Readers know that the Department of Defense has long struggled with “commercial item” procurements. The tension between accepting market pricing as the barometer of price reasonableness and delving into contractor “cost and pricing” data has been a tough challenge for contracting officers. Congress has been “helping” DoD with the challenge, by passing various bits of acquisition reform legislation, going back at least to 1994 (the Federal Acquisition Streamlining Act). The message has been, “buy commercial.” But the message didn’t seem to percolate through the acquisition bureaucracy, as reports have **surfaced** that DoD’s acquisition of commercial items has actually *declined*, rather than increased as Congress intended.

As the Section 809 Panel recently stated—

DoD’s commercial buying has stagnated for multiple reasons. The acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services, and determining that prices are fair and reasonable. DoD contracting officers have received increasing criticism and oversight from both the DoD Inspector General (IG) and the Government Accountability Office (GAO). This confusion has resulted in frequent promulgation of legislative revisions as Congress seeks ways to encourage DoD to access the commercial marketplace, as well as agency-level policy and local guidance intended to improve the workforce’s ability to buy commercially.

(Vol. 1, Section 1, page 17. Internal footnotes omitted.)

In 2016, DCMA created six Commercial Item Centers of Excellence in order to help its contracting officers navigate the shoals of commercial item procurements. The six CoE’s (located in Tampa Bay, Denver, Indianapolis, Phoenix, Boston, and Philadelphia) are collectively known as the **Commercial Item Group** . (That link, by the way, contains other links to a number of helpful resources.) DCMA told GAO that the new CoEs were helping, and that 94 percent of all Commercial Item Determinations (CIDs) submitted to one of the CoEs were found to be legitimate and that the items in question met the FAR definition of a “commercial item.”

Meanwhile, subcontractors struggle to convince prime contractor buyers that their items meet

the FAR definition as well. While prime contractors can ask their government contracting officers to submit the CID to the Commercial Item Group for resolution, subcontractors do not seem to have a similar path of appeal. They lack recourse when a prime's buyer says "no," and demands certified cost and pricing data. Changing standards regarding what support is required for a prime's CID by DCMA CPSR review teams don't help things, since prime contractor buyers believe they are risking their system adequacy with every CID they make.

It's a tough situation, but recent changes might help us all.

Let's discuss.

First, we have a brand new final **DFARS rule** (DFARS Case 2016-D006) that was issued on January 31, 2018. Entitled "Procurement of Commercial Items," the rule revision incorporates various Congressional "fixes" going all the way back to the GFY 2013 National Defense Authorization Act (NDAA). The rule makes changes to DFARS rules in Parts 202, 212, 215, 234, and 239. It adds a new solicitation provision in Part 252 (252.215-7010) entitled "Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data" and an Alternate 1 to that provision. The provision implements the new regulatory language in Part 215.

Without rehashing the long rule, let's summarize. Readers are encouraged to review the rule carefully for nuances our summary will inevitably gloss over.

Contracting officers are encouraged to obtain no more information than they need in order to determine that a price is fair and reasonable. In the absence of adequate price competition, the preferred method for determining price reasonableness is a comparison to market prices (meaning "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").

But if that's not sufficient, then "the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and commercial customers for the same or similar commercial items under comparable terms and conditions … if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison."

If that's not sufficient, then the contracting officer should request "Prices paid for the same or similar items sold under different terms and conditions; [or] Prices paid for similar levels of work or effort on related products or services; [or] Prices paid for alternative solutions or approaches; [and/or] Other relevant information that can serve as the basis for determining the reasonableness of price."

If all that doesn't work, then the contracting officer may request cost data from the prospective offeror. However, "no cost data may be required in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price."

Contracting officers are also told that prior CIDs are to be accepted when evaluating whether an item is or is not a commercial item. Further, items *and services* provided by "non-traditional defense contractors" (defined as "an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards … for at least the 1-year period preceding the solicitation of sources by DoD for the procurement") as commercial items. As readers know, once an item (or service) has been accepted as being a commercial item, then the contracting officer is prohibited from requiring certified cost or pricing data from the contractor.

So that happened. Seems like good news for some contractors.

In addition, DoD recently issued its final Commercial Item Handbook (Version 2.0), link **here** . It comes in two volumes. Part A is for Commercial Item Determinations and Part B is for Pricing Commercial Items. Skimming the new Handbook, we liked how it clearly explained expectations. For example, it tells contracting officers that, when determining price reasonableness, the first data source should be government resources; the second source should be public/market resources other than the contractor; and only as a final resort should the contractor be expected to provide resources and information. Without a detailed review, we may have missed something. But what we have seen so far seems clear and unobjectionable

Finally, let's not forget the Section 809 Panel's first report, which devoted an entire Section to Commercial Buying. The Panel made four recommendations in this area, including: (1) Revise definitions related to commercial buying to simplify their application and eliminate inconsistency; (2) Minimize government -unique terms applicable to commercial buying; (3) Align and clarify

FAR commercial termination language; and (4) Revise DFARS sections related to rights in technical data policy for commercial products.

Those recommendations, if enacted and implemented in the manner intended by the Section 809 Panel, might further clarify and streamline the murky waters of commercial item procurement. In the meantime, we have the new DFARS rules and the new Commercial Item Handbook, which should help all parties.