

Commercial Item Determinations: Practical Tips for Primes & Subs

Since the passage of the Federal Acquisition Streamlining Act of 1994 (FASA), the preference within the Federal Government has shifted from the acquisition of items developed exclusively for the Government to the acquisition of commercial items¹. In response, Federal Primes and Subs have submitted assertions of commerciality that range anywhere from rational to ridiculous. On the Government side of things, it's been so confusing that this year, the DCMA has created a dedicated Command tasked with nothing other than reviewing commercial item determinations (CIDs).

This practical guide is based on what we have learned working with Prime Contractors (dealing directly with the Government) and Subcontractors (dealing with either Primes or other Subs). While all of these principles apply to both groups, it's important to understand some basic distinctions:

Prime Contractors

Primes are concerned with satisfying the needs of their government customers, which include the DCMA, DCAA, and Contracting Officers.

- Reviewing submittals from subs: CIDs have a direct impact on their CPSR status (Contractor Procurement System Review) in that commercial items are an exception to obtaining certified cost or pricing data (CCOPD) for procurements over the Truthful Cost or Pricing Data Threshold. Since the requirement for CCOPD is a matter of law, Primes tend to be quick to find reasons to deny commercial item assertions, particularly for procurements over the threshold.
- Submitting assertions to the government: Just because they're typically bigger, doesn't mean Primes are typically better at the CID process. Primes are quick to deny their subs, but then

expect different treatment from the government. It's less risky from an IG (Inspector General) perspective for government reviewers to deny a commerciality claim than it is to approve one.

Subcontractors

Subs are often first and foremost concerned with their own well-being over and above the stated needs of their Prime customers.

- Reviewing submittals from subs: Except for very large contracts or where a company that's typically Prime is sub to another Prime, these reviews don't often happen. When the need does arise for a traditional sub (for instance when a sub-tier contract is over the CCOPD threshold) the process is murky and messy, at best.
- Submitting assertions to Primes: Typically include incomplete data and lump together commerciality and price reasonableness. While many have valid claims of commerciality, they present their case in their own language rather than that of the Prime contract requirements they're working to assuage.

Step 1: Separate Commercial Item Determination from Price Reasonableness

Whether you're reviewing or writing CIDs, this is the first area that causes trouble. A determination of commerciality has nothing to do with price reasonableness. While most contractors nod in agreement with this statement, the documentation they're providing to support their assertion is often not in alignment.

- **Submitters:** Make it clear that you're providing a commercial item assertion or determination *and* support for price reasonableness. By simply

¹ Office of the Secretary of Defense Acquisition, Technology and Logistics. (2011). *Commercial Item Handbook, Version 2.0*.

quoting a price and providing a CID, you're implying that commerciality = price reasonableness and your chances of success diminish significantly.

- **Reviewers:** Start the review with an intent to separate the issues of commerciality and price reasonableness. Remember that applying non-commercial practices to buys that should qualify as commercial is a waste of both company and taxpayer funds.

Step 2: Determine whether a government commercial item determination already exists

If an item has been determined commercial in the past, it is to be reviewed for commerciality each time it's purchased in the future. However, in order to overturn a commercial item determination, additional work and supervisory review is required by the dissenting PCO.

So, put some effort into determining if a government-issued CID already exists. Written CIDs are required within the federal government for any purchase over \$1 Million. This can be accomplished by searching various online resources, including the Federal Procurement Data System-Next Generation (FPDS-NG). To strengthen the reliability of information taken from this database, submit FOIA (Freedom of Information Act) requests to obtain a copy of the written CID.

This holds true to a lesser extent when working with Prime-issued CIDs. While it's advisable to rely on past experience in this area, be aware that CID precedent only holds at the level at the Government – Prime level. Between Prime and Sub, a prior precedent may or may not be upheld, depending on the Prime's judgement.

- **Submitters:** If a government-issued CID already exists, be sure to include it with your assertion. Remember that this only covers half the equation – price reasonableness support will still be required.

- **Reviewers:** Do a quick search on part number and description to see if a government CID already exists and whether it can be applied to the current purchase.

Step 3: Write your own determination

If no prior CID exists, or you've determined that what does exist doesn't fit your needs, you'll have to conduct and document your own determination. In Figure 1, you'll find the definition of a commercial item (products, not services) and steps on writing and reviewing CIDs.

- **Submitters:** In order to be treated as "commercial," you're going to have to convince the buyer that your product or service meets the requirements set out by the FAR. But first, you're going to have to convince yourself! Conduct your own CID and submit it with the proposal. If you're unable to complete it, chances are the buyer will run into the same difficulty and your assertion will be denied. Whenever possible, provide supporting documentation and market research.
- **Reviewers:** Focus solely on commerciality. Break the FAR 2.101 definition into distinct pieces, by sentence, and make an objective determination on each. Once you're done, it pays to provide this objective determination back to the supplier, especially if it suggests that the item/service is not commercial. They may have additional facts and data to assist you.

Commercial Item Definition (FAR 2.101)	Pro Tips
1. 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...	Don't stop at "of a type." Specifically show how it's "of a type customarily used...for purposes other than governmental purposes."
(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;	Identify which of these applies and then provide verifiable supporting documentation.
2. Any item that evolved from an item 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;	Identify which item in paragraph (1) applies and then provide verifiable supporting documentation of when it will become available.
3. Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but 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.	Identify which applies (i or ii) and then provide verifiable supporting documentation. For (i) this is very straightforward. For (ii), try to explain modifications in terms of form, fit, and function. Additionally (not <i>in place of</i> form, fit, and function) provide verifiable supporting information showing the relative weight of any impact on price. The closer in price the modified item is to the un-modified item, the better.
4. Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;	Explain and provide evidence that the individual items are commercial <i>and</i> that the combination of these items are customarily combined and sold to the general public.

Figure 1: How to successfully write or review a commercial item assertion or determination (Products)

Step 4: Document Price Reasonableness

Regardless of whether the item is determined commercial or not, this step is required prior to contract award and is separate from the CID process, although the two impact each other.

- **Submitters:** Realize that the reviewer is going to be required to complete this step, so do everything possible to help make it easier. How is it that you know your price is reasonable? Is it due to prior purchase history? Explain it! Is it due to market research? Provide it! Best case outcome is that the buyer utilizes your data as the price analysis. Worst case, you've created

an anchor point for use in negotiations.

Whenever possible, provide market data to help support both the CID and price reasonableness reviews.

- **Reviewers:** If the procurement value is below the TCOPD threshold, this step can be conducted in parallel with Steps 2 and 3 above. For items that are determined commercial, your government customers will be looking for market data. While this isn't a requirement of either commerciality or price analysis, it will significantly help support your case in both areas.

Step 5: Maintain records of what worked and what didn't

Experience will prove out what works and what doesn't. Tools such as SpendLogic allow you to create and reuse price analysis reports and commercial item determinations over time. Tracking successful CIDs and price analysis reports significantly reduces time required for follow-on and similar-to purchases in the future.

Conclusion

When it comes to commercial item determinations, Submitters (sellers) and Reviewers (buyers) should strive to work from the same playbook. By viewing the issue from each other's perspective, the chances of success increase significantly, which saves both sides time and money. ☺ - **Patrick Mathern**

Article at a glance

- Commercial Item Determinations (CIDs) must be treated separately from price reasonableness reviews.
- Primes and Subs each may fill the role of Reviewer (buyer) and Submitter (seller) at different times.
- Rely on existing government CIDs whenever possible.
- Include supporting market data whenever possible, both in CIDs and Price support.
- Use SpendLogic to standardize your CID and Price Analysis process so that past efforts may be reused.

Helpful Links and Related Content

- www.SpendLogic.com Automated price analysis software solutions
- www.fpds.gov Federal Procurement Data System – Next Generation, as mentioned in this article
- www.acquisition.gov/far Federal Acquisition Regulations (navigate to Section 2.101 for the definition of commercial items or 15.404 for price analysis methods)

The Author: Patrick Mathern

Contact: patrick@spendlogic.com

- *President of SpendLogic; based in Santa Barbara, CA*
- *SpendLogic automates price analysis and provides services to the nation's largest Defense Contractors and their suppliers.*
- *Committed to helping companies effectively and efficiently meet the needs of federal contractors related to price reasonableness determinations.*