealt with via clarification requests
 - When rejected, have seen detailed outline of deficiencies documented by GSA for offeror review
 - Offer review team may be new to your industry – especially if a new offeror
 - No mention of TDR “pilot” status – last reference was March 2020

GSA Schedules – What can I do?

- Best practices to keep things moving as a contractor or offeror
 - Focus on the basics: understand your contract, deliver against your obligations
 - Assume the person you're submitting your request to doesn't know anything about your contract or industry
 - Leverage available mechanisms to speed things up: GSA FastTrack, etc...
 - Be comprehensive, accurate and complete when preparing any submission

CLE Code: 2020-128

Questions?



David Dixon | Partner
Pillsbury Winthrop Shaw Pittman LLP
david.dixon@pillsburylaw.com
703.770.7557



Toghrul Shukurlu | Associate
Pillsbury Winthrop Shaw Pittman LLP
toghrul.shukurlu@pillsburylaw.com
703.770.7533



Tom Fuchs | Principal
BDO USA, LLP
tfuchs@bdo.com
203-905-6249



GOV CON

2020

BDO[®]

pillsbury