



2023 COMMERCIAL ITEM SUMMIT

BRIEFING PACKET

APRIL 4TH/5TH

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2023 COMMERCIAL ITEM SUMMIT

Day 1 (CIG/Industry Summit) - 4 April			Speaker	Description
0800	0805	Administrative	Jim Popielec	Welcome remarks, Administrative notes, facility related concerns (emergency exit, restrooms, schedule)
0805	0815	Welcome/Opening Remarks	DCMA Director	
0815	0900	Welcome/Opening Remarks	Mr. Jorge Bennett	Cost and Pricing Regional Command and Commercial Item Group
0900	0945	Keynote - DoD/DPC	Mr. John Tenaglia	
0945	1000	Break		
1000	1100	Commercial Determinations and Market Research	Scott Pace	The importance of Market Research early and often throughout the procurement process
1100	1130	New Regulations- DFARs Cases D033, and '23 NDAA	Tim Niu & Andrew Kirkendall	D033, NDAA 23 pricing changes (Section 803)
1130	1200	Commercial Contracting Pathways	Ryan Connell	Nontraditional defense contractors, FAR13, IT Contracting
1200	1330	Lunch // Networking	Jim Popielec	Ideas where to go/ dismissal and return time
1330	1430	The Relationship between Pricing and Commerciality	Andrew Kirkendall	Open discussion highlighting the relationship between pricing and commerciality – why this matters
1430	1500	Commercial Acquisition Challenges	Multiple	Topics include: - Evaluating / proposal package expectations (Helpful hints/guideposts) - Examples of Other-Than-Commercial cases decisions
1500	1515	Break		
1515	1645	Q&A Open Forum Discussion	CIG Panel	The panel will address pre-submitted questions from Industry Partners and address live questions during the summit
1645	1700	Closing Remarks	Mr. Jorge Bennett/ Dan Hawley	



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DCMA

DEFENSE CONTRACT MANAGEMENT AGENCY

Cost and Pricing Command Commercial Item Group

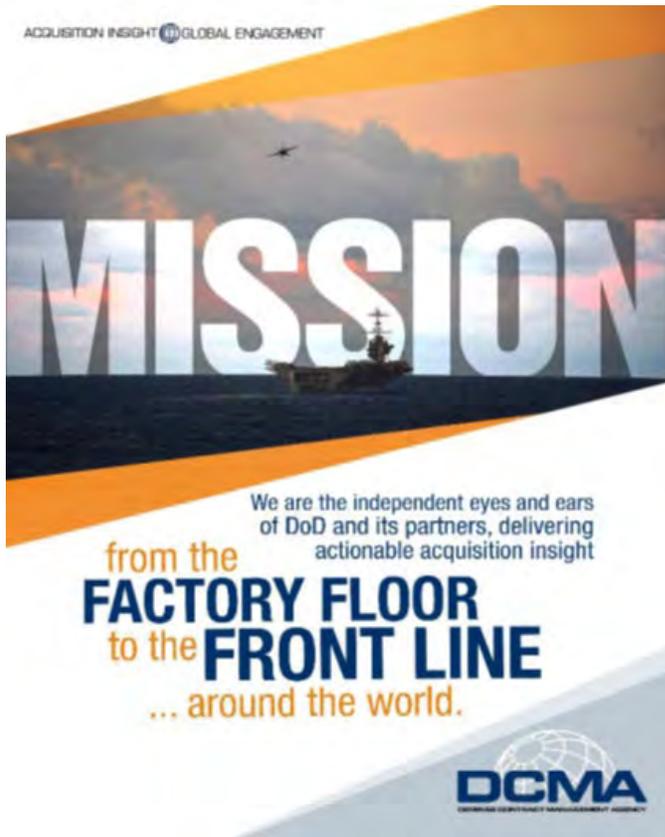
Presented By:

Mr. Jorge Bennett

Executive Director, Cost & Pricing Regional Command

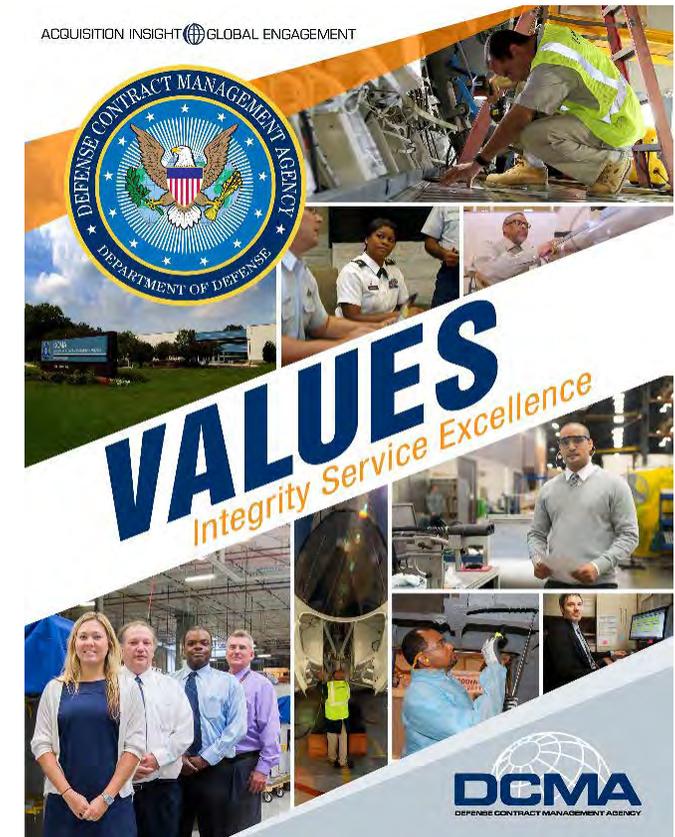
April 2023

DCMA's Mission, Vision and Values



We are the leading experts in contract administration, independent cost/price analysis, quality assurance, schedule and supply chain predictability.

We will enable our partners to achieve contract and program objectives



INTEGRITY - "Committed to the highest standards of ethical and moral behavior at all times"

SERVICE - "Working for the benefit of our nation and putting professional responsibilities before self-interest"

EXCELLENCE - "Committed to exceptional performance in everything we do"



➔ **LOE 1**



✓ **LOE 2**



\$ **LOE 3**



💡 **LOE 4**

Improve warfighter capabilities by influencing timely **delivery of quality** and affordable products

Expand DOD Contract Administration **capabilities** to allow for flexibility and enhanced acquisition decision making

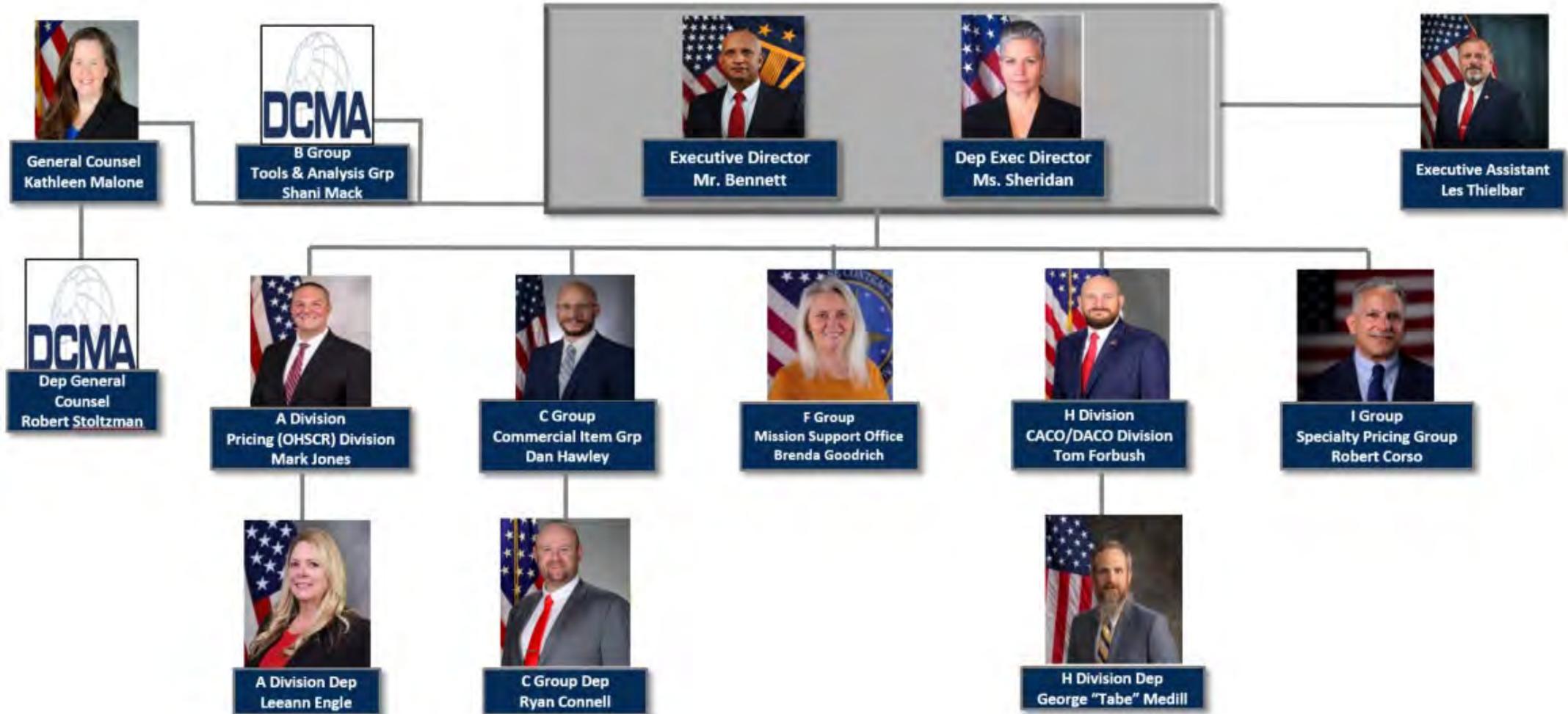
Drive **enhanced value** and affordability through modern, adaptive, and responsive cost and pricing capabilities

Innovate the Agency's approaches to how and where we **work** to better adapt to the workplace of the future

- Modernize business processes and tools
- Measure and tailor workload for efficiencies and savings
- Exploit multi-functional data and predictive insights

- Transform hiring, developing, and retaining the skilled people needed
- Transition to a workplace of the future

Achieve 21st Century Quality, Delivery, and Contract Administration empowered by technology and a committed, well-trained, world-class workforce.



MISSION

Deliver superior cost and pricing insight supporting affordability and readiness for the DoD and its partners.

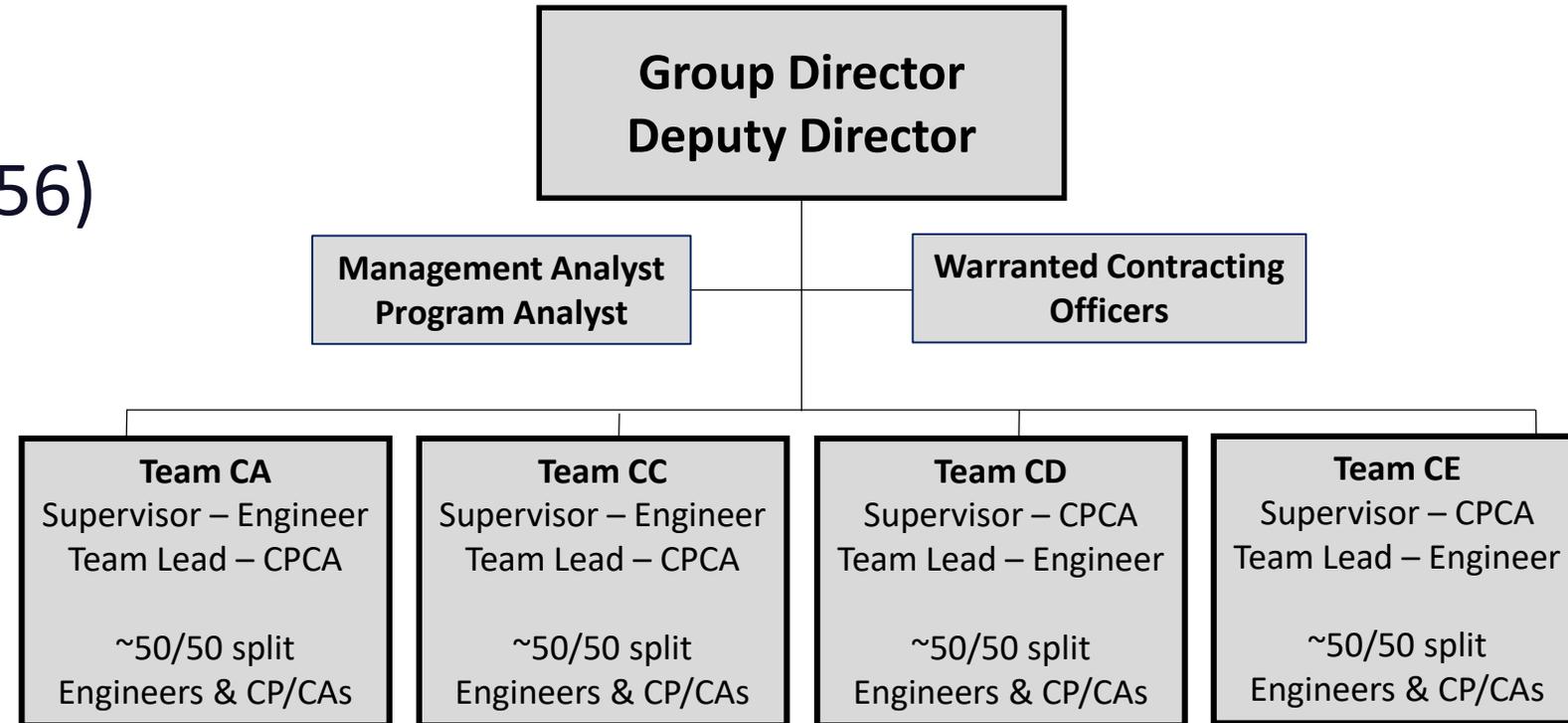
VISION

A team of trusted professionals delivering value to our Warfighters throughout the acquisition lifecycle.



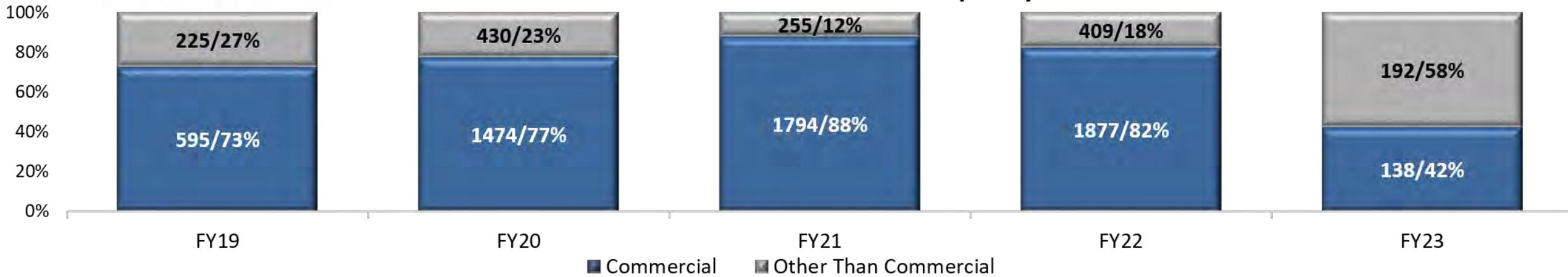
- 2012
 - February: A small team of DoD SMEs was established to explore updating the Commercial Handbook
- 2013
 - NDAA set the mandate for a “Cadre of Experts” within DoD (Established under 10 USC 3456)
 - Guidance on implementing Commercial Centers of Excellence
 - DCMA selected to run pilot
- 2014
 - October: Pilot program began with only 9 personnel
- 2015
 - Review of 2013 NDAA language & results of pilot program
 - Commercial pilot program ends
- 2016
 - January: Commercial Item Group (CIG) standup/hiring
 - June: CIG Declared operational capability
- 2018
 - Shift to Agile customer support (realigned technical-centers of excellence to meet increasing customer needs)
- 2019
 - Gained OUSD (A&S) authority to issue Determinations
- 2021
 - Internal restructure, shifted from stove pipe functional teams to multi discipline teams

- 62 team members across 8 locations
- Mission Focus (10 USC 3456)
 - Commercial Item Determinations
 - Price Analysis
 - Market Research
- Initiatives
 - Data Collection & Automation
 - Early Engagement with DoD
 - Continuous engagement with Industry

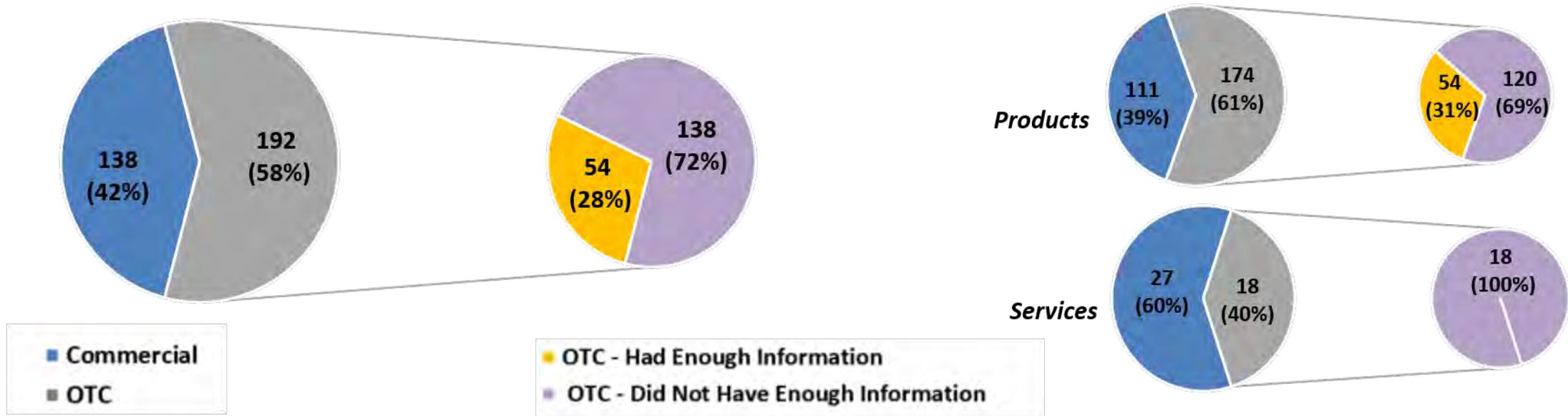


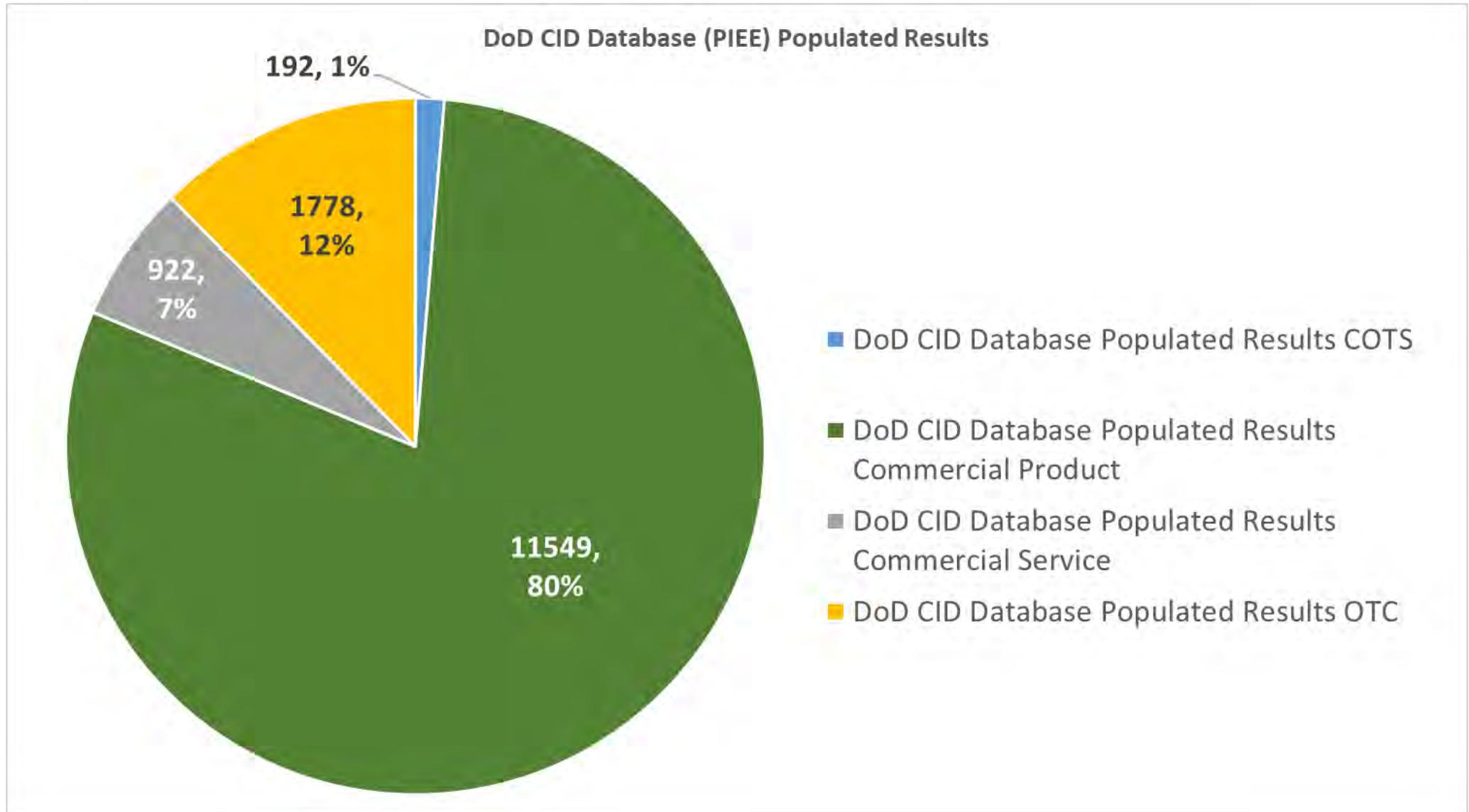
- Multifunctional Team Structure
- Organization is not aligned with a specific Customer or Contractor

Commercial Determinations Output by FY



FY23 Breakdown of Commercial vs Other-Than-Commercial (OTC) Output







DEFENSE CONTRACT MANAGEMENT AGENCY

Commercial Determinations

Overview and Tips for Success

Presented By:

Scott Pace

DCMA Commercial Item Group

April 4, 2023



- Commercial Determination (CD) Responsibilities
- Evidence to Support Commerciality – the CD “Puzzle”
- Misconceptions About Commerciality

Provide a framework for how to evaluate and determine whether a product or service meets the FAR commercial definitions

**Buying
Command**

- Each of the entities listed plays a key role in making Commercial Determinations (CDs) for DoD acquisitions
- Regardless of which entity is performing an analysis, the process of determining whether a product or service meets any of the FAR 2.101 commercial definitions is similar

Prime Contractor

Subcontractor

DCMA CIG

Buying Command

- Performs market research to determine if commercial solutions are available, can be tailored to meet requirement, or if requirement can be tailored to leverage existing commercial solutions
- Determines appropriate contract vehicle (FAR 12, FAR 15, etc.)
- PCO makes a Commercial Determination (CD) for the **specific** proposed products and services
- PCO determines F&R price and whether exceptions apply to obtaining certified cost or pricing data
- For acquisitions over the TINA threshold, if the PCO determines a claimed commercial product/service to be Other Than Commercial (OTC), the contractor is required to submit certified cost or pricing data (FAR 15.403-1(c)(3))
- **PCO has the ultimate authority to determine whether proposed products/services will be treated with commercial procedures**

Prime Contractor

Subcontractor

DCMA CIG

TIP #1: Identify the specific PN/nomenclature being determined commercial. Configuration at the time of the CD matters!

Buying Command

- When claiming an exception to certified cost or pricing data for prime supplied products or services, submit a justification package that supports the assertion

Prime Contractor

- Determine whether any subcontractor-claimed commercial products/services meet the commercial definitions (DFARS 244.402)

- **Explicitly state which commercial product/service definition paragraph applies**

Subcontractor

- Perform market research to identify commercial market alternatives

- Exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10

DCMA CIG

TIP #2: The specific commercial definition paragraph matters!

Evidence required to support each element of the definition varies depending on the applicable paragraph.

Buying
Command

Prime
Contractor

Subcontractor

DCMA CIG

- When claiming an exception to certified cost or pricing data for supplied products or services, submit a justification package that supports the assertion
- Consider including:
 - Side-By-Side comparison to commercial product/service
 - Commercial catalogs
 - Sales data demonstrating commercial sales
 - Market insights – How widespread is the commercial use? What industries is it used in? How much competition is there?

TIP #3: Address each element of the applicable commercial definition paragraph. Simply stating that the proposed product/service is “of a type” is not sufficient!

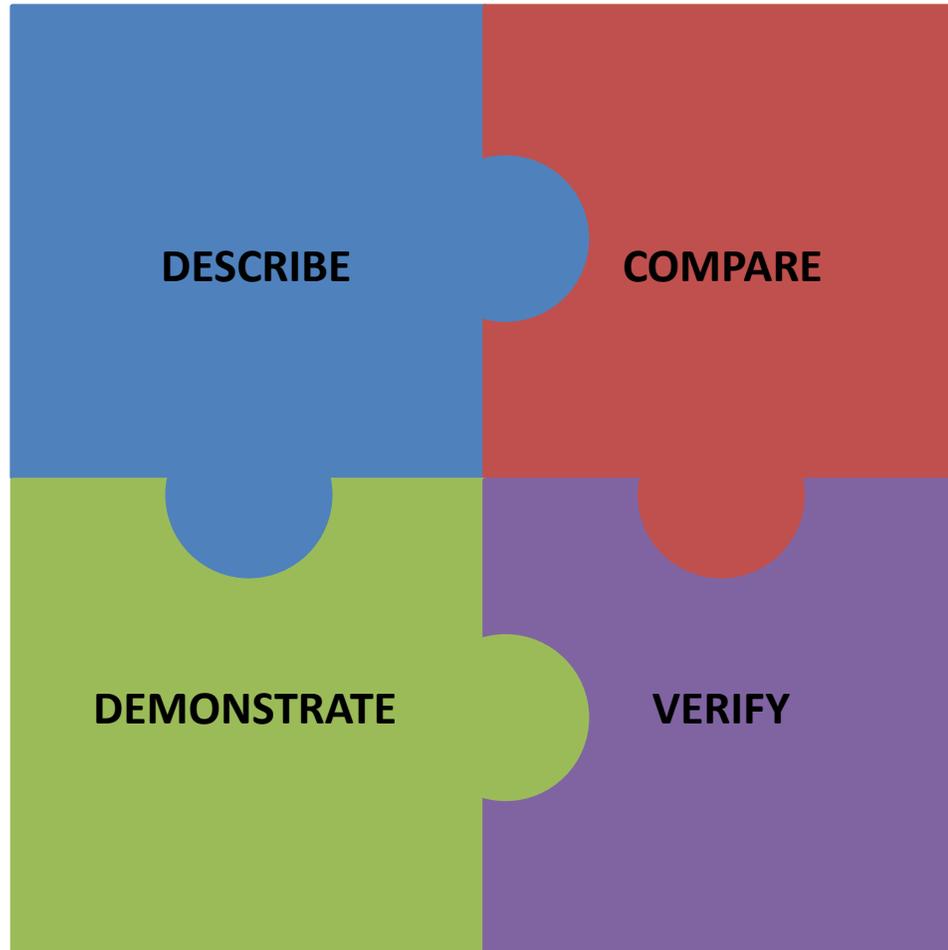
Buying
Command

Prime
Contractor

Subcontractor

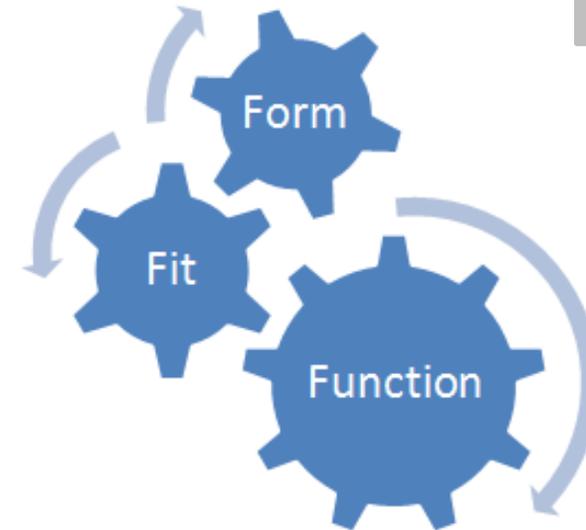
DCMA CIG

- Supports the Buying Commands **upon request**
- Primary services:
 - Market Research
 - Technical Analysis
 - Government Commercial Determinations
 - Price Analysis
- Also:
 - Support to Negotiations
 - Mentoring
 - CI Database maintenance
 - Support DoD commercial acquisition initiatives



- Describe the salient characteristics of the proposed product or service
- Compare the proposed product or service with those found in the commercial marketplace
 - *Commercial product definition paragraph (6) is an exception
- Demonstrate that the commercial comparison product or service is used by the general public
- Verify whether all elements of the applicable commercial definition are covered in the steps above – provide evidence to substantiate any missing pieces

- Form, Fit, and Function describe the essential characteristics that define a product
- Frequently used term in engineering
- Although the terms are not associated with the FAR commercial definitions, they are pertinent to describing a product

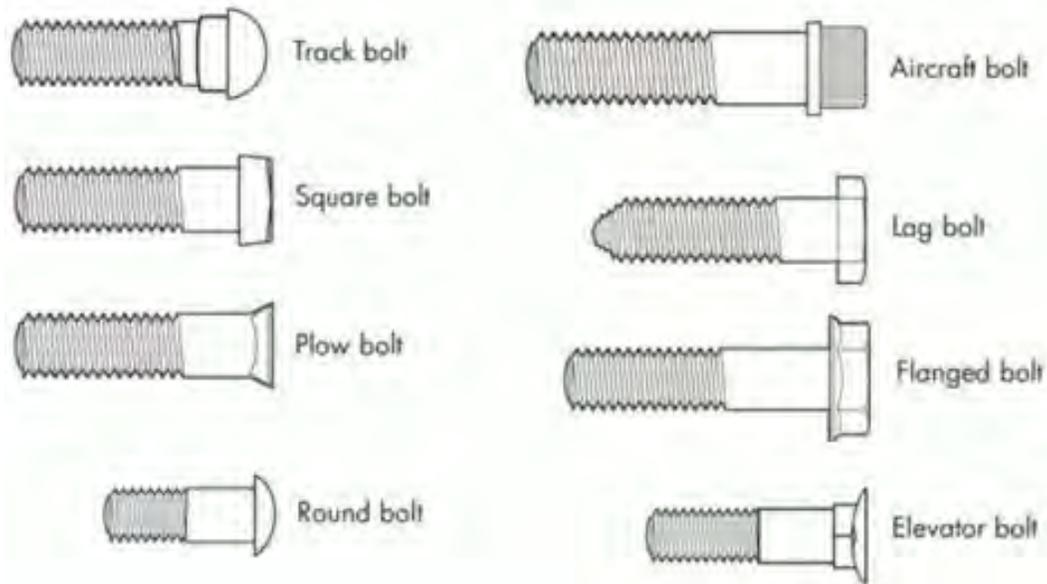


DESCRIBE

Remember that FFF are not the only considerations with respect to commerciality!

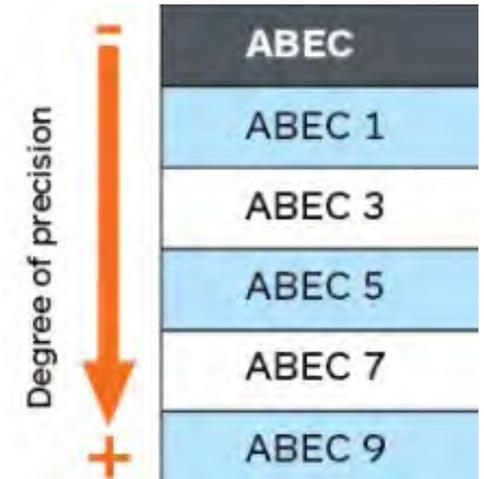
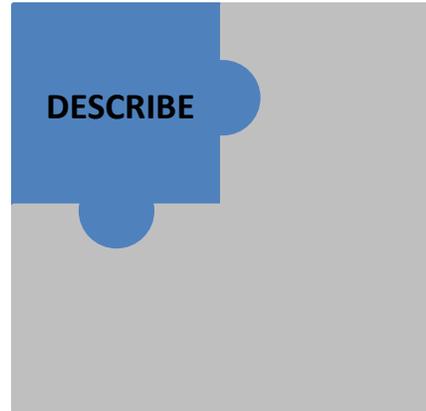
- Physical characteristics such as shape, size, dimensions, mass, weight, material, etc.
- Could impact commerciality if the modifications are significant
- Likely impacts pricing (minor vs. major modifications)

DESCRIBE



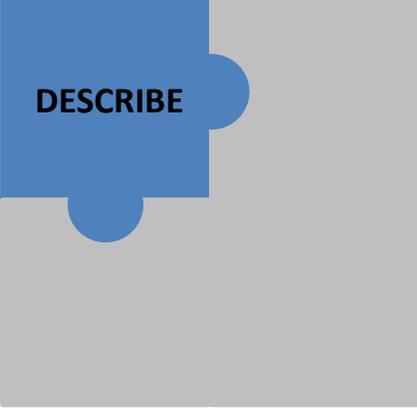
Different Form, Same Function

- The interface of the product with other components/systems and to any installation requirements
- Refers to tolerances or connection specifications
- Are there unique Government interface requirements that substantively alter the commercial of a type product? (minor vs. major modifications)

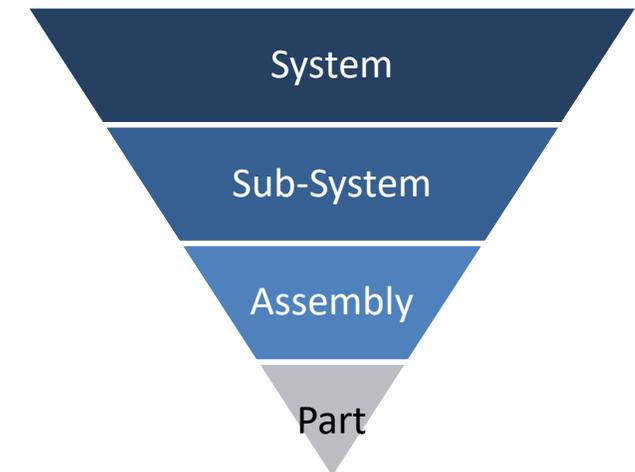


Commercial and military products do not need to be interchangeable

- The “essential” purpose of the product
- What are the similarities **and differences** between the proposed product/service and commercial comparisons?
- The function at the part level may be similar, even if the system function varies significantly
- Both narratives and technical data can be used to describe

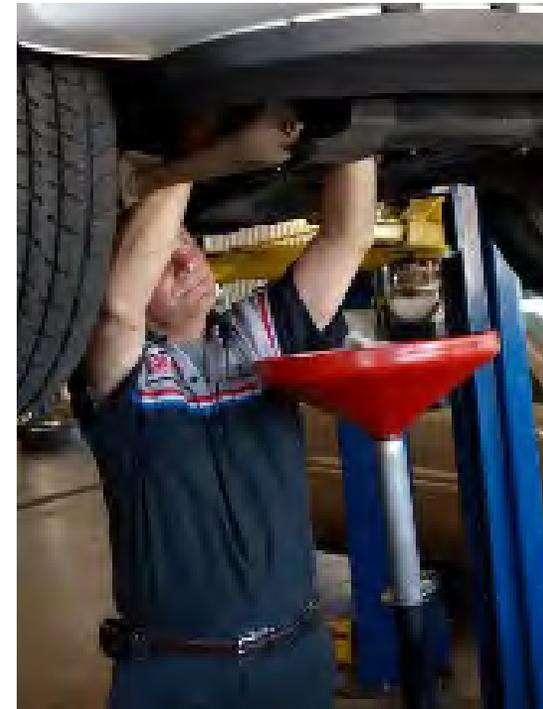


DESCRIBE



TIP #4: When comparing products and services, don't focus solely on similarities – differences matter equally!

- Describe the proposed scope of work in sufficient detail to assess whether it can reasonably be considered:
 - Similar to services provided “contemporaneously to the general public”
(FAR 2.101 Commercial service definition paragraph (1))
 - Services “of a type” offered and sold competitively in substantial quantities to the general public
(FAR 2.101 Commercial service definition paragraph (2))



DESCRIBE

Commercial service assertion packages often lack the requisite detail to sufficiently assess

Description provided:

- Off-road SUV
- 2022 model year
- Blue paint job / black roof
- Spare tire

How about these facts?

- 1:64 scale model
- \$3 MSRP



DESCRIBE

Ensure sufficient descriptive details are provided to lead a reasonable person down the correct path

- Government Requirements above and beyond the requirements typically found in “of a type” commercial products or services
- Why is it important?
 - Additional requirements imposed by the contractor or buying command COULD change whether a proposed product meets the commercial product or commercial service definition
- Examples:
 - Testing/QA Requirements
 - Ruggedization
 - Ts&Cs



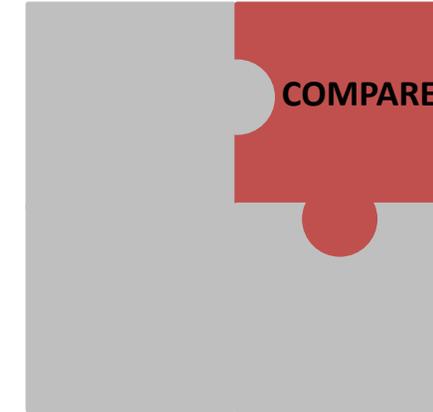
DESCRIBE



The Government should be careful not to introduce additional requirements above and beyond what is typically available in the commercial marketplace unless necessary for the Government function

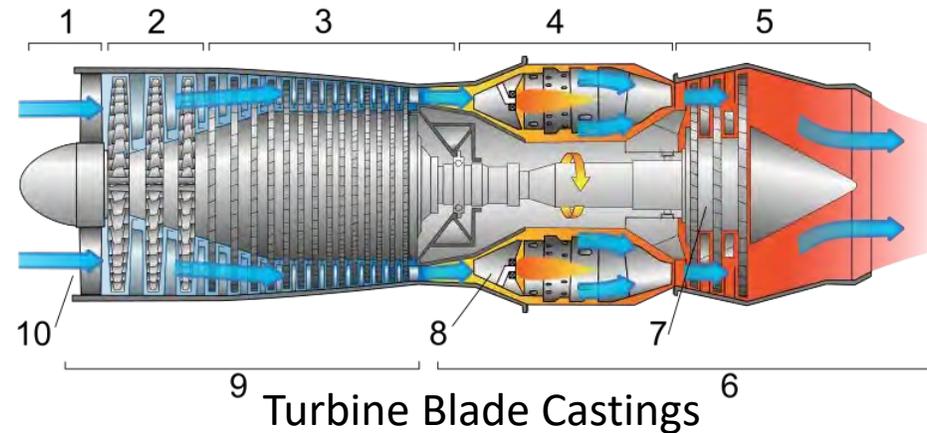
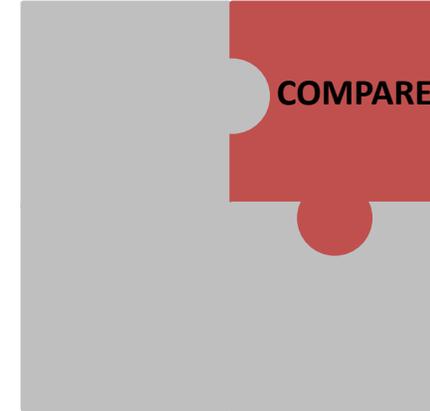
Is it acceptable if the form, fit, and function of a proposed commercial product is not EXACTLY the same as a known commercial variant?

YES!



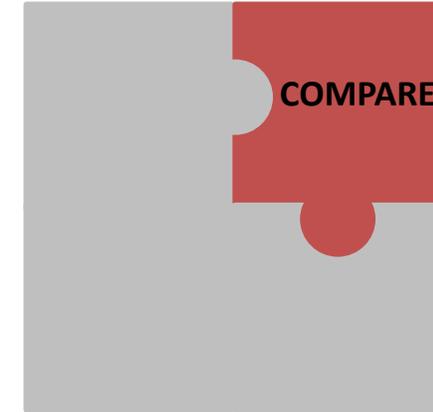
	Mil-Spec	Commercial
Buffer Tube O.D.	1.148"	1.168"
Buffer Tube End	Flat Back	5 Degree Slant Back

- Proposed Product vs. “Of a type” Technical Comparison Chart
- Efficient method to showcase FFF similarities/differences



	Military Use	Commercial Use
Aircraft/Part Description	Military Blade casting	Commercial Blade casting
Material	PWA 1484-2 NI Alloy	PWA 1484-1 NI Alloy
Cast Weight	1.50 lbs.	1.36 lbs.
Units per engine	48	76
Location in engine	2 nd stage LPT	2 nd stage HPT

- Compare the scope of work between the proposed and similar commercial service in sufficient detail to reasonably assess
- Example:
 - Prime contractor Flight Displays 'R' Us proposed an Overhaul and Repair (O&R) to replace an obsolete screen on a primary flight display for a military aircraft
 - Base PN has been determined commercial, with a Gov't CID (CD) on file



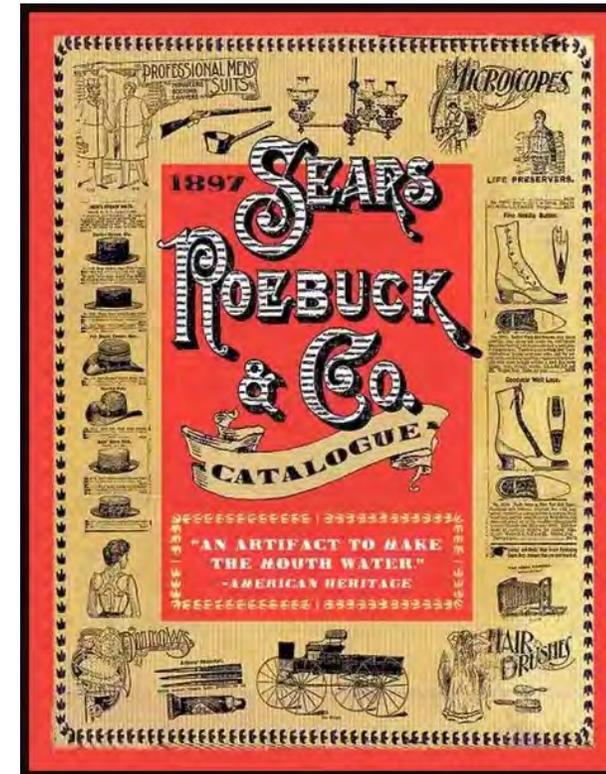
	Military Variant	Commercial Variant
PN / Description	PFD012345-M	PFD012345-C
O&R performed?	Yes (proposed)	Yes – work scope provided
Scope	Remove old screen and replace with higher resolution screen (PN SC012345-HD)	Remove old screen and replace with higher resolution screen (PN SC012345-HD)
Invoices/Sales History provided?		Yes
Ts&Cs including expressed warranty similar?	Yes	Yes

- What nongovernmental entities use the similar commercial product or service and what is it used for?
- Why is this important?
 - It's in the FAR 2.101 commercial definitions!
 - Several commercial definition paragraphs use the terms “customarily used by the general public” or “offered/sold to the general public” so this is a way to ensure there is a legitimate nongovernment end use application
- Evidence can be a combination of narrative and technical data



Just like FFF, end use application is not the only consideration with respect to commerciality!

- Commercial Catalogs can be an important piece of the puzzle
- Importance given to the existence of a commercial catalog depends on:
 - Public accessibility
 - Transparent pricing
 - “Click to buy” capability
- Does not necessarily address whether the proposed product or service is customarily used by the general public



DEMONSTRATE

- Invoices are frequently used to substantiate commercial sales history
- Redacted invoices provide some insight, but may be inadequate to demonstrate commercial sales
- Un-redacted invoices ensure a more expedient review
- Demonstrating a single sale (or handful of sales) does not necessarily mean the FAR commercial definition is satisfied



JaneCorp				
123 Uncle Sam Way Denver, CO 80204 (555) 555-5555		Original Invoice		
		Invoice Date	4/4/2023	
		Invoice #	12345678	
		Sales Order #	98765432	
		Customer P.O. #	100-1234567	
Bill to:		Remit to:		
[REDACTED]		JaneCorp		
[REDACTED]		123 Uncle Sam Way		
[REDACTED]		Denver, CO 80204		
[REDACTED]		(555) 555-5555		
PN/Description	Unit	Qty	Unit Price	Ext Price
200-34789, HPT blade	ea	912	\$4,500	\$4,104,000

The Government is required per the FAR to protect contractor proposal/source selection information

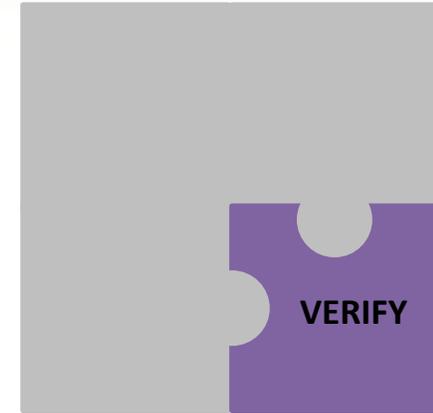
- Contractor provided sales history with customer names redacted
- Virtual over-the-shoulder invoice review with the supplier demonstrated commercial sales and protected competition sensitive information

200-34789, HPT blade					
Commercial Sales					
PO #	Customer	Qty	Unit Price	Extended Price	Year Purchased
S345667	[REDACTED]	78	[REDACTED]	[REDACTED]	2019
S345668	[REDACTED]	468	[REDACTED]	[REDACTED]	2019
S345669	[REDACTED]	2340	[REDACTED]	[REDACTED]	2019
S345670	[REDACTED]	78	[REDACTED]	[REDACTED]	2019
S345671	[REDACTED]	546	[REDACTED]	[REDACTED]	2020
S345672	[REDACTED]	2	[REDACTED]	[REDACTED]	2020
S345673	[REDACTED]	2340	[REDACTED]	[REDACTED]	2021
S345674	[REDACTED]	78	[REDACTED]	[REDACTED]	2021
S345675	[REDACTED]	468	[REDACTED]	[REDACTED]	2021
S345676	[REDACTED]	546	[REDACTED]	[REDACTED]	2021
S345677	[REDACTED]	2	[REDACTED]	[REDACTED]	2022
Government Sales					
PO #	Customer	Qty	Unit Price	Extended Price	Year Purchased
G345667	USAF	54	\$4,600	\$248,400	2019
G345668	USAF	324	\$4,500	\$1,458,000	2020
G345669	NAVAIR	810	\$4,300	\$3,483,000	2020



Unfiltered access to un-redacted invoices/sales data is most expedient, but DCMA CIG can work directly with suppliers in more controlled data sharing environments

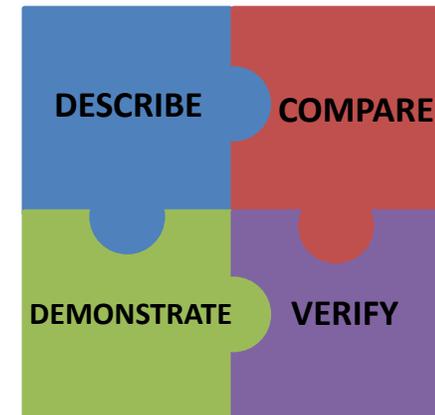
- Ensure all commercial definition elements are addressed and substantiated
- Examples not specifically addressed in the previous steps:
 - Commercial product definition paragraph (3): substantiation for minor modification meeting Gov't requirements vs modification of a type customarily available in the commercial marketplace
 - Commercial product definition paragraph (6): “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”
 - Commercial service definition paragraph (2): evidence of “Market prices”



Tip #5: Read the applicable commercial definitions often and in detail!

- The products of a “commercial company” are certainly commercial
- The output of a “commercial facility” is certainly commercial
- Nondevelopmental items are always commercial
- If a product or service is developed at private expense, it must be commercial
- A product that has no commercial sales cannot be commercial
- All you need to prove a product or service is commercial is to list it on your company website
- Invoices can be “too old” for consideration in commerciality
- If it’s ITAR-restricted, it cannot be commercial
- If it’s commercial, the asking price must be fair and reasonable
- Catalog prices are automatically fair and reasonable

- “We’re not so different, you and I”
- The CD “Puzzle”
 - **Describe** the proposed product/service
 - **Compare** to product/service in the commercial marketplace
 - **Demonstrate** that the commercial comparison is used by the general public
 - **Verify** that all elements of the commercial definition are substantiated





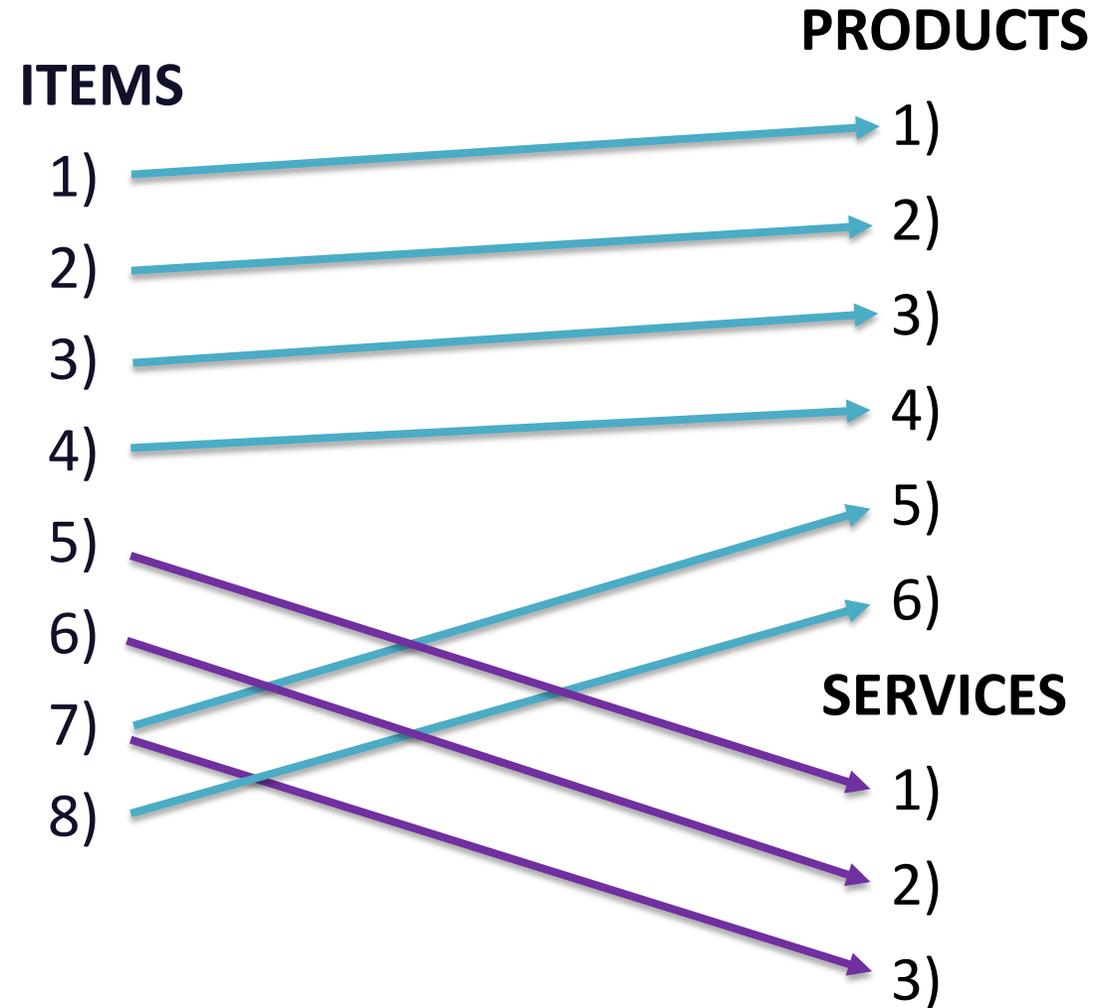


FAR Case 2018-018

Federal Register/ Vol. 86, No. 211 /
Thursday, November 4, 2021 / Rules and
Regulations

DFARS Case 2018-D066

Federal Register/ Vol. 88, No. 6578 /
Thursday, January 31, 2023 / Rules and
Regulations



FAR 2.101 lists nine commercial product and service definition paragraphs - each is a different & unique pathway, or “Door”

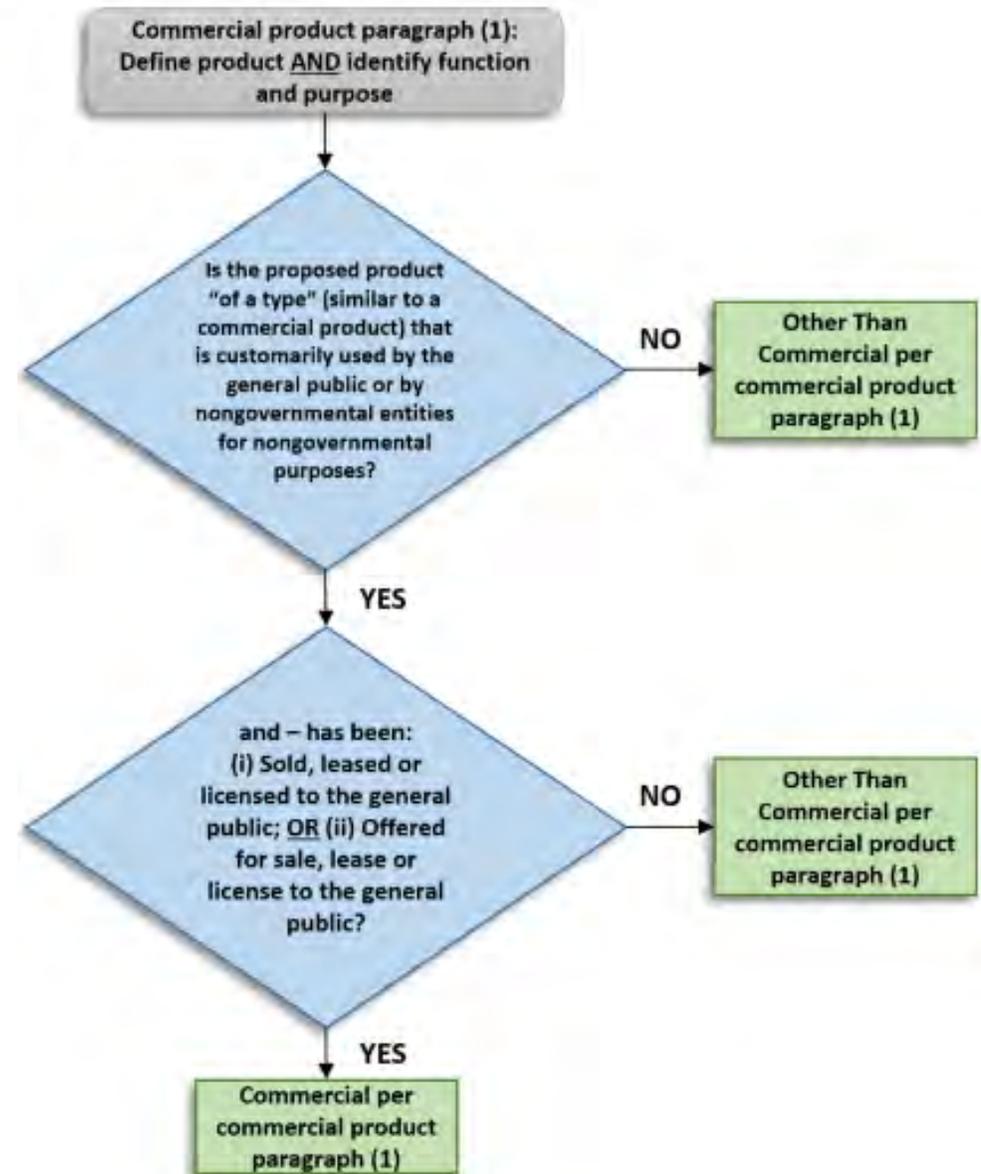


NOTE: Regulation text on upcoming slides has been summarized. See FAR full text for original.

Paragraph (1) (Door #1): A product, other than real property, that is OF A TYPE customarily used by the general public or by nongovernmental entities for purposes other than government purposes, AND has been sold, leased, or licensed to the general public OR has been offered for sale, lease, or license to the general public.

What to look for:

- Market Research
- Technical comparison of proposed product and “of a type” item
- Invoices showing sales of proposed product or “of a type” to nongovernment buyers
- Catalogs showing the proposed product is offered for sale to the general public without requiring special credentials
- On-line advertisements
- Who is buying/who is selling similar products

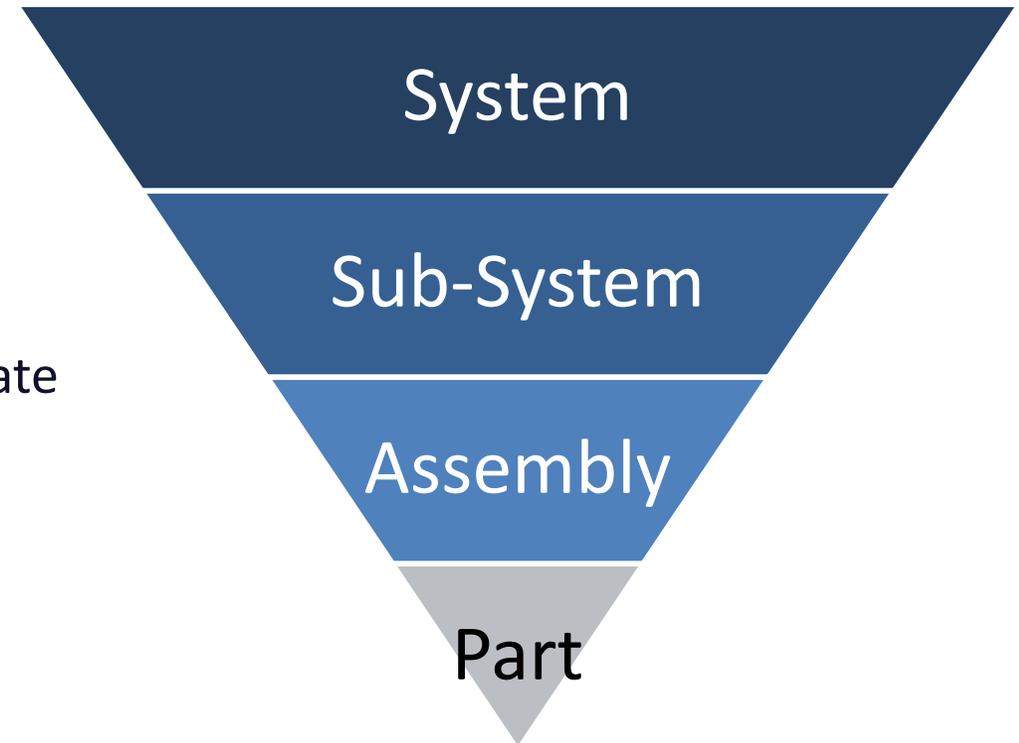


- Considering “similar” products “of a type” embraces the broader view of commercial products
- Allows consideration of products and services offered by both traditional and non-traditional defense contractors
- Intentionally vague to provide contracting officers broad latitude when making determinations



Cessna 337 Skymaster and A-10 Warthog “similar” enough to be “of a type” of airplane?

- There are many other aspects to consider, but understanding the function is critical
 - Is the function military in nature?
- Cessna 337 Skymaster
 - Twin-engine civil utility aircraft primarily used by private organizations
- A-10 Warthog
 - Twin turbo-fan, fixed-wing close combat support and ground-attack aircraft



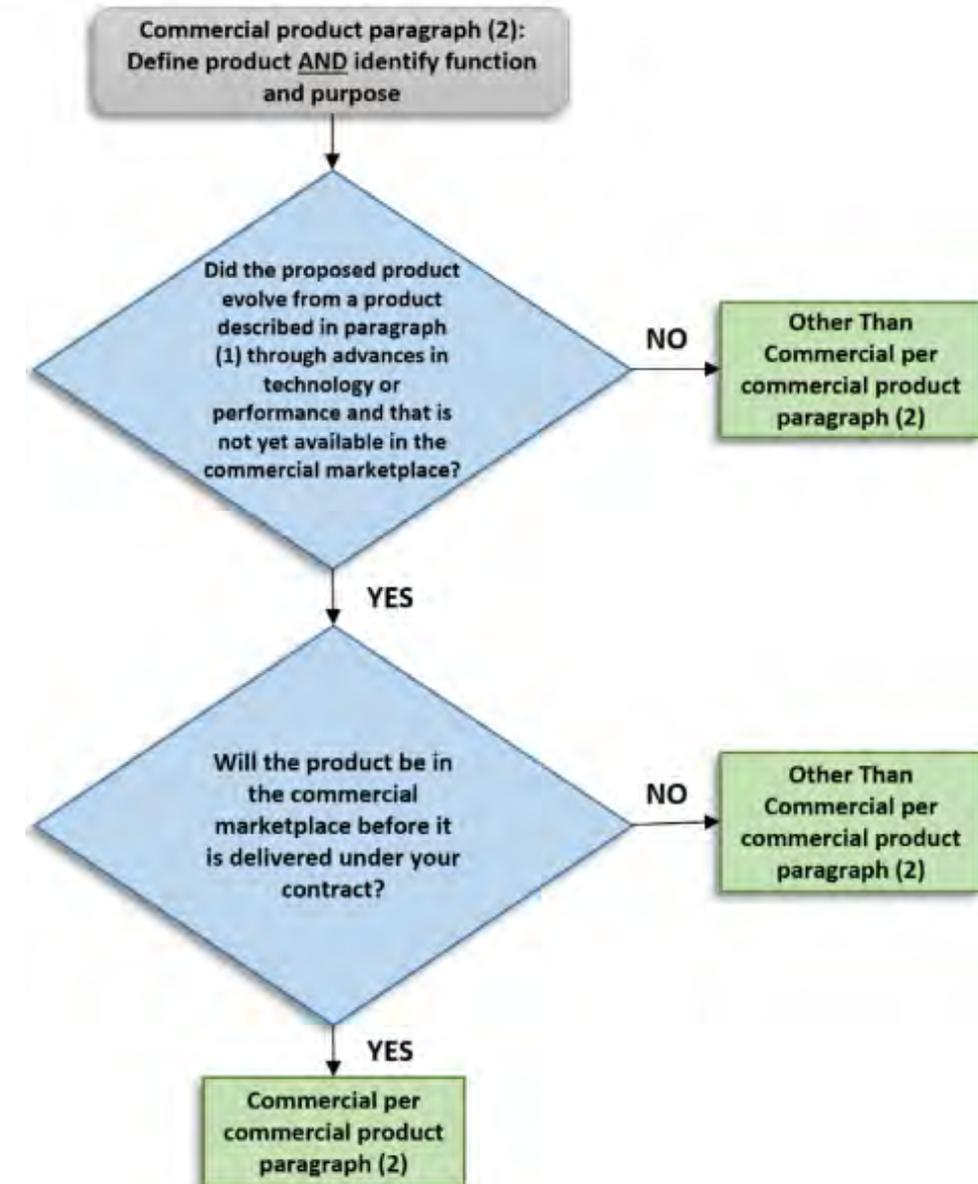
Market Research is vital to identify similar “of a type” products or services

Paragraph (2) (Door #2): A product that would fit through Door #1 except that it hasn't hit the marketplace yet (not sold or offered for sale), but it will hit the marketplace by the time the government procures it.

What to look for:

- Product launch planning documents
- Commercial Contracts for future deliveries
- Date of procurement vs launch date
- Evidence of general public need

COMING SOON



Paragraph (3) (Door #3) A product that would go through Door #1 or #2

EXCEPT FOR

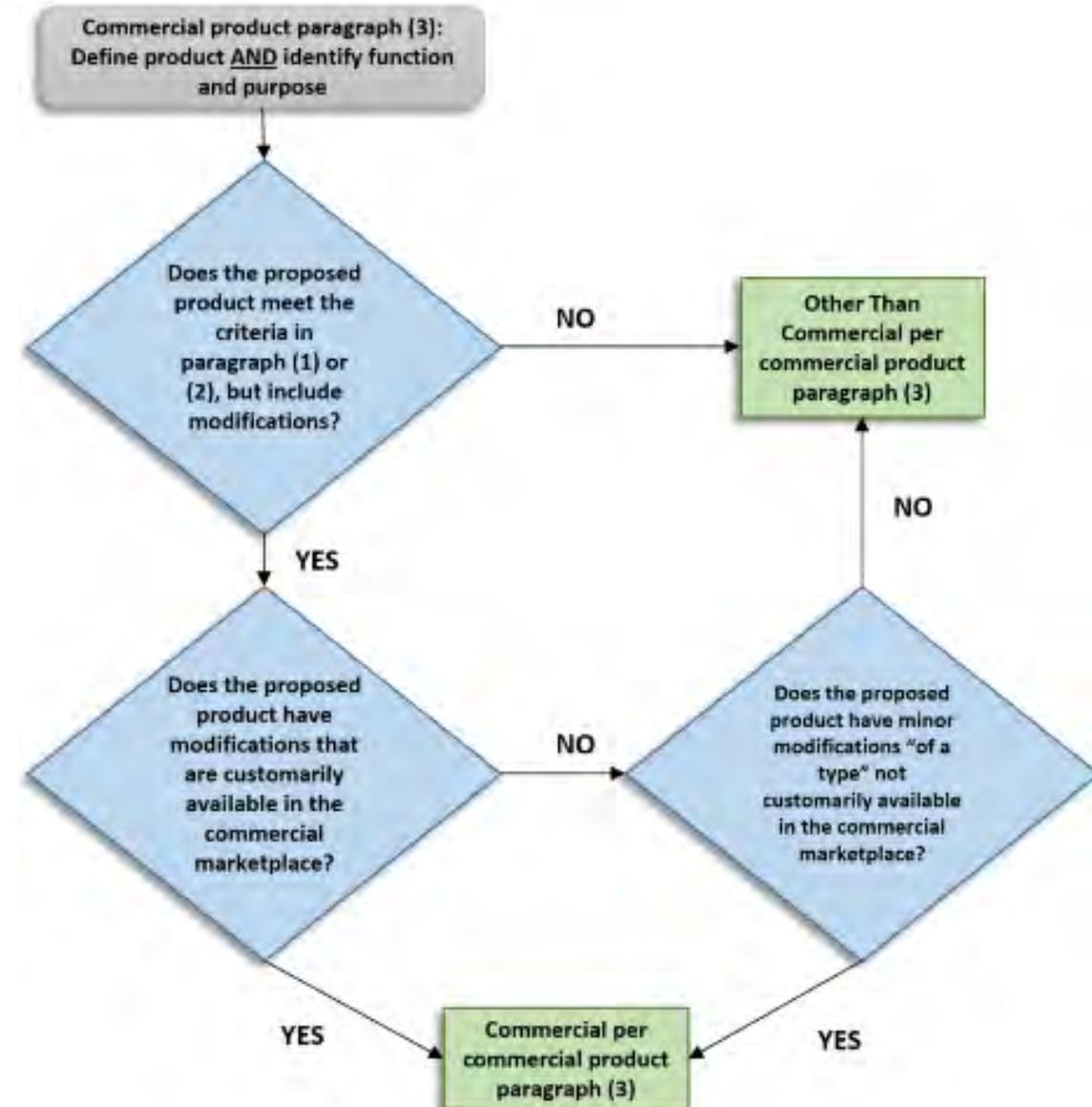
- (i) Modifications that are customarily available in the commercial marketplace, or
- (ii) Minor modifications of a type to meet government requirements but do not significantly change the functional characteristics of the product

What to look for:

- FFF data for the proposed product
- If (i), evidence that the modification is available to anyone
- Comparison item FFF data showing that it is similar to the proposed item in most respects and fits through Doors #1 or #2
- Details on the modification (differences) to show that the modifications meet (i) or (ii)
- Drawings, photographs, specifications
- Statement of Work (SOW)

Show-stoppers:

Government-unique functions or characteristics that are NOT minor mods.



- Modification should be:
 - “Customarily” available to the public, OR
 - Minor and made to meet Federal Government requirements
- What constitutes a “minor” modification?
 - Look to the FAR commercial product definition - can’t rely on standard configuration management definitions
- Considerations include:
 - Is the non-governmental function significantly altered?
 - Cost and size of the modification
 - FAR 15.403 offers a guidepost of 5% of total cost or if cost exceeds certified cost and pricing threshold



Cessna 337 Skymaster

Twin-engine civil *utility* aircraft primarily used by private organizations

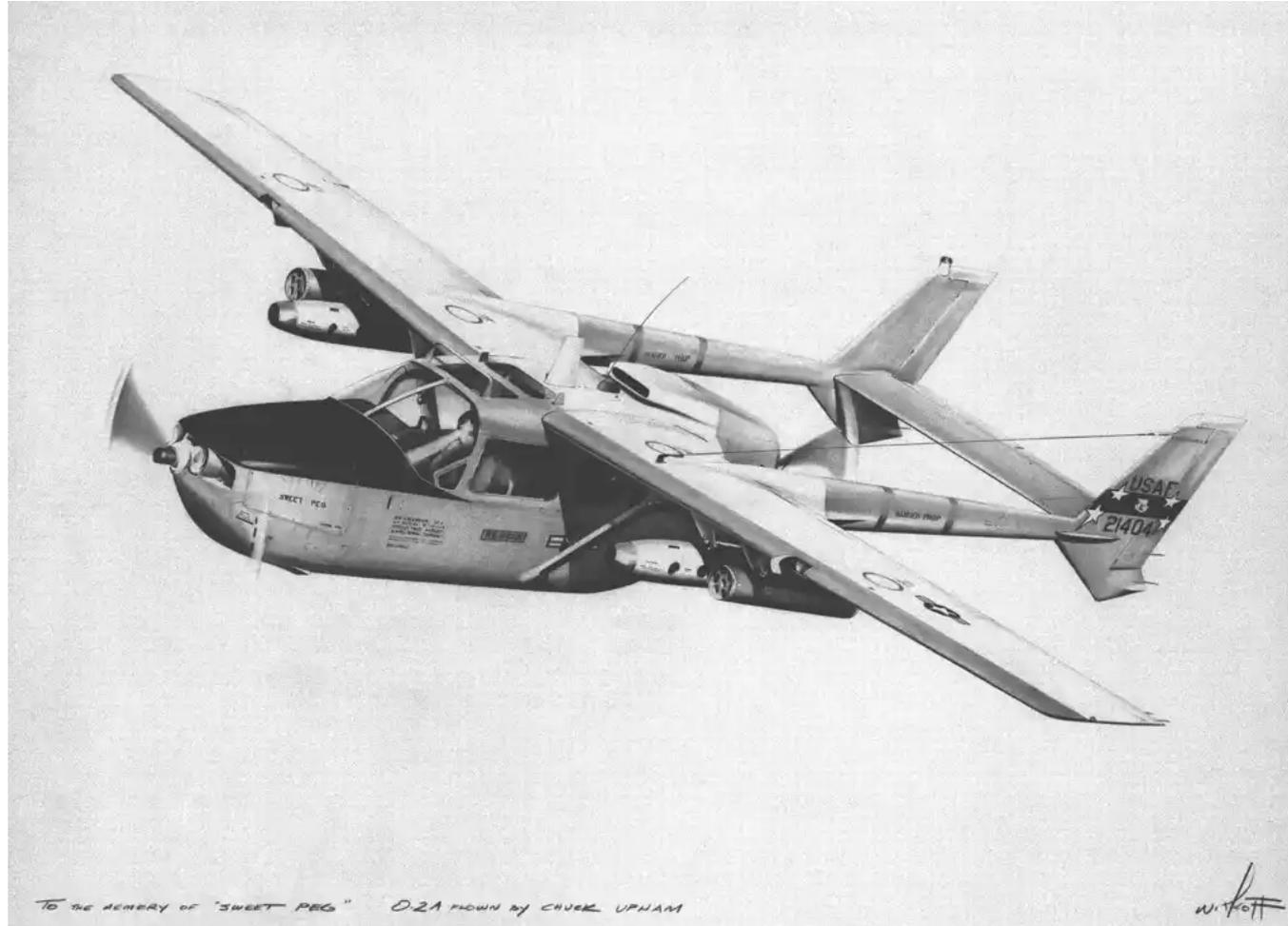
- Modifications include paint, markings, and communication systems



Cessna O-2 Skymaster

Twin-engine military *utility* aircraft primarily used for forward air control and psychological ops

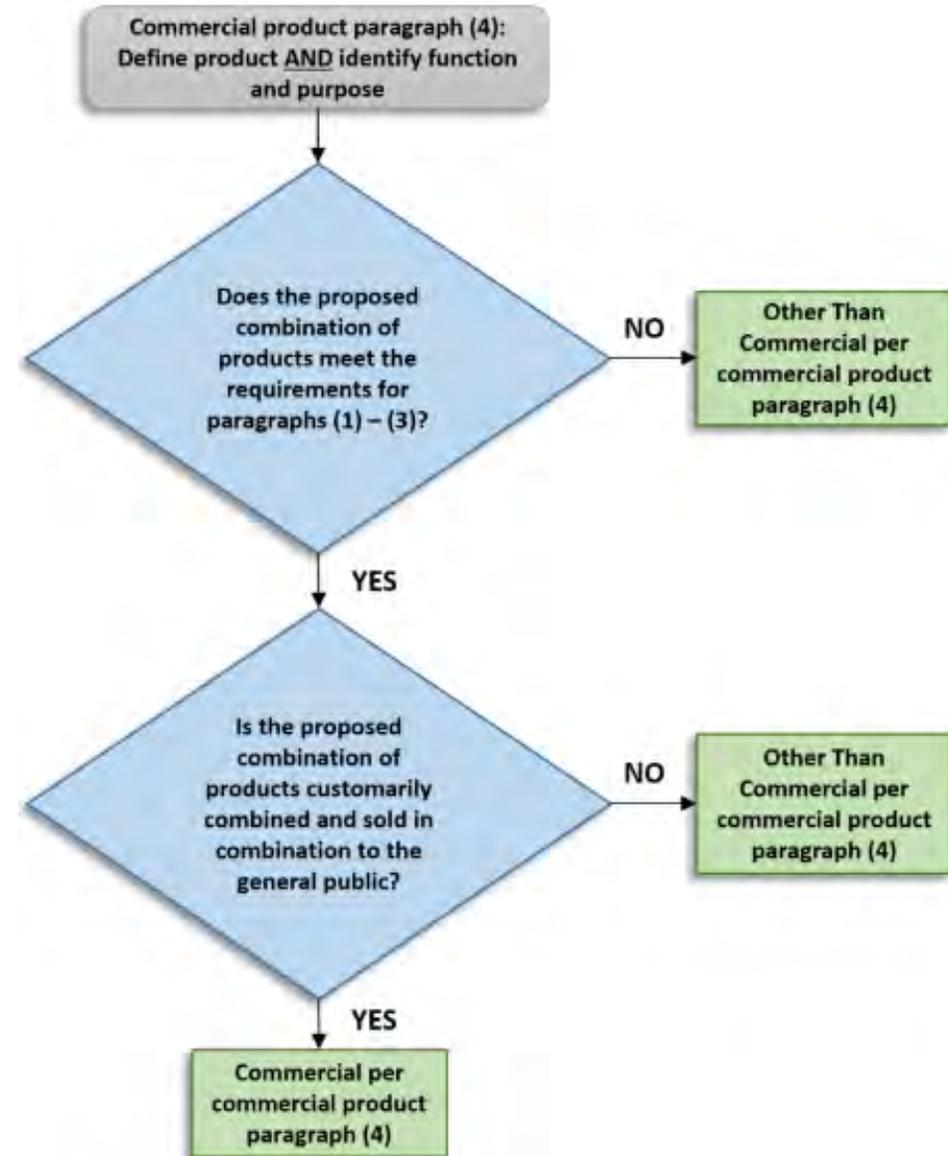
How about now?



Paragraph (4) (Door #4): Any combination of products that can go through Doors 1-3 that are OF A TYPE customarily combined and sold in combination to the general public

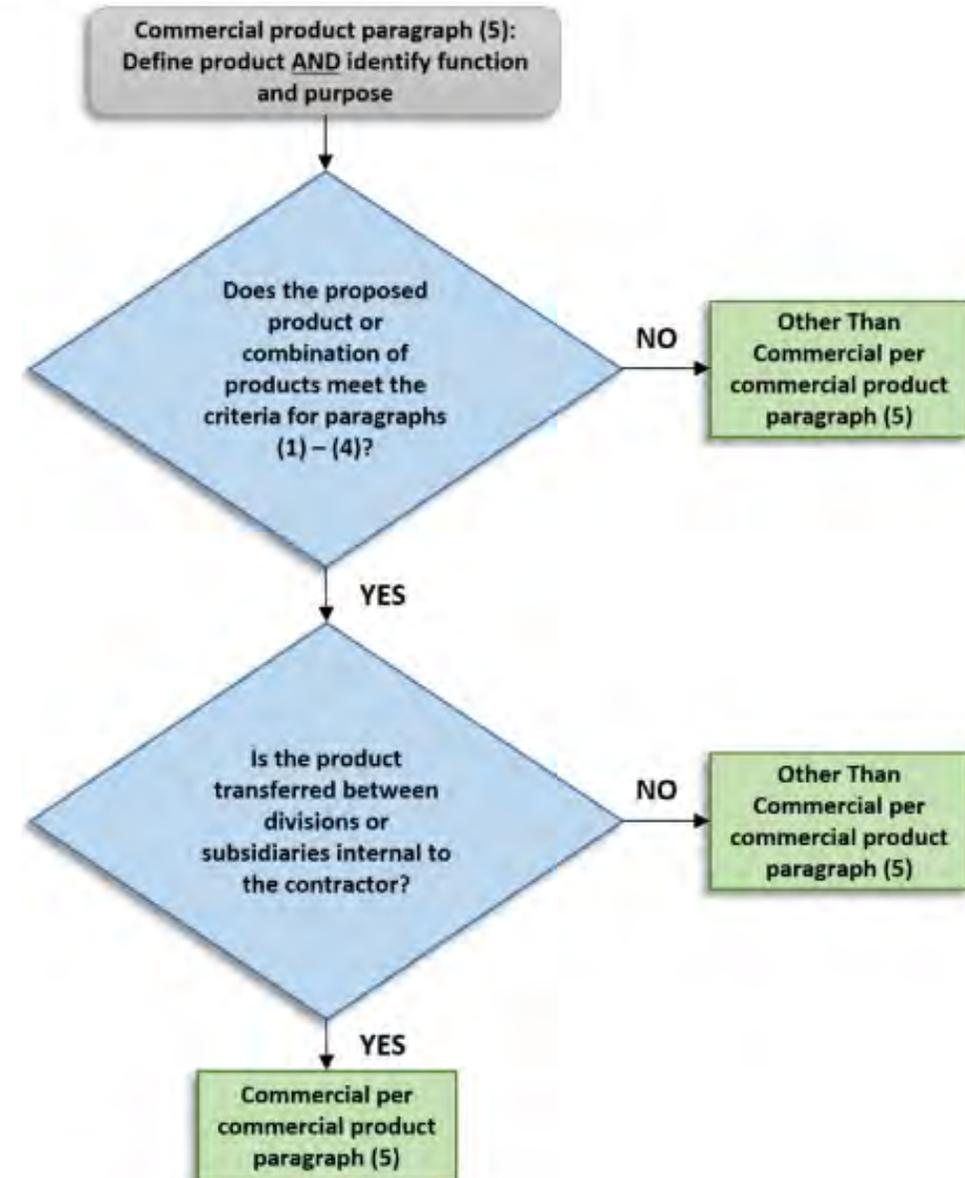
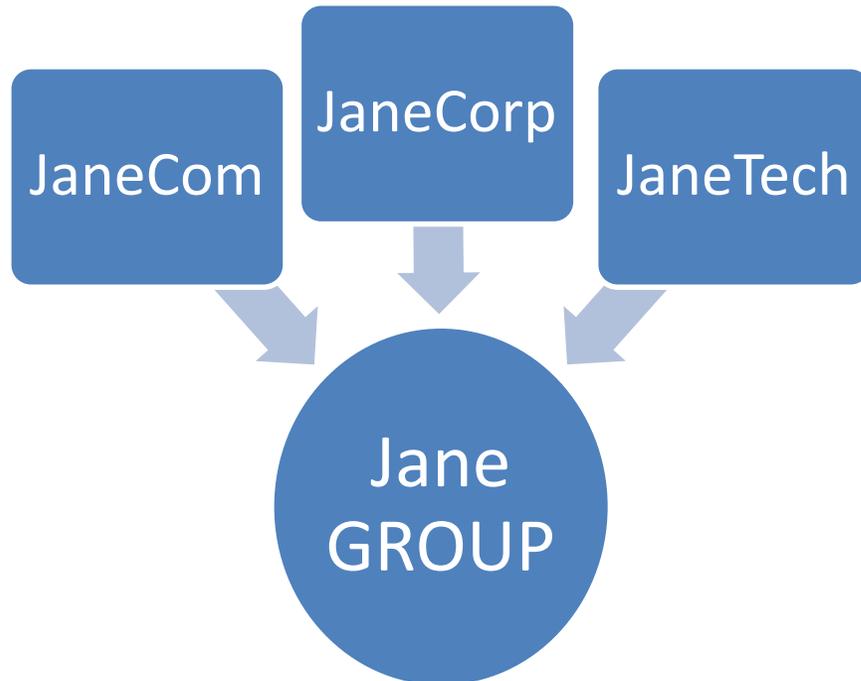
What to look for:

- Evidence that the product goes through any of Doors 1-3
- Statements of work
- Contracts showing terms & conditions
- Advertisements for services



Paragraph (5) (Door #5) A product, or combination of products, that meet the definition of Doors 1-4 even though the product, or combination of products, is transferred among separate divisions, subsidiaries, or affiliates

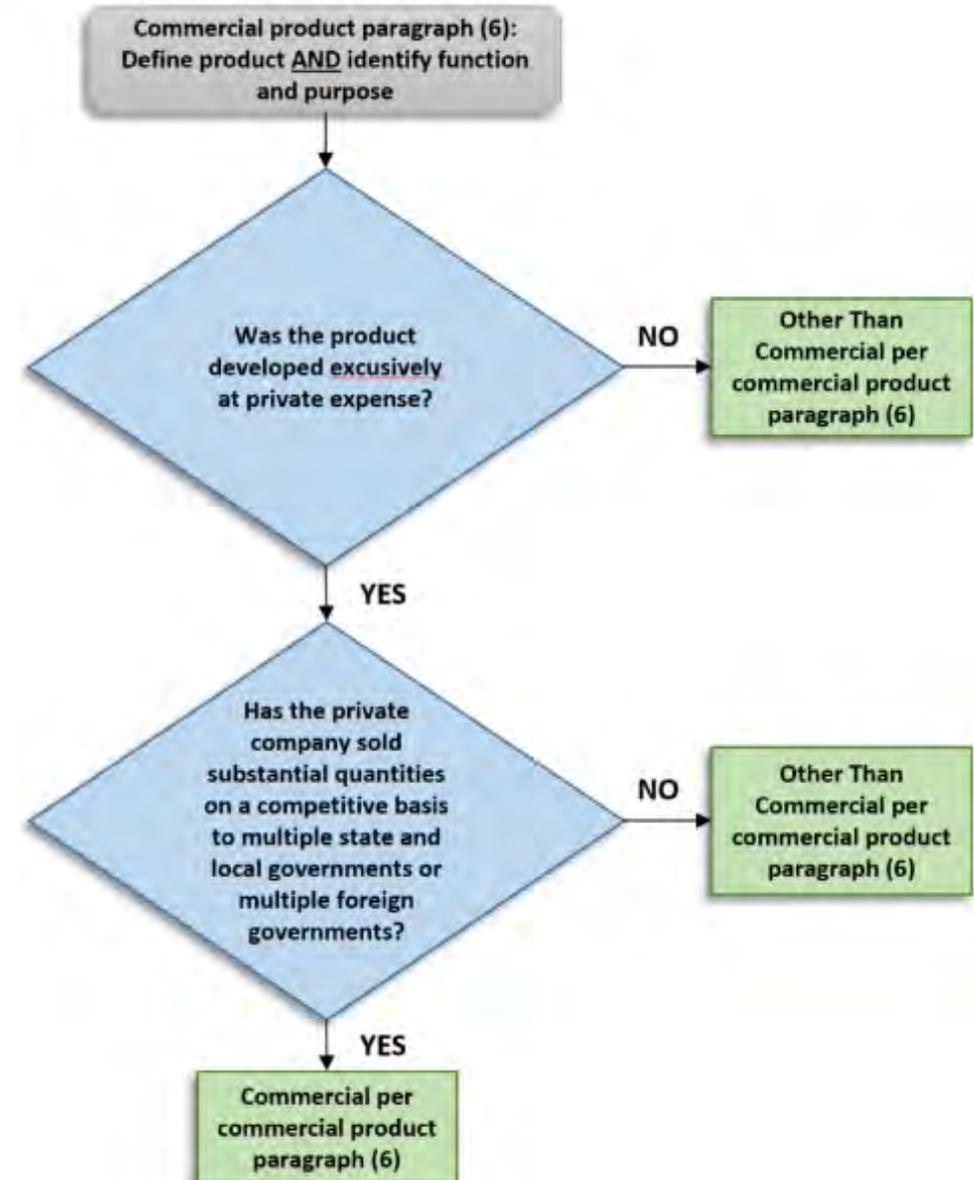
...NOTWITHSTANDING the fact that products are transferred between separate divisions, subsidiaries, or affiliates of a contractor



Paragraph (6) (Door #6): A nondevelopmental item, if the procuring agency determines that the product was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State, local, and foreign governments.

What to look for:

- Evidence of private funding for development,
- Quantities that are “substantial,”
- Evidence of market competition, and
- State/local government sales invoices



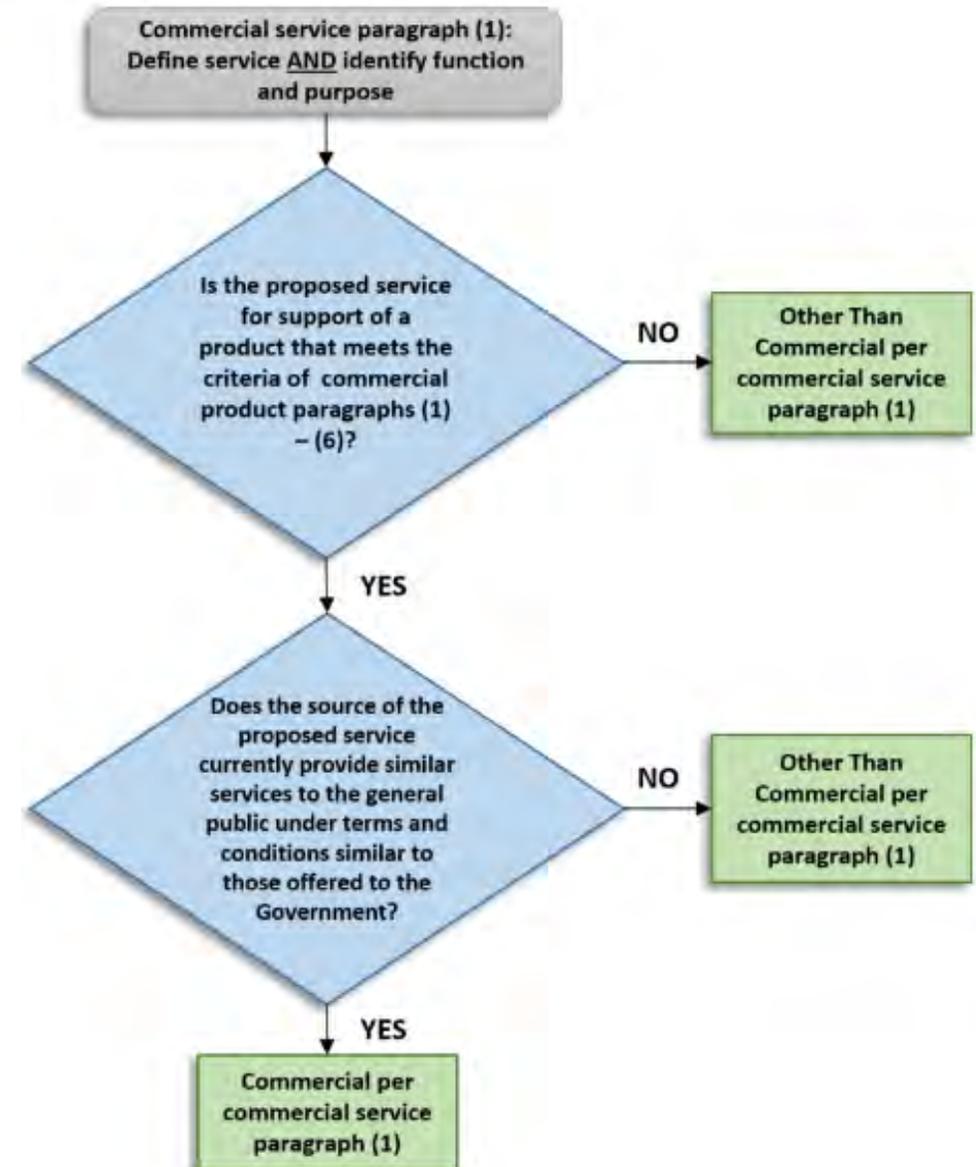
Paragraph (1) (Door #7): Installation, maintenance, repair, training, and other services, IF...

Such services are procured for support of a product that goes through any of Doors 1-6; and...

...the services are available to the general public under similar terms & conditions.

What to look for:

- Is the product being serviced commercial or commercial OF A TYPE product that meets one of the commercial product definitions?
- Does the contractor have commercial clients currently receiving similar services?
- Are the terms and conditions similar?

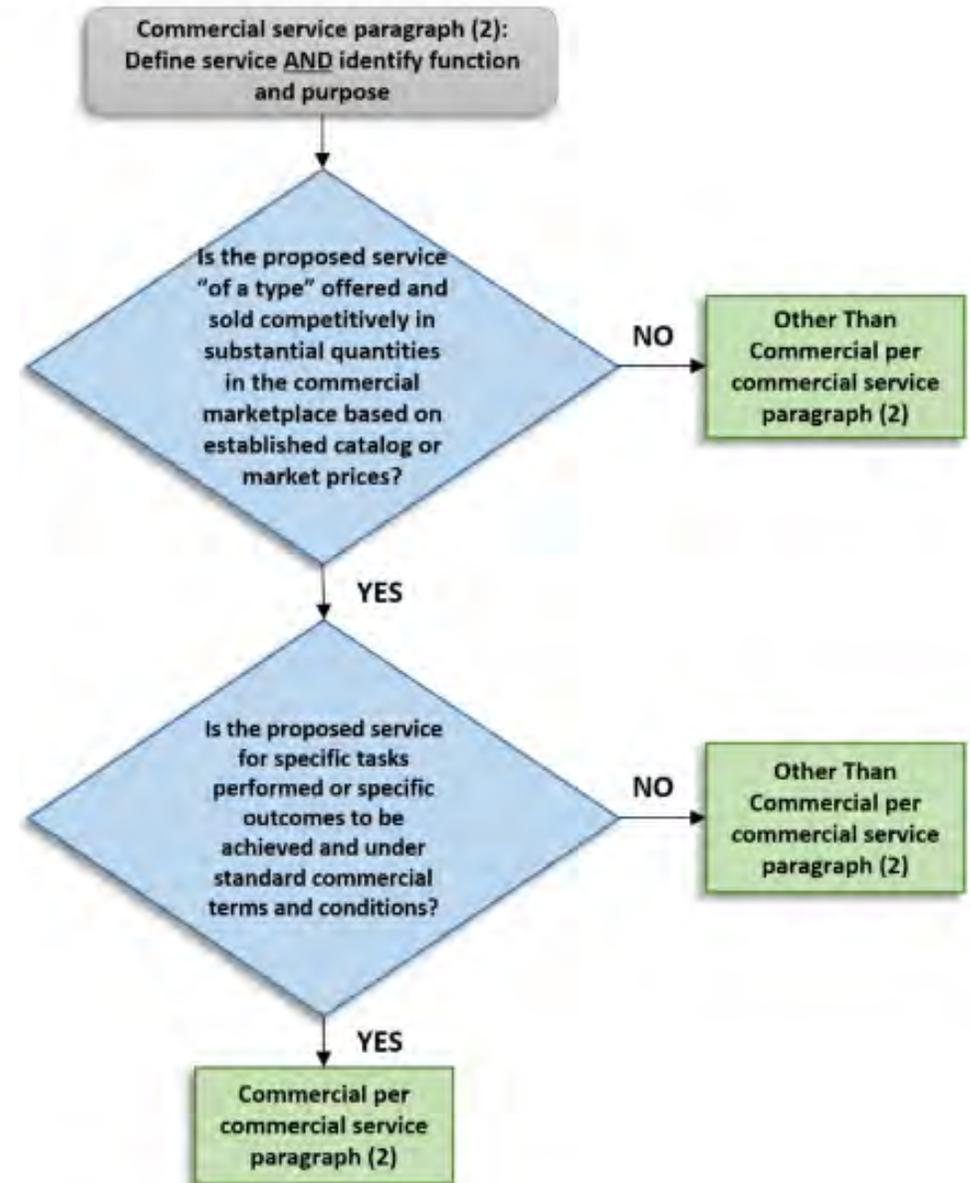


Paragraph (2) (Door #8): Services OF A TYPE offered and sold competitively in substantial quantities based on established catalog or market prices for specific tasks or outcomes, under standard commercial terms & conditions.

What to look for:

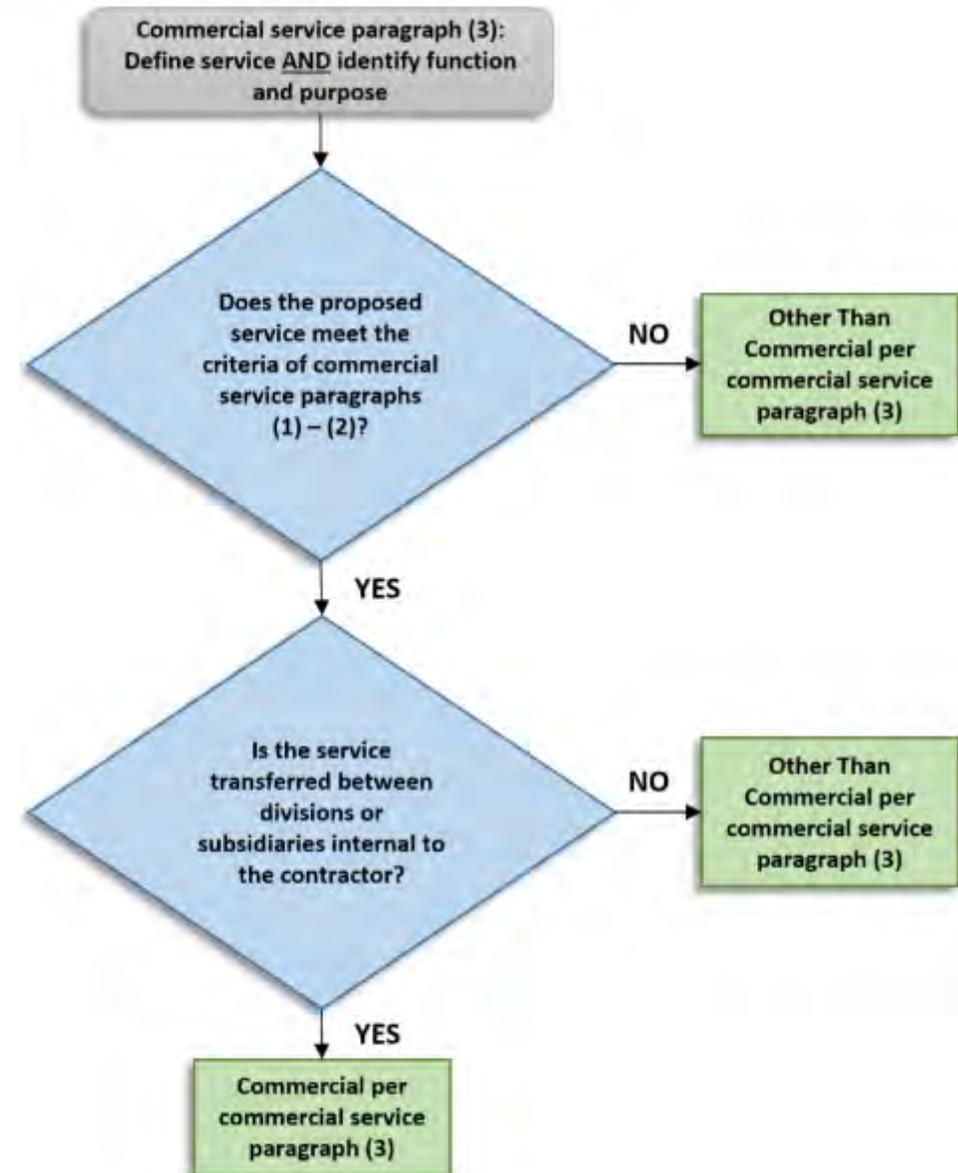
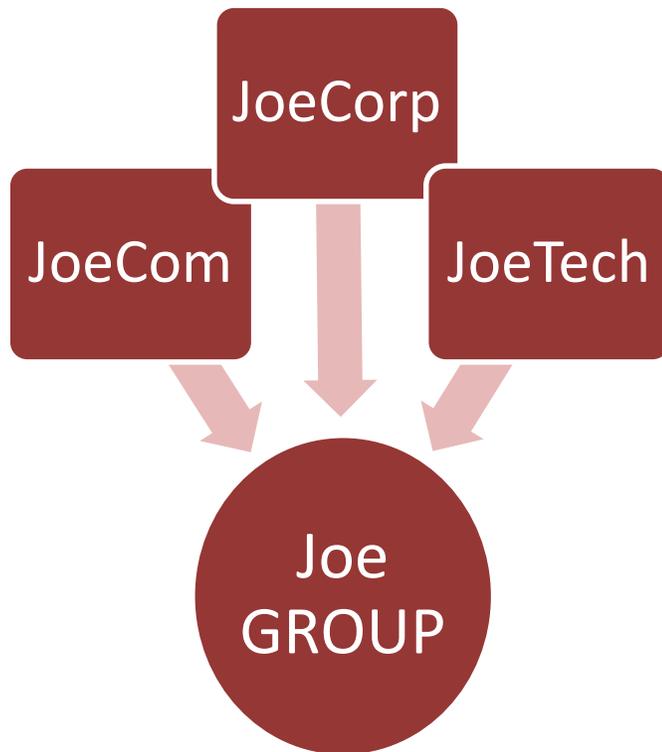
- Are the services OF A TYPE?
- Contracts showing terms & conditions
- Advertisements for services
- Are similar services available in the market? Based on established market/catalog pricing?

The FAR further defines “catalog price” and “market prices”



Door #9 Any combination of items and services that go through Doors #7 and #8...

...NOTWITHSTANDING the fact that services are transferred between separate divisions, subsidiaries, or affiliates of a contractor





DEFENSE CONTRACT MANAGEMENT AGENCY

Regulatory Updates

Presented By:

Tim Niu and Andrew Kirkendall

4 April 2023

DoD Final Rule

A contract for an item using FAR part 12 procedures may serve as a prior commercial item determination (CID)

- Additional key changes/clarifications include:
 - \$1M CID threshold is removed – now required above SAT (\$250k)
 - Section DFARS part 212.70 (HCA overturning procedures) is removed, however this language is still incorporated into DFARS part 212.102.
 - Exception: FAR part 12 contracts that used FAR part 12 procedures for items that were only “treated as commercial items” cannot be relied upon as a prior CID.
 - Defense against cyber, nuclear, biological, chemical or radiological attack
 - Nontraditional defense contractors (NTDC)

- Previously required evidence of a prior CID, now required to search for prior FAR part 12 contracts – need to validate whether the FAR part 12 contract was awarded using other authorities
- Timing – No date/cutoff grandfathering relative to this case
- Prior FAR part 12 contract is precedent setting to a more recent Other-Than-Commercial (OTC) memo, unless we have the specific HCA (or delegated) overturning decision
- Note: “Prior FAR Part 12” can only exist in a contract between Government and Prime; FAR part 12 does not exist between Prime and sub

DECEMBER 23, 2022

Statement by the President on H.R. 7776, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023

 BRIEFING ROOM | STATEMENTS AND RELEASES

Today, I have signed into law H.R. 7776, the “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023” (the “Act”). The Act authorizes fiscal year appropriations for the Department of Defense, for Department of Energy national security programs, and for the Department of State, Department of Homeland Security, and the Intelligence Community. The Act provides vital benefits and enhances access to justice for military personnel and their families, and includes critical authorities to support our country’s national defense, foreign affairs, and homeland security. While I am

H. R. 7776

One Hundred Seventeenth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday,
the third day of January, two thousand and twenty-two*

An Act

Section 803 of the 2023 NDAA amends data requirements for commercial products (subsystems, components, and spare parts) of major weapons systems under 10 U.S.C § 3455

For Subsystems, Components, and Spare Parts for Major Weapon Systems proposed as commercial (that has not been previously determined commercial), the offeror shall:

1. Identify the comparable commercial product that the offeror sells to the general public *(if they do not, see next slide)*
2. Submit a comparison necessary to serve as the basis of the 'of a type' assertion (including physical characteristics and functionality)
3. Provide the National Stock Number (NSN) for both the comparable commercial product identified and the subsystem, if assigned

If the offeror does not sell a comparable commercial product to the general public, the offeror shall:

1. Notify the contracting officer that it does not sell a comparable commercial product
2. Provide a comparison necessary to serve as the basis of the 'of a type' assertion' of the physical characteristics and functionality between the subsystem and the most comparable commercial product

To enable contracting officers to determine the reasonableness of the price of subsystems, components, and spare parts of major weapon systems, offerors shall provide:

1. A representative sample of prices paid for the same or similar products under similar terms and conditions (including specific detail on those terms and conditions)
2. If a representative sample of prices is not available, a similar representative sample of prices paid under different terms and conditions must be provided (including specific detail on those terms and conditions)
3. If the submitted information is insufficient for the contracting officer to determine price reasonableness (and approved by one level above the contracting officer), the offeror must submit relevant other than certified cost or pricing data

Reminder: The signed 2023 NDAA is still being implemented into regulations through the rulemaking process



DCNMA

DEFENSE CONTRACT MANAGEMENT AGENCY

Commercial Contracting Authorities

Presented By:

Ryan Connell

CIG Deputy Director

4 April 2023

Commercial Contracting Authorities*

FAR 13.5 –

Use of Simplified Acquisition Procedures for commercial procurements under \$7.5M

Nontraditional Defense Contractor–

DFARS 212.102 allows the use of commercial acquisition procedures without the need for commercial determination

Nontraditional Defense Contractor–

DFARS 212.102 requires the use of commercial acquisition procedures for the procurement of services using same pool of employees/ similar pricing structure

Nontraditional authority may apply to Primes, subs. Specific to the top middle box, the permissive authority is retained at the PCO; e.g. a prime cannot grant this authority to a subcontractor

Commercial Preference –

FAR 10.001 (3) determine if commercial solutions are available to meet agency needs, modified to meet agency needs, or requirements could update to leverage commercial solutions

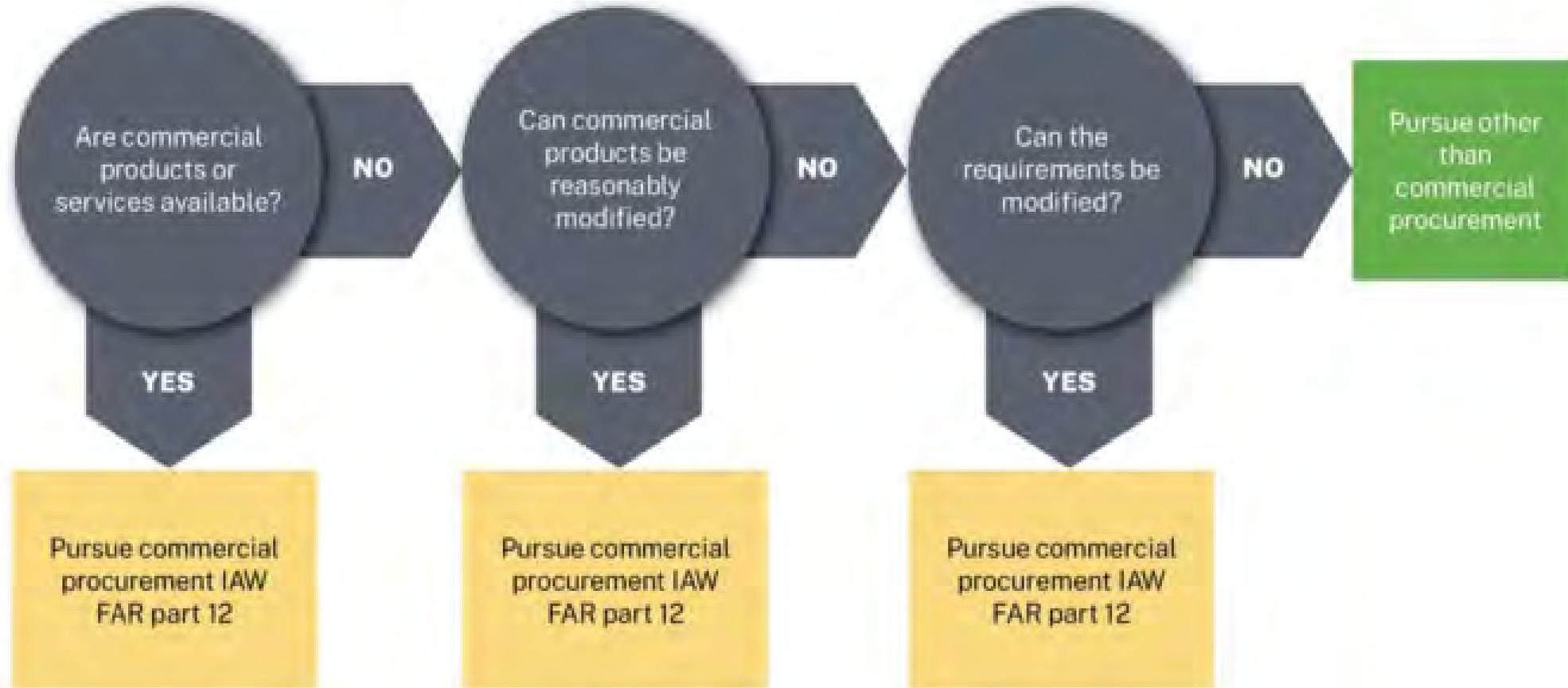
Commercial Contracting

FAR 12 – Acquire commercial products & services, exempt from certified cost or pricing data. Use SF1449

Commercial Preference (IT) –

DFARS 239.101 requirement to buy IT products and services commercial or HCA determine in writing no commercial are available

*Boxes shown are for discussion purposes – please see FAR & DFARs for specific regulation language



- Commercial Solutions Opening (CSO)
 - Solicitation type, not contract type
 - Pilot (2020) -> DFARs Case (2022)
- Authorizations
 - Innovative solutions
 - Close capability gaps
 - Technical/scientific approaches
- Treat As Commercial



Photo: DAU How to be an Effective Military Innovation Champion



DEFENSE CONTRACT MANAGEMENT AGENCY

The Relationship between Pricing and Commerciality

Presented By:

F. Andrew Kirkendall

DCMA Commercial Item Group

April 4, 2023

- Reduce acquisition cycle times (speed of relevance)
- Leverage innovative technology available in the marketplace
- Increase the industrial supply base
- Utilize market-based forces that impact fair and reasonable pricing for products and services



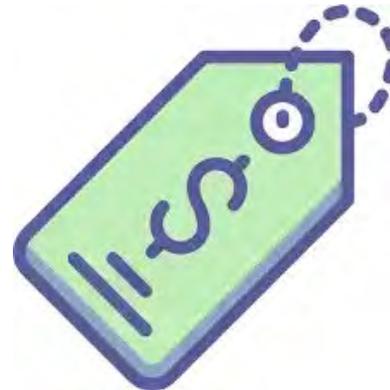
- Commercial products and services
 - Prices set by competition in a healthy marketplace in which buyers have many choices
 - Not subject to certified cost or pricing data requirements
 - Commercial marketplace is presumed to be a competitive environment and should drive fair and reasonable prices

“While it is our responsibility to perform adequate price analysis of commercial items, that responsibility does not relieve the offeror of its obligation to support the reasonableness of its proposed prices if it chooses to supply goods and services to DoD.”

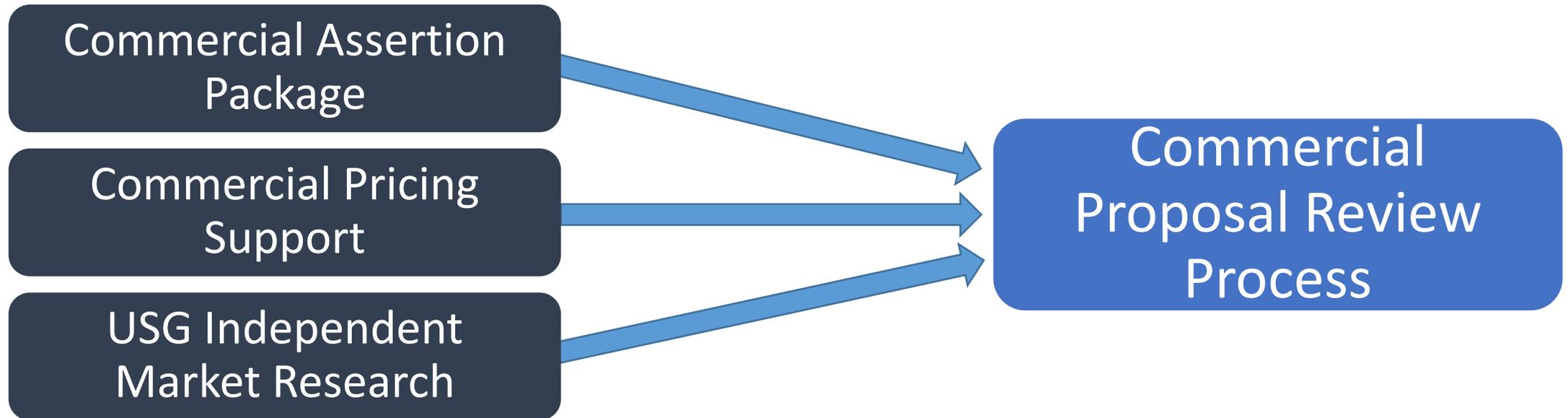
–DoD Guidebook for Acquiring Commercial Items, Part B, January 2018



- However... DoD considers commercial determinations separately from price reasonableness determinations
- Commerciality determinations
 - Limited to confirming that all respective FAR 2.101 definition requirements are met for the individual Commercial Product or Service definition
- Fair and Reasonable Price determinations
 - Made through price analysis of meaningful data specific to the evaluated commercial product(s) and/or service(s)



- Commercial determinations and price reasonableness determinations should be completed concurrently
 - DFARS 252.215-7010 and FAR 52.215-20 require submission of information that is adequate for evaluating the reasonableness of the proposed price for commercial product and service exceptions to certified cost or pricing data



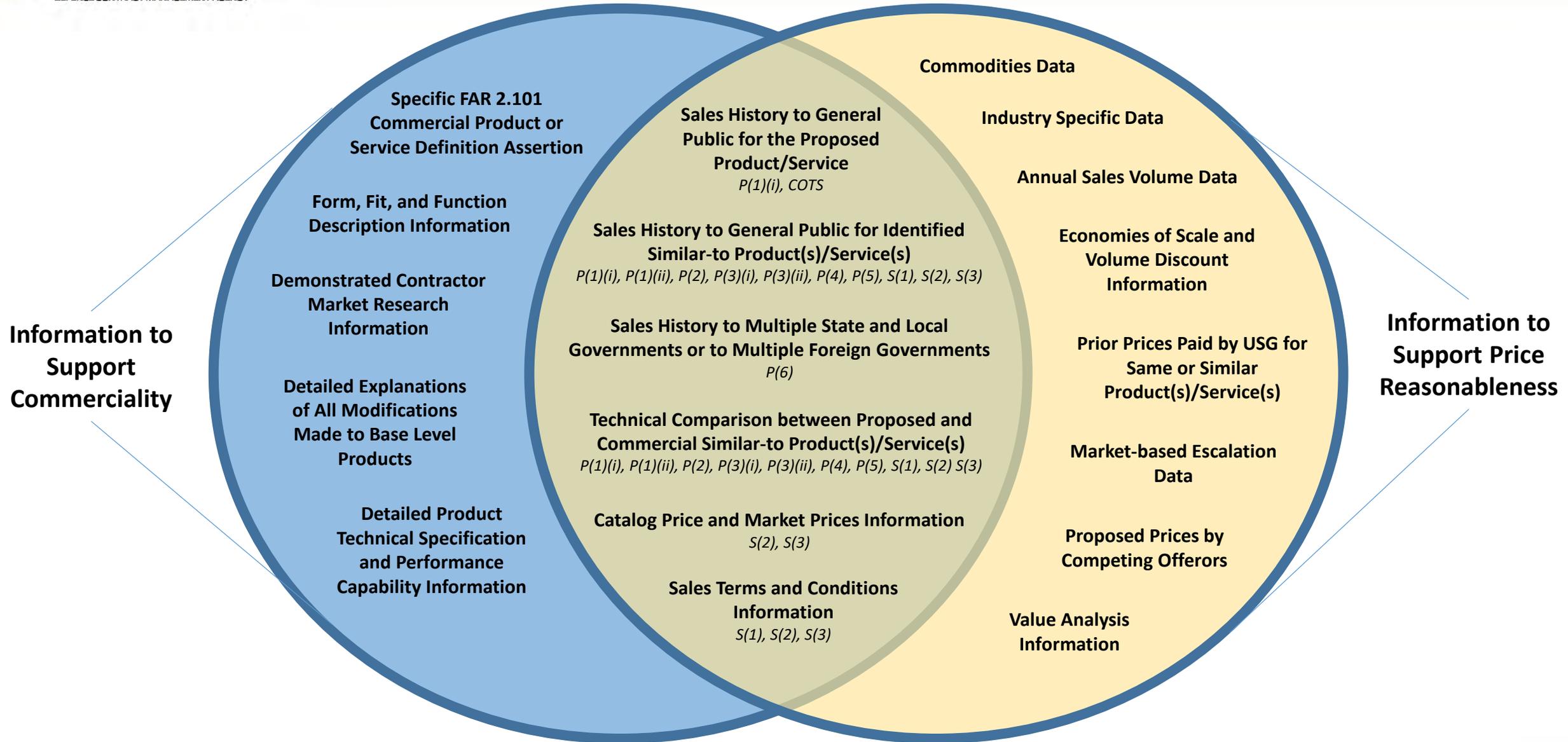
Federal Register / Vol. 83, No. 21 / Wednesday, January 31, 2018 / Rules and Regulations / Pg. 4434
Analysis of Public Comments

“DoD considers commercial item determinations separately from price reasonableness determinations, however, offerors are still expected to provide adequate supporting data with their proposal submissions in order to avoid unnecessary delays in contract award.”

“It would not be in the best interest of DoD or industry to delay acquisitions by establishing a formal two-step sequential proposal process of first requiring supporting information only for the purpose of making a commercial item determination, and then following up with a second request for information in order to make a determination of price reasonableness.”

“In accordance with DFARS 252.215–7010, and consistent with the existing requirements of FAR 52.215–20, where commercial items are proposed in response to a solicitation, the offeror is required to concurrently submit information that is adequate for evaluating the reasonableness of the proposed price.”

Commerciality and Price Reasonableness Overlap





Commercial product means—

(1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental 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) A product that evolved from a product 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;

If proposed price for the evaluated product is significantly different than the 'of a type' product:

- Further explore price difference
- Confirm that a meaningful comparison can be made between the products



Commercial product means—

(3) A product that would satisfy a criterion expressed in paragraph (1) or (2) of this definition, except 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;

- **Product definition: same concerns could be present as those in paragraphs (1) or (2)**
- **Significant price differences could indicate that the modifications may not be minor**
- **FAR 15.403-1(c)(3)(iii)(C) requires submission of certified cost or pricing data if the modification price exceeds:**
 - **The greater threshold of TINA, or**
 - **5 percent of the total price of the contract at the time of contract award**



Commercial product means—

(4) Any combination of products meeting the requirements of paragraph (1), (2), or (3) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor;

- **Product definitions: same concerns may apply as those at paragraphs (1) through (3)**



Commercial product means—

(6) A nondevelopmental item, if the procuring agency determines the product 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.

- Sales information that impacts both pricing and commerciality is critical
- Specific cost information may be needed to support the assertion that the product was developed exclusively at private expense



Commercial service means—

(1) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of a commercial product as defined in this section, regardless of whether such services are provided by the same source or at the same time as the commercial product; 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;

- Significant price difference can be indicative of significant differences between the services



Commercial service means—

(2) 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;

- **Service definition: same concerns could be present as paragraph (1) for ‘of a type’ comparison.**
- **Evidence of competitive sales in substantial quantities will directly impact both commerciality and price reasonableness.**



Commercial service means—

(3) A service referred to in paragraph (1) or (2) of this definition, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

- **Service definition: same concerns could be present as paragraphs (1) and (2)**



Commercially available off-the-shelf (COTS) item —

- (1) Means any item of supply (including construction material) that is—
 - (i) A commercial product (as defined in paragraph (1) of the definition of “commercial product” in this section);
 - (ii) Sold in substantial quantities in the commercial marketplace; and
 - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

- **Supporting information will directly impact both commerciality and price reasonableness determinations**

- Submit supporting documentation for both commerciality and price reasonableness determinations concurrently
- Provide the specific FAR 2.101 definition paragraph asserted for the proposed product(s) and/or service(s)
- Review the individual definition paragraph requirements and provide supporting documentation to meet all requirements
- Provide detailed supporting information for significant differences between prices proposed and sales history information for the same or identified 'of a type' or similar-to product(s) or service(s)





DCMA

DEFENSE CONTRACT MANAGEMENT AGENCY

Commerciality Challenges

Presented By:

CIG

DCMA

4 April 2023



Request & Package Completeness



- **WHY SUBMIT A COMMERCIALITY PACKAGE?**
 - You have submitted a proposal to a solicitation
 - You have a product/service you think meets the FAR 2.101 Definition
 - You know your product/service better than anyone else
 - You should want the Government to know your product/service
 - You want to be exempt from providing Certified Cost & Pricing Data
 - You want a CD (Commercial Determination) from the DoD*
- **WHY DOES THE CIG REQUEST MORE INFORMATION?**
 - The package does not contain enough information to uniquely identify the product
 - The package does not contain enough information to allow for a robust evaluation
 - To provide the most beneficial analysis to the customer and contractor

*Submitting a Commerciality Package does not mean the product/service will be determined commercial

- FAR REQUIREMENT FOR PRIME CONTRACTOR CID ON SUBCONTRACTOR –
 - DFARS 244.402(a) - The Defense Federal Acquisition Regulations Supplement (DFARS 244.402(a)) requires a contractor to determine whether a particular subcontract item meets the definition of a commercial item
 - FAR 15.404-3(b) - requires the contractor to conduct appropriate price or cost analyses to establish the reasonableness of proposed subcontract prices and include these analyses in cost proposals
- FAR REQUIREMENT FOR PRIME CONTRACTOR COMMERCIAL ASSERTION
 - DFARS 252.215-7010 and FAR 52.215-20 require submission of information that is adequate for evaluating the reasonableness of the proposed price for commercial product and service exceptions to certified cost or pricing data

- Contractor's commercial assertion/determination stating which FAR 2.101 commercial product/service definition applies
 - Include supporting documentation justifying the assertion
 - Uniquely identify the product/service, including part number and nomenclature
- Evidence of the product's sale, lease, licenses, or offer for sale, lease or license to, or evidence of availability in the commercial market
- Any existing CDs (especially DoD-issued)
- Contractor's comparative technical analysis of the proposed product and any commercial product the Contractor asserts is of the same type
 - Should include a side-by-side comparison of the proposed product vs. the similar commercial product or products, noting any differences and similarities



- Name of product
- Description of product
 - including information regarding the assembly, operation and/or maintenance of the product
- Pictures of proposed product and of-a-type commercial equivalent
- Function(s) to be performed; describe and provide examples of:
 - how the applications of the similar products are the same or different as applications for the proposed products
 - why any different characteristics can be deemed minor or commercially available
- Performance characteristics; describe and provide examples of:
 - how the applications for the similar products are the same or different as applications for the proposed products
- Market research documentation
- Terms and conditions for products:
 - warranty, technical data rights and intellectual property



- Essential physical characteristics
- Technical Specification Sheets/Drawings and Performance Specification Sheets
 - data sheet and/or explanation of physical characteristics function and performance characteristics
- Drawings, parts lists, notes lists, and development or product specifications, as applicable
- Any other products the contractor or DCMA deems necessary to support comparability between the proposed product(s) and the of-a-type product(s)

- Identify any price differences between the product identified as commercial, and the comparable type of product, and any reason for those price differences.
- Pricing for any minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements
- Prime Contractor's Proposal and/or Subcontractor's Proposal, if applicable
- A contractor point of contact to reach in the event questions arise or if clarifications are needed

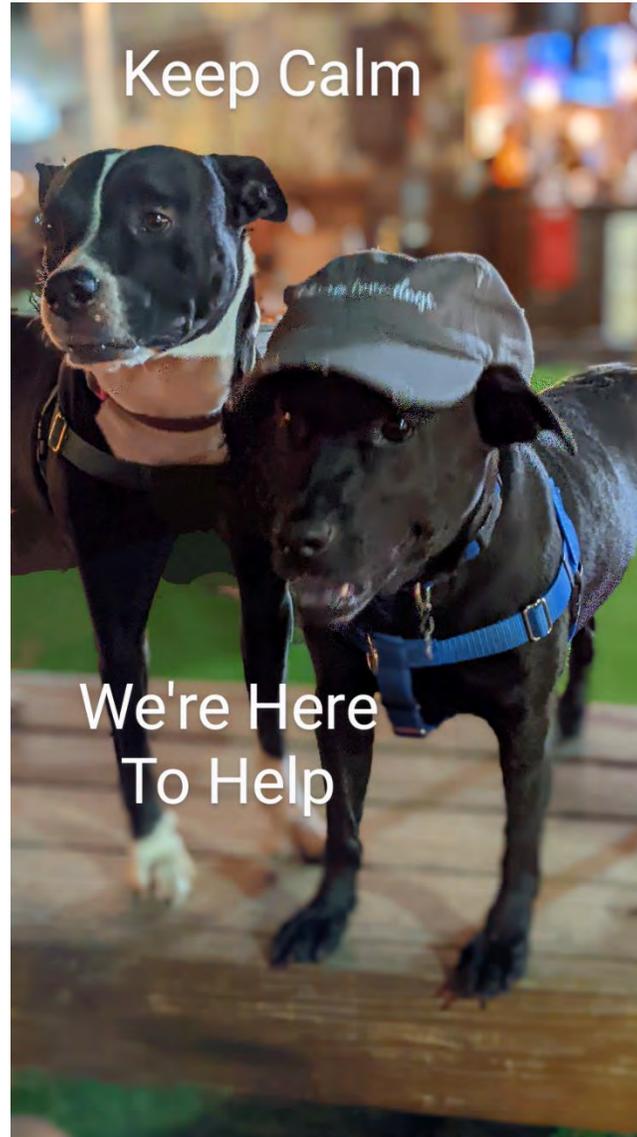


- PCO requests assistance from the CIG
- CIG Engineer/Analysts research part/service
- If information received/researched is not sufficient to evaluate fully:
 - Seek out other potential information sources
 - Request for information (RFI) from contractor/customer
- If RFI sent to contractor and information is not received by the suspense:
 - CIG will finish the evaluation with the data on-hand
 - The evaluation may not be as beneficial to the contractor
- CIG issues CD (or Other Than Commercial (OTC)) and price reasonableness recommendation to PCO



**KEEP
CALM**

**WE'RE
HERE
TO HELP**



- Example Other-Than-Commercial Stories

Classified
Components

The Satellite

Currently
being
designed

The Washer



Photo: DLA DSCC – Story Time

BACKUP

- FAR REQUIREMENT FOR CONTRACTOR CID –
 - DFARS 244.402(a) - The Defense Federal Acquisition Regulations Supplement (DFARS 244.402(a)) requires a contractor to determine whether a particular subcontract item meets the definition of a commercial item
 - Contractors are expected to support and document their commercial item determinations
 - FAR 15.404-3(b) - requires the contractor to conduct appropriate price or cost analyses to establish the reasonableness of proposed subcontract prices and include these analyses in cost proposals



2023 COMMERCIAL ITEM SUMMIT

Q&A SLIDES IN DEVELOPMENT

WILL BE PUBLISHED TO THE CIG SITE WHEN COMPLETED

```
[cpu] done / done / password found / operation 129 227  
[cpu] negative / negative / [not found] / operation 2289  
[cpu] done / negative / error 001  
[cpu] error / error / restart  
[cpu] done / done / access / complete / operation 122 334  
[cpu] error  
[cpu] negative / analyzing / operation 552 390  
[cpu] preparation complete / code xxx000x0xx0xx0
```

