

Congress and Commercial Services Acquisition 1994-2016

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Preliminaries

- **To affect acquisition policy, the Congress has only three tools in the toolbox**
 - Legislation
 - Providing or withholding funding
 - Oversight
 - Legislation has been the preferred approach.
- **No focus on commercial services acquisition before 1994.**
- **Section 800 Panel (1992-93) did not believe that government-unique statutes created the same type of barriers to the Federal acquisition of commercial services as was the case with commercial items. (Report of the Acquisition Law Advisory Panel, p. 8-19, January 1993).**

Section 8001 Definitions (41 USC 403(12), later recodified in 41 USC 103).

- Services defined as commercial items:
 - Installation services, maintenance services, repair services, training services, and other services if those services are procured for support of a commercial item, regardless of whether the services are provided by the same source or at the same time as the item; and the source of the services offers:
 - such similar services contemporaneously to the general public under similar terms and conditions, and
 - to use the same workforce.
 - 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.

Federal Acquisition Streamlining Act of 1994



- **Section 8002. Regulations on the Acquisition of Commercial items**
- **Section 8003. List of Inapplicable Laws in Federal Acquisition**
- **Sections 8101-8103. Title 10 parallels**
- **Section 8104. 10 USC 2377 - Preference for the acquisition of commercial items (including services).**
- **Sections 1202-1204. Truth in Negotiation Act exemptions of commercial item procurements from the requirements for the submission of certified cost or pricing data.**

Federal Acquisition Reform Act (“Clinger-Cohen”) – Division D

- **Sec. 4201. Commercial item exception to requirement for certified cost or pricing data.**
 - Expanded commercial item exception to the requirement for submission of certified cost or pricing data by eliminating the requirement for substantial sales to the general public at catalog prices.
 - Provided for a requirement for contractors not required to submit certified cost or pricing data to submit other than certified cost or pricing data.
- **Sec. 4204. Amendment to commercial item definition.**
 - Allowed market prices as an alternative to catalogue prices.

Sec. 805. Clarification of definition of commercial items with respect associated services.

- **Modified the definition of commercial services associated with commercial items to allow more flexibility in the provider of the services as long as provider is providing similar services contemporaneously to the general public under similar terms and conditions.**

Sec.814. Pilot program for commercial services.

- **Authorized DoD to perform a five-year pilot program to procure up to three categories of services (utilities and housekeeping, education and training, and medical services) as commercial item contracts as long as the source of services is providing similar services contemporaneously to the general public under similar terms and conditions.**

Sec. 821. Improvements in procurement of services.

- **Established a preference for performance-based services contracts in DoD.**
- **Authorized DoD agencies to treat as commercial item contracts performance-based contracts or task orders valued up to \$5M with certain characteristics including a requirement that any source of services is providing similar services to the general public under similar terms and conditions.**
- **Required the establishment of DoD services contracting CoE and enhanced training for acquisition personnel.**

**Services Acquisition Reform Act – Title XIV
Subtitle C- Acquisition of commercial items.**

- **Sec. 1431. Additional incentive for use of performances-based contracting for services.**
 - Authorized civilian agencies to treat as commercial item contracts performance-based contracts or task orders valued up to \$25M with certain characteristics including a requirement that any source of services is providing similar services to the general public under similar terms and conditions.
 - Required the establishment of Federal services contracting CoE.
- **Sec. 1432. Authorization of additional commercial contract types.**
 - Authorized the use of T&M and labor hour contracts for contracts for commercial services with some restrictions and requirements.

Sec. 803. Defense commercial communications satellite services procurement process.

- **Special requirement for the SecDef to commercial communications satellite services and provide guidance to DISA and the Services on how such procurement should be conducted.**
- **Alternative mechanisms were to include:**
 - IDIQ contracts;
 - Procurement from “qualified” sources using full and open competition;
 - Use of existing DISA or Services contracts with integrators or resellers; or
 - Use of an existing procurement method using modified with streamlined processes for efficiency and cost-effectiveness.

Sec. 805. Procurement of commercial services.

- **Required that the DFARS be amended to ensure that services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered for sale and sold competitively and in substantial quantities in the commercial marketplace may be treated as commercial items for purposes of the Truth in Negotiations Act if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price.**
- **Authorized a contracting officer to request a contractor to submit information regarding the basis for the price or cost, including information on labor costs, material costs, and overhead rates, if the information on prices paid for the same or similar items under comparable terms and conditions by both commercial and government customers is not sufficient to determine price reasonableness.**
- **Required that the DFARS also include procedures to ensure that time-and-materials and labor-hour contracts for commercial services may only be used to acquire:**
 - services in support of a commercial item;
 - emergency repair services; and
 - any other commercial services only to the extent that
 - the head of the agency approves a written determination by the contracting officer that the services to be acquired meet the statutory definition of a commercial service;
 - such services are commonly sold to the general public through the use of time-and-materials or labor-hour contracts; and
 - the use of such a contract type is in the best interest of the government.

Section 868. Minimizing abuse of commercial services item authority.

- **Required that the FAR be amended to ensure that services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered for sale and sold competitively and in substantial quantities in the commercial marketplace may be treated as commercial items for purposes of the Truth in Negotiations Act if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price.**
- **Authorize a contracting officer to request a contractor to submit information regarding the basis for the price or cost, including information on labor costs, material costs, and overhead rates, if the information on prices paid for the same or similar items under comparable terms and conditions by both commercial and government customers is not sufficient to determine price reasonableness.**

Sec. 855. Market research and preference for commercial items.

- **Requires the USD (AT&L) to issue guidance implementing 10 USC 2377 on market research and commercial items to require that the head of an agency may not enter into a contract above the simplified acquisition threshold for information technology products or services that are not commercial items unless she determines in writing that no commercial items are suitable.**

Sec. 857. Treatment of goods and services provided by nontraditional defense contractors as commercial items.

- **Authorizes the Department of Defense to treat goods and services provided by a non-traditional contractor (an entity that has not performed within the last year any DoD contract or subcontract subject to full Cost Accounting Standards) as a commercial item.**

FY17 NDAA (P.L. 114-328)



Sec. 876. Preference for commercial services.

- **Requires that the DoD guidance issued to implement section 855 of the FY16 NDAA (Market research and preference for commercial items) be amended to provide that:**
 - prior to DoD entering into any contract valued above \$10M for facilities-related services, knowledge-based services (excluding engineering services), equipment-related services, construction services, medical services, logistics management services or transportation services that are not commercial services, the USD (AT&L), the service acquisition executive, agency head or commanding officer must determine in writing that no commercial services are suitable to meet the agency's needs; and
 - prior to DoD entering into any contract valued between \$150K and \$10M for facilities-related services, knowledge-based services (excluding engineering services), equipment-related services, construction services, medical services, logistics management services or transportation services that are not commercial services, the contracting officer must determine in writing that no commercial services are suitable to meet the agency's needs.

Sec. 878. Treatment of services provided by nontraditional contractors as commercial items.

- **Amends 10 USC 2380A to provide that services provided by a business unit that is a non-traditional defense contractor be treated as commercial items to the extent that the services are provided by the same pool of employees as are used for commercial customers and are priced using similar methodology as commercial pricing.**

Sec. 879. Defense pilot program for authority to acquire innovative commercial items, technologies, and services using general solicitation competitive procedures.

- **Authorizes a pilot through 9/30/22 to award FP or FPI contracts valued up to \$100M for innovative commercial items, technologies, services in response to a general solicitation with peer review before award.**