

DOD Issues More Guidance on Commercial Items

Written by Nick Sanders

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On 02 September 2016 the Director, Defense Procurement and Acquisition Policy, [issued](#) new policy guidance on commercial item determinations.

As we understand it, the guidance implements the tenets of the [proposed rule](#) on the topic. To be clear: the guidance implements the proposed rule before public comments are received and before it becomes a final rule.

Now, we didn't have very many problems with the proposed rule. We opined that the definition of "nontraditional defense contractor" was poorly worded and would lead to (perhaps) unintended consequences. And we snarked a bit at the news that DOD has a "cadre of experts" in commercial item determinations who would be available to offer "expert advice" to contracting officers on the topic. Other than those two cavils, we were generally in favor of the proposed rule. However, the fact that we liked the proposed rule is not at all the same thing as endorsing an early implementation via guidance memo of something that really needs to wait for the rule-making process to complete. If DOD felt so strongly about the topic, the rule could have been issued as an interim rule; but it wasn't.

Anyway, back to the memo. It announces six Commercial Item Centers of Excellence "staffed with a cadre of engineers and price/cost analysts to advise" COs in how to make commercial item determinations. Again, nothing is provided regarding the qualifications of the cadre (times six) and we have to wonder where all those experts are coming from? Are they being decanted from storage? Because if they've been around, we've never encountered them.

As the memo notes, "the responsibility for commercial item determinations remains a PCO responsibility." However, we strongly suspect that it will be a rare, courageous PCO who takes issue with the advice and assistance of the "experts" located in the Centers of Excellence.

Interestingly, the memo notes that DOD elements and "interested companies" are "working closely" to "define, through the use of advance agreements, the types of information necessary to support commercial item determinations and associated pricing determinations." In other words, certain companies will be able to enter into Advance Agreements that will permit streamlined determinations. The Advance Agreements will be uploaded into the CBAR database. Companies that do not execute Advance Agreements in this area may not be able to avail themselves of streamlined determinations.

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Selling commercial items to the DOD does not have to be difficult. However, certain elements within DOD historically have tried to impede the process. In addition, certain contractors have created difficulties by failing to provide information that a CO deemed necessary to their determination. This memo should go a long way toward helping in this area though, as noted, we still have some concerns with the process.