

## 1. **COMMERCIAL ITEMS: The Department Of Defense vs. Congress**

Nash & Cibinic Report | April 2016 | 30 No. 4 Nash & Cibinic Rep. NL ¶ 18



The determination of what is a **commercial item** has never been dependent on an agency's ability to come up with an assessment of whether the **item** is being offered at a fair and reasonable price. Thus, the definition of "**commercial item**" in Federal Acquisition Regulation 2.101 (derived directly from the statutes) makes it clear that the Government...

...This section requires a report to Congress on "defense-unique provisions of law that are applicable for procurement of **commercial items** or **commercial off-the-shelf items**, both at the prime contract and subcontract level."...

...(A) of limiting the inclusion of clauses in contracts for **commercial items** or **commercial off-the-shelf items** to those that are required to implement law or Executive orders or are determined to be consistent with standard commercial practice; and...

## 2. **COMMERCIAL ITEM PROCUREMENT: THE RECENT COMPTROLLER GENERAL DECISIONS**

Nash & Cibinic Report | July, 1999 | 13 No. 7 Nash & Cibinic Rep. ¶ 35



Now that the Government's **commercial item** procurement initiative has had time to gather a full head of steam, we decided to take a look at the protest decisions of the U.S. Comptroller General in the last year to see if they are instructive on the progress and course of this initiative. We found a veritable bonanza of information--not startling...

...There, the agency stated that it was procuring a "**commercial off the shelf**" **item** but used the "Instructions to Offerors--**Commercial Items**" solicitation provision at FAR 52.212-1 which incorporates the definition of "**commercial item**" by reference....

...The protest was denied, but the following discussion of the Comptroller General seems to waver between holding that the protester's product was not a **commercial item** and was not a **commercial off-the-shelf item**: Here, based on our review of the record, we conclude that the Navy's evaluation of [the protester's] proposal, and the contracting officer's determination not to include the proposal in the competitive range, are unobjectionable because the statements in [the protester's] technical proposal that [its] proposed test station will meet the RFP's performance requirements, without more, are not sufficient to satisfy the RFP's **commercial**...

## 3. **COMMERCIAL ITEM PROCUREMENT: An Ongoing Set Of Problems?**

Nash & Cibinic Report | June 2015 | 29 No. 6 Nash & Cibinic Rep. NL ¶ 32



There has been enough activity this year in the world of procuring **commercial items** to indicate that this must be a deep-seated problem area. A Department of Defense Inspector General report, Summary of DoD Office of Inspector General Spare-Parts Pricing Audits: Additional Guidance Is Needed, DODIG-2015-103 (Mar. 31, 2015), concluded that there...

...A subsystem of a major weapon system (other than a **commercially** available **off-the-shelf item**) may be treated as a **commercial item** and acquired under procedures established for the acquisition of **commercial items** only if— (1) The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of **commercial items**...

...(1) A component or spare part for a major weapon system (other than a **commercially** available **off-the-shelf item**) may be treated as a **commercial item** only if— (i) The component or spare part is intended for— (A) A major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of **commercial items** in accordance with paragraph (a) of this section; or (B) A subsystem of a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of **commercial**...

## 4. **COMMERCIAL ITEM DISPUTES: USING NEW CONTRACT LANGUAGE**

Nash & Cibinic Report | January, 2003 | 17 No. 1 Nash & Cibinic Rep. ¶ 2



In **Commercial Item** Procurement: The Recent Comptroller General Decisions, 13 N&CR ¶ 35, we reviewed the protests regarding the use of the new **commercial items** rules in Federal Acquisition Regulation Part 12. However, we did not discuss disputes because there had been few at that time. There are now enough decisions of the agency boards of contract...

...The standard acceptance provisions for a **commercial items** contract reflected in FAR 52.212-4(a) are general in nature and reflect the proposition that, in making an acquisition under FAR **commercial item** provisions, the Government has determined that an **off- the- shelf commercial** product meets the needs of the Government....

...This has the appearance of specification by stealth where the [agency] incorporates very detailed and technical performance requirements as part of a purchase description while maintaining the illusion that it was conducting a normal **off- the- shelf commercial item** acquisition....

## 5. **COMMERCIAL ITEMS TECHNICAL DATA REVISITED: Understanding The DFARS Policy**

Nash & Cibinic Report | May 2014 | 28 No. 5 Nash & Cibinic Rep. NL ¶ 27



I never completely understood the treatment of technical data related to **commercial items** in the Defense Federal Acquisition Regulation Supplement. I was aware that the FAR 12.211 provides that federal agencies should only acquire the technical data and data rights that are customarily available to **commercial** buyers, except if otherwise provided by...

...Further, the amendments to 10 USCA § 2320 and 10 USCA § 2321 by § 802(b) of the National Defense Authorization Act for FY 2007, Pub. L. No. 109-364, regarding the presumption that **commercial items** were developed exclusively at private expense and § 815(a)(2) of the FY 2008 NDAA, Pub. L. No. 110-181, which exempted **commercial off- the- shelf items** from its major systems rule expressed a congressional intent to apply the data statutes to **commercial items**...

...As to the DFARS technical data rights policy for **commercial items**, DFARS 227.7102-4 requires the use of a unique technical data clause, "Technical Data— **Commercial Items** (FEB 2014)" at DFARS 252.227-7015, in all contracts calling for the delivery of **commercial items** technical data....

## 6. **Buy American Requirements Under the Recovery Act: The Final Rules**

Nash & Cibinic Report | January 2011 | 25 NO. 1 Nash & Cibinic Rep. ¶ 1



The application of the Buy American Act, 41 USCA §§ 10a-10d, and the Trade Agreements Act of 1979, 19 USCA § 2501 et seq., and the interplay between the two, has caused confusion for years. Ralph wrote about one facet of the problem--the difficulty in coming up with a reliable definition of the term "substantial transformation" as used in the...

...A "domestic construction material" is defined as (1) un manufactured construction material mined or produced in the United States or (2) a construction material manufactured in the United States if the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all of its components or if the end product is a **commercial- off- the- shelf item**....

...Because supply contracts are evaluated on an **item-by- item** basis, it appears possible that a portion of the contract could be subject to the "substantial transformation" test of the TAA and other **items** subject to the 6%/12%/50% evaluation factors under the BAA....

## 7. **LOCKED INTO PROPRIETARY SOFTWARE: A Common Dilemma**

Nash & Cibinic Report | March 2009 | 23 NO. 3 Nash & Cibinic Rep. ¶ 14



One of the most common problems we encounter in teaching our course on intellectual property is the dilemma of agencies that have obtained massive software programs containing proprietary software. The agencies

find that they have continuing needs to upgrade and enhance the software yet they can go only to the original contractor for that work....

...NOA allows for incorporating more **commercial-off-the-shelf (COTS)** technology in warfare systems and enabling re-use of software and related assets....

...The Government will assess the impact of the delivery of: 1) limited rights (LR) data, 2) restricted rights (RR) software, 3) standard licenses in Commercial computer software (CS), or 4) **items** covered under DFARS 252.227-7015, "Technical Data--**Commercial Items**," in technical data related to **commercial items** on the Government's long term costs associated with minimum future needs with respect to the system as identified by the Government, e.g., impact of LR in data on life cycle costs (when making cost assessment keep in mind alternatives like use of form, fit, function, etc. as assessment must be "reasonable")....

## 8. AUCTIONS: SOME THOUGHTS

Nash & Cibinic Report | July, 2000 | 14 No. 7 Nash & Cibinic Rep. ¶ 33



The 1997 FAR Part 15 Rewrite removed the prohibition against the Government using "auction techniques"-- i.e., indicating to an offeror a cost or price it must meet to obtain further consideration, advising an offeror of its price standing relative to another offeror, or otherwise furnishing information about other offerors' prices. Therefore,...

...Auctions may be fine for procuring "**off-the-shelf**" **commercial items**....

...However, we have reservations about using them for procuring services and complex **items**....

## 9. COMMERCIAL ITEM DETERMINATION: A Matter Of Discretion?

Nash & Cibinic Report | February 2009 | 23 NO. 2 Nash & Cibinic Rep. ¶ 10



There aren't many protests of an agency's determination that a product or service is a **commercial item**, but the few out there indicate that it is a difficult protest to win. In the latest protest, Precision Lift, Inc., Comp. Gen. Dec. B-310540.4, 2008 CPD ¶ 166, the agency solicited quotations for portable helicopter maintenance platforms...

...Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 at 3. As pertinent here, Federal Acquisition Regulation (FAR) § 2.101 defines a **commercial item** as: (1) Any **item** . . . that is of a type customarily used by the general public or by non-governmental 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) 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**....

...Crane & Co., B-297398, Jan. 18, 2005, 2006 CPD ¶ 22 at 9; Carr's Wild Horse Ctr., B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 5. However, with respect to procurement; of services that allegedly did not meet the definition of a **commercial item**, our Office denied a protest where the protester did not claim that any of the provisions or procedures unique to **commercial item** procurements put it at a competitive disadvantage, and did not show that the use of **commercial item** procedures otherwise prejudiced the protester's competitive position....

## 10. AUTHORIZATION AND CONSENT: Inappropriate On Contracts For Commercial Items?

Nash & Cibinic Report | December 2005 | 19 NO. 12 Nash & Cibinic Rep. ¶ 59



We received the following letter from Richard N. Kuyath of the Minnesota Mining and Manufacturing Co.:  
Dear Professor Nash: Federal Acquisition Regulation 27.201-2 appears to require that the FAR 52.227-1 "Authorization and Consent" clause be included in all Government contracts, except when using simplified acquisition procedures or when both...

...There is no mention of authorization and consent in Part 12 of the Federal Acquisition Regulation, dealing with contracts for **commercial items**, and the "Contract Terms and Conditions-- **Commercial Items**" clause in FAR 52.212-4 contains

[no paragraph granting authorization and consent to the contractor to use publicly owned patents in the performance of the contract....](#)

[...Rather, if there is any "deeply ingrained" policy, it would be that the right way to buy a \*\*commercial item\*\* is to use \*\*commercial\*\* practices as much as possible....](#)

## **11. POSTSCRIPT: TERMINATION FOR CONVENIENCE OF FAR PART 12 COMMERCIAL ITEM CONTRACTS**

Nash & Cibinic Report | August 2011 | 25 NO. 8 Nash & Cibinic Rep. ¶ 37



The short-form contract provisions in the "Contract Terms and Conditions-- **Commercial Items**" clause in Federal Acquisition Regulation 52.212-4 will undoubtedly remain a puzzle for many years because they introduce new language describing old legal principles. Perhaps the most troublesome paragraph of this clause is the termination for convenience...

[...In \*\*Commercial Item\*\* Terms and Conditions: Neither Fish Nor Fowl, 10 N&CR ¶ 61, Professor Cibinic criticized the inclusion of a termination for convenience clause in FAR Part 12 \*\*commercial item\*\* contracts as inconsistent with standard \*\*commercial\*\* practice....](#)

[...FASA § 8002\(b\)\(1\) directs that the FAR include, to the maximum extent practicable, only clauses-- "\(A\) that are required to implement provisions of law or executive orders applicable to acquisitions of \*\*commercial items\*\* or \*\*commercial\*\* components, as the case may be; or \(B\) that are determined to be consistent with standard \*\*commercial\*\* practice."...](#)

## **12. THE GOVERNMENT AS A COMMERCIAL BUYER: WILL CONGRESS ANSWER THE CHALLENGE?**

Nash & Cibinic Report | February, 1994 | 8 No. 2 Nash & Cibinic Rep. ¶ 10



We don't normally write about pending legislation because the odds of its adoption are so slim. But there is one major issue to be addressed this year that is so important that we believe it is worth an in-depth discussion: whether Congress will pass a statute that truly permits the Government to buy **commercial** products and services in the same way...

[...The Section 800 Panel did not recommend that this statute be made inapplicable to contracts for \*\*commercial items\*\*, but it is not the type of clause that a \*\*commercial\*\* buyer would use and it adds little to the contracting process for \*\*commercial items\*\*....](#)

[...However, it should be made inapplicable to contracts for \*\*commercial items\*\* because it clearly is not the type of clause that \*\*commercial\*\* buyers would use....](#)

## **13. POSTSCRIPT V: DEFINING COMMERCIAL SERVICES**

Nash & Cibinic Report | October, 2000 | 14 No. 10 Nash & Cibinic Rep. ¶ 55



In our continuing discussion of the definition of "**commercial** services," we have noted that the definition in Federal Acquisition Regulation 2.101(f) is subject to varying interpretations and that the Comptroller General takes a broad view of the scope of the definition. See Defining **Commercial** Services: An Exercise in Obfuscation, 10 N&CR ¶ 18;...

[...The Comptroller General denied the protest because the protester had been unable to demonstrate that it had been prejudiced by the Government's use of \*\*commercial item\*\* procedures, stating: We do not find the protester will be competitively prejudiced here, inasmuch as it does not claim that any of the provisions or procedures unique to \*\*commercial item\*\* procurements put it at a competitive disadvantage, nor has it shown that the use of \*\*commercial item\*\* procedures otherwise prejudices the protester's competitive position. Because showing prejudice is essential to winning a protest, the Comptroller General refused to rule on the issue of whether the base operation and maintenance work was a \*\*commercial\*\*...](#)

[...When a protest is filed in a \*\*commercial item\*\* acquisition, the agency will immediately assert that there is no prejudice to the protester in the Government's use of \*\*commercial item\*\* procurement procedures....](#)

## **14. POSTSCRIPT VI: DEFINING COMMERCIAL SERVICES**

Nash & Cibinic Report | March, 2002 | 16 No. 3 Nash & Cibinic Rep. P 15



Every year we survey what progress has been made in defining “**commercial** services.” Last year, we commented on additional Department of Defense guidance on the definition of stand-alone **commercial** services, Postscript V: Defining **Commercial** Services, 15 N&CR ¶ 27. This guidance has now been partially incorporated into the Federal Acquisition...

...See Johnson Controls World Services, Inc., Comp. Gen. Dec. B-285144, 2000 CPD ¶ 108, 42 GC ¶ 327, refusing to rule on whether base operation and maintenance work was a **commercial** service and stating: Since the protester has not demonstrated, and it is not otherwise apparent from the record, that Johnson Controls was prejudiced by the agency's use of **commercial item** procedures, we will not decide the issue of whether the services are properly designated as **commercial items** or whether the solicitation was properly issued under **commercial item**...

...See also Techseco, Inc., Comp. Gen. Dec. B-284949, 2000 CPD ¶ 105, which appears to be a procurement of preventive maintenance and repair services under the category of services supporting **commercial items** in paragraph (e) of the FAR 2.101 definition of “**commercial item**.”...

## 15. POSTSCRIPT II: DEFINING COMMERCIAL SERVICES

Nash & Cibinic Report | December, 1997 | 11 No. 12 Nash & Cibinic Rep. ¶ 62



We received the following excellent letter from Robert E. Lloyd, at the U.S. Department of State, on one of the most puzzling issues in Government procurement--the definition of “**commercial** services”: I've been reading with great interest your articles on acquisition of **commercial items** (Postscript: Defining **Commercial** Services, 11 N&CR ¶ 34, and...

...We received the following excellent letter from Robert E. Lloyd, at the U.S. Department of State, on one of the most puzzling issues in Government procurement--the definition of “**commercial** services”: I've been reading with great interest your articles on acquisition of **commercial items** ( Postscript: Defining **Commercial** Services, 11 N&CR ¶ 34, and Defining **Commercial** Services: An Exercise in Obfuscation, 10 N&CR ¶ 18) and wanted to offer some insight that you may have missed...

...The definition of “**commercial item**” in FAR 2.101(f) includes “[s]ervices 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 under standard **commercial** terms and conditions.”...

## 16. PROPRIETARY RIGHTS vs. COMPETITION: A Strategic Choice

Nash & Cibinic Report | October 2006 | 20 NO. 10 Nash & Cibinic Rep. ¶ 49



When an agency decides that it needs a new product, it has to make some tough decisions balancing the goal of obtaining competition with the goals of honoring proprietary rights of contractors and buying **commercial** products. Two recent decisions, KSD, Inc. v. U.S., 2006 WL 2468349 (Fed. Cl. Aug. 23, 2006), and Lakota Technical Solutions, Inc.,...

...The head of an agency shall ensure that procurement officials in that agency, to the maximum extent practicable-- (1) acquire **commercial items** or nondevelopmental **items** other than **commercial items** to meet the needs of the agency; (2) require prime contractors and subcontractors at all levels under the agency contracts to incorporate **commercial items** or nondevelopmental **items** other than **commercial items** as components of **items**...

...The head of an agency shall ensure that, to the maximum extent practicable-- (1) requirements of the agency with respect to a procurement of supplies or services are stated in terms of-- (A) functions to be performed; (B) performance required; or (C) essential physical characteristics; (2) such requirements are defined so that **commercial items** or, to the extent that **commercial items** suitable to meet the agency's needs are not available, nondevelopmental **items** other than **commercial items**, may be procured to fulfill such requirements; and...

## 17. BUYING APPLIED RESEARCH AS A COMMERCIAL ITEM: ADDITIONAL INSIGHTS

Nash & Cibinic Report | December, 1999 | 13 No. 12 Nash & Cibinic Rep. ¶ 65



In Buying **Commercial Items**: Signs of Progress, 13 N&CR ¶ 27, we noted that the Defense Advanced Research Projects Agency (DARPA) had issued several research and development contracts as **commercial item** procurements. The Logistics Management Institute (LMI) recently issued a report that sheds considerable light on this practice, Using FAR Part 12 to...

...The initial question to be answered before using the **commercial item** acquisition procedures is whether the work to be procured meets the definition of "**commercial item**" in FAR 2.101....

...In Buying **Commercial Items**: Signs of Progress, 13 N&CR ¶ 27, we noted that the Defense Advanced Research Projects Agency (DARPA) had issued several research and development contracts as **commercial item** procurements....

## 18. POSTSCRIPT II: TERMINATION FOR CONVENIENCE OF FAR PART 12 COMMERCIAL ITEM CONTRACTS

Nash & Cibinic Report | April 2015 | 29 No. 4 Nash & Cibinic Rep. NL ¶ 21



Two recent decisions of the Armed Services Board of Contract Appeals take another look at the **commercial item** termination for convenience provision in paragraph (l) of the "Contract Terms and Conditions — **Commercial Items**" clause in Federal Acquisition Regulation 52.212-4 and FAR 12.403(d). The first, SWR, Inc., ASBCA 56708, 15-1 BCA ¶ 35832, 2014 WL...

...In **Commercial Item** Terms and Conditions: Neither Fish Nor Fowl, 10 N&CR ¶ 61, Professor Cibinic criticized the inclusion of a termination for convenience clause in FAR Part 12 **commercial item** contracts as inconsistent with standard **commercial** practice....

...Two recent decisions of the Armed Services Board of Contract Appeals take another look at the **commercial item** termination for convenience provision in paragraph (l) of the "Contract Terms and Conditions— **Commercial Items**" clause in Federal Acquisition Regulation 52.212-4 and FAR 12.403(d)....

## 19. COMMERCIAL ITEM TERMS AND CONDITIONS: NEITHER FISH NOR FOWL

Nash & Cibinic Report | December, 1996 | 10 No. 12 Nash & Cibinic ¶ Rep. 61



I thought that it would be helpful to review the Federal Acquisition Regulation coverage in the area of **commercial item** contract terms and conditions. It is not possible to completely treat all of these issues in one article. Instead, this article will focus on the major differences between the performance-related terms contained in the new FAR...

...In § 8002(b)(1) of the Federal Acquisition Streamlining Act of 1994, P.L. 103-355, Congress directed that the FAR contain "a list of contract clauses to be included in contracts for the acquisition of **commercial end items**," stating that: Such list shall, to the maximum extent practicable, include only those contract clauses-- (A) that are required to implement provisions of law or executive orders applicable to acquisitions of **commercial items** or **commercial** components, as the case may be; or (B) that are determined to be consistent with standard **commercial**....

...FAR 12.402(a) and (b) provide that the acceptance procedures in the clause are "generally appropriate when the Government is acquiring noncomplex **commercial items**" and that "other acceptance procedures" may be more appropriate for the acquisition of complex **commercial items** or **commercial items** used in critical applications....

## 20. BUYING COMMERCIAL ITEMS: SIGNS OF PROGRESS

Nash & Cibinic Report | May, 1999 | 13 No. 5 Nash & Cibinic Rep. ¶ 27



As we have written previously, Part 12 of the Federal Acquisition Regulation, covering the procurement of **commercial items**, provides significant benefits. First, it gives the contracting agency almost complete flexibility in the technique it uses to carry out the procurement. FAR 12.203 permits the use of simplified acquisition procedures for...

...The Panel had recommended the following subparagraph in the definition: (E) An **item** may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the **item** is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar **items** for the general public using the same workforce, plant, or equipment. The Panel reasoned that an **item** made using **commercial** manufacturing processes should be treated as a **commercial item**...

...An article by Michael E. Heberling and Mary E. Kinsella, **Commercial Item** Definition Facilitates Affordable Military Products, describes how the Air Force was able to include electronic modules manufactured by a **commercial** division of a company in the definition of "**commercial item**."...

## 21. TRUTH IN NEGOTIATIONS: THE FAR IMPLEMENTATION OF FASA

Nash & Cibinic Report | November, 1995 | 9 No. 11 Nash & Cibinic Rep. ¶ 57



In Truth in Negotiations Act Changes: When Do They Apply?, 9 N&CR ¶ 7, John described the reforms that the Federal Acquisition Streamlining Act of 1994 made to the Truth in Negotiations Act and voiced our hope that the Federal Acquisition Regulation implementation would reduce the burdens TINA has imposed on the contracting process. After an...

...For modifications of contracts or subcontracts for **commercial items**, the exception at 15.804-1(a)(4) applies if the modification does not change the **item** from a **commercial item** to a noncommercial **item**...

...(v) For a **commercial item** exception, information on prices at which the same **item** or similar **items** have been sold in the **commercial** market....

## 22. USING INCENTIVES ON COMMERCIAL ITEM CONTRACTS

Nash & Cibinic Report | September, 2000 | 14 No. 9 Nash & Cibinic Rep. ¶ 44



In an April 5, 2000, memorandum to the Secretaries of the military departments and the Directors of defense agencies, Deputy Under Secretary of Defense for Acquisition and Technology Jacques Gansler called for the Department of Defense to make 50% of its service contracts performance-based by the year 2005. He also encouraged agencies to take...

...Nothing in this clause may be interpreted as limiting the Government's right to terminate this contract in accordance with the "Termination for the Government's Convenience" and "Termination for Cause" articles in FAR 52.212-4, "Contract Terms and Conditions-- **Commercial Items**." The clause can be easily adapted as an "Award Term" incentive clause for use in **commercial item** contracts for services by substituting the word "services" for "**items**."...

...He also encouraged agencies to take greater advantage of **commercial** sources and services, using the procedures in Federal Acquisition Regulation Part 12, "Acquisition of **Commercial Items**," and providing "contract incentives to contractors based on their performance, even in a fixed-price environment, as is widely done in the **commercial** world."...

## 23. COMMERCIAL ITEM PROCUREMENT: Using Noncommercial Terms And Conditions

Nash & Cibinic Report | August 2016 | 30 No. 8 Nash & Cibinic Rep. NL ¶ 41



In a recent protest, the Army defended against an allegation that it had used a term that was inconsistent with **commercial** practice by arguing that the term was not inconsistent because it did not change the **commercial item** to a noncommercial **item**. When the Government Accountability Office granted the protest, rejecting this defense, the Army...

...The Army advocates, in essence, an interpretation of the FAR requirements concerning **commercial item** procurements that links the definition of **commercial items** with the prohibition on use of terms inconsistent with customary **commercial** practice....

...Rather, under the agency's "interplay" interpretation, a term or condition is not inconsistent with customary **commercial** practice unless it causes "supplies or service sought as **commercial items** [to be] changed into noncommercial **items**."...

## 24. [FREE THE DOD FROM THE FAR: Bring Back The Defense Acquisition Regulation](#)

Nash & Cibinic Report | October 2015 | 29 No. 10 Nash & Cibinic Rep. NL ¶ 58



The Department of Defense has published a controversial proposed rule that would amend the Defense Federal Acquisition Regulation Supplement to provide Contracting Officers with guidance about requiring the submission of information other than certified cost or pricing data when buying **commercial items**. See “Evaluating Price Reasonableness for...

...The suppliers claim that the parts are **items** “of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes” and thus qualify for the **commercial item** exception to the requirement to submit certified cost or pricing data....

...The DOD believes that the lack of adequate pricing data about **commercial items** hobbles its COs’ efforts to negotiate fair and reasonable prices....

## 25. [THE DEPARTMENT OF DEFENSE COST PREMIUM: Can It Be Reduced?](#)

Nash & Cibinic Report | January 2016 | 30 NO. 1 Nash & Cibinic Rep. NL ¶ 5



In 1994, Coopers & Lybrand published a study, The DoD Regulatory Cost Premium: A Quantitative Assessment, which concluded that a defense contractor incurred costs of at least 18% more than a comparable **commercial** company. See The Cost of Oversight in Defense Procurement, 9 N&CR ¶ 19. In response to a number of suggestions, including one from the...

...The report’s response to these criticisms was to repeat the prior recommendations of the DOD that the statute be changed to preclude defining products that were “of a type” as **commercial items** and to narrow the definition of **commercial items** to only those products that had been previously sold **commercially** (precluding the current situation where the Government can be the first buyer of a **commercial item**)....

...While some in industry disagree that **commercial** prices paid should be a [**commercial item** determination] criterion, we reasoned that such a change would be a small step to creating more certainty for industry and the Government about which goods and services should be considered **commercial** and thus eligible for preferential [Federal Acquisition Regulation] Part 12 contracting procedures....

## 26. [TERMINATION FOR CONVENIENCE OF FAR PART 12 COMMERCIAL ITEM CONTRACTS: Is Fair Compensation Required?](#)

Nash & Cibinic Report | August 2010 | 24 NO. 8 Nash & Cibinic Rep. ¶ 37



Terminations for convenience of traditional Government contracts are governed by required forms, arcane inventory procedures, the Truth in Negotiations Act, Cost Accounting Standards, and Government contracts Cost Principles. See Seidman & Banfield, Preparing Termination for Convenience Settlement Proposals for Fixed-Price Contracts, Briefing...

...The ASBCA appears to hold that the “fair compensation principle” is inapplicable to **commercial items** procurements, stating: Thus, to allow such costs as preparatory and insurance costs--which might be allowable in terminated non-**commercial**, fixed-price contracts, see FAR 31.205-42(b), (c)(2)--in this **commercial item** contract would conflict with FAR 12.403(a) and 52.212-4(l)....

...In its place is the “Termination for Convenience” clause for Government purchases of **commercial items** that appears as paragraph (l) of the FAR 52.212-4 “Terms and Conditions-- **Commercial Items**” clause and FAR 12.403 entitled “Termination.”...

## 27. [VALIDITY OF FAR PROVISIONS: THE GOVERNMENT “DISSES” THE FAR](#)

Nash & Cibinic Report | January, 2001 | 15 No. 1 Nash & Cibinic Rep. ¶ 4





In our February 1989 Dateline, we wrote about Government “rebels”--Government personnel who refuse to follow procurement regulations that are designed to protect contractors so that they can gain a greater advantage for the Government. The Government has not been reluctant to exploit such rebellions, forcing the matter into litigation in many...

...Similarly, 10 U.S.C. § 2307(f), Conditions for payments for **commercial items**, provides at (1) that advance payments for **commercial items** may be made under terms and conditions determined by the agency head to be customary in the **commercial** marketplace, while also requiring that the agency head obtain adequate security....

...Sundstrand involved the question of whether a contractor's financial condition could be accepted as “adequate security” for installment payments under contracts for **commercial items**....

## 28. REFORMING THE PROCUREMENT PROCESS: PART I--THE PROPOSALS ARE COMING

Nash & Cibinic Report | February, 1993 | 7 No. 2 Nash & Cibinic Rep. ¶ 7



In the past few years, there has been an increasing recognition that the procurement process has become far too complex to permit Government agencies to acquire goods and services in an efficient and effective manner. In 1986, the Packard Commission identified the seriousness of this problem in its final report as follows: [T]he legal regime for...

...The proposed definition states as follows: The term “**commercial item**” means (A) Property, other than real property, which (i) is sold or licensed to the general public for other than government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than government purposes; or (iii) is comprised of a combination of **commercial items**, or services and **commercial items**, of the type customarily combined and sold in combination to the general public; (B) The term “**commercial**...”

...The Packard Commission identified a number of areas where DOD had bought made-to-specification **items** when **commercial items** were available at significantly lower prices....

## 29. “EQUITABLE ADJUSTMENT”: A Term Of Art?

Nash & Cibinic Report | February 2016 | 30 No. 2 Nash & Cibinic Rep. NL ¶ 8



Vern found a very interesting decision addressing the question of whether the term “equitable adjustment” is a term of art. In United Launch Services, LLC, ASBCA 56850, 14-1 BCA ¶ 35511, 2013 WL 7143781, the Air Force awarded a contract for 19 launch services in various classes of satellites. During performance of the contract the weight of the...

...However, the first paragraph of the above quote seems to clearly state that the term “equitable adjustment” does not necessarily have the same meaning in a **commercial item** contract that it has in contracts for noncommercial **items**....

...The Changes clause in this **commercial items** contract dictates that it can only be changed with the agreement of the parties....

## 30. POSTSCRIPT II: SUBCONTRACTOR DELAYS UNDER COMMERCIAL ITEM CONTRACTS

Nash & Cibinic Report | August 2008 | 22 NO. 8 Nash & Cibinic Rep. ¶ 51



In Excusable Delays Under **Commercial Item** Contracts: Are Subcontractor Delays Excusable?, 21 N&CR ¶ 22, and Postscript: Subcontractor Delays Under **Commercial Item** Contracts, 22 N&CR ¶ 32, we discussed thoroughly the decisions in General Injectables & Vaccines, Inc., ASBCA 54930, 06-2 BCA ¶ 33401, 48 GC ¶ 349, aff'd, 519 F.3d 1360 (Fed. Cir. 2008),...

...After the decision of the Armed Services Board of Contract Appeals in John Andresen & Co., ASBCA 633 (Dec. 13, 1950), refusing to grant the Government's request for liquidated damages under an excusable delays clause containing no mention of subcontractors (like the “Contractor Terms and Conditions--**Commercial Items**” clause in Federal Acquisition Regulation 52.212-4, para. (f), at issue in General Injectables) when a subcontractor's nonperformance caused the contractor's

performance to be delayed, they carefully rewrote the contracts to explicitly state that delays were only excusable if they were beyond the control and without the fault or negligence of both the contractor and the subcontractor....

...In Excusable Delays Under **Commercial Item** Contracts: Are Subcontractor Delays Excusable?, 21 N&CR ¶ 22, and Postscript: Subcontractor Delays Under **Commercial Item** Contracts, 22 N&CR ¶ 32, we discussed thoroughly the decisions in General Injectables & Vaccines, Inc., ASBCA 54930, 06-2 BCA ¶ 33401, 48 GC ¶ 349, aff'd, 519 F.3d 1360 (Fed. Cir. 2008), 50 GC ¶ 133....

### 31. POSTSCRIPT: DEFINING COMMERCIAL SERVICES

Nash & Cibinic Report | July, 1997 | 11 No. 7 Nash & Cibinic Rep. ¶ 34



In Defining **Commercial** Services: An Exercise in Obfuscation, 10 N&CR ¶ 18, John analyzed some of the difficulties in determining the meaning of “**commercial** services.” In our teaching since that time, our students have raised additional problems regarding the definition of **commercial** services not in support of **commercial** supply **items**. In addition,...

...The Senate followed the Section 800 Panel recommendation to omit stand-alone services from the definition, but the House took the bait in the last sentence of the Panel's Report and added the following paragraph to the definition of “**commercial item**”: (f) Services offered and sold competitively, in substantial quantities, in the **commercial** marketplace based on established catalog prices for specific tasks performed and under standard **commercial** terms and conditions. This language was subsequently enacted in 41 USC § 403, which was explained in House Conference Report 103-712, 140 Cong. Rec. H8879-01 (Aug. 21, 1994), as follows:...

...For example, a memorandum written by a Government lawyer entitled Summary of FAR Changes Affecting **Commercial Item** Purchases states: The implementing team concluded that if a service is specifically priced, e.g., an oil change at Jiffy Lube, it is a **commercial item**, but having your car repaired, e.g., parts plus labor at \$49 an hour, does not qualify as a **commercial item**....

### 32. COMMERCIAL PRACTICES: HOW NOT TO DO MONKEY BUSINESS

Nash & Cibinic Report | March, 2005 | 19 No. 3 Nash & Cibinic Rep. ¶ 10



In Complicating Simplified Acquisition Procedures: A New Twist, 16 N&CR ¶ 2, we criticized an agency for requiring extensive technical proposals when all that was being procured was hotel rooms and meals. Now we have encountered an instance where an agency required technical proposals in the procurement of **commercially** available monkeys, Worldwide...

...Procurements of **commercial items** should use **commercial** practices to the maximum extent possible, and these practices do not include requiring prospective vendors to submit a written statement of how they are going to furnish the product....

...But it is still an illustration of the wrong way to buy **commercial items**....

### 33. JURISDICTION OF THE COURT OF FEDERAL CLAIMS: Now You See It, Now You Don't

Nash & Cibinic Report | April 2009 | 23 NO. 4 Nash & Cibinic Rep. ¶ 16



Recently, there have been some fascinating decisions regarding the U.S. Court of Federal Claims' jurisdiction under both prongs of 28 USCA § 1491 and the Contract Disputes Act, 41 USCA §§ 601-613. 28 USCA § 1491(b)(1) contains the following jurisdictional statement: [T]he United States Court of Federal Claims . . . shall have jurisdiction to render...

...In the convoluted facts of the case, the agency had published a market research Request for Information seeking **commercial off- the- shelf** products to meet a stated need....

...The agency therefore issued a task order requiring that contractor to “[s]upport [the agency's] acquisition and assistance function used for contracts and grants worldwide” and to integrate “**commercial off- the- shelf** packages from various vendors” so that they met the agency's needs....

### 34. [POSTSCRIPT IV: DEFINING COMMERCIAL SERVICES](#)

Nash & Cibinic Report | August, 2000 | 14 No. 8 Nash & Cibinic Rep. ¶ 39



One of the continuing puzzlements in the Government contracting process is the interpretation of the definition of stand-alone **commercial** services in the Federal Acquisition Regulation 2.101 definition of "**commercial item**," subparagraph (f): Services of a type offered and sold competitively in substantial quantities in the **commercial** marketplace...

[...While, as discussed below, there is one requirement in the RFPs that may not be consistent with \*\*commercial\*\* practice, it is permissible for a \*\*commercial item\*\* solicitation to have noncommercial terms and still remain a solicitation for a \*\*commercial item\*\*....](#)

[...In this regard, we note that the FAR definition of \*\*commercial item\*\* speaks in terms of services of a "type" offered and sold in the \*\*commercial\*\* marketplace under standard \*\*commercial\*\* terms and conditions; it does not require that the services be identical to what offerors provide their \*\*commercial\*\* customers....](#)

### 35. [POSTSCRIPT III: DEFINING COMMERCIAL SERVICES](#)

Nash & Cibinic Report | August, 1999 | 13 No. 8 Nash & Cibinic Rep. ¶ 41



For the last three years we have been speculating on the meaning of the Federal Acquisition Regulation definition of "stand-alone" **commercial** services in FAR 2.101(f). See Defining **Commercial** Services: An Exercise in Obfuscation, 10 N&CR ¶ 18, and Postscript: Defining **Commercial** Services, 11 N&CR ¶ 34. We now have the first judicial interpretation...

[...The FAR states that stand-alone services are a \*\*commercial item\*\* if they are-- 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 under standard \*\*commercial\*\* terms and conditions....](#)

[...Accordingly, these services do not fall within FAR 2.101's definition of "\*\*commercial items\*\*."...](#)

### 36. [APPLICABILITY OF COST ACCOUNTING STANDARDS: REGULATORY CHANGES NEEDED](#)

Nash & Cibinic Report | December, 1995 | 9 No. 12 Nash & Cibinic Rep. ¶ 62



It's time for the Cost Accounting Standards Board to make some changes in the regulations covering the applicability of the Cost Accounting Standards. The regulatory language dealing with exemptions from CAS remains virtually unchanged from that originally adopted. Recent changes in procurement policies and statutes, however, call for a new...

[...Services other than services "procured in support of" \*\*commercial\*\* supplies are required to be "offered and sold competitively, in substantial quantities, in the \*\*commercial\*\* marketplace" to qualify as \*\*commercial items\*\*....](#)

[...The "\*\*commercial item\*\*" definition, contained in FASA § 8001 and codified at 41 USC § 403, eliminates the "substantial sales" requirement for these types of \*\*items\*\*....](#)

### 37. [GUIDANCE ON CONTRACT PRICING: A Substantive Addition](#)

Nash & Cibinic Report | August 2007 | 21 NO. 8 Nash & Cibinic Rep. ¶ 41



In the March 2006 Dateline, we commented on the effort of the Department of Defense to move material from the DOD Federal Acquisition Regulation Supplement to the new Procedures, Guidance and Information (PGI) publication. The goal is to separate policy and rules from explanation of the policy and guidance on how it should be implemented. Until now...

...In that case, the guidance in PGI 215.403-1(c)(3)(A)( 2) directs COs to obtain "prior non-government sales data" on the precise **item** or the predecessor **item** if the **item** being procured has not yet been sold **commercially** but has evolved from a **commercial item**....

...The guidance emphasizes that this latter requirement is "particularly critical" when an agency is procuring a **commercial item** on a sole-source basis....

### **38. THE DOD ONE "OFFER" RULE: A Confusing Regulation**

Nash & Cibinic Report | August 2012 | 26 NO. 8 Nash & Cibinic Rep. ¶ 44



In 77 Fed. Reg. 39126 (June 29, 2012), the Department of Defense issued a final rule on the procedures to be followed when only one "offer" is received. While the procedures are contained in Part 215 of the Defense Federal Acquisition Regulation Supplement, "Contracting by Negotiation," they are applicable to procurements under several other parts...

...Thus, it is possible that the rule will induce companies selling sole-source **commercial items** to stop selling to the Government....

...If the procurement is for a **commercial item**, the rule seems to require the CO to obtain uncertified cost or price data....

### **39. TAILORING COMMERCIAL ITEM TERMS AND CONDITIONS: A Few Limitations**

Nash & Cibinic Report | December 2011 | 25 NO. 12 Nash & Cibinic Rep. ¶ 63



A recent decision, U.S. Foodservice, Inc. v. U.S., No. 11-376C, 2011 WL 4863878 (Fed. Cl. Oct. 12, 2011), provides an interesting prospective on an agency's ability to tailor the terms and conditions in a **commercial item** procurement. Federal Acquisition Regulation 12.302(a) permits tailoring with the following limitation in FAR 12.302(c): The...

...Federal Acquisition Regulation 12.302(a) permits tailoring with the following limitation in FAR 12.302(c): The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for **commercial items** in a manner that is inconsistent with customary **commercial** practice for the **item** being acquired unless a waiver is approved in accordance with agency procedures....

...While neither of these cases involved a **commercial item** procurement, the court felt that they applied because they dealt with modified procurement practices that were similar to tailoring....

### **40. POSTSCRIPT: TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS FOR COMMERCIAL ITEMS**

Nash & Cibinic Report | October 2008 | 22 NO. 10 Nash & Cibinic Rep. ¶ 59



No one can accuse the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council of hasty regulation. In a February 2007 article, Time-and-Materials and Labor-Hour Contracts for **Commercial Items**: A Significant Departure From Tradition, 21 N&CR ¶ 5, we discussed the language of what was then the new "Payments" provision of...

...In a February 2007 article, Time-and-Materials and Labor-Hour Contracts for **Commercial Items**: A Significant Departure From Tradition, 21 N&CR ¶ 5, we discussed the language of what was then the new "Payments" provision of the **commercial item** time-and materials and labor-hour contract clause, FAR 52.212-4 Alternate I. The councils added the clause to the Federal Acquisition Regulation in Federal Acquisition Circular 2005-15, **Item** II, 71 Fed. Reg. 74667 (Dec. 12, 2006)....

...We hope so, because we think that is the correct policy for the acquisition of **commercial items**....

### **41. TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS: FIXED-PRICE OR COST CONTRACTS?**

Nash & Cibinic Report | January, 1998 | 12 No. 1 Nash & Cibinic Rep. ¶ 1



At our November 1997 Roundtable we discussed the issue of whether “stand-alone” service contracts based on fixed hourly rates could qualify as **commercial** contracts. See Postscript: Defining **Commercial** Services, 11 N&CR ¶ 34, for a discussion of the “stand-alone” issue. One of our panelists allowed that such services might qualify as **commercial** were...

...One of our panelists allowed that such services might qualify as **commercial** were it not for the fact that only firm-fixed-price contracts can be used for **commercial items**....

...With respect to the type of contracts permitted for **commercial item** acquisitions, § 8002 of the Federal Acquisition Streamlining Act, Public Law 103-355, contains the following statement: (d) Use of firm, fixed price contracts.--The Federal Acquisition Regulation shall include, for acquisitions of **commercial items**-- (1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and (2) a prohibition on use of cost type contracts. No mention is made of either time-and-materials or labor-hour contracts....

#### **42. COMMERCIAL ITEM CONTRACT REMEDIES: Strict Interpretation**

Nash & Cibinic Report | October 2014 | 28 No. 10 Nash & Cibinic Rep. NL ¶ 54



A recent decision of the Civilian Board of Contract Appeals, DMW Marine Group v. Department of **Commerce**, CBCA 3518, 2014 WL 4147907 (Aug. 14, 2014), demonstrates that, when Contracting Officers procure **commercial items**, they must be completely conversant with the remedial scheme in the "Contract Terms and Conditions—**Commercial Items**" clause in...

...A recent decision of the Civilian Board of Contract Appeals, DMW Marine Group v. Department of **Commerce**, CBCA 3518, 2014 WL 4147907 (Aug. 14, 2014), demonstrates that, when Contracting Officers procure **commercial items**, they must be completely conversant with the remedial scheme in the "Contract Terms and Conditions—**Commercial Items**" clause in Federal Acquisition Regulation 52.212-4....

...In this regard, administering **commercial item** contracts presents a new challenge to many, if not most, COs....

#### **43. SIMPLIFIED ACQUISITION: Avoiding The GAO's Clarifications/Discussions Mess**

Nash & Cibinic Report | May 2012 | 26 NO. 5 Nash & Cibinic Rep. ¶ 21



In Postscript VII: Clarifications vs. Discussions, 26 N&CR ¶ 11, Ralph reviewed Government Accountability Office decisions marking the distinction between clarifications and discussions in source selections under Federal Acquisition Regulation Part 15. In February 2012, the GAO issued a decision about clarifications and discussions in simplified...

...In a **commercial item** procurement conducted using simplified acquisition procedures pursuant to FAR Subpart 13.5, “Test Program for Certain **Commercial Items**,” the Air Force sought to buy a mobile concrete batch plant....

...The GAO's convoluted discussion rules are bad enough when applied under FAR Part 15, but they are entirely wrong for the acquisition of **commercial items** under Part 13....

#### **44. ONLINE PROCUREMENT SERVICES: REVERSE AUCTIONS TOO**

Nash & Cibinic Report | July, 2004 | 18 No. 7 Nash & Cibinic Rep. ¶ 29



In a May 12, 2004 memorandum, Office of Federal Procurement Policy Associate Administrator Robert A. Burton “encouraged” agencies to use “**commercially** available online procurement services” for acquisition of **commercial** goods and services. See 46 GC ¶ 210(b). The memorandum also endorsed reverse auctions “if used correctly”: Numerous **commercial**...

...In general, the least risky use of reverse auctions would be for purchasing **commercial off-the-shelf** supplies....

...If not, simplified acquisition procedures could be used if the specific “**commercially** available online procurement services” to be acquired meet the FAR 2.101 definition of “**commercial** services.”...

#### 45. [POSTSCRIPT II: COST OR PRICING DATA](#)

Nash & Cibinic Report | November, 2003 | 17 No. 11 Nash & Cibinic Rep. ¶ 58



One of the most interesting aspects of Government contracting is that there are always new issues that pop up when you least expect them. We recently encountered two such issues relating to the requirement for the submission of cost or pricing data under the Truth in Negotiations Act. The first raises the question whether exceptions to the...

...If the [items](#) are truly [commercial items](#) we should not be applying TINA requirements to them simply because they happen to be on a contract with some non-[commercial items](#) subject to TINA....

...We learned about this issue when Vern Edwards alerted us to a discussion on the Wifcon Forum about whether the [commercial item](#) exception could be applied to a part of a construction contract for the lease of a [commercial item](#) when the balance of the contract was for noncommercial work....

#### 46. [POSTSCRIPT: ORGANIZATIONAL CONFLICTS OF INTEREST](#)

Nash & Cibinic Report | January 2008 | 22 NO. 1 Nash & Cibinic Rep. ¶ 1



Two recent decisions provide additional guidance on the question of the organizational conflict of interest (OCI) of a contractor that is providing staff support to a contracting agency. The OCI difficulty in this situation is that the contractor's employees will likely have access to a large amount of internal agency information as well as...

...This includes, for example: [concept exploration and development; system design; system development and integration; \[commercial off-the shelf\] procurement and integration; internal development testing; deployment; installation; operations; and maintenance....](#)

...See [\[the RFQ\]](#) (indicating a total 3 year term, with a maximum total estimate with optional [\[contract line item numbers\]](#) at \$12.044 million)....

#### 47. [BOOK REVIEW: Judging Statutes](#)

Nash & Cibinic Report | November 2014 | 28 No. 11 Nash & Cibinic Rep. NL ¶ 64



Judging Statutes (Oxford Univ. Press 2014) is Judge Robert A. Katzmann's 105-page argument for the use of legislative history in statutory interpretation and his response to Reading Law: The Interpretation Of Legal Texts by Justice Antonin Scalia and Bryan Garner (Thomson Reuters 2012), in which those authors oppose the use of legislative history....

...His critique of the canons of interpretation resonates with me as I recall the seemingly absurd decision of the Court of Federal Claims in [CGI Federal Inc. v. U.S.](#), No. 14-355C, 2014 WL 4179360 (Fed. Cl. Aug. 22, 2014), in which the court relied on [expressio unius est exclusio alterius](#) in holding that the rules in Federal Acquisition Regulation Part 12 for the acquisition of [commercial items](#) applies to the award of General Services Administration schedule contracts, but not to the placement of orders under those contracts, which seems to be clearly inconsistent with the rationale for having special rules for [commercial items](#)....

#### 48. [THE DEMISE OF VOLUNTARY GOVERNMENT CONTRACT COMPLIANCE AND DISCLOSURE PROGRAMS: The New Requirement](#)

Nash & Cibinic Report | March 2009 | 23 NO. 3 Nash & Cibinic Rep. ¶ 11



Before December 2007, the Government did not require its contractors either to establish Government contract compliance programs or to disclose possible statutory or regulatory violations relating to those contracts. Rather, the Government's policy was to encourage contractors to take these steps voluntarily, as typified by the Department of...

[...It was not required for \(a\) procurements of \*\*commercial items\*\* and services conducted under FAR Part 12 or \(b\) contracts performed outside of the United States....](#)

[...However, the proposed rule continued to exempt contracts for \*\*commercial items\*\* and services and contracts performed outside the United States from the requirements of the contract clause....](#)

#### **49. PRICING POLICY: New Federal Acquisition Regulation Guidance**

Nash & Cibinic Report | October 2010 | 24 NO. 10 Nash & Cibinic Rep. ¶ 46



After a four-year gestation period, the Federal Acquisition Regulation councils have issued revised guidance on the types of data that Contracting Officers should obtain from offerors, FAC 2005-45, 75 Fed. Reg. 53135 (Aug. 30, 2010). The stated purpose of the revision is "to clarify the distinction between 'certified cost or pricing data' and 'data..."

[...The introductory language to FAR 15.404-1\(b\) has also been revised to read: Price analysis for \*\*commercial\*\* and non-\*\*commercial items\*\*....](#)

[...If COs recognize this fact and apply the guidance to only sole-source \*\*commercial item\*\* procurements, as we noted in 21 N&CR ¶ 41, this seems to allow a \*\*commercial item\*\* vendor to provide sales data or cost data and hope that the chosen data will satisfy the CO. However, the revised guidance clearly permits a CO to ask for both sales data and cost data....](#)

#### **50. THE NEW CLAUSE FOR PAYMENTS UNDER NONCOMMERCIAL TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS: An End To The Confusion?**

Nash & Cibinic Report | April 2007 | 21 NO. 4 Nash & Cibinic Rep. ¶ 15



In December 2006, the FAR Council issued Federal Acquisition Circular 2005-15, promulgating a new FAR 16.601, "Time-and-materials contracts," and FAR16.602, "Labor-hour contracts," and new solicitation provisions and payment clauses for noncommercial T&M and L-H contracts. The changes took effect on February 12, 2007, 71 Fed. Reg. 74656 (Dec. 12,...

[...So an affiliate selling \*\*commercial items\*\* to the contractor can get profit or fee in its price, but not the contractor....](#)

[...Moreover, the hourly rates for an affiliate may include profit for the contractor, but not for the affiliate, unless the services to be provided by the affiliate are \*\*commercial items\*\* as defined in FAR 2.101....](#)

#### **51. COMPENSATORY SCHEMING: How To Do Things When You Can't Do The Right Thing**

Nash & Cibinic Report | November 2015 | 29 No. 11 Nash & Cibinic Rep. NL ¶ 59



The award of Government contracts is governed by rules that can make the process time-consuming and costly, so agencies have devoted a lot of thought to finding creative ways to get around them. Too bad they haven't devoted as much thought to properly managing their requirements and streamlining their processes, because their attempts to get around...

[...Consider the abuse and mismanagement of task order contracts, \*\*commercial item\*\* policies, and interagency contracting....](#)

[...And in March of \[2012\], the Department of Defense asked Congress to eliminate the "of a type" criterion for \*\*commercial items\*\* because of abuses of that policy....](#)

#### **52. POSTSCRIPT: SUBCONTRACTOR DELAYS UNDER COMMERCIAL ITEM CONTRACTS**

Nash & Cibinic Report | May 2008 | 22 NO. 5 Nash & Cibinic Rep. ¶ 32



In Excusable Delays Under **Commercial Item** Contracts: Are Subcontractor Delays Excusable?, 21 N&CR ¶ 22, we discussed General Injectables & Vaccines, Inc., ASBCA 54930, 06-2 BCA ¶ 33401, 48 GC ¶ 349,

holding that a subcontractor delay was not an excusable delay under the paragraph (f) of the "Contractor Terms and Conditions--**Commercial Items**" clause...

...We believe that the court's reliance on the regulatory history of the FAR 52.212-4 "Contractor Terms and Conditions--**Commercial Items**" clause is misplaced....

...See 60 Fed. Reg. 48231, 48232 (1995) (final rule) (describing the provisions in FAR 52.212-4 as "contain[ing] the terms and conditions the Team believes are consistent with customary **commercial** practice by addressing general areas that previous studies have identified as the 'core' areas covered by **commercial** contracts....")...

### 53. THE NEW DOD POLICY ON TECHNICAL DATA AND COMPUTER SOFTWARE

Nash & Cibinic Report | April, 1994 | 8 No. 4 Nash & Cibinic Rep. ¶ 22



We haven't written about the Department of Defense (DOD) policy on rights in technical data and computer software for many years because it has not changed since the issuance of the "interim rule" in October 1988. See Department of Defense Technical Data Policy: The New Interim Rule, 3 N&CR ¶ 1. Since that time, congressional dissatisfaction with...

...For technical data, the new policy includes a "Technical Data-- **Commercial Items**" clause to be added at DFARS 252.227-7015 that, in general, takes no rights greater than those given in the normal **commercial** sale of **items**....

...The policy recommended by the Section 807 Committee takes fewer rights in a broader spectrum of **commercial items** and **commercial** computer software....

### 54. MANDATORY CONTRACT CLAUSES: Can They Be Incorporated By Regulation?

Nash & Cibinic Report | February 2014 | 28 No. 2 Nash & Cibinic Rep. NL ¶ 10



A new provision in the Federal Acquisition Regulation raises the question whether the Government can mandate a contract clause for purchases using Government purchase cards when the cardholder accepts the seller's provisions. Put in legalistic terms, the question is whether the "Christian doctrine" applies to purchase card buying. The clause in...

...For **commercial item** contracts, this language is contained in new paragraph (u) of FAR 52.212-4, "Contract Terms and Conditions— **Commercial Items**."...

...The regulations apply broadly—calling for the use of a standard contract clause in virtually all procurements (including **commercial item** procurements)....

### 55. POSTSCRIPT V: DEFINING COMMERCIAL SERVICES

Nash & Cibinic Report | May, 2001 | 15 No. 5 Nash & Cibinic Rep. ¶ 27



For the last five years, we have been discussing the definition of stand-alone "**commercial** services" in Federal Acquisition Regulation 2.101: 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 under standard **commercial**...

...As part of this guidance, the Under Secretary provided a number of "clarifications," including the following: Market Price versus Catalog Price for Services: The **commercial item** definition includes services of two general types: services in support of a **commercial item**; and, stand-alone services....

...In Postscript: Defining **Commercial** Services, 11 N&CR ¶ 34, I argued that an established market price could be one that was established by obtaining competitive prices for a specific task at the time the **commercial item** was bought....

### 56. NEW DATA RIGHTS LEGISLATION: Killing The Goose?

Nash & Cibinic Report | January 2007 | 21 NO. 1 Nash & Cibinic Rep. ¶ 63





Congress wants the Department of Defense to obtain more data rights when it buys a weapon system. To achieve this goal, § 802 of the National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 (Oct. 17, 2006), contains two new provisions. See also 48 GC ¶ 367. It will be interesting to see if they significantly change the balanced...

...This reverses the very strong presumption in the current statute regarding **commercial items**: In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for **commercial items**, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the **item** was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3)....

...The second new provision adds the following subparagraph to 10 USCA § 2321(f): (2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (whether or not under a contract for **commercial items**) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the **item** was developed exclusively at private expense....

### 57. CRITICAL THINKING: Do Acquisition Leaders Really Want It?

Nash & Cibinic Report | October 2014 | 28 No. 10 Nash & Cibinic Rep. NL ¶ 57



Critical thinking is all the rage. It seems that almost everyone wants the acquisition workforce to do more critical thinking, which must mean that almost everyone thinks the workforce is not doing enough of it. In an article in Defense AT&L magazine, Sean M. Frisbee, president of IES Global, Inc., and a former F-22 program director, and Scott...

...So do contest-style competitions have the same motivational effect in acquisitions for the future development of a weapon system or for the future performance of an incompletely specified, long-term and complex service as they do in acquisitions of **commercial off-the-shelf** supplies or standard **commercial** services or for the production of **items** that have been designed and fully tested under prior contracts?...

...We don't doubt that sealed bidding and lowest price technically acceptable competitive negotiation can reduce fixed prices for **commercial** goods and services and for fully specified governmental **items** under fixed-price contracts. (...)

### 58. POSTSCRIPT: SLOW PAYMENT OF SUBCONTRACTORS

Nash & Cibinic Report | January 2014 | 28 No. 1 Nash & Cibinic Rep. NL ¶ 4



In Slow Payment of Subcontractors: A Solution?, 26 N&CR ¶ 60, we were critical of a new contract clause calling for accelerated payments of contractors and subcontractors so that they could pay their small business subcontractors faster. The Federal Acquisition Regulation has now been amended to add the new clause in FAR 52.232-40, 78 Fed. Reg....

...It is to be used in virtually all contracts, including those for **commercial items** and simplified acquisitions that are not for **commercial items**....

...(c) Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including subcontracts with small business concerns for the acquisition of **commercial items**....

### 59. POSTSCRIPT: LATE PROPOSALS

Nash & Cibinic Report | February, 1999 | 13 No. 2 Nash & Cibinic Rep. ¶ 11



We've received several responses to our November 1998 article, Late Proposals: In Search of a Sensible Rule, 12 N&CR ¶ 57. Two of them support strict enforcement of the late proposal rule. Another tells a "horror story"

and makes a constructive suggestion for changes in the rules. Two of our most faithful and astute critics, Alan Washburn and...

...The Comptroller has already indicated that the "Government mishandling exception" will be extended to **commercial** procurement even though not specified in the FAR 52.212-1, "Instructions to Offerors-- **Commercial Items**" provision, Russo & Sons, Inc., Comp. Gen. Dec. B-280948, 98-2 CPD ¶ 141....

...The proposed rule would make the treatment of late submissions the same for all types of procurements--sealed bids, competitive proposals, and **commercial item** acquisitions....

## 60. MILITARY SPECIFICATIONS: CAN THEY BE REFORMED?

Nash & Cibinic Report | November, 1993 | 7 No. 11 Nash & Cibinic Rep. ¶ 61



Almost every study of Government procurement has identified the problem created by military specifications and recommended that their use be curtailed. Now there is a marvelous report, Road Map for Milspec Reform, issued by the Center for Strategic and International Studies (CSIS) in July 1993, containing a series of concrete recommendations on how...

...It would also be a disservice to many people in the military departments and defense agencies who have been working steadily toward the goal of having military specifications and standards for military-unique **items** only and of using **commercial** specifications and standards for **commercial** or modified **commercial** products....

...At the same time, there has been inadequate training in writing performance requirements or in how to convert from milspec to **commercial item** description. . .or nongovernmental standards....

## 61. KNOWLEDGE OF THE REGULATIONS: Is That All It Takes?

Nash & Cibinic Report | October 2012 | 26 NO. 10 Nash & Cibinic Rep. ¶ 56



In a recent blog post in Federal Computer Week entitled, The Navy's Elliott Branch: Getting a Good Deal for Government, Sept. 18, 2012, [http:// fcw.com/Blogs/Lectern/2012/09/sammies.aspx](http://fcw.com/Blogs/Lectern/2012/09/sammies.aspx), Steve Kelman reported that Deputy Assistant Secretary of the Navy for Acquisition and Procurement Elliott Branch received a "Service to America Medal" ("Sammie")...

...Consider the abuse and mismanagement of task order contracts, **commercial item** policies, and interagency contracting....

...And in March of this year, the Department of Defense asked Congress to eliminate the "of a type" criterion for **commercial items** because of abuses of that policy....

## 62. TRUTH IN NEGOTIATIONS ACT CHANGES: WHEN DO THEY APPLY?

Nash & Cibinic Report | January, 1995 | 9 No. 1 Nash & Cibinic ¶ Rep. 7



The Federal Acquisition Streamlining Act of 1994 (FASA), P.L. 103-355, made a number of significant changes in the Truth in Negotiations Act, 10 USC § 2306a (military agencies, National Aeronautics and Space Administration, and Coast Guard) and 41 USC § 254 (civilian agencies). These changes include increasing the TINA threshold for civilian...

...Since this exemption applies to "**commercial items**," there does not appear to be any reason why it should not be incorporated into the **commercial item** coverage to be developed for the FAR....

...FASA states a preference for price-- not cost--data when awarding noncompetitive contracts for **commercial items**, §§ 1204 and 1251....

## 63. DEFINING COMMERCIAL SERVICES: AN EXERCISE IN OBFUSCATION

Nash & Cibinic Report | April, 1996 | 10 No. 4 Nash & Cibinic ¶ Rep. 18



When the Federal Acquisition Streamlining Act of 1994, P.L. 103-355, liberalized many of the procurement rules applicable to the purchase of **commercial** supplies and services, it defined **commercial** services more restrictively than **commercial** supplies. In a section even more confusing than the usual statutory gobbledygook, FASA sometimes uses the...

[...When the Federal Acquisition Streamlining Act of 1994, P.L. 103-355, liberalized many of the procurement rules applicable to the purchase of \*\*commercial\*\* supplies and services, it defined \*\*commercial\*\* services more restrictively than \*\*commercial\*\* supplies....](#)

[...Both supplies and services are included in the 41 USC § 403\(12\) definition of "\*\*commercial item\*\*."...](#)

#### **64. EXCUSABLE DELAYS UNDER COMMERCIAL ITEM CONTRACTS: Are Subcontractor Delays Excusable?**

Nash & Cibinic Report | May 2007 | 21 NO. 5 Nash & Cibinic Rep. ¶ 22



A recent decision, General Injectables & Vaccines, Inc., ASBCA 54930, 06-2 BCA ¶ 33401, 48 GC ¶ 349, raises, but does not answer, the question whether the "Excusable delays" paragraph in the "Contractor Terms and Conditions-- **Commercial Items**" clause in Federal Acquisition Regulation 52.212-4 makes subcontractor delays excusable. The clause reads:...

[...A recent decision, General Injectables & Vaccines, Inc., ASBCA 54930, 06-2 BCA ¶ 33401, 48 GC ¶ 349, raises, but does not answer, the question whether the "Excusable delays" paragraph in the "Contractor Terms and Conditions-- \*\*Commercial Items\*\*" clause in Federal Acquisition Regulation 52.212-4 makes subcontractor delays excusable....](#)

[...Thus, it is contemplated in such contracts that procuring, or in the present sense, furnishing, goods not manufactured by the prime contractor is of "the very essence of the...contract." In short, procured, or subcontracted \*\*items\*\*, are therefore of "the very essence" of a government contract and failure to deliver them must be for a reason enumerated in the contract if it is to be treated as excusable.....](#)

#### **65. POSTSCRIPT: COMMERCIAL-MILITARY INTEGRATION**

Nash & Cibinic Report | April, 1998 | 12 No. 4 Nash & Cibinic Rep. ¶ 19



Every year or so, we report on the progress being made by the Department of Defense to overcome the barriers to the integration of **commercial** and military operations of contractors. In 1991, we reported on an early study calling for such integration, Integrating **Commercial** and Military Technologies: A Program for Efficient Procurement, 5 N&CR ¶ 53....

[...The benefit, of course, of treating R&D work as a "\*\*commercial\*\* service" is that it permits DARPA to enter into firm-fixed-price contracts with only the minimal terms and conditions called for by Part 12 of the Federal Acquisition Regulation, "Acquisition of \*\*Commercial Items\*\*."...](#)

[...If a \*\*commercial item\*\* is available competitively, this is not difficult because the competitive prices will demonstrate reasonableness....](#)

#### **66. GOVERNMENT USE OF PRIVATE PATENTS: A License To Steal**

Nash & Cibinic Report | March 2010 | 24 NO. 3 Nash & Cibinic Rep. ¶ 12



The Government follows interesting policies when it comes to balancing the goals of obtaining competition and honoring proprietary rights. The Government has concluded that it should not obtain competition if that would entail violating private copyrights or trade secrets but that it should obtain competition when the product being procured is...

[...\(c\) Generally, contractors providing \*\*commercial items\*\* should indemnify the Government against liability for the infringement of U.S. patents....](#)

[...The clause is not used in most contracts for \*\*commercial items\*\*, although FAR 27.201-2\(a\) is silent on this issue....](#)

## 67. SIMPLIFIED ACQUISITION PROCEDURES: Why Can't We Keep Them Simple?

Nash & Cibinic Report | July 2007 | 21 NO. 7 Nash & Cibinic Rep. ¶ 31



Vernon J. EdwOne of the most remarkable and disappointing phenomena of Government contracting is the unwillingness or inability of many Contracting Officers to take advantage of the streamlining and labor-saving contract formation procedures that became available during the acquisition reform era of the 1990s. COs needlessly resort to the Federal...

...The freedom to use simplified acquisition procedures to buy **commercial items** valued at up to \$5.5 million is a great procedural gift...

...The Government Accountability Office sustained a protest of that procurement in Finlen Complex, Inc., Comp. Gen. Dec. B-288280, 2001 CPD ¶ 167, 43 GC ¶ 435, as we discussed in Complicating Simplified Acquisition Procedures: A New Twist, 16 N&CR ¶ 2. Now we have the case of the Department of Agriculture's purchase of a relatively simple **commercial item**: laboratory devices and kits used to test cattle brain tissue for bovine spongiform encephalopathy (BSE), commonly known as "mad cow disease."...

## 68. ORDERS UNDER FEDERAL SUPPLY SCHEDULE CONTRACTS: Must They Comply With FAR Part 12?

Nash & Cibinic Report | July 2015 | 29 No. 7 Nash & Cibinic Rep. NL ¶ 35



Interpreting unclear regulations can be a real challenge for both procurement officials and judges. A good example can be found in the tortuous process that was followed to answer a simple question—when an agency competes an order under a Federal Supply Schedule, must it follow the Federal Acquisition Regulation Part 12 guidance on the terms and...

...First, [FAR] Subpart 8.402 instructs agencies that they may add **items** not on the FSS—"open market **items**"—to Blanket Purchase Agreements ("BPA") or FSS orders, but "only if" the agency complies with "all applicable acquisition regulations pertaining to the purchase of the **items** not on the Federal Supply Schedule. . . (e.g., publicizing (Part 5), competition requirements (Part 6), acquisition of **commercial items** (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19))....

...The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for **commercial items** in a manner that is inconsistent with customary **commercial** practice for the **item** being acquired unless a waiver is approved in accordance with agency procedures....

## 69. PRICE-BASED ACQUISITION: "JUST DO IT!"

Nash & Cibinic Report | March, 2000 | 14 No. 3 Nash & Cibinic Rep. ¶ 17



Long-time readers of this REPORT will note that we have consistently called for the Government to reduce its reliance on cost analysis in pricing its contracts. As early as our third issue (March 1987), I criticized agencies for unnecessarily requiring cost or pricing data when adequate price competition existed, Cost or Pricing Data in Competitive...

...In Time-and-Materials and Labor-Hour Contracts: Fixed-Price or Cost Contracts?, 12 N&CR ¶ 1, I discussed the statutory provisions related to T&M contracts and concluded that T&M contracts are fixed-price contracts and that the statutes do not preclude their use in a procurement using **commercial item** procedures, stating: It is our view that [the Federal Acquisition Streamlining Act of 1994] does not preclude their use for **commercial item** procurements....

...The Report's primary concern with this type of contract is to obtain statutory changes to "allow time and material line **items** on **commercial** contracts."...

## 70. CONTRACTING AUTHORITY: WHO HAS THE POWER?

Nash & Cibinic Report | July, 2005 | 19 No. 7 Nash & Cibinic Rep. ¶ 32



In the June 8, 2005 edition of The Government Contractor, Professor Christopher Yukins of The George Washington University Law School wrote about what he called the "devolution" of the contracting function and its role in the current wave of procurement reform. See Feature Comment: Understanding the Current Wave of Procurement Reform, 47 GC ¶ 255....

[...Prof. Yukins sees a legislative proposal to make the use of "commercially available online procurement services to purchase commercial items" \(H.R. 1815, § 812\) as devolution to the private sector and twice mentions Amazon.com. But if I log on to Amazon.com and select and order a book or some other product, who is doing the buying?...](#)

[...He says that Congress was responsible for the First Devolution, but attributes the Second Devolution to a number of factors, such as the decline in agency acquisition workforces, the appearance and growth in popularity of interagency contracts-presumably, Government-wide acquisition contracts \(GWACs\) and multiagency contracts \(MACs\)-and the push to buy commercial items....](#)

## 71. **POSTSCRIPT: INTELLECTUAL PROPERTY RIGHTS WITH COMMERCIAL COMPANIES**

Nash & Cibinic Report | August, 2002 | 16 No. 8 Nash & Cibinic Rep. ¶ 41



The Department of Defense is slowly making progress in its efforts to adopt policies and train its Contracting Officers and lawyers to formulate intellectual property terms and conditions that will permit the DOD to deal with commercial contractors. We commented on the internal memorandum that initiated this effort in Adopting Policies That Protect...

[...I say "almost" because the DFARS does contain a "Rights in Technical Data- Commercial Items" clause in DFARS 252.227-7015 for "pure" commercial items and permits the use of the vendor's terms and conditions for "pure" commercial computer software....](#)

[...The FAR also contains a "Commercial Computer Software-Restricted Rights" clause in FAR 52.227-19 that conflicts with commercial practice....](#)

## 72. **"MINIMUM NEEDS": A CONTENTIOUS TERM?**

Nash & Cibinic Report | February, 1997 | 11 No. 2 Nash & Cibinic Rep. ¶ 10



Over the years, my students probably heard me criticize the term "minimum needs" more than any other term that is used in the lexicon of Government procurement. They knew that use of that term in a paper or examination answer would raise my dander and endanger their class standing. My problem was (and is) very simple. I believe that the term is a...

[...Moreover, this change would apply to all acquisitions, not just to acquisitions of commercial items....](#)

[...However, the Government actually has substantial latitude to describe its needs in the manner that reflects an optimum acquisition strategy, e.g., considering which item\(s\) represent the best value in terms of quality, expected life of item, vendor past performance; making use of capabilities in the marketplace, such as those for ensuring reliability and distributing products; requiring offerors to have a "track record" of previous production for a length of time appropriate to the item being acquired, when such a requirement can be shown to reasonably relate to helping ensure that the agency will acquire an item that meets its need.\)...](#)

## 73. **SOLE-SOURCE ACQUISITIONS: What Are The Proper Procedures?**

Nash & Cibinic Report | March 2012 | 26 NO. 3 Nash & Cibinic Rep. ¶ 12



Ralph C. Nash What are the rules for conducting sole-source acquisitions under the Competition in Contracting Act as implemented by the Federal Acquisition Regulation 6.302-1? FAR 2.101 defines a sole-source acquisition as one in which an agency solicits and negotiates with only one firm. The CICA statutes, 10 USCA § 2304 and 41 USCA § 3304, the...

...Even if it were for a [commercial item](#), the one-day response time from January 23 to January 24 would be unreasonably short...

...DODEA proceeded under the [commercial items](#) test program described in FAR Subpart 13.5, but did not use the combined synopsis-solicitation procedure then described in FAR Subpart 12.6....

#### **74. RELYING ON THE GOVERNMENT: CONTRACTORS DO IT AT THEIR RISK**

Nash & Cibinic Report | June, 2003 | 17 No. 6 Nash & Cibinic Rep. ¶ 32



A contractor dealing with the Government might conclude that interpretations of the legal rules by the agency Contracting Officer and the supporting lawyers are correct and hence can be relied upon. Such a contractor would be WRONG. It's up to the contractor to figure out if the agency officials are following the law, and, if the contractor's...

...In Sundstrand, the contractor's [commercial item](#) contracts included the FAR 52.232-30 "Installment Payments for [Commercial Items](#)" clause....

...The board made a thorough analysis of the legislative history of the amendments to this statute that implemented the use of [commercial](#) financing techniques for the purchase of [commercial items](#) and found no mention of the issue of whether a contractor's financial condition could serve as adequate security....

#### **75. POSTSCRIPT III: LATE BIDS AND PROPOSALS**

Nash & Cibinic Report | January, 2000 | 14 No. 1 Nash & Cibinic Rep. ¶ 4



We have written a number of articles critical of the Government's policy with respect to late proposals. See Late Bids and Proposals: I Hear You Knocking but You Can't Come In, 6 N&CR ¶ 16; Late Proposals: In Search of a Sensible Rule, 12 N&CR ¶ 57; Postscript: Late Proposals, 13 N&CR ¶ 11, and most recently, Postscript II: Late Proposals, 13 N&CR...

...Language has been added to allow proof through "oral testimony or statements of Government personnel," FAR 14.304(c) (sealed bids), FAR 15.208(c) (competitive proposals), and FAR 52.212-1, paragraph (f)(3) ([commercial items](#))....

...We had argued that the rule should extend the same treatment to [commercial](#) carriers....

#### **76. "COST-BASED" CONTRACTING: ON THE WAY OUT?**

Nash & Cibinic Report | November, 1998 | 12 No. 11 Nash & Cibinic Rep. ¶ 58



There are a number of initiatives underway that could sharply reduce the Government's use of "cost-based" contracting. The principal effort is within the Department of Defense. The Defense Science Board (DSB), in a June 12, 1998 Memorandum to Under Secretary of Defense (Acquisition and Technology) Jacques Gansler, recommended that price-based...

...(3) This subsection shall cease to be effective one year after the date on which final regulations prescribed pursuant to paragraph (1) take effect. While this statutory provision deals only with the procurement of [commercial items](#), Congress' concerns regarding the proper use of price analysis techniques would appear to be even more applicable to the procurement of unique Government [items](#)....

...analysis;3(B) the circumstances under which contracting officers should require offerors of exempt [commercial items](#) to provide--3(i) information on prices at which the offeror has previously sold the same or similar [items](#); or3(ii) other information other than certified cost or pricing data;3(C) the role and responsibility of Department of Defense support organizations in procedures for determining...

#### **77. TIME-AND-MATERIALS CONTRACT PAYMENTS: What Rate For Subcontractor Employees?**

Nash & Cibinic Report | May 2011 | 25 NO. 5 Nash & Cibinic Rep. ¶ 23



We've been waiting for a decision on payment of subcontractor employees on time-and-materials contracts for a long time. Our curiosity has been piqued by repeated information that contractors have been billing these employees at the rates specified in the contract for their own employees--which we thought conflicted with the old "Payments Under...

[...Under that definition, contracts for standard and off-the-shelf items, raw materials, and much of what we call commercial items would not be subcontracts and their producers would not be subcontractors....](#)

[...Such names include outside production, off-the-shelf items, subcontracted parts, purchased parts, contractor-furnished parts, off-site production, vendor items, CFE, "B" products, customer-furnished equipment, and standard items or parts. . . . In order to arrive at a "clear-cut definition," and on the basis that subcontracting is part of the manufacturing task, the Air Force first defined the airframe manufacturing process as consisting of "machining, processing, fabricating, and assembling all parts of the aircraft."...](#)

## 78. [LATE QUOTATIONS: A New Wrinkle](#)

Nash & Cibinic Report | March 2008 | 22 NO. 3 Nash & Cibinic Rep. ¶ 16



We have written a number of pieces about late proposals--the latest of which is Postscript: Late Final Proposal Revisions, 21 NCR ¶ 60. However, we have never looked at the issue of late quotations until Data Integrators, Inc., Comp. Gen. Dec. B-310928, 2008 CPD ¶ 27. There, the Government Accountability Office ruled that the Government Printing...

[...If an agency conducts the procurement as a commercial item procurement, the situation is totally confusing....](#)

[...In M. Braun, Inc., Comp. Gen. Dec. B-298935.2, 2007 CPD ¶ 96, 49 GC ¶ 267, the agency solicited quotations but included the "Instructions to Offerors-- Commercial Items" solicitation provision in FAR 52.212-1 in the solicitation....](#)

## 79. [POSTSCRIPT: THE DOD ONE "OFFER" RULE](#)

Nash & Cibinic Report | December 2013 | 27 No. 12 Nash & Cibinic Rep. NL ¶ 59



On Halloween, the Department of Defense published the final version of its "one offer" rule that we described in The DOD One "Offer" Rule: A Confusing Regulation, 26 N&CR ¶ 44. See 78 Fed. Reg. 65214 (Oct. 31, 2013). In reading the final rule, we noticed that we had mistakenly stated that it applied to small business set-asides (it doesn't) and...

[...For a commercial item exception, the Offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition....](#)

[...\(C\) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item....](#)

## 80. [LATE PROPOSALS: IN SEARCH OF A SENSIBLE RULE](#)

Nash & Cibinic Report | November, 1998 | 12 No. 11 Nash & Cibinic Rep. ¶ 57



The following letter from William H. Butterfield, an attorney with Kilcullen, Wilson and Kilcullen, suggests a "common sense" approach to dealing with the Government's consideration of late proposals and proposal modifications: As an avid reader of the Nash & Cibinic Report, I notice that other readers occasionally write in to suggest topics or...

[...The FAR 15.208 policy on late submissions does not apply to commercial item procurements....](#)

[...Moreover, FAR Part 12 is silent with respect to late submissions in commercial item procurements....](#)

## 81. [THE COMMON LAW OF CONTRACTS: It Sometimes Applies To Government Contract Disputes](#)

Nash & Cibinic Report | December 2008 | 22 NO. 12 Nash & Cibinic Rep. ¶ 74



Most litigation regarding Government contracts is resolved using the unique legal principles that apply to our field. However, occasionally we see a case that is resolved using normal contract law principles that have been devised in the course of developing the common law of contracts. *Comptech Corp.*, ASBCA 55526, 2008 WL 4628786 (Oct. 1, 2008),...

...Paragraph (c) appears to tell COs that they can cancel a purchase order, of either kind, at any time before acceptance following the procedures in FAR 13.302-4, which states: (a) If a purchase order that has been accepted in writing by the contractor is to be terminated, the contracting officer shall process the termination in accordance with-- (1) [FAR] 12.403 and 52.212-4(l) or (m) for **commercial items**; or (2) [FAR] Part 49 or 52.213-4 for other than **commercial items**....

## 82. **CONTRACTING OFFICER DETERMINATIONS: FOR BETTER OR WORSE**

Nash & Cibinic Report | June, 1992 | 6 No. 6 Nash & Cibinic Rep. ¶ 35



Contracting Officers (COs) are required to make many determinations during the formation and administration of contracts. A substantial number of these determinations involve the exercise of judgment. Some turn out to be favorable to the Government and others do not. Sometimes the judgment is wise and sometimes it is shortsighted. In some cases the...

...Several COs placing orders under the BOA determined that the contractor was entitled to the **commercial item** exemption and was, therefore, not required to submit cost or pricing data....

...Most of the spare parts sold to **commercial** customers were part of the basic sale of the **item** and the customers were allowed to "view the list."...

## 83. **TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS FOR COMMERCIAL ITEMS: A Significant Departure From Tradition**

Nash & Cibinic Report | February 2007 | 21 NO. 2 Nash & Cibinic Rep. ¶ 5



The Services Acquisition Reform Act, Pub. L. 108-136, enacted in November 2003, authorized the use of time-and-materials and labor-hour contracts to buy **commercial items**, and in December 2006, the Federal Acquisition Regulation Council published a final rule to implement the statute. See Federal Acquisition Circular 2005-15, **Item** II, 71 Fed. Reg....

...The Federal Acquisition Regulation Council developed an alternate to FAR 52.212-4, "Contract Terms and Conditions--**Commercial Items**," for use in time-and-materials and labor-hour contracts, titled "Alternate I (FEB 2007)....

...The Services Acquisition Reform Act, Pub. L. 108-136, enacted in November 2003, authorized the use of time-and-materials and labor-hour contracts to buy **commercial items**, and in December 2006, the Federal Acquisition Regulation Council published a final rule to implement the statute....

## 84. **STUDIES OF THE ACQUISITION PROCESS: They Keep Coming**

Nash & Cibinic Report | November 2015 | 29 No. 11 Nash & Cibinic Rep. NL ¶ 63



There seems to be a continual flow of studies of the acquisition process with a variety of recommendations. We will comment on the two latest studies, one from the University of Maryland and one from the Department of Defense. Jacques S. Gansler, William Lucyshyn, Ryan Ouimette, and Bryn Woollacott of the Center for Public Policy and Private...

...Requirements such as government-unique standards, cost data for **commercial** (or modified **commercial**) **items**, and unfavorable intellectual property requirements, deter **commercial** firms from doing business with the DoD....

...[Footnote omitted.] These are the large-scale subcontractors for which we have detailed cost data—not those providing **commercial items**....



## 85. [LATE BIDS, PROPOSALS, AND QUOTATIONS: THE PERILS OF HAND-CARRIED SUBMISSIONS](#)

Nash & Cibinic Report | November, 2004 | 18 No. 11 Nash & Cibinic Rep. ¶ 50



The recent decision of InfoGroup Inc., Comp. Gen. Dec. B-294610, 2004 CPD ¶ 190, 46 GC ¶ 402, is yet another illustration of the perils of attempting hand-delivery of a response to an Invitation for Bids, a Request for Proposals, or a Request for Quotations. The limited regulatory coverage related to hand-carried submissions and the wide variation...

...Where [commercial items](#) over the simplified acquisition threshold are being procured under simplified acquisition procedures, FAR 12.301 requires the inclusion of the FAR 52.212-1 "Instructions to Offerors- [Commercial Items](#)" solicitation provision, which incorporates provisions similar to the FAR 52.215-1 provision....

...More specifically, while [item 7](#) on the RFP cover page included a parenthetical identifying 1300 Pennsylvania Avenue as the address for hand delivery and delivery by overnight [commercial](#) carriers, the amendments did not include similar parenthetical information in [item 6](#), and nowhere else expressly identified an address other than 1300 Pennsylvania Avenue as the place for delivery of any offers; indeed, nothing in the amendments purported to provide any information at all regarding the place of delivery of offers....

## 86. [PATENTS AS GROUNDS FOR SOLE-SOURCE PROCUREMENT: An Unknown Rule?](#)

Nash & Cibinic Report | August 2014 | 28 No. 8 Nash & Cibinic Rep. NL ¶ 44



We are beginning to find out that many Contracting Officers and their lawyers do not know about the Government Accountability Office rule that patents are not a valid grounds for a sole- source procurement. A decision illustrating this phenomenon is Infrastructure Defense Technologies, LLC v. U.S., 81 Fed. Cl. 375 (2008), rejecting a protest of a...

...Both Justifications also stated that the Corps of Engineers "investigated and evaluated the feasibility of development of a [Commercial Item](#) Description (CID) or a Brand Name or Equal Purchase [Item](#) Description for purposes of solicitation on the basis of full and open competition....

...The [items](#) are part-numbered [items](#) for which the Government does not possess and cannot develop complete unrestricted technical data to be referenced in this solicitation....

## 87. [GUIDANCE FOR DEPARTMENT OF DEFENSE ACQUISITION PERSONNEL](#)

Nash & Cibinic Report | February, 2005 | 19 No. 2 Nash & Cibinic Rep. ¶ 9



We took a look at the new Defense Acquisition Guidebook (available at [http:// akss.dau.mil/DAG](http://akss.dau.mil/DAG)) to see how it treated the procurement process. As reported at 46 GC ¶ 408(a), this "provisional release" of the Guidebook is intended to supplement the policy documents, DOD Directive 5000.1 and DOD Instruction 5000.2. In fulfilling this function, it...

...Those purchasing Performance Based Logistics should follow Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) guidance, as appropriate, for the acquisition of logistics services and support, and should seek to utilize FAR Part 12-"Acquisition of [Commercial Items](#)" to acquire Performance Based Logistics as a [commercial item](#)....

...In footnote 3, the decision quotes the regulations: Specifically, 48 C.F.R. § 315.305(a)(1) advises that The [CO] should request the project officer to analyze [items](#) such as the number of labor hours proposed for various labor categories; the mix of labor hours and categories of labor in relation to the technical requirements of the project; the kinds and quantities of material, equipment, and supplies; types, numbers and hours/days of proposed consultants; logic of proposed subcontracting; analysis of the travel proposed including number of trips, locations, purpose, and travelers; and kinds and quantities of information technology....

## 88. [UNILATERAL PURCHASE ORDERS: When Are They Binding?](#)

Nash & Cibinic Report | March 2007 | 21 NO. 3 Nash & Cibinic Rep. ¶ 11



We don't get many offer/acceptance issues in the world of Government contracting, but we have had an interesting run of cases dealing with unilateral purchase orders. It is clear that a purchase order is an offer by the Government that is binding on both parties by acceptance. See FAR 2.101, stating: Purchase order, when issued by the Government,...

[...Whether a supplier is entitled to compensation is dependent on compliance with the delivery provisions, line item specification requirements, and requirements of provisions incorporated by reference....](#)

[...FAR 13.302-4 states: \(a\) If a purchase order that has been accepted in writing by the contractor is to be terminated, the contracting officer shall process the termination in accordance with-- \(1\) \[FAR\] 12.403\(d\) and 52.212-4\(l\) for \*\*commercial items\*\*; or \(2\) \[FAR\] Part 49 or 52.213-4 for other than \*\*commercial items\*\*....](#)

## **89. BUYING COMMERCIAL SPARE PARTS: CAN DOD GET REASONABLE PRICES?**

Nash & Cibinic Report | March, 2000 | 14 No. 3 Nash & Cibinic Rep. ¶ 14



A recent report of the General Accounting Office, Contract Management: A Comparison of DOD and **Commercial** Airline Purchasing Practices, GAO/NSIAD-00-22 (Nov. 29, 1999), refocused our attention on the difficult problem of obtaining a reasonable price for **commercial** parts. As we discussed in our April 1998 Dateline, the Inspector General of the...

[...Thus, in another report, Contract Management: DOD Pricing of \*\*Commercial Items\*\* Needs Continued Emphasis, GAO/NSIAD-99-90 \(June 24, 1999\), GAO found that in one-half of the procurements reviewed, the only price analysis was a comparison of the offered price with the catalog price or the prior price, while in the other half of the procurements the analysis included some other data such as \*\*commercial\*\* prices....](#)

[...We conclude that the Government has the ability to use \*\*commercial\*\* buying techniques to get good prices for \*\*commercial\*\* spare parts....](#)

## **90. COST PRINCIPLES CHANGES CHART: FAR 1990 EDITION**

Nash & Cibinic Report | February, 1996 | 10 No. 2 Nash & Cibinic ¶ Rep. 7



When allowability questions arise, the general rule is that the version of the Cost Principles in effect on the date of the contract governs. Because the Cost Principles undergo periodic changes, contractors and Government personnel often find it necessary to determine which version of the Cost Principles governs a particular contract. We started...

[...The term "\*\*commercial items\*\*" substituted for "\*\*commercial\*\* products" in cost principle for facilities contracts....](#)

[...\(This FAC also contains the FAR 52.212-4 clause, "Contract Terms and Conditions-- \*\*Commercial Items\*\*," which provides that the Cost Principles do not apply to convenience termination claims under \*\*commercial\*\* contracts.\)...](#)

## **91. DATELINE OCTOBER 2008 • THE NASH & CIBINIC REPORT ROUNDTABLE**

Nash & Cibinic Report | October 2008 | 22 NO. 10 Nash & Cibinic Rep. DATE



Soon you should receive, in a separate envelope, your Invitation to the 2008 Nash & Cibinic Report Roundtable, which includes the Roundtable program and your Registration Form. Please note that (1) this is the only Invitation you will receive, (2) your registration must be made on the included Form, and (3) we must receive your registration no...

[...Capsule Data: The Roundtable will be held on Thursday, December 4 \(8:30 a.m. to 5 p.m.\) and Friday, December 5 \(8:30 a.m. to 12 noon\) at The George Washington University's E Street Conference Center in Washington, DC. Six 11/2 hour sessions will deal with the following topics: Effective Contract Administration • Choosing Between Arbitration, Mediation & Litigation • The Regulations: Problems In Quality & Communication • Construction As A \*\*Commercial Item\*\* • Meaningful Discussions In Negotiated Procurement • Obtaining Sufficient Intellectual Property Rights....](#)

## 92. [DATELINE NOVEMBER 2005](#)

Nash & Cibinic Report | November 2005 | 19 NO. 11 Nash & Cibinic Rep. DATE



In a hurried response to Hurricane Katrina, Congress again decided that the basic procurement statutes were inadequate for the relief and rescue mission. Thus, the Second Emergency Supplemental Appropriations Act To Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005, Public Law 109-62, 119 Stat. 1990 (Sept. 8, 2005),...

[...See also Dateline January 2003 commenting on the authority given to the Department of Homeland Security to follow higher thresholds with regard to simplified acquisition and \*\*commercial item\*\* procedures....](#)

## 93. [The Nonmanufacturer Rule: When Does It Apply?](#)

Nash & Cibinic Report | September 2006 | 20 NO. 9 Nash & Cibinic Rep. ¶ 44



In a recent preaward bid protest decision, Rotech Healthcare, Inc. v. U.S., 71 Fed. Cl. 393 (2006), the U.S. Court of Federal Claims, in a case of first impression, interpreted the nonmanufacturer rule in a way that could have a significant effect on small business set-asides. Under the Small Business Act, the Small Business Administration's...

[...The VA considered the acquisitions to be for services and sought to award a \*\*commercial items\*\* contract under FAR Part 12....](#)

[...That word encompasses the terms end \*\*item\*\*, manufactured \*\*item\*\*, and product, which are used in the statute, the SBA regulations, and by the court in Rotech.\)...](#)

## 94. [ADOPTING POLICIES THAT PROTECT COMMERCIAL INTELLECTUAL PROPERTY RIGHTS: A CHALLENGE FOR DOD](#)

Nash & Cibinic Report | November, 2000 | 14 No. 11 Nash & Cibinic Rep. ¶ 57



On September 5, 2000, Under Secretary of Defense for Acquisition, Technology, and Logistics Jacques Gansler sent a memorandum to the military services emphasizing the need for better training of procurement personnel on flexible approaches to Department of Defense rights in intellectual property that will attract **commercial** companies that have...

[...First, it will find that while DOD has a relatively protective "Technical Data-- \*\*Commercial Items\*\*" clause in DFARS 252.227-7015 for use in buying purely \*\*commercial items\*\*, DFARS 227.7102-3\(b\) prohibits the use of that clause "if the Government will pay any portion of the development costs."...](#)

[...Thus, this policy is seen by some \*\*commercial\*\* contractors as rather heavy-handed Government intervention into the \*\*commercial\*\* marketplace....](#)

## 95. [CLARIFYING THE TIME-AND-MATERIALS PAYMENT CLAUSE: A Lost Cause?](#)

Nash & Cibinic Report | November 2005 | 19 NO. 11 Nash & Cibinic Rep. ¶ 54



In May 2004, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council opened Federal Acquisition Regulation Case 2004-015 with the stated objective of clarifying the "Payments Under Time-and-Materials and Labor-Hour Contracts" clause at FAR 52.232-7. The matter to be clarified was whether T&M contractors were to be...

[...The Councils are proposing to revise paragraph \(b\)\(8\) of the FAR clause at 52.232-7 to specifically state that the Government does not pay profit or fee to the prime contractor on materials \(except for \*\*commercial items\*\* discussed in \[Item 4\]\(#\) above \["Contractor furnished material"\] or as otherwise provided for in FAR 31.205-26\)....](#)

...(2) The Government will (i) pay the Contractor the catalog or market price of materials of its own production that are **commercial items**, and (ii) reimburse the Contractor for the allowable costs of other materials in accordance with FAR 52.216-7, Allowable Cost and Payment; and (c) Incidental services....

## 96. **LATE IS LATE: Even With Two Feet Of Snow**

Nash & Cibinic Report | July 2010 | 24 NO. 7 Nash & Cibinic Rep. ¶ 33



Our readers know that we are not enthusiasts for the strict late proposal rule. See, for example, Postscript: Late Final Proposal Revisions, 21 N&CR ¶ 60. Nonetheless, it is the rule, and the decision in CFS-INC, JV, Comp. Gen. Dec. B-401809.2, 2010 CPD ¶ 85, gives us a new wrinkle on it. In CFS-INC, the issue was the time for submission of...

...This language is also contained in the solicitation provisions "Instructions to Offerors-- Competitive Acquisitions" at Federal Acquisition Regulation 52.215-1, and "Instructions to Offerors-- **Commercial Items**" at FAR 52.212-1....

## 97. **RIGHTS IN TECHNICAL DATA: HOW MUCH IS ENOUGH?**

Nash & Cibinic Report | November, 2004 | 18 No. 11 Nash & Cibinic Rep. ¶ 46



A recent report of the Government Accountability Office, Opportunities To Enhance the Implementation of Performance-Based Logistics (GAO-04-715, Aug. 16, 2004), raises an interesting question as to whether the military services are obtaining sufficient rights in technical data in implementing their new "performance-based logistics" (PBL) technique....

...It is interesting to note that the standard clause to be used when obtaining **commercial items**, the "Technical Data-**Commercial Items**" clause at DFARS 252.227-7015, does not give the Government a Government license right in technical data pertaining to such **items**....

...It seems clear that many, if not most, **commercial** companies will be unwilling to agree to give the Government unlimited rights to their technology when they agree to incorporate their **commercial** technology in elements of a weapon system....

## 98. **RECOUPMENT: A POLICY ENIGMA**

Nash & Cibinic Report | March, 1992 | 6 No. 3 Nash & Cibinic Rep. ¶ 18



After many years of seclusion, recoupment has finally hit the headlines. However, it is sufficiently obscure to require that we define it before we discuss it. Recoupment is the recovery of nonrecurring costs of developing and preparing a product for manufacture from other buyers of that product. It is based on the theory that if the Government...

...When recoupment is applied to **commercial items** that derive from military **items**, the policy issues become much more difficult....

...It would also redefine "derivative **items**" to include only **items** with 50% commonality....

## 99. **FIRM-FIXED-UNIT-PRICE vs. TIME-AND-MATERIALS: A Good Alternative For Services**

### **Acquisition**

Nash & Cibinic Report | April 2015 | 29 No. 4 Nash & Cibinic Rep. NL ¶ 18



Wouldn't it be nice to have an alternative to time-and-materials and labor-hour contracts? We think there is one — the firm-fixed-unit-price (FFUP) contract. You won't find any mention of it in Federal Acquisition Regulation Part 16, where FAR 16.202-1 describes firm-fixed-price (FFP) contracts as follows: A firm-fixed-price contract provides for a...

...The table below shows how a T&M line **item** and its informational subline **items** should be structured:...

[...To show in more detail how an FFUP contract might work, consider a \*\*commercial item\*\* contract awarded by the Department of the Interior for flight services....](#)

### 100. **POSTSCRIPT: NOTICE OF CHANGES**

Nash & Cibinic Report | June, 2004 | 18 No. 6 Nash & Cibinic Rep. ¶ 25



Back in March 1987, our first year of writing this Report, Ralph wrote about the conflict between clauses requiring notice of changes and decisions seeming to ignore the requirements of the clauses, Notice of Changes: Conflicts Between Clauses and Decisions, 1 N&CR ¶ 20. Several recent decisions dealing with notice requirements for constructive...

[...The FAR 52.212-4 "Contract Terms and Conditions- \*\*Commercial Items\*\*" clause only provides for bilateral changes and does not mention constructive changes....](#)

[...Ralph discussed earlier cases applying constructive change logic to that clause in \*\*Commercial Item\*\* Disputes: Using New Contract Language, 17 N&CR ¶ 2....](#)

### 101. **ACQUISITION REFORM: A PROGRESS REPORT**

Nash & Cibinic Report | October, 2002 | 16 No. 10 Nash & Cibinic Rep. ¶ 48

Steven Kelman, who spearheaded the acquisition reform movement in the Clinton Administration, has published Working Paper No. 3: Remaking Federal Procurement, in the Visions series of the Kennedy School of Government at Harvard University (available at <http://www.ksg.harvard.edu/visions/publication/kelman.pdf>). See also 31 Pub. Cont. L.J. 581...

[...His discussion of the \*\*commercial item\*\* initiatives includes the movement away from military specifications....](#)

[...Steve identifies four major elements of the acquisition reform movement of the 1990s-\(1\) streamlining, \(2\) best value procurement, \(3\) using \*\*commercial items\*\*, and \(4\) partnership between Government and industry....](#)

### 102. **WHAT IS A SUBCONTRACT? WHO IS A SUBCONTRACTOR?: Confusion Prevails**

Nash & Cibinic Report | April 2012 | 26 NO. 4 Nash & Cibinic Rep. ¶ 19

Richard N. Kuyath of the Office of General Counsel of 3M Company has brought to our attention a Department of Defense interpretation of the definition of "subcontract." The DOD's interpretation has significant implications and has prompted us to think yet again about the ways in which the Federal Acquisition Regulation does and does not define the...

[...That clause is incorporated by reference into contracts for \*\*commercial items\*\* by FAR 52.212-4, "Contract Terms and Conditions-- \*\*Commercial Items\*\*" \(Feb 2012\)," paragraph \(e\)....](#)

[...Such purchases include materials, parts, equipment, and services that are to be used in operations but that will not be incorporated into any deliverable \*\*item\*\*....](#)

### 103. **BAD REGULATIONS OR BAD DECISIONS?**

Nash & Cibinic Report | July, 1993 | 7 No. 7 Nash & Cibinic Rep. ¶ 41

Vice President Gore's National Performance Review may turn up some procurement problems that can be corrected by new statutes or regulations. However, his steam trap and lawn mowing examples fall far short. USA Today (May 25, 1993, at 2B) gave the following report on an interview with the Vice President: Beyond the White House, Gore said there are...

[...Another technique is the requirements contract, which is particularly suited for high-volume purchases of \*\*commercial-type items\*\*....](#)

[...They wound up paying \\$40 for each mowing. Ludicrous as they are, these stories pale by comparison to the purchases of toilet seats, allen wrenches, coffee pots, ash trays and other assorted \*\*items\*\* involved in past demagoguery....](#)

#### 104. [EVALUATING COMPETITIVE PROPOSALS: RELATIVE IMPORTANCE OF THE FACTORS](#)

Nash & Cibinic Report | March, 1992 | 6 No. 3 Nash & Cibinic Rep. ¶ 17

There appears to be no greater area of confusion in the competitive negotiation process than the methods used to state the relative importance of the evaluation factors in the source selection plan and the Request For Proposals (RFP). The requirement that the RFP contain this statement of relative importance is clearly stated in 10 U.S.C....

...(2) Section 131 would amend the Office of Federal Procurement Policy Act, 41 U.S.C. 414, to require that [commercial item](#) acquisitions include price or cost to the Government as an evaluation factor with a relative importance of not less than 30% of all evaluation factors....

#### 105. [OBTAINING MORE RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE: A Steady Erosion Of Contractor Rights](#)

Nash & Cibinic Report | January 2012 | 26 NO. 1 Nash & Cibinic Rep. ¶ 5

The Department of Defense continues to move down the road of taking more and more intellectual property rights from its contractors. In *New Data Rights Legislation: Killing the Goose?*, 21 N&CR ¶ 63, we described the new statutory requirement in 10 USCA § 2320 to assess the need for data rights during the life cycle of a weapon system to allow...

...The implementation applies to contracts for [commercial items](#) as well as noncommercial [items](#)....

...It also contains considerable guidance on negotiating license prices, suggesting several techniques that might be used to determine the value of a license and pointing out the certified cost or pricing data must be provided by the offeror "unless an exception applies" (presumably referring to sole-source procurements although the document contains some very confusing language on whether the rule on minor modifications to [commercial items](#) applies)....

#### 106. [POSTSCRIPT III: EXEMPTION 4 OF THE FREEDOM OF INFORMATION ACT](#)

Nash & Cibinic Report | January, 2005 | 19 No. 1 Nash & Cibinic Rep. ¶ 4

We have been following the struggle of McDonnell Douglas to prevent the disclosure of unit prices for several years. See *Postscript I: Exemption 4 of the Freedom of Information Act*, 13 N&CR ¶ 52, where I discussed the implications of *McDonnell Douglas Corp. v. National Aeronautics & Space Administration*, 180 F.3d 303 (D.C. Cir. 1999), 41 GC ¶ 313,...

...The same notice is contained in the FAR 52.212-1 "Instructions to Offerors- [Commercial Items](#)" solicitation provision....

...The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and (2) Mark each sheet of data it wishes to restrict with the following legend: Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal. It should be noted that this provision is not contained in the FAR 52.212-1 [commercial item](#) solicitation instructions....

#### 107. [COMPLICATING SIMPLIFIED ACQUISITION PROCEDURES: A NEW TWIST](#)

Nash & Cibinic Report | January, 2002 | 16 No. 1 Nash & Cibinic Rep. ¶ 2

A recent decision of the U.S. Comptroller General, *Finlen Complex, Inc.*, Comp. Gen. Dec. B-288280, 2001 CPD ¶ 167, provides a clear illustration that acquisition reform has not been fully accomplished. The case involved a very simple procurement for meals, lodging, and transportation for applicants arriving at a military processing center in Butte,...

...The agency correctly identified the procurement as one for [commercial](#) services and decided that it would use the Federal Acquisition Regulation Subpart 13.5 test program that permits the use of simplified acquisition procedures for any procurement of [commercial](#) supplies or services not exceeding \$5 million....

...Moreover, we are sensitive to the fact that the thrust of FAR parts 12 and 13 is to avoid the use of procedures that constrict and complicate the acquisition process, and that FAR §§ 12.602(a) and 13.106-1(a)(2) do not, on their face, limit a contracting

[officer's discretion to disclose, or not disclose, the relative weight of evaluation criteria in a \*\*commercial item\*\* procurement conducted using simplified procedures....](#)

### **108. FADDISM IN THE PROCUREMENT PROCESS**

Nash & Cibinic Report | June, 1996 | 10 No. 6 Nash & Cibinic ¶ Rep. 27

In our wandering around the Government procurement world, we have noticed that a number of contracting activities are adopting new techniques as standard operating policy. In this way, the latest “fad” becomes the innovation mode for that activity. Our immediate reaction is that this is wrong because there is no single best technique that will lead...

[...The same issue comes up in simplified acquisitions under FAR Part 13 and acquisition of \*\*commercial items\*\* under FAR Part 12....](#)

[...We are especially concerned that the best value fad may migrate too far into simplified acquisitions and acquisition of \*\*commercial\*\* products....](#)

### **109. PREJUDICE IN AWARD CONTROVERSIES: WHAT COMES FIRST?**

Nash & Cibinic Report | May, 2003 | 17 No. 5 Nash & Cibinic Rep. ¶ 29

Although it would be an understatement to say that we are not advocates of the protest system, we have been critical of the requirement that a protester demonstrate prejudice before relief is granted. See *Protests: The “No Prejudice Rule*, 11 N&CR ¶ 20, where I stated that “the rule obscures the failures of an agency’s procurement organization.” In...

[...In \*Johnson Controls World Services, Inc., Comp. Gen. Dec. B-285144\*, 2000 CPD ¶ 108, 42 GC ¶ 327, the Comptroller General refused to rule on whether base operation and maintenance work was a \*\*commercial\*\* service since the “protester has not demonstrated...that \[it\] was prejudiced by the agency’s use of \*\*commercial item\*\* procedures.”...](#)

### **110. INTELLECTUAL PROPERTY RIGHTS IN CONTRACTS WITH COMMERCIAL COMPANIES: MIXED SIGNALS**

Nash & Cibinic Report | January, 2002 | 16 No. 1 Nash & Cibinic Rep. ¶ 5

We’ve been following the efforts of the Department of Defense to adopt intellectual property rights policies that persuade **commercial** companies to make their capabilities available to meet DOD needs. See *Adopting Policies That Protect **Commercial** Intellectual Property Rights: A Challenge for DOD*, 14 N&CR ¶ 57, describing the memorandum that launched...

[...Unless the end result of the research sought under the BAA is a \*\*commercial item\*\*, DOD apparently intends to follow the intellectual property regulations precisely....](#)

[...It will be interesting to see how \*\*commercial\*\* companies respond to this BAA....](#)

### **111. CLEAN CONTRACTING: A New Definition Of Procurement Reform?**

Nash & Cibinic Report | November 2008 | 22 NO. 11 Nash & Cibinic Rep. ¶ 65

Subtitle G of Title VIII of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, which was signed by the President on October 14, 2008, contains a statute called the “Clean Contracting Act of 2008” that applies to almost all Government agencies. See 50 GC ¶ 371. Apparently, this constitutes the efforts of...

[...Section 868 calls for the issuance of a FAR provision requiring a CO to obtain either sales price information or cost information when an agency procures a \*\*commercial item\*\* that has not been “sold competitively in substantial quantities in the \*\*commercial\*\* marketplace.”...](#)

[...\*\*Commercial\*\* Services...](#)

### **112. POSTSCRIPT: ATTRACTING COMMERCIAL COMPANIES TO GOVERNMENT CONTRACTING**

Nash & Cibinic Report | October 2014 | 28 No. 10 Nash & Cibinic Rep. NL ¶ 56

In Attracting **Commercial** Companies to Government Contracting: A Case Study, 27 N&CR ¶ 22, we described a dispute in which a **commercial** contractor entered into a contract to build a simple modular building, encountered varying interpretations of the specification by different Government personnel, finally had to file a claim to get compensation for...

...There, the contractor had entered into a **commercial item** contract for two refrigeration units plus 12 months of maintenance at \$600 per month....

...A simpler suggestion would have been that a **commercial** company should not ever consider entering the Government marketplace if it can make a buck doing **commercial** work....

### 113. **POSTSCRIPT: COMPETITIVE PROTOTYPES**

Nash & Cibinic Report | April 2013 | 27 NO. 4 Nash & Cibinic Rep. ¶ 18

As our readers know, we are advocates of the use of competitive prototyping as a means of injecting real competition into the acquisition of systems. See our latest push for this technique in Competitive Prototypes: A Better Way To Buy, 26 N&CR ¶ 49, and our earlier discussions, Weapon System Procurement Planning: A Memory Loss, 21 N&CR ¶ 14, and...

...Thus, with this type of **commercial item** as the base vehicle, the agency might have been able to obtain firm-fixed-price contracts for the production of the helicopters rather than the fixed-price-incentive contracts being used for the total package procurement....

...The procurement in question was the Air Force's second attempt to buy a modified **commercial** helicopter to meet the needs of its rescue mission....

### 114. **PRICE REALISM: A Primer**

Nash & Cibinic Report | January 2014 | 28 No. 1 Nash & Cibinic Rep. NL ¶ 1

In source selection, see Federal Acquisition Regulation Subpart 15.3, cost realism analyses seek to determine whether an offeror's proposed estimated cost or fixed price is high enough to cover the offeror's performance costs. FAR 2.101 defines cost realism as follows: Cost realism means that the costs in an offeror's proposal—FAR 15.404-1(d)(1)...

...Since price realism analysis seeks to determine whether proposed prices are high enough to cover the costs of performance, it does not make sense to conduct such analyses when buying **commercial items** or other **items** for which prices are not set by estimating costs and adding markups....

...Market-based pricing is used primarily in the acquisition of **commercial items**....

### 115. **POSTSCRIPT: THE COST OF OVERSIGHT IN DEFENSE PROCUREMENT**

Nash & Cibinic Report | June, 1995 | 9 No. 6 Nash & Cibinic Rep. ¶ 37

In The Cost of Oversight in Defense Procurement, 9 N&CR ¶ 19, we discussed a recent study that found an 18% delta between the cost of a defense contract for a weapon system and the cost of a comparable **commercial item**. This difference was in the systems imposed by the Department of Defense to ensure quality, timely performance, accurate cost...

...In The Cost of Oversight in Defense Procurement, 9 N&CR ¶ 19, we discussed a recent study that found an 18% delta between the cost of a defense contract for a weapon system and the cost of a comparable **commercial item**....

...Permitting alternative proposals is an excellent way to get rid of military specifications where there are **commercial** standards or **commercial** techniques available for use, but it is not a very effective way to get rid of the excessive management and accounting paperwork....

### 116. **DEBRIEFING: CONGRESS HAS NOW SPOKEN**

Nash & Cibinic Report | January, 1995 | 9 No. 1 Nash & Cibinic ¶ Rep. 3



For many years we have taught that postaward debriefing is an important part of the competitive negotiation process and that agencies should give losing offerors a thorough debriefing. In 1990, John laid out our views in *Debriefing: Tell It Like It Is*, 4 N&CR ¶ 43. Presciently, he predicted that if the Government procuring agencies did not provide...

...(B) The debriefing shall include, at a minimum-- (i) the agency's evaluation of the significant weak or deficient factors in the offeror's offer; (ii) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror; (iii) the overall ranking of all offers; (iv) a summary of the rationale for the award; (v) in the case of a proposal that includes a **commercial item** that is an end item under the contract, the make and model of the **item** being provided in accordance with the offer of the contractor awarded the contract; and...

### **117. SOLE-SOURCE CONTRACTING: "I ONLY HAVE EYES FOR YOU"**

Nash & Cibinic Report | July, 2003 | 17 No. 7 Nash & Cibinic Rep. ¶ 40

The first verse of that old standard goes, "My love must be a kind of blind love, I can't see anyone but you." One of the major purposes of the Competition In Contracting Act, 10 U.S.C. § 2304 and 41 U.S.C. § 253 was to cure that affliction. Under CICA, Contracting Officers must "obtain full and open competition through the use of competitive...

...through another agency or from a specified source, or the agency's need is for a brand-name **commercial item** for authorized resale;2(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or2(7) the head of the agency-2(A) determines that it is necessary in the public...

### **118. FRAGMENTATION OF REQUIREMENTS TO PERMIT USE OF SIMPLIFIED ACQUISITION PROCEDURES**

Nash & Cibinic Report | August, 2000 | 14 No. 8 Nash & Cibinic Rep. ¶ 40

One of the long-standing rules of Government procurement is that an agency may not fragment its requirements in order to take advantage of the lower competition standard in the simplified acquisition procedures. The rule is stated in 10 USC § 2304(g)(2) and 41 USC § 253(g)(3) as follows: "A proposed purchase or contract for an amount above the...

...As it obtained the funds for each **item**, it issued a requisition, and the CO bought that **item** using simplified acquisition procedures....

...This requirement is implemented in Federal Acquisition Regulation 13.003(c) with the following language: Do not break down requirements aggregating more than the simplified acquisition threshold (or for **commercial items**, the threshold in [FAR] subpart 13.5) or the micro-purchase threshold into several purchases that are less than the applicable threshold merely to-- (1) Permit use of simplified acquisition procedures; or (2) Avoid any requirement that applies to purchases exceeding the micro-purchase threshold....

### **119. PRICE/PAST PERFORMANCE TRADEOFFS: WHAT IS BEST VALUE?**

Nash & Cibinic Report | June, 2004 | 18 No. 6 Nash & Cibinic Rep. ¶ 24

One of the recurring themes that we see in best value procurements is an agency making a tradeoff decision where the question is whether the agency should pay a higher price to award to an offeror that has a higher past performance rating. This is fundamentally a problem of risk analysis-assessing whether the lower-rated offeror poses a risk of...

...The protester had received good past performance evaluations from two prior customers that had bought a similar **commercial item**....

...The Comptroller General found this decision reasonable, describing the agency's reasoning as follows: In her decision, the [source selection authority] notes the crucial role of this power switching unit to the functioning of two combat vehicles, the backlog of orders for the **item**, and the resulting Army decision to place significant weight on previous successful production of

the "exact same **item**" in establishing the selection criteria....In describing her tradeoff rationale, the SSA states, in part, that "[a]lthough [the awardee's] proposed price is higher than [the protester's]....

## 120. FULLY NUMERICAL EVALUATION SYSTEMS: What Is The Rule?

Nash & Cibinic Report | April 2007 | 21 NO. 4 Nash & Cibinic Rep. ¶ 17

We always thought that the Government Accountability Office did not demand an actual source selection tradeoff analysis if an agency was using a fully numerical evaluation and scoring scheme. In the past, if an agency assigned points to both nonprice factors and price and stated in the Request for Proposals that the offeror with the highest number...

...In a **commercial item**, best value procurement where the agency used a fully numerical system but did not state in the RFP that the offeror with the most points would win, the GAO granted a protest because the agency did not base the source selection decision on a real tradeoff analysis....

## 121. INTERAGENCY CONTRACTING: It's Not A Way To Avoid Legal Requirements

Nash & Cibinic Report | October 2007 | 21 NO. 10 Nash & Cibinic Rep. ¶ 17

One benefit of the spree of interagency contracting that has occurred in recent years is that we have learned a lot of important legal rules applying to such contracts. These have been enunciated in decisions of the Government Accountability Office in response to requests from the Inspector General of the Department of Interior concerning contracts...

...We have been provided no information suggesting that the printers GovWorks purchased on DOD's behalf are anything but readily available **commercial items** that GovWorks could have purchased on DOD's behalf with little lead time....

## 122. RIGHTS TO INFORMATION EMBEDDED IN COMPUTER SOFTWARE: A Challenging Issue

Nash & Cibinic Report | September 2007 | 21 NO. 9 Nash & Cibinic Rep. ¶ 44

When an agency buys a computerized system to handle its information, the agency faces the challenge of ensuring that it does not lose the rights to the information that it places in the system. At the same time, if the system that the agency buys uses a **commercial** computer program, the contractor wants to maintain its rights in that program, a...

...Generally, offerors and contractors shall not be required to-- (1) Furnish technical information related to **commercial** computer software or **commercial** computer software documentation that is not customarily provided to the public; or (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose **commercial** computer software or **commercial** computer software documentation except as mutually agreed to by the parties....

...At the same time, if the system that the agency buys uses a **commercial** computer program, the contractor wants to maintain its rights in that program, a position Federal Acquisition Regulation 12.212 supports: (a) **Commercial** computer software or **commercial** computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs....

## 123. CONGRESSIONAL GUIDANCE: A Full Employment Endeavor

Nash & Cibinic Report | February 2016 | 30 No. 2 Nash & Cibinic Rep. NL ¶ 11

The National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, which was signed by the President on November 25, 2015, is wondrous in the detailed work that it imposed on the Department of Defense. Title VIII on "Acquisition, Policy, Acquisition Management, and Other Matters" contains 78 sections, almost all of which impose a...

...Section 896 of the Act requires the following "survey": SURVEY.—The Secretary of Defense shall conduct a survey of contractors with the highest level of reimbursements for cost type contracts with the Department of Defense during fiscal year 2014 to estimate industry's cost of regulatory compliance (as a percentage of total costs) with Government-unique acquisition regulations and requirements in the categories of quality assurance, accounting and financial management, contracting and

[purchasing, program management, engineering, logistics, material management, property administration, and other unique requirements not imposed on contracts for \*\*commercial items\*\*....](#)

[...\(E\) Ensuring that the Department of Defense has appropriate access to innovative products, technologies, and processes developed by the private sector for \*\*commercial\*\* use....](#)

#### **124. POSTSCRIPT: ACQUISITION REFORM**

Nash & Cibinic Report | November, 2002 | 16 No. 11 Nash & Cibinic Rep. ¶ 53

Last month in Acquisition Reform: A Progress Report, 16 N&CR ¶ 48, we discussed a recent article by Steven Kelman, Remaking Federal Procurement, 31 Pub. Cont. L.J. 581 (Summer 2002). We received the following letter from Vern Edwards commenting on Steve's article: Dear Professor Nash: I would like to comment on Steve Kelman's paper on acquisition...

[...The acquisition reformers wrote rules that said contracting officers "shall" evaluate past performance and "shall" write performance work statements and "shall" put incentives in service contracts and "shall" make multiple awards of indefinite delivery, indefinite quantity contracts and "shall" establish a competitive range of all of the most highly rated proposals and "shall" acquire \*\*commercial items\*\* and, well, shall I go on?...](#)

[...The "people without a clue" are no better \*\*off\*\* than they were before acquisition reform, and there are a lot of them in government contracting and legal offices....](#)

#### **125. DEFAULT TERMINATION OF ORDERS UNDER MULTIPLE AWARD SCHEDULES: CLEARING UP THE CONFUSION**

Nash & Cibinic Report | July, 2003 | 17 No. 7 Nash & Cibinic Rep. ¶ 39

If you ever want to read about a situation where all of the people working on a contract were confused, look at the decision in United Parcel Systems, Inc., ASBCA 53915, 2003 WL 2012838 (May 2, 2003), 45 GC ¶ 212. In that case, the Contracting Officer of the agency that had issued an order under a multiple award schedule "contract" awarded by...

[...It contained the standard "Contract Terms and Conditions- \*\*Commercial Items\*\*" clause in Federal Acquisition Regulation 52.212-4, which includes the following paragraphs: \(f\) Excusable delays....](#)

[...If the schedule contracting officer has terminated any \*\*items\*\* covered by the schedule contract, no further orders may be placed for those \*\*items\*\*....](#)

#### **126. UNBALANCED BIDS AND PROPOSALS: WHO ESTIMATED THESE QUANTITIES?**

Nash & Cibinic Report | May, 2004 | 18 No. 5 Nash & Cibinic Rep. ¶ 22

Every once in a while we come upon a decision that raises more questions than it answers. Such a case is Burney & Burney Construction Co., Comp. Gen. Dec. B-292458.2, 2004 CPD ¶ 49, 46 GC ¶ 146. Because it involves the perennial problem of unbalanced bids or proposals, we thought that we would take another look at the subject of unbalancing....

[...\(2\) All offers with separately priced line \*\*items\*\* or subline \*\*items\*\* shall be analyzed to determine if the prices are unbalanced....](#)

[...The greatest risks associated with unbalanced pricing occur when- \(i\) Startup work, mobilization, first articles, or first article testing are separate line \*\*items\*\*; \(ii\) Base quantities and option quantities are separate line \*\*items\*\*; or \(iii\) The evaluated price is the aggregate of estimated quantities to be ordered under separate line \*\*items\*\* of an indefinite-delivery contract....](#)

#### **127. REFORMING THE PROCUREMENT PROCESS: PART II--ADDITIONAL ISSUES**

Nash & Cibinic Report | March, 1993 | 7 No. 3 Nash & Cibinic Rep. ¶ 12

Last month, we began our discussion of three proposals for reforming the procurement process that merit serious consideration. Reforming the Procurement Process: Part I--The Proposals Are Coming, 7 N&CR ¶ 7. The major proposal is the Report of the Department of Defense (DOD) Acquisition Law Advisory Panel (the "Section 800 Panel"), Streamlining...

...The Panel also recommended that the new statute exempt all procurements of **commercial items** and components and all simplified purchases from any domestic source requirements....

...product is substantially transformed within the United States into a new and different article of **commerce** with a name, character, or use distinct from that of the article or articles from which it was so transformed.<sup>5</sup>The use of this "substantial transformation" test will ease the determination of what constitutes a domestic end product and will bring uniformity to this area....

### **128. POSTSCRIPT II: EXEMPTION 4 OF THE FREEDOM OF INFORMATION ACT**

Nash & Cibinic Report | November, 2002 | 16 No. 11 Nash & Cibinic Rep. ¶ 51

"Exemption 4" of the Freedom of Information Act, 5 USC § 552(b)(4), provides that the Act's requirement for the release of information does not apply to "trade secrets and **commercial** or financial information obtained from a person and privileged or confidential." In interpreting this provision, the courts have held that a contract's unit prices are...

...It states at paragraph (f): (11) The Government may disclose the following information in postaward debriefings to other offerors: (i) The overall evaluated cost or price and technical rating of the successful offeror; (ii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection; (iii) A summary of the rationale for award; and (iv) For acquisitions of **commercial items**, the make and model of the **item** to be delivered by the successful offeror....

...In Postscript I: Exemption 4 of the Freedom of Information Act, 13 N&CR ¶ 52, Ralph discussed the implications of that D.C. Circuit decision and noted, "One would have to conclude from this decision that an agency may not release contract line-**item** prices on any **item** where there is going to be competition in the future."...

### **129. CONTRACTING OFFICER AUTHORITY: DOLLAR VALUE LIMITS**

Nash & Cibinic Report | November, 1998 | 12 No. 11 Nash & Cibinic Rep. ¶ 59

One of the basic rules of Government contracting is that a Contracting Officer's authority to contract is circumscribed by the dollar limitations, if any, contained in the CO's delegation of authority, *Edwards v. U.S.*, 22 Cl. Ct. 411 (1991), 10 FPD ¶ 11. Moreover, it is a fact of life that very few Government contracts end up with the same dollar...

...However, FAR 12.203 and 13.500(a), which authorize simplified acquisition procedures for **commercial items** state that the procedures are available for contracts "not exceeding \$5,000,000, including options" (emphasis added)....

### **130. POSTSCRIPT: REVERSE AUCTIONS**

Nash & Cibinic Report | August 2015 | 29 No. 8 Nash & Cibinic Rep. NL ¶ 46

In *Reverse Auctions: A Growing Procurement Technique*, 28 NCRNL ¶ 5, we discussed a December 2013 report of the Government Accountability Office that provided the first data on reverse auctions and contained a number of recommendations to improve the process. See GAO, *Reverse Auctions: Guidance Is Needed To Maximize Competition and Achieve Cost...*

...These circumstances would typically exist in acquisitions for **commercial items** and simple services that often fall under the [simplified acquisition threshold]....

...Certainly, it would be odd to see a **commercial** auctioneer conducting an auction with only one person in the room....

### **131. QUALIFICATIONS-BASED CONTRACTOR SELECTION: Can Agencies Use It Now?**

Nash & Cibinic Report | June 2016 | 30 No. 6 Nash & Cibinic Rep. NL ¶ 29

We have long wondered why it is that when the U.S. Fish and Wildlife Service wants to select an architect or an engineer to design an outhouse for a national wildlife refuge it must comply with Federal Acquisition Regulation Subpart 36.6, "Architect-Engineer Services," and separate the process of contractor selection and contracting pricing. The...

...Thus, unless architect and engineer services are categorized as **commercial items**, companies that compete for Government contracts will have to submit certified cost or pricing data, something that many of them will know little about....

### 132. **UNDULY RESTRICTIVE REQUIREMENTS PROTESTS: A Growing Phenomenon?**

Nash & Cibinic Report | January 2011 | 25 NO. 1 Nash & Cibinic Rep. ¶ 3

There has been a flurry of recent protests in the Government Accountability Office asserting that there was an unduly restrictive provision in a solicitation--arguing that the procurement should be opened up for greater competition. In such cases, the GAO will scrutinize the agency's justification for the restriction to determine if it is based on...

...Thus, for example, the agency does not address why, in the context of this **commercial item** acquisition, a prime contractor, which like the protester has experience providing **commercial** family health services, could not satisfy the agency's needs by proposing a subcontractor with experience providing military [family advocacy program] services....

### 133. **AGENCY POLICY MEMOS: The Statutory Publication And Public Comment Rules Apply**

Nash & Cibinic Report | February 2011 | 25 NO. 2 Nash & Cibinic Rep. ¶ 9

On November 24, 2010, the Director of Defense Procurement and Acquisition Policy issued a policy memorandum entitled, Improving Competition in Defense Procurement, available at [http:// www.acq.osd.mil/dpap/policy/policyvault/USA006629-10-DPAP.pdf](http://www.acq.osd.mil/dpap/policy/policyvault/USA006629-10-DPAP.pdf). See 52 GC ¶ 392(c). The memo's key sentence states: To maximize the savings that are obtained through...

...And according to the background statement to the final rule that put the current adequate price competition standards into effect: [T]he final rule may have a significant economic impact on a substantial number of small entities because the final rule will substantially affect the price negotiations of non-competitive **commercial item** contracts....

...proposed price is reasonable in comparison with current or recent prices for the same or similar **items**, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition....

### 134. **THE NEW DEPARTMENT OF DEFENSE PROFIT POLICY It's Long Overdue**

Nash & Cibinic Report | August, 2002 | 16 No. 8 Nash & Cibinic Rep. ¶ 37

In April, the Department of Defense completed the revamping of its profit policy to bring it in line with current reality. See the revision to the DOD weighted guidelines method in Defense Federal Acquisition Regulation Supplement 215.404-71 in 67 Fed. Reg. 20688 (Apr. 26, 2002). The first part of this revamping was issued in 1999. See 64 Fed. Reg....

...Metrics developed by the contractor such as fully loaded labor hours (i.e., cost per labor hour, including all direct and indirect costs) or other productivity measures may provide the basis for assessing the effectiveness of the contractor's cost reduction initiatives over time; (5) The contractor's adoption of process improvements to reduce costs; (6) Subcontractor cost reduction efforts; (7) The contractor's effective incorporation of **commercial items** and processes; or (8) The contractor's investment in new facilities when such investments contribute to better asset utilization or improved productivity....

### 135. **IMPOSING RISK ON CONTRACTORS: An Allowable Procurement Technique**

Nash & Cibinic Report | May 2013 | 27 NO. 5 Nash & Cibinic Rep. ¶ 24

A recent decision of the U.S. Court of Federal Claims got us wondering whether there are any constraints on Government agencies that structure procurements in a way that requires the contractor to assume a high degree of risk. From the reported decisions, it seems as if the answer is no. The decision is Lakeshore Engineering Services, Inc. v. U.S.,....

...There, the court ruled that fixed prices over a 15-year term was not a customary **commercial** practice with the result that the procurement did not meet the requirements for a **commercial item** procurement....

...As part of its initiative to begin deploying the DTS [the software program], it held numerous meetings with the military services, the [**commercial** travel office] industry, including small businesses, and professional travel organizations, and a pre-proposal conference, prior to issuing the [Request for Proposals], to try to decide the best approach to this effort....

### 136. OBSOLETE RITES: It's Time To Discard Them

Nash & Cibinic Report | March 2015 | 29 No. 3 Nash & Cibinic Rep. NL ¶ 13

Green Earthworks Construction, Inc., Comp. Gen. Dec. B-410724, 2015 WL 500839 (Feb. 2, 2015), is another contribution to the heap of evidence that already supports arguments for significant changes in acquisition law and procedure. The protest concerned a \$2.5–\$3 million **commercial item** acquisition for the performance of five small demolition and...

...The protest concerned a \$2.5–\$3 million **commercial item** acquisition for the performance of five small demolition and abatement projects at Fairchild Air Force Base....

...After determining that the individual line **items** are reasonable, the proposed line **item** pricing will be added to confirm the total amount for each offer....

### 137. POSTSCRIPT II: NEGOTIATION IN A COMPETITIVE SITUATION

Nash & Cibinic Report | August, 2001 | 15 No. 8 Nash & Cibinic Rep. ¶ 42

In Negotiation in a Competitive Situation: The Most Radical Change Made by the Rewrite, 12 N&CR ¶ 54, we discussed the dramatic change that the Federal Acquisition Regulation Council made in the new negotiation rule in the 1997 Federal Acquisition Regulation Part 15 Rewrite. To induce Contracting Officers to conduct detailed negotiations with each...

...Government personnel involved in the acquisition shall not engage in conduct that-- (1) Favors one offeror over another; (2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of **commercial items**, or any information that would compromise an offeror's intellectual property to another offeror; (3) Reveals an offeror's price without that offeror's permission....

...For another way of stating this proposition, see Information Network Systems, Inc., Comp. Gen. Dec. B-284854, 2000 CPD ¶ 104: Although discussions must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to "spoon-feed" an offeror as to each and every **item** that could be raised to improve its proposal....

### 138. POSTSCRIPT: CONTRACTING OFFICER AUTHORITY

Nash & Cibinic Report | June 2008 | 22 NO. 6 Nash & Cibinic Rep. ¶ 33

Because Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007), 49 GC ¶ 356, is such an important decision, we are going to track the decisions of the U.S. Court of Federal Claims and the boards of contract appeals to determine how they are dealing with the authority issue. Our readers may remember that Cath-dr/Balti virtually...

...There, in performing a **commercial item** contract for the installation of a telephone system, the contractor found that additional **items** were needed to provide a complete system....

...It added the **items** during installation while communicating with the Government "program analyst" who was the "point of contact" for the work about how it was to be paid for the extra work....

### 139. UNALLOWABLE COST PENALTIES: A Growing Phenomenon?

Nash & Cibinic Report | October 2013 | 27 No. 10 Nash & Cibinic Rep. NL ¶ 49

A 2012 decision of the Armed Services Board of Contract Appeals concerning the assessment of statutory penalties for the inclusion of expressly unallowable costs piqued our curiosity. See Thomas Associates, Inc., ASBCA 57795, 12-2 BCA ¶ 35162, 2012 WL 5199227. There has been very little litigation on this issue but this decision affirming the...

...(b) This section applies to all contracts in excess of \$700,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of **commercial items**....

[...FAR 31.001 and Cost Accounting Standard \(CAS\) 405.20\(a\)\(2\) both define an "expressly unallowable" cost as "a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable."...](#)

#### **140. REFORMING THE PROCUREMENT PROCESS: PART III--REMAINING ISSUES**

Nash & Cibinic Report | April, 1993 | 7 No. 4 Nash & Cibinic Rep. ¶ 18

In the last two months we have discussed three proposals for reforming the procurement process that merit serious consideration. See *Reforming the Procurement Process: Part I--The Proposals Are Coming*, 7 N&CR ¶ 7; *Reforming the Procurement Process: Part II--Additional Issues*, 7 N&CR ¶ 12. The major proposal is the Report of the Department of...

[...The first was the current policy of granting authorization and consent to the use of private patents when an alleged infringement would occur or when a commercial item or component was being procured....](#)

[...Thus, most civilian agency audit is contracted out to either the DCAA or commercial accounting firms....](#)

#### **141. REVERSE AUCTIONS: A Growing Procurement Technique**

Nash & Cibinic Report | January 2014 | 28 No. 1 Nash & Cibinic Rep. NL ¶ 5

In *Reverse Auctions: Guidance Is Needed To Maximize Competition and Achieve Cost Savings*, GAO-14-108 (Dec. 9, 2013), the Government Accountability Office has provided some useful data on the growing use of the reverse auction technique and has recommended that the Federal Acquisition Regulation be amended to contain guidance on how the technique...

[...It suggests that regulations should address the following areas: Certain issues that are not addressed by agencies and could be included in government-wide guidance are whether reverse auctions should: • be limited to commercial items; • be used only for simple services acquisitions; and • be used only for items of a relatively low dollar value \(\\$150,000 or less\)....](#)

[...These requirements may include delivery terms, whether the acquisition must be a brand name item, or other terms specific to the acquisition....](#)

#### **142. EXPLANATION AND JUSTIFICATION IN SOURCE SELECTION DECISIONMAKING: They Are Not The Same Thing**

Nash & Cibinic Report | February 2016 | 30 No. 2 Nash & Cibinic Rep. NL ¶ 6

In its December 10, 2015 report to Congress about bid protests in Fiscal Year 2015, the Government Accountability Office stated that inadequate documentation was the fourth most frequent reason for sustained protests. See <http://www.gao.gov/assets/680/674134.pdf>; see also 58 GC ¶ 1. We have discussed the problem of inadequate documentation several...

[...There is nothing in the source selection document that suggests that the source selection authority believed that Beautify's significantly lower price in this fixed-price, commercial item acquisition reflected any lack of understanding by Beautify of the RFP requirements or that Beautify was otherwise incapable of performing the requirements....](#)

#### **143. POSTSCRIPT: VERIFICATION OF PROPOSALS WHEN MISTAKES ARE SUSPECTED**

Nash & Cibinic Report | November, 2003 | 17 No. 11 Nash & Cibinic Rep. ¶ 56

In *Verification of Proposals When Mistakes Are Suspected: It's Required!*, 14 N&CR ¶ 34, we discussed *Griffy's Landscape Maintenance, LLC v. United States*, 46 Fed. Cl. 257 (2000), 42 GC ¶ 153, which we read as breaking new ground by requiring Contracting Officers to verify proposals when they suspected that mistakes had occurred. We agreed that this...

[...The other decision, \*Houston Air, Inc., Comp. Gen. Dec. B-292382\*, 2003 CPD ¶ 144, 45 GC ¶ 364, deals with a commercial item procurement under FAR Part 12 where the agency solicited requests for quotations but followed FAR 15 procedures....](#)

#### **144. MULTIPLE AWARD SCHEDULES: WHAT ARE THEY?**

Nash & Cibinic Report | November, 1997 | 11 No. 11 Nash & Cibinic Rep. ¶ 60

The increased use of Multiple Award Schedules (MAS) has raised a number of concerns among the legislative and regulatory rulemakers. See Vacketta & Handler, Feature Comment: GSA's MAS Explosion, 39 GC ¶ 408. In addition, the regulations governing these Schedules have recently changed. The General Services Administration Acquisition Regulation...

...In a number of cases, the Comptroller General has indicated that agencies could order unlisted [items](#) (called "incidental" [items](#)) along with listed [items](#), e.g., ViON Corp., Comp. Gen. Dec. B-275069.2, 97-1 CPD ¶ 53....

...While the agency may be on solid ground when it comes to [items](#) specifically listed on MAS schedules, there are limitations on its ability to "piggy back" unlisted [items](#) from the same vendor without seeking competition....

#### 145. [POSTSCRIPT: CREDITS](#)

Nash & Cibinic Report | September, 2003 | 17 No. 9 Nash & Cibinic Rep. ¶ 48

We first wrote about this subject in Credits: Giving It Back, 6 N&CR ¶ 55. Ralph followed that up with Cost Accounting Standards: Do They Permit Contract Repricing, 10 N&CR ¶ 14. Recently, there have been a number of cases dealing with determining whether credits are owed to the Government and how they should be allocated to contracts. These...

...The only contracts where it is safe to definitively say that they do not apply are contracts for [commercial items](#)....

#### 146. [U.S. v. United Technologies Corp.: Where's The "False" Claim?](#)

Nash & Cibinic Report | November 2008 | 22 NO. 11 Nash & Cibinic Rep. ¶ 67

In False Claims Flowing Out of False Statements: Certification Doesn't Matter, 22 N&CR ¶ 54, Ralph reported on what appears to be the concluding chapter in an almost two decade-long defective pricing dispute between the Air Force and United Technologies' Pratt & Whitney that arose out of a contract for F-100-PW-220 jet aircraft engines. Previously,...

...In U.S. ex rel Ubl v. IIF Data Solutions, 2007 WL 2220586 (E.D. Va. 2007), a whistleblower alleged that his employer had falsely claimed that it qualified for the [commercial item](#) exemption under Federal Acquisition Regulation 15.403-1(b)(3) and that the prices paid by the Government were substantially higher than they would have been had the contractor submitted cost and pricing data as required by TINA....

...Thus, in U.S. ex rel. Wilkins v. North American Construction Corp., 101 F. Supp. 2d 500 (S.D. Tex. 2000), the relator alleged that the contractor had falsely priced its fixed-price contract by failing to disclose that certain waste disposal costs had been included in its base price for the drilling of wells, although those same costs were to be separately billed to the Government under another line [item](#) in the contract....

#### 147. [DOD TINA HANDBOOK: A BEST SELLER](#)

Nash & Cibinic Report | June, 1993 | 7 No. 6 Nash & Cibinic Rep. ¶ 30

The Department of Defense (DOD) Inspector General's (IG's) Truth in Negotiations Act (TINA) Handbook was published on April 1, 1993 (apparently not as an April Fools' joke). See 35 GC ¶ 295. It should be a best seller. The Handbook contains the following sections: Section 1: Background and History Section 2: Responsibility of the Contracting...

...( DFARS 215.804-3(b)(3)(B)(1) Similarly, the CO is admonished as follows: DON'T • Require submission or certification of cost or pricing data on negotiated contracts or modifications over \$500,000 when the contract price is based on adequate price competition, based on established catalog or market prices of [commercial items](#) sold in substantial quantities to the general public, or set by law or regulations....

...This policy may also apply to a portion of a contract or subcontract when, for example, a contractor will provide both an [item](#) that qualifies for a catalog exemption and a service that does not qualify for an exemption....

#### 148. [AUTHORIZATION AND CONSENT: Its Role In Private Litigation](#)

Nash & Cibinic Report | July 2006 | 20 NO. 7 Nash & Cibinic Rep. ¶ 31



28 USCA § 1498(a) provides that if a patented invention is used “by or for the United States” without a license or other right, “the owner’s remedy shall be by action against the United States in the Court of Federal Claims” and that use “for the United States” will occur when a contractor or other entity makes such use “for the Government and with...

...On the latter point, see [Authorization and Consent: Inappropriate on Contracts for Commercial Items?](#), 19 N&CR ¶ 59....  
...See also [Applera Corp. v. MJ Research, Inc.](#), 311 F. Supp. 2d 293 (D. Conn. 2004) (calling for a trial on the question whether the Government had authorized and consented to the use of patented inventions in contracts with Federally Funded Research and Development Centers), and [Connell v. KLN Steel Products Co.](#), No. 04-C-0194 (N.D. Ill. 2006) (rejecting the contention that the Government had authorized and consented to the use of patented inventions in a contract calling for the delivery of a [commercial](#) product merely because the products were furnished to the Government)....

#### 149. “Improving” The Workforce: Can It Be Done?

Nash & Cibinic Report | September 2005 | 19 NO. 9 Nash & Cibinic Rep. ¶ 44

Nearly everyone thinks that the federal acquisition workforce must be improved. Some say that the workforce is shorthanded and overworked; some that it needs an infusion of “new blood”; some that it is dominated by program officials who do not care about the rules; some that it is poorly educated or poorly trained; and some say all of the above....

...It resulted in special rules for buying [commercial items](#) that provide for simpler contracts, for the use of combined synopsis/solicitation, and for the use of simplified acquisition procedures for buys of \$5 million or less....

#### 150. COMMUNICATIONS AFTER RECEIPT OF PROPOSALS: THE MOST DIFFICULT ISSUES IN THE FAR PART 15 REWRITE

Nash & Cibinic Report | January, 2000 | 14 No. 1 Nash & Cibinic Rep. ¶ 3

Since the rewrite of Part 15 of the Federal Acquisition Regulation, “Contracting by Negotiation,” which was binding as to all solicitations issued after January 1, 1998 (62 Fed. Reg. 51224, Sept. 30, 1997), we have had two years of operation under the new rules. This seems a sufficient period to learn how the Comptroller General and the judges of...

...Government personnel involved in the acquisition shall not engage in conduct that-- (1) Favors one offeror over another; (2) Reveals an offeror’s technical solution, including unique technology, innovative and unique uses of [commercial items](#), or any information that would compromise an offeror’s intellectual property to another offeror; (3) Reveals an offeror’s price without that offeror’s permission....

...In [Miller-Horzwarth](#), the Court of Federal Claims held that it was proper to tell the winning offeror the prices paid on prior contracts for the [items](#) being procured....

#### 151. DEFINITIVE STANDARDS OF RESPONSIBILITY: HOW TO SHOOT ONESELF IN THE FOOT

Nash & Cibinic Report | November, 1992 | 6 No. 11 Nash & Cibinic Rep. ¶ 66

We are always amazed at the great effort procuring agencies expend in making things difficult for themselves. Use of so-called “definitive standards” of contractor responsibility is one example of this “lemming instinct.” When definitive standards are used, Contracting Officers (COs) give up the wide discretion that they are accorded in making...

...However, requirements to submit general information before award will not be construed as definitive standards, [Teltara, Inc.](#), Comp. Gen. Dec. B-245806, 92-1 CPD ¶ 363 (requirement to submit statement of experience with bid is not definitive responsibility criterion because it does not establish “specific quantitative and qualitative standards by which a bidder’s responsibility is measured”), and [Blue Tee Corp.](#), Comp. Gen. Dec. B-246623, 92-1 CPD ¶ 289 (RFP requiring a [commercial item](#) is not definitive standard--solicitation must contain a more “specific requirement such as a number of years of particular specified experience compliance of which can be measured objectively”....

...See [C3, Inc.](#), GSBICA 10647-P, 90-3 BCA ¶ 23180, 1990 BPD ¶ 195, 32 GC ¶ 349, where the solicitation required offerors to have approximately three years experience in providing installation and to have installed at least 2,000 of the [items](#) being purchased....

## 152. [ADDITIONAL PROTECTION FOR TRADE SECRETS](#)

Nash & Cibinic Report | June, 1997 | 11 No. 6 Nash & Cibinic Rep. ¶ 28

Last year, Congress enacted a new statute making it a federal crime to steal a trade secret. The Economic Espionage Act of 1996, P.L. 104-294, adds a new Chapter 90--Protection of Trade Secrets--to Title 18 of the United States Code. The first provision covers theft of a trade secret for a foreign entity: (a) IN GENERAL.--Whoever, intending or...

...It is clear enough that a noncommercial scientist's research design is not literally a trade secret or [item](#) of [commercial](#) information, for it defies common sense to pretend that the scientist is engaged in trade or [commerce](#)...

...The second provision covers theft of a trade secret that is connected with a product to be placed in interstate or foreign [commerce](#)...

## 153. [PROTESTS AND DEBRIEFINGS: A TANGLED WEB](#)

Nash & Cibinic Report | September, 1997 | 11 No. 9 Nash & Cibinic Rep. ¶ 47

One of our subscribers, William Simmons of Perkins, Smith & Cohen in Boston, Massachusetts, pointed out an aspect of the problem of obtaining information in protests before the General Accounting Office that we did not address in *Protests in the General Accounting Office: The New Discovery Rules*, 10 N&CR ¶ 57. That is the rule tying the timeliness...

...Since the agency was procuring a [commercial](#) end [item](#), at such debriefing [the protester] would have been entitled to learn the make and model of the [item](#) to be delivered by [the winning contractor] and to receive a summary of the agency's rationale for the award to [the winning contractor] and "reasonable responses to relevant questions" concerning the agency's conduct of this procurement...

## 154. ["BRAND NAME OR EQUAL": THE CONTRACTOR'S RIGHTS](#)

Nash & Cibinic Report | July, 1994 | 8 No. 7 Nash & Cibinic Rep. ¶ 39

One of the more common ways for the Government to specify its needs in a procurement is to identify a brand name product and to provide for competition by stating that it is willing to accept an "equal" product. Federal Acquisition Regulation (FAR) 10.004(b)(3) contains the following skimpy guidance on this technique: (3) Generally, the minimum...

...Although the general rule is that "equal" [items](#) should be permitted in order to increase competition, agencies may exclude "equal" [items](#) when they can justify procurement of only the brand name [item](#)...

...(3) May, if necessary to adequately describe an [item](#), use a [commercial](#) catalog description or an extract from the catalog...

## 155. [TASK AND DELIVERY ORDERS: Are They "Contracts"?](#)

Nash & Cibinic Report | October 2010 | 24 NO. 10 Nash & Cibinic Rep. ¶ 50

The explanation to a recent final rule in Federal Acquisition Circular 2005-39, "Clarification of Submission of Cost or Pricing Data on Non-[Commercial](#) Modifications of [Commercial Items](#)," 75 Fed. Reg. 13414 (Mar. 19, 2010), contained an interesting statement. Responding to a public comment concerning the applicability of the Truth in Negotiations...

...The explanation to a recent final rule in Federal Acquisition Circular 2005-39, "Clarification of Submission of Cost or Pricing Data on Non-[Commercial](#) Modifications of [Commercial Items](#)," 75 Fed. Reg. 13414 (Mar. 19, 2010), contained an interesting statement...

## 156. [COMPETITION FOR TASK ORDERS: THE EXCEPTION OR THE RULE?](#)

Nash & Cibinic Report | October, 2004 | 18 No. 10 Nash & Cibinic Rep. ¶ 42

The major “acquisition reform” at the end of the 20th Century turned out to be the huge shift to the use of task orders instead of new contracts for obtaining services. Almost all major procuring agencies appear to have made this “reform,” although the approaches have varied. Some agencies seem to have concluded that they can meet most of their...

[...In addition, one respondent raised a concern regarding a potential conflict between the FAR and GSA ordering procedures regarding the type of contract that may be used for \*\*commercial items\*\*....](#)

[...\(4\) The Government must not hesitate to communicate with the \*\*commercial\*\* sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the \*\*commercial\*\* marketplace....](#)

### **157. TIME-AND-MATERIALS CONTRACTS: A DIFFERENT VIEW**

Nash & Cibinic Report | October, 1999 | 13 No. 10 Nash & Cibinic Rep. ¶ 56

Mike Love's call for giving time-and-materials contracts preference over cost-reimbursement contracts--see Labor-Hour and Time-and-Materials Contracting, 13 N&CR ¶¶ 24--elicited the following response from Vern Edwards: Dear Ralph and John: In his guest article in your May issue, Mike Love recommended changing the Federal Acquisition Regulation to...

[...Thus, I propose the following two alternatives to Mike's recommendations: \(1\) FAR 12.207 should be changed to permit the use of T&M contracts in conjunction with the \*\*commercial items\*\* contracting procedures in FAR Part 12 when market research shows that T&M pricing is standard \*\*commercial\*\* practice for services of the same nature and duration....](#)

[...These were used where no practicable alternative existed and were in keeping with \*\*commercial\*\* practice....](#)

### **158. MANDATORY FLOWDOWN CLAUSES: Not Always Easy To Decipher**

Nash & Cibinic Report | February 2013 | 27 NO. 2 Nash & Cibinic Rep. ¶ 8

Not long ago I read a blog post entitled, “Flow Down of Mandatory FAR and DFARS Clauses Are Handled Poorly By Contractors,” <http://www.wifcon.com/discussion/index.php?/blog/15/entry-2829-flow-down-of-mandatory-far-and-dfars-clauses-are-handled-poorly-by-contractors/>. The opening paragraph states: Generally speaking, contractors flow mandatory FAR...

[...The rules for the definition of terms used in FAR contract clauses are in the clause at FAR 52.202-1, “Definitions \(Jan 2012\),” which must be included in every contract valued in excess of the simplified acquisition threshold, including contracts for \*\*commercial items\*\*....](#)

[...See, for example, the clause at FAR 52.203-6: Restrictions on Subcontractor Sales to the Government \(Sept 2006\) \(a\) Except as provided in \(b\) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any \*\*item\*\* or process \(including computer software\) made or furnished by the subcontractor under this contract or under any follow-on production contract....](#)

### **159. PRICE NEGOTIATION: THE LOST ART?**

Nash & Cibinic Report | December, 2003 | 17 No. 12 Nash & Cibinic Rep. ¶ 62

A number of years ago, at the University of Minnesota/National Contract Management Association annual procurement conference I was asked, “Whatever happened to good old-fashioned negotiation?” The questioner noted that detailed negotiation of the price was absent from the competitive negotiation environment and explained that this led to situations...

[...However, FAR Subpart 13.5 permits the use of these procedures for procurements of \*\*commercial items\*\* up to \\$5 million....](#)

[...It states: \(ii\) \[The General Services Administration\] has already determined the prices of \*\*items\*\* under schedule contracts to be fair and reasonable....](#)

### **160. UNABSORBED OVERHEAD ON SUPPLY CONTRACTS: AN IDEA WHOSE TIME HAS COME**

Nash & Cibinic Report | August, 1994 | 8 No. 8 Nash & Cibinic Rep. ¶ 45

In the last 30 or so years, discussions of unabsorbed overhead have focused on construction contracts and the infamous "Eichleay" formula. We have contributed our share to those discussions, including, most recently, several articles in this report. See The Eichleay Formula: Does It Spell Relief?, 5 N&CR ¶ 62; The Eichleay Formula: Another...

...However, the Department of Defense FAR Supplement (DFARS) 252.211-7000 "Termination-- **Commercial Items**" clause provides in Paragraph (b)(7)(iv) that the Government "will make no payment" for, among other **items**, "any loss of anticipated profit" or "unabsorbed overhead."...

...Thus, if a contractor experiences less work on other Government or **commercial** contracts than anticipated, a proportional amount of the unabsorbed overhead should be allocated to that other work rather than being allocated completely to the contract under which the price adjustment is being sought....

## **161. COPYRIGHT ON WORKS CREATED UNDER GOVERNMENT CONTRACTS: A JUMBLED AND OUTDATED POLICY**

Nash and Cibinic Report | October, 2001 | 15 No. 10 Nash & Cibinic Rep. ¶ 54

The current policy of the Government regarding copyright of works created during the performance of Government contracts is contained in the contract clauses covering the rights to technical data and computer software and has not changed for at least 15 years. Since this policy was formulated, the United States has joined the "Berne Convention" and...

...The clauses for contracts for noncommercial **items**--the "Rights in Technical Data-Noncommercial **Items**" clause in DFARS 252.227-7013 and the "Rights in Computer Software-Noncommercial **Items**" clause in DFARS 252.227-7014--take a copyright license that includes both rights for Government use and the right to convey a **commercial** copyright to other parties....

...(2) The parties should share the copyright, with the Government taking Government rights and the contractor taking **commercial** rights....

## **162. ARMY DATA & DATA RIGHTS GUIDE: New Guidance**

Nash & Cibinic Report | November 2015 | 29 No. 11 Nash & Cibinic Rep. NL ¶ 61

In August 2015 the Army issued a 150-page Army Data & Data Rights (D&DR) Guide:A Reference for Planning and Performing Data Acquisition and Data Management Activities Throughout the DoD Life Cycle. This guide contains some of the clearest and most straightforward information of the new procedures that the Department of Defense is implementing to...

...It also contains excellent guidance on data issues involving **commercial items** and Small Business Innovation Research procurements....

...The specific "standard" rights entitlements are dependent upon many factors such as the type of data, the type of **item** the data is associated with, and who paid for the development of the **item** and data....

## **163. POSTSCRIPT III: BLANKET PURCHASE AGREEMENTS**

Nash & Cibinic Report | July 2013 | 27 NO. 7 Nash & Cibinic Rep. ¶ 34

We received the following letter from Steve Feldman, my co-author on Government Contract Changes (Thomson Reuters 3d ed. 2007 & Supp. 2012): Dear Ralph: Agencies have a choice of vehicles in meeting their needs for services and supplies. One increasingly popular method is the blanket purchase agreement. As the Government Accountability Office has...

...The BPA covered **commercial** fire equipment support services, such as the provision of vehicles and tents, and contained clauses prescribed for **commercial items** by FAR Part 12....

...Crewzers received orders, but in some cases it did not provide the **items** required by the specification....

## **164. SCOPE OF THE COMPETITION TEST: Is It Valid?**

Nash & Cibinic Report | March 2013 | 27 NO. 3 Nash & Cibinic Rep. ¶ 12

When a third party protests the issuance of a contract modification on the ground that the modification is a procurement for which the Contracting Officer should seek full and open competition, the Government Accountability Office and the U.S. Court of Federal Claims apply a "scope of the original competition" test. That test was enshrined in the...

[...A variety of factors may be pertinent, including: whether the requirement was appropriate initially for an advertised or negotiated procurement; whether a standard \*\*off-the-shelf\*\* or similar \*\*item\*\* is sought; or to whether, e.g., the contract is one for research and development, suggesting that broad changes might be expected because the Government's requirements are at best only indefinite....](#)

[...The "Termination" clauses allow the Government to delete \*\*items\*\* and to reduce quantities....](#)

### **165. PAST PERFORMANCE: Has Bureaucratization Crippled A Useful Policy ?**

Nash & Cibinic Report | January 2016 | 30 NO. 1 Nash & Cibinic Rep. NL ¶ 1

Past performance is one of the most frequently protested issues in source selection and one on which agencies have suffered a high rate of sustained protests before the Government Accountability Office. What is going on? Two recent decisions of the GAO suggest a theory: Al Raha Group for Technical Services, Inc., Comp. Gen. Dec. B-411015.2, 2015...

[...On May 30, 2013, the Air Force published a synopsis of an acquisition of \*\*commercial item\*\* technical support services for Saudi F-15 aircraft....](#)

[...Each FACTS sheet was to include 13 \*\*items\*\* of information about a particular job—information such as program title, contract number, name of customer, point of contact, contract type \(pricing arrangement\), contract value, description of the job, and period of performance....](#)

### **166. ALLOWABLE COSTS: A SMORGASBORD OF ISSUES**

Nash & Cibinic Report | July, 2003 | 17 No. 7 Nash & Cibinic Rep. ¶ 38

A recent decision by the U.S. Court of Appeals for the Federal Circuit, Abraham v. Rockwell International Corp., 326 F.3d 1242 (Fed. Cir. 2003), 45 GC ¶ 200, deals with a number of allowable cost issues worthy of comment. The case involved the unique rules of Department of Energy (DOE) Management & Operation (M&O) contracts. However, the court's...

[...The costs of certain legal proceedings are covered by the Major Fraud Act of 1988, 41 U.S.C. § 256, which applies to executive agencies' contracts in excess of \\$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of \*\*commercial items\*\*....](#)

[...\[Footnote omitted.\] The language upon which the government relies provides: "\[a\]llowable cost shall not include the cost of any \*\*item\*\* described as unallowable in paragraph \(e\) of this clause except as indicated therein."...](#)

### **167. RESTRICTED RIGHTS: How Much Protection?**

Nash & Cibinic Report | May 2014 | 28 No. 5 Nash & Cibinic Rep. NL ¶ 28

When a contractor incorporates privately developed modules into software being developed for the Government, it expects that competing contractors will not be allowed to use the code in those modules to compete for modification or upgrade of the software. This expectation is implemented in the "rights" clauses of Government contracts by giving the...

[...Paragraph \(a\)\(15\)\(vi\) of the clause permits giving the software to contractors or subcontractors "performing emergency repairs or overhaul of \*\*items\*\* or components of \*\*items\*\* procured under this or a related contract."...](#)

[...DoD Response: The statutory purpose restrictions on the covered Government support contractor's access and use of such proprietary information are expressly incorporated at \[DFARS\] 252.227-7025\(b\)\(5\)\(i\) into the access and use restrictions on a covered Government support contractor for limited rights technical data and restricted rights computer software, and also for technical data related to \*\*commercial items\*\*....](#)

### 168. [DETERMINING APPLICABLE STATUTES OR REGULATIONS: WHAT DATE GOVERNS?](#)

Nash & Cibinic Report | March, 2004 | 18 No. 3 Nash & Cibinic Rep. ¶ 10

The rights of the parties can vary significantly depending upon which version of a statute or regulation applies to the contract. Thus, when statutes or regulations change after the parties have entered into a contract, the question arises whether the new statute or regulation applies to the contract. The general rule is that postcontract...

...See, for example, FAR 52.222-26 "Equal Opportunity" (application to Office of Federal Contract Compliance Programs to be made within 30 days after contract award); FAR 52.222-49 "Service Contract Act-Place of Performance Unknown" (postcontract wage determination retroactive to date of contract award); FAR 52.230-5 "Cost Accounting Standards-Educational Institution" (adjustment for accounting principle amendment effective after date of contract award); and FAR 52.232-30 "Installment Payments for **Commercial Items**" (number of payments based on number of months from date of contract award)....

### 169. [THE FIRM-FIXED-PRICE LEVEL-OF-EFFORT CONTRACT: A Mystery In An Enigma](#)

Nash & Cibinic Report | July 2012 | 26 NO. 7 Nash & Cibinic Rep. ¶ 35

The firm-fixed-price level-of-effort (FFP-LOE) term contract described in Federal Acquisition Regulation 16.207 is something of a mystery to many practitioners, who are not sure what this contract is, how it works, or when to use it. Consider this exchange between one of the co-chairs of the Commission on Wartime Contracting in Iraq and Afghanistan...

...This rule addresses the use of T&M and LH contracts for **commercial items**; therefore, the respondent's request to define LOE contracts is outside the scope of this case....

...Agencies should think carefully about the best approach to pricing and line **item** structuring....

### 170. [THE NEW DOD "RIGHTS IN SOFTWARE" POLICY: HALF A LOAF](#)

Nash & Cibinic Report | March, 1996 | 10 No. 3 Nash & Cibinic ¶ Rep. 12

In The New DOD Policy on Technical Data and Computer Software, 8 N&CR ¶ 22, we discussed the final report of the Section 807 Committee that was established by Congress through the enactment of § 807 of the National Defense Authorization Act for Fiscal Years 1992 & 1993, P.L. 102-190, to negotiate a technical data policy that was acceptable to the...

...(13) Noncommercial computer software means software that does not qualify as **commercial** computer software under paragraph (a)(1) of this clause. This definition of **commercial** computer software reflects the broader definition for **commercial items** included in the Federal Acquisition Streamlining Act of 1994, P.L. 103-355....

...• **Commercial** Computer Software--The policy attempts to follow **commercial** practice in obtaining rights to **commercial** computer software....