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9 May 2017

Mr. John Tenaglia
Deputy Director, Contract Policy and International Contracting (CPIC)
Defense Procurement and Acquisition Policy (DPAP), OUSD/AT&L
Pentagon 5E621
Washington, DC 20301-3060

Subject: Commercial Item Guidebook (DRAFT) Comments on Commercial Item Determinations (Part A) and Pricing Commercial Items (Part B) – CODSIA Case: 2017-003

Dear Mr. Tenaglia:

On behalf of CODSIA[1], we are resending our comments of 1 May 2017 on the Commercial Item Guidebook (DRAFT) Comments on Commercial Item Determinations (Part A) and Pricing Commercial Items (Part B). The version sent on 1 May was missing the line-in line-out comments we intended to provide. This version includes that feature.

Again, we appreciate the significant undertaking of the Department necessary to complete the draft and look forward to an on-going collaboration with your office in addressing/adjudicating our comments and improving on the initial draft.

In mirroring the Guidebook, our comments are addressed in two sections, one dealing with Commercial Item Determinations (Part A) and the other with the Pricing of Commercial Items (Part B). In some cases, our comments are presented by "line-in/line-out" changes we are recommending for sections, or sub-sections, with comments supporting our rationale for the edits provided where needed. In other cases, it was necessary to submit comments and contributing rationale as more of a discussion, in which case we reference those comments back to the sections/sub-sections of the Guidebook that is being addressed.

Given the complex undertaking of developing this initial draft, the elapsed time since the former Guidebook was issued, the extensive level of Congressional activity in Commercial Items, and the array of stakeholders impacted by commercial pricing policy, rules and regulations, CODSIA

[1] At the suggestion of the Department of Defense, CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues. CODSIA consists of seven associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Associated General Contractors of America, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, the Professional Services Council, and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Together these associations represent thousands of government contractors and subcontractors. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

looks forward to opportunities to stay involved with the important process of editing and finalizing the Guidebook and our continued engagement.

For additional information on this submission, please contact our POC for this effort, Mr. Ron Youngs of the Aerospace Industries Association (AIA) at 703-358-1045, or ronald.youngs@aia-aerospace.org.

Sincerely,

[signature]	[signature]
John Luddy	A.R "Trey" Hodgkins, III, CAE
Vice President National Security	Senior Vice President, Public Sector
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Comments on Guidebook (Part A and B)

The Guidebook emphasizes important aspects of the commercial item acquisition process and current regulations on the subject. We are encouraged by the way that the Guidebook addresses commercial item determinations and pricing commercial items as two separate parts. This structure is important so that contracting officers make the commercial item determination before evaluating the price, rather than merging the two concepts as contractors have frequently experienced in recent years. The Guidebook occasionally lacks clarity, and it contains some guidance and examples that address concepts that are not directly relevant to making a commercial item determination or evaluating a commercial price.

We believe the clear majority of commercial item determinations, and succeeding price reasonableness determinations, can be made through market research and competition with no controversy or difficulty. To provide enhanced perspective, therefore the Guidebook should expand on the four common “exception” situations that present unique challenges:

a. New items offered by one (or few) sources and for which there is little (or no) market sales experience;
b. The lapse of time since the last non-Government sale of a commercial item. Or old items that were once sold in an active commercial market, but have now become obsolete and only the Government buys them. They are offered by one (or few) sources and for which there is limited (or no) recent commercial market sales experience;
c. “Of a type” items where government-specific modifications make price comparability difficult in the absence of competition;
d. Commercial services other than productized services.

Services are not fully addressed in the Guidebook, particularly in the Price Analysis section. Even the Services section addresses services in the context of products/product support. We recommend the Guidebook discuss a variety of services, including those that are discussed in the 2017 NDAA (knowledge-based (e.g., engineering), facilities-related, construction, medical, transportation). See Section 876 of the 2017 NDAA.

Commercial Item Guidebook Part A – Commercial Item Determinations

General Comments on Part A

The Guidebook can be alternatively organized in this section to ensure that procurement practitioners get the most out of the guidance. The following are suggested changes:

- Recommend “Implications of FAR Part 12 and FAR Part 15 Procedures” be moved up after the preamble, “Overview and Vision Forward”. This organization seems most appropriate given the importance of the messaging and helps to set the tone of the

entire Guidebook by describing the significance and implications of Commercial Item Determinations (CID) and Price Reasonableness (PR) assessments.

- Recommend beginning the “Commercial Item Determination” section with the FAR 2.101 definition of commercial items and commercial off-the-shelf (COTS) items before addressing the statutory preference for commercial items.
- It may also be beneficial to reorganize the section on Commercial Item Determinations so that guidance for making commercial determinations is set forth before the discussion of the usability of prior CIDs (a step that is more administrative in nature). Readers should understand how different items can qualify as commercial (new determinations) before they can begin to understand reviewing, using, and overturning a prior CID. Alternatively, the section on prior CIDs can begin with a lead in that explains why DoD is beginning there (e.g. there are very few items that would qualify as completely new therefore the starting point should always be to determine whether there is an existing CID that should be relied upon).
- The sequence of events from describing agency needs to contract award are not clear enough for contracting officers to follow. FAR Part 12 should be a streamlined process and this draft does not leave that impression.
- The reliance on prior CIDs must be clarified in a non-risk averse way. What happens if a contractor does not agree with a non-commercial CID?
- There is too much emphasis on which paragraph of FAR 2.101 definition applies (of a type, minor mod or service) and not enough emphasis on the bigger picture of accessing the technology available from the commercial marketplace. This is one of the overarching goals of the CID process, and its importance cannot be overstated.
- The Guidebook fails to address the prime contractor CID process and the level of documentation required to satisfy a CPSR audit. This is an important part of the CID process as it will affect many subcontracts in the government contracting supply chain.
- The previous commercial item handbook included the language below. We recommend something similar is included in this guidebook to make it clear that prime contractors can and should rely on a prior Government CID.

Contractor Determinations

Prime contractors and subcontractors at all tiers are required by law to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to agencies. Contractors make commercial item determinations in much the same way as Government acquisition personnel. Interchange between Government and industry on this topic is encouraged because it is mutually beneficial.

Contractor determinations are another source of information that acquisition personnel should consider when making their own commercial item determinations. If a contractor

procured an item commercially, and the Government subsequently acquires the same item, acquisition personnel should consider the contractor's determination as part of its own market research efforts. Likewise, if the Government determines that an item is commercial, the prime contractor should consider the Government's determination as part of its own market research efforts.

CODSIA also made this argument in its comments to the DFARS Rule 2016-D006:

(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, another component of DoD or prime contractor shall serve as a determination for subsequent procurements of such item. The contracting officer may accept as evidence of a prior determination a government contract number from the offeror to assess if the prior determination remains a valid determination.

- We recommend including an introduction discussing more of the benefits of procuring commercial items to address some of the concerns set forth above. It appears too many people continue to struggle to understand why all this effort is valuable. A "foot-stomp" of the strategic concept being advocated and how it furthers the overarching goals of DoD would be a helpful reinforcement.

Overview and Vision Forward (pages 2-3)

i. The third paragraph includes, among the benefits of access to commercial items and practices, "an expanded pool [of] innovative and non-traditional contractors that seek to do business with DoD." We request that the term "non-traditional" be removed from this paragraph. This term is not defined (other than by reference to statutory language on page 45 of the Guidebook), and its use in this section suggests that traditional DoD contractors are not innovative. Including the term "non-traditional" in this introductory section of the Guidebook creates an erroneous perception that contractors who support DoD do not and cannot sell commercial items and services. Moreover, whether a contractor is a "traditional" or "non-traditional" defense contractor is not included in the FAR 2.101 definition of a commercial item.
ii. It is important for this section to set a positive tone for commercial item acquisition. The statement in the fourth paragraph that "of a type items are particularly challenging" shows an unnecessary bias. Most products that DoD buys for use as subsystems or components of weapons systems are likely not the same exact item as sold to the commercial marketplace. COTS items are not part of the commercial item definition and have a separate definition, therefore the discussion should be on "commercial items" generally and not "of a type" items. The use of "of a type" is intended to broaden the items that might be acquired commercially as "Items of a type customarily available in the commercial marketplace". The Commercial Item Determination Handbook dated Nov. 2001 included a statement that should be carried forward:

iii.

"Only after careful review of the commercial item definition - and the gathering of significant evidence that the item is *not* commercial - should they consider the item Government-unique".

iv. Some of the language in the textbox entitled "Things to Consider" at the bottom of page 2 raises concerns.

- We recommend rewording the introductory sentence as follows:

  "Initial market research is conducted to determine the degree to which commercial products, services, or technologies are available to meet the government's needs." The existing phrasing ("can be applied towards deploying and sustaining war fighting capabilities") suggests that DoD's only acquisition needs are in direct support of deployments and the war environment. Although there are many examples of commercial items in use in support of deployments, we suspect that some of the discord that contractors have had with DoD on commercial items stems from the perception that defense products and services are mutually exclusive of commercial products and services (i.e. that DoD acquisitions are presumptively not commercial because DoD engages in warfighting while the commercial sector does not). Similarly, there are many examples of acquisitions by DoD for items and services that are necessary for DoD operations, training and logistics, but are not used in direct support of deployments. The regulations are written in terms of meeting the government's needs, and we recommend that such phrasing be used in the Guidebook.

- The first bullet in the textbox should be reworded as follows:

  "Are there any commercial or non-developmental items that can meet the government's needs?" As stated ("Are there sufficient sources of commercial or non-developmental items?"), the question could create confusion over the number of sources that are required to determine that a commercial product or service exists. There is no regulatory basis for suggesting that there must be a certain number of sources before an item or service may be determined to be commercial.

- The second bullet ("Do you have sufficient market depth to determine if the market can sustain the planned or deployed capability over the longer term?") is unclear and is not relevant to the determination of the existence of commercial items in the marketplace. What does "sufficient market depth" mean? What is meant by "the longer term"? How is the bullet relevant to determining whether an item or service is commercial?

We recommend that the "Things to Consider" textbox currently on page 2 be moved to appear after the flow chart currently on page 3 (the one prefaced with the words "Pre-Solicitation Market Research Asks the Following Questions:"), rather than in "Overview and Vision Forward." The text speaks to market research for requirements definition and, therefore, is better suited in the market research section.

Comments on Market Research:

Market Research to Encourage Competition

1. We recommend that the market research section be reformatted and edited for clarity as follows:
   a. **Page 3** Prior to the paragraph currently entitled "Market Research to Encourage Competition", we recommend inserting a paragraph entitled "Market Research Basic Requirements" and covering the paragraph currently found at the bottom of page 3 ("The review may include . . . and other practices common to that industry"). We request, however, that the paragraph at the bottom of page 3 be modified to remove the reference to "prices at which those capabilities or technologies have been offered for sale or sold" as a "minimum" requirement for market research. While we encourage contracting officers to learn as much as possible about the market for commercial items and services as part of the acquisition process, we note that FAR Part 10 does not require that a contracting officer gather all this information during the market research stage.

   b. **Page 3** We recommend modifying the title of the existing section entitled "Market Research to Encourage Competition" to read "Market Research to Identify Commercial Items and Encourage Competition". This section of the guidebook will be most beneficial to the acquisition process if it clearly and repeatedly makes the link between identifying commercial items available in the market, defining requirements to permit commercial items to be offered, and increasing competition.

   c. **Page 3** The first paragraph of the section currently entitled "Market Research to Encourage Competition" includes the phrase "superior knowledge". Superior knowledge is a legal term relevant to constructive changes and the obligation of the government to disclose vital information to a contractor under certain circumstances. We recommend replacing the word "superior" with "extensive", "deep", or some other synonym.

   d. **Page 3** At the end of first paragraph of the section currently entitled "Market Research to Encourage Competition", we recommend deleting the word "slightly" to describe commercial item modifications that may be needed to meet the

government's needs. The term "slightly" is not used in the commercial item definition to describe modifications. Moreover, contracting officers should be encouraged to identify commercial items that may meet the government's needs, including the extent of modifications that may be required, as part of developing requirements, drafting solicitations, and evaluating proposals. Acquisition planning benefits from consideration of all options, including a major modification to an existing commercial item, especially if the modified item is more cost-effective than developing an entirely new product.

e. **Page 3** After the first paragraph of the section currently entitled "Market Research to Encourage Competition", we recommend adding a new section entitled "Pre-solicitation Market Research for Requirements Definition and Identification of Sources". This section would then cover the paragraph that is currently at the top of page 3, as modified below, and add a new paragraph as follows:

> "Per 10 U.S.C. § 2377, requirements must be defined in such a way that commercial services/supplies could be procured to the maximum extent practicable, and ensure that commercial items and non-developmental items (NDIs) are offered to compete in any procurement. FAR Part 12 implements the statutory preference for the acquisition of commercial items. To implement the requirement, a statement of need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable. To the maximum extent possible, acquisition officials must state requirements in broad terms with respect to: (1) functions to be performed; (2) performance required; or (3) essential physical characteristics to enable and encourage offerors to meet agency needs with commercial items. Or, to the extent that commercial items suitable to meet the agency's needs are not available, to acquire non-developmental items, in response to agency solicitations. FAR 11.002(d) refers to various statutes and executive orders identified in FAR Part 23 that must be considered when developing requirements."
>
> "Section 875 of Public Law 114-328 (National Defense Authorization Act for Fiscal Year 2017) further emphasizes the need for flexibility in requirements definition by requiring DOD to use commercial or non-government specifications and standards in lieu of military specifications and standards, including for procuring new systems, major modifications, upgrades to current systems, non-developmental and commercial items, and programs in all acquisition categories, unless no practical alternative exists to meet user needs."

"These suggested edits emphasize the need for contracting officer flexibility in defining government requirements to, wherever possible, maximize the number of commercial solutions available to the government. The additional paragraph above should be complemented with a reference to Section 875 of Public Law 114-328 to require use of commercial specifications and standards over government unique standards. The new law further emphasizes the need for contracting officers to remain flexible in defining the government's requirements."

f. **Page 3** The terms used to describe commercial items must be consistent with the regulations. In this case, the Guidebook should use the same language as FAR Part 10: "Items of a type customarily available in the commercial marketplace with modifications." In the flow diagram on page 3, the first block should read "are items of a type customarily available in the commercial marketplace?" And the second block should read "are items of a type customarily available in the commercial marketplace with modifications?" Changing the language of this section of the FAR, even slightly, will likely deviate from the intent of the FAR, as even slight modifications can create a significant impact.

g. **Page 3** There is guidance currently at the bottom or page 3 and the top of page 4 instructing contracting officers to gather information about pricing and customary terms as part of market research. While we encourage contracting officers to learn as much as possible about the market for commercial items and services as part of the acquisition process, we note that FAR Part 10 does not require that a contracting officer gather all this information during the market research stage. We recommend that the guidance be modified to explain that this level of detail is encouraged but not required. Additionally, consistent with FAR 10.001(b), we strongly recommend that the guidance be modified to direct contracting officers not to issue pre-solicitation demands for potential offerors to submit information about pricing and terms under the guise of market research or as a prerequisite to issuing a solicitation under FAR Part 12.

h. **Page 2** As stated above and in addition to the edits and questions described above, we recommend that the "Things to Consider" textbox currently on page 2 be moved to the market research section. We further recommend that the following statement appear immediately after the textbox, modified as marked: "Your pre-solicitation market research may lead you to conclude that adequate commercial items or services are not available and you may recommend developing new items, but that may serve to increase both the time and expense to obtain the item." The V.1 Handbook included a flowchart "Market Research Drives the Pre-award Process". This chart should be carried forward into the Guidebook. The chart on Page 3 is not as clear. This process is key to

understanding that market research results in a decision that commercial items are available and that a FAR Part 12 solicitation should be used. This decision must be made prior to issuance of the solicitation. It is improper to require an offeror to justify a commercial item in response to a solicitation.

i. **Page 4** The textbox currently on page 4 entitled "Things to Consider" misstates FAR Part 10. FAR Part 10 does not state that market research should include the prices at which capabilities or technologies have been offered for sale or sold. A contracting officer may indeed come across commercial pricing information as part of market research; however, we are concerned that the guidance will be interpreted as a requirement that a contracting officer obtain commercial pricing information as a prerequisite to determining that an acquisition should be conducted under FAR Part 12. As a practical matter, pricing information will likely be collected during pre-solicitation market research. However, to maintain the CID and Price Reasonableness assessment as two distinct steps, the guidance should clarify that the pricing information should be used only for price reasonableness determinations. We recommend that the second bullet of the textbox be deleted or modified to reinforce the actual language of FAR Part 10, not to create a misperception that FAR Part 10 requires pricing information or create confusion about the two-step process. To preserve the distinction between the commercial item determination and the price reasonableness determination, we recommend the following modification to the second bullet: "The prices at which those capabilities or technologies have been offered for sale or sold to assist with subsequent price reasonableness assessments is discussed in Part B."

j. **Page 4** The list of market research activities at the bottom of page 4 and on page 5 is a comprehensive description of appropriate market research activities and will hopefully prove to be a useful table of ideas for contracting officers. We suggest including an introductory paragraph which provides direction on how extensive market research needs to be relative to the nature of the procurement, life cycle total cost, length of program, security issues, etc. The amount of market research conducted should correlate to the size and importance of the procurement.

k. **Page 6** The Documentation section mixes the two elements of the commercial item definition, "of a type" and "modifications". FAR Part 10 states "If market research establishes that the Government's need may be met by a type of item or service customarily available in the commercial marketplace that would meet the definition of a commercial item at Subpart 2.1, the contracting officer shall solicit and award any resultant contract using the policies and procedures in Part 12". This does not require that the item is a modification to an existing item to be "of a type", but that it could be a type of item that is available in the commercial marketplace in terms of (A) Functions to be performed; (B) Performance

required; or (C) Essential physical characteristics. Recommend that the last two sentences be revised to read:

> "Particular care must be taken to document the rationale for the product or service meeting the commercial item definition as determined by market research".

l. **Page 6** The Guidebook does not address whose responsibility market research is. This is a key point because while industry is responsible for many aspects of market research, it is ultimately the responsibility of the Government.

m. **Page 6** A paragraph is inserted explaining that "particular care must be taken to document determinations involving modifications 'of a type' customarily available in the commercial marketplace, and items only 'offered for sale, lease, or license to the public,' but not yet actually sold, leased or licensed. In these situations, the documentation must clearly detail the particulars of the modifications and sales offers." These statements seem to refer more to choosing a particular commercial item definition and do not have anything to do with market research. If this text is meant to be included in the market research discussion, we're not sure what "particular care" is needed when determining if an "of a type" item is available.

n. **Page 8** The "Industry Associations References", should include Aerospace Industries Association (AIA) (http:/www.aia-aerospace.org). AIA is the premiere provider of National Aerospace Standards.

Comments on Prior Commercial Item Determinations:

Commercial Item Determination: Prior CIDs as a Basis for Current Procurement:

1. **General Comment on DCMA and DCAA Engagement Consistent with Guidebook.** Our experience has been these two organizations do not interpret FAR requirements for prior CIDs in the same manner. Therefore, it is an opportunity for the new Guidebook release to ensure consistent implementation by government practitioners.
   a. For example, DCAA requires proof of sales. DCMA Commercial Items Group (CIG) does not require proof of sales.
   b. Recommendation - The Guidebook should be vetted with and accepted by both DCAA and DCMA to ensure consistent execution to the Guidebook by both the government audit and government analysis review entities so contractors are not deemed compliant by one organization and non-compliant by the other – at least due to differing interpretations of the Guidebook.

2. **Page 10 "Statutory and Regulatory Overview"**

a. Recommend adding a subtitle at the beginning of this section for clarity. A suggested subtitle is "Preference for Commercial Items."
b. The reference to 41 U.S.C. 3307 should be moved to the section of the Guidebook on "Market Research".
c. Similarly, the Sec. 855 and Sec. 876 mandatory use of FAR Part 12 products and services should not be part of the Commercial Item Determination section as none is required.

3. **Page 11 "Commercial Item Definition"**
   a. Regarding the reference to **FAR Part 2.101**, we recommend also including the definition of commercial off-the-shelf (COTS) items with the definition of commercial items, rather than in the "Other Considerations" section. It seems easier to start from an understanding of the definition of COTS and to only then move to discussing all the variations of commercial items. The current draft does not always draw clear lines between COTS and the first commercial item definition.

   b. This is where language from the 2001 CID Handbook would be helpful to the understanding of the commercial item definition by adding a lead in paragraph:

> "This Handbook clarifies current regulations and reinforces the broad interpretation of the commercial item definition. Commercial items include any item of a type customarily used by the general public, or by nongovernmental entities, for purposes other than governmental purposes that has been sold, leased, or licensed, or offered for sale, lease, or license to the general public (see FAR 2.101). Also, included in the commercial item definition is any item that has evolved from a commercial item as described herein, through technical or performance advances, even if it is not yet available in the commercial marketplace, as long as it will be available in time to satisfy the Government's delivery requirements. Commercially available Off-the-Shelf (COTS) items are defined at FAR 2.101 and are a subset of commercial items."

The phrase "of a type" broadens the commercial item definition so that qualifying items do not have to be identical to those in the commercial marketplace. An "of a type" item includes functional characteristics that are customarily used by and are currently available in the commercial marketplace. If the item is "of a type" that is offered to the general public, with or without actual sales to the general public, it meets the definition of a commercial item.

Additionally, the FAR commercial item definition includes many services. A service is considered a commercial item when it is provided in support of a commercial item as previously defined, regardless of whether the services are provided by the same source or at the same time as the item. A service is also considered a commercial item when it

is of a type offered and sold competitively in substantial quantities in the commercial market based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. The definition also includes any combination of commercial items that are customarily combined and sold in combination to the general public.

4. **Page 12 "Use of Commercial Item Determinations"**
   a. The first sentence in this references several requirements. It is unclear whether these requirements originate in statute, regulation or policy. This should be made clear. If there is no basis for these requirements, they should be removed. The language confuses "commercial item determinations" with the memoranda generated in support of such determinations. Contracting officers should of course assess a supporting memorandum for the CID if available, but the inability to obtain that memo, which is not only common but normal, does not in any way vitiate the existence of the determination. For any item previously determined commercial, the decision tree should be made clear: either presume that the prior determination will govern and enter into contract using FAR Part 12 procedures or request a review from the head of contracting activity, as spelled out by Section 851 of the 2016 NDAA.

   b. Public Law 114-92, Section 851 includes a very specific list of DoD components for which contracting officers can rely on CIDs: "military department, a Defense Agency, or another component of the Department of Defense". We suggest including the list for clarity. A suggested rewrite of this section follows:

      "This section will address: the use of prior Commercial Item Determinations (CIDs), including~~;~~ the use of a checklist for the contracting officer to consider in reviewing ~~prior~~a CID~~s~~,~~;~~ verification of a CID's completeness and authenticity,~~;~~ and an assessment of the ~~commercial item, and the~~ logic and supporting information provided in a CID. It will describe methods for overturning a previous CID made by a military department, a Defense Agency, or another component of the Department of Defense ~~DoD CID~~. It will describe the prime contractor's role in conducting and providing copies of CIDs for subcontractors' commercial items, and other offeror-provided CID~~S~~s. It will discuss conversion of prior FAR Part 12 procurements to FAR Part 15 procurements and the implications of each process."

5. **Page 13 "Use of Prior CIDs"**
   a. The cautionary note and questions to consider on Page 13 are inconsistent with the statutory language at 10 U.S.C. 2306a(b)(4)(B) which states that "If the contracting officer does not make the presumption described in paragraph (A) of this section and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other

than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement". This provision was enacted to preclude the repetitive CIDs for the same item and to allow a contracting officer to rely on a prior CID without going through the time-consuming process of repeating a CID. The Guidebook introduces additional steps to verify the appropriateness of a prior CID and to potentially deviate from or overturn the prior CID. This goes far beyond a presumption and encourages a new CID. Further, an analysis of the prior CID to confirm logic, thoroughness and thought process is totally unreasonable. It should be made clear under the cautionary note that if the same item is being procured that was previously procured as a commercial item, then the prior CID should be considered relied upon, and that the burden of proof to overturn a prior CID rests with the Government.

b. **NOTE:** Section 851 of Pub. L. No. 114-92 provides that DoD contracting officers may presume that a prior CID made by ~~another DoD contracting officer~~ a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of that item. In other words, a prior DoD contracting officer determination~~s~~ for the same item may be relied upon ~~by any other DoD contracting officer may rely upon by the contracting officer of~~ for any future purchases of the same item. If a contracting officer wants to ~~deviate from~~ overturn a prior CID, that contracting officer must request a review of the CID which will result in the head of the contracting activity either confirming the prior determination was appropriate and still valid or issuing a revised CID with supporting rationale. ~~When procuring an item that is similar to (or "of a type") an item that was previously determined by a DoD contracting officer to be commercial, the contracting officer should of course consider the appropriateness of the prior CID.~~ As a starting point, contracting officers will consider as reasonable any contracting officer's prior CIDs when preparing a recommendation of commerciality ~~provided that the CIDs meet the following considerations:~~

6. **Page 13 "Questions to Consider"** are framed toward scrutinizing the prior CID, rather than procurement officials' rationale for wanting to overturn the prior conclusion. This places the burden of proof on the prior CID each time to remain valid, and runs contrary to Pub. L. 114-92, which establishes a high threshold for overturning prior determinations. We suggest revising the questions to focus procurement officials' attention on analyzing the current procurement and to determine whether, and how circumstances have changed to bring the validity of the prior CID into question. Additionally, the last bullet provides the incorrect qualifications for a commercial item. The item must have been sold or **offered for sale** to the general public.

7. **Page 13** "**Prior CID Logic and Conclusion"** - Procurement officials may agree with the CID conclusion, but may "on occasion" disagree with a prior Contracting Officer's logic, facts, or documentation, or believe it "could be improved". This approach will likely drive cycle time delays and costs into the procurement process, the exact issue Congress intended to legislate with Section 851 of NDAA FY2016. The statute states that a review of the CID should be made by the HCA, however that a new review should only be required if the CO chooses not to use Part 12 procedures. The text on Page 13 and decision chart on Page 16 instead requires the CO to review the prior CID to "confirm that the prior determination was appropriate and still applicable*"* We recommend a more balanced approach that supports the stated policy to reach CIDs within 10 days, while allowing Contracting Officers to make desired improvements to a CID documentation as necessary. We recommend the following updates to the paragraph:

   > "Although the law states that contracting officers may accept prior CIDs, the contracting officer should review the content of the CID. On occasion a~~A~~ contracting officer may agree with the conclusion that an item is commercial but believe that the logic, facts, or documentation supporting that conclusion could be improved. Under such circumstances,~~ A~~ a contracting officer may ~~wish to provide another CID in lieu of the prior CID or to~~ amplify or supplement the original CID~~,~~ but should proceed directly with confirming the CID for the current procurement, even while making updates to the original CID, to ensure that the current procurement can move forward in a timely manner."

8. **Page 14** The section on Offeror Provided CIDs statement that "the statute on precedent explicitly links these to a DoD CID" is unclear. The paragraph should be clarified that subcontract CIDs are the responsibility of the prime contractor or a higher tier subcontractor, and DoD contracting officers should rely on such determinations after confirming that the goods or services were acquired in accordance with the contractor's internal process for acquiring commercial items. Further, a subcontractor CID is not required if the prime contract is FAR Part 12, or if the value of the subcontract does not exceed the threshold for certified cost or pricing data. The last paragraph on "self-identify" is not possible, as the contractor does not receive a copy of CID memos. The fact that a FAR Part 12, Contract for Commercial Items, is issued should be adequate proof to rely on the prior CID. In some case, FAR Part 12 contracts have been used to procure items for over a decade. **These should not require a new CID.**

9. **Page 14** Under Relevant Market Conditions, the presumption to rely on a prior CID should be automatic if the Government has procured the same item as FAR Part 12 over a period of contracts and years. The Sec. 856 provision requires certain conditions be

met to convert procurement from a commercial item to a non-commercial (FAR Part 15). These conditions will eventually be in the DFARS but should be spelled out in the Guidebook as well.

Implications of FAR PART 12 and FAR PART 15 Procedures

1. **Page 15** The implications of making a CID and as a result employing FAR Part 12 commercial procedures are significant, including reducing the number of FAR requirements which will apply and relying almost exclusively on price analysis to determine a fair and reasonable price. This follows from the policy that where items and services are bought and sold in the commercial marketplace, we maximize use of standard commercial terms and conditions and will pay the going market price (see more in Part B of this Guide). Further, the commercial exception in 10 U.S.C § 2306a, Cost or Pricing data: Truth in Negotiations prohibits contracting officers from requiring certified cost or pricing data from contractors and subcontractors selling commercial items.

   Terms and conditions that accompany a FAR Part 12 contract establish a different business relationship between the Government (or higher tier contractor) and the supplier. That is by design in law and policy to entice commercial companies to sell their products and services to the Government by imposing less restrictive terms than would be imposed upon them for non-commercial products and services. Specifically, FAR Part 15 requires the use of additional oversight requirements such as Truthful Cost and Pricing Data (formerly TINA), Cost Accounting Standards, and Business System Requirements that constrain commercial companies from using their business systems.

   The policy and statutory limitations on converting prior FAR Part 12 contracts to FAR Part 15 contracts recognizes this distinction. Once a CID is rendered and FAR Part 12 is selected as the avenue to procure the item/service, contracting officers must avoid imposing FAR Part 15 clauses on what is intended to be a streamlined set of terms and conditions to acquire the commercial item/service. With inappropriate use of FAR Part 15, the Government loses the benefit of synergies of the commercial business industrial base as well as becoming disconnected from the commercial market place.

2. **Page 16.** For better flow, we recommend that the flow diagram be moved up to follow the section entitled "Overturning a Prior DoD CID", with the following changes:
   a. For any item previously determined commercial, the decision tree should be made clear: either presume that the prior determination will govern and enter into a contract using FAR Part 12 procedures or request a review from the head of contracting activity, as spelled out by Section 851 of the 2016 NDAA.
   b. Further, as mentioned above, the "evaluation" of a prior CID should not be required. It is possible that a CO cannot find a prior CID that was

completed years ago. It should be noted that Contractors do not receive copies of CIDs. The fact that a FAR Part 12, Contract for Commercial Items, is issued should be adequate to rely on the prior CID. In some cases, FAR Part 12 contracts have been used to procure items for over a decade. **These should not require a new CID.** Even if there is a prior CID, there should not be a requirement to confirm that the prior CID was "appropriate and still applicable". This is in effect eliminating the reliance on prior CIDs and ignoring the statutory change made by Sec. 851. The chart should also include a step on converting from Part 12 to Part 15 with HCA approval.

c. **Contracting Officer's Responsibility to Submit CIDS For Archive.** Finally, the CID is not complete until the contracting officer submits the CID with the PNM to DCMA via encrypted email to the address posted on the DCMA website, with a copy to the DCMA CIG that provided analysis on behalf of the contracting officer. This one-time submission of the CID is very important as it will afford other contracting officers the opportunity to benefit from this CID in the future. In turn, this should provide greater consistency and efficiency in CIDs. While not required, the contracting officer is strongly encouraged to provide a copy of the CID to the contractor for their records.

Comments on New Determinations:

1. **Page 17** The following administrative change is recommended to the introductory paragraph to accurately reflect the topics discussed in the New Determinations section:

   "This section addresses the subparagraphs of the commercial item definition in FAR 2.101 that you will ~~-~~encounter most frequently (sub paragraphs 1, 3, 5, and 6: items, items customarily used for non-governmental purposes, modified commercials items, ~~"of-a-type"~~, services in support of a commercial item, and services "of-a-type". Not all subparagraphs are covered in as much detail as subparagraphs 1, 3, 5 and 6, the most commonly encountered circumstances."

2. **Page 17 "Subparagraph 1: "Of-a-Type" Commercial Items":**

   a. The second diamond in the flow diagram, indicates that the same exact item needs to be sold or offered for sale, to obtain a commerciality determination. This is in error and conflicts with the statement below the diagram that similar items may be considered for "of a type" determinations. The focus directed by the commercial item definition is clearly and unambiguously on product type: is the offered product a type of products commonly used in the private sector. "Similarity" is not a synonym for "of a type." Guiding contract officers to decide whether two items are "similar" is no guidance at all. How similar? There is no predictable answer to such questions, and this is not the inquiry directed by the

statute. The product type focus dictated by the definition yields predictable and consistent results. Similarity is a question with no sure or consistent answer. Note that dissimilarities in some qualities or features (such as enhanced durability in harsh conditions) are valid pricing considerations, but they have no bearing on the commercial item determination itself. Commercial vs. non-commercial comes before the fair and reasonable pricing determination, and it is contrary to the statutes to commingle those inquiries. CODSIA therefore recommends that all references to similarity be stricken for the "of a type" discussion.

b. We recommend the text in diamond 2 be updated as follows:

> "Is the ~~Has~~ proposed item of a type~~item~~ that has~~,~~ been: (i) sold, leased, or licensed to the general public; OR (ii) offered for sale, lease, or license to the general public;"

3. **Page 18** We recommend the following explanatory language be included directly below the flow diagram and before the sentence beginning "when deciding". The addition will better assist procurement officials with understanding the fundamental considerations underlying both steps of the "of a type" analysis:

> "The first element of the commercial item analysis addresses the nature of the product. Is it something that commercial or non-government customers would purchase? Certain products, by their nature, are only sold to government customers. An example of such a product would be a fighter aircraft.
>
> The second element requires that the product be available "offered for sale" in the marketplace. Unlike a COTS item which must be sold in substantial quantities, commercial items just have to be offered for sale. Furthermore, the ratio of nongovernment to government sales of the proposed or similar item is irrelevant to the commerciality determination."

4. **Page 18** We recommend the following administrative changes for clarity and precision:

> "When deciding if a proposed item satisfies the definition ~~to be deemed~~ of a commercial item, an evaluation of a similar (i.e., "of-a-type") item is permitted. The definition does not require that the exact proposed item must be sold or offered for sale to non-government customers."

> **"NOTE**: The ability to consider ~~similar~~ "of-a-type" items embraces the DoD's broader view of the types of items that may qualify as commercial and gives consideration to products and services offered by both traditional and non-traditional defense contractors."

"The "of-a-type" language in the FAR definition provides broad latitude to contracting officers in arriving at their CIDs. The phrase "of a type" in the commercial item definition broadens the definition so that qualifying items do not have to be identical to those in the commercial marketplace. This takes full advantage of the opportunities for modified commercial items, both commercial and non-commercial, to be procured utilizing these procedures. ~~This is meant to encourage acquisitions of commercial items by the Department that do not fulfill the well-defined commercial off the shelf (COTS) category, yet are similar to items available commercially. The definition is applied when ascertaining whether items sold or offered for sale to the general public are present in the marketplace, and are similar to those offered to fulfill the government requirement.~~ This perspective provides the broad discretion granted to contracting officers pursuant to the principles laid out in FAR 1.102(d) and at FAR 1.102-4 which call for contracting officers to exercise flexibility and sound business judgment in interpreting and applying regulations."

"Comparison points to analyze the Government's needs to items or services available in the commercial marketplace include "Form, fit and function" which describe the essential characteristics that define a product."

- "Form refers to the physical characteristics of the item, such as the physical shape, size, material and weight. Form expands to the manufacturing process, packaging and handling requirements and any specialized coatings."
- "Fit refers to the interface of the item with other systems and to any installation requirements. Form and fit can help support a subsequent price analysis, but the function of an item is vital to support a commerciality determination."
- "Function is the essential purpose of the part. For example, is the primary purpose for the Government item military-unique?"

"When making the "of-a-type" judgment, also consider the context of the products and industry practices in customizing commercial items. While ~~items~~ functionally interchangeable items may not be exactly alike, the~~se~~ differences may be customary in the marketplace, thereby warranting an ~~do not automatically mean that they should be considered~~ "of a type" distinction~~modifications~~."

"Consideration must be given to conditions common to the technology, product or service. For example:"

- "If a car is a different color, it is still functionally interchangeable, it is "of-a-type".
- "If a safety harness jacket is one of several sizes offered, it is "of-a-type."
- "If a communication device offers different frequencies, modes, or memory, it

is “of-a-type.”

5. **Page 18 “~~Questions~~Points to Consider”** - this section highlights key points related to “of a type” procurements. We recommend that an additional point be added to the box to address issues surrounding funding of a product or service as it relates to commerciality determinations. While Government funding may be a factor to be considered, it is not conclusive and does not automatically mean that the item being procured is non-commercial. An example is when a commercial market subsequently develops for the item.

The last bullet emphasizes the fact that where an item is manufactured on the same production line as a contractor’s commercial business, this is an indication that the item is commercial. The offeror decides on processes to produce the required item most efficiently. Whether items are handmade or robotically assembled does not change the items’ type. We recommend including additional factors that indicate where a contractor applies multiple resources used to operate its commercial business segments or divisions to manufacture the item being procured, this indicates that the item may be commercial.

- Whether the Government funded the development or modification of a product or service (partially or wholly) does not by itself render the product or service as non-commercial. Even when the Government has paid for its development, or the product or service has military origin, a commercial market may subsequently develop for the item.

- What are the essential physical characteristics of the government’s “of-a-type” requirement, and how does it compare to the commercial items?

- Is the primary purpose of the item to be procured a non-governmental (commercial) purpose? If no, it is less likely that it is commercial.

- Is the “of-a-type” item coming down the same production line, or utilizing the same personnel, policies, processes, or procedures as the commercial item? These are indications the item being procured is commercial.

- The offered price is not part of the Commercial Item Determination (CID). The commerciality determination precedes and is separate from the price reasonableness determination.

- The ratio of nongovernment to government sales of a product is irrelevant to the determination of commerciality. The lapse of time

since the last nongovernment sale does not affect the ability of an item to be considered commercial.

6. **Page 19 "Application"** –
   a. The third of a type "key concept" would also become a source of inconsistency and conflict. An open-ended comparison between government requirements and available commercial items is not a predictable litmus test, nor does it say anything about product type. An offered product obviously must meet the requirements to be eligible for purchase, but this has no bearing on whether it is commercial. This concept adds no value in this context and invites confusion and should therefore be stricken.

   b. Practical Example 1 references information submitted by the offeror in support of a CID, which included examples of similar Auxiliary Power Units sold to both military and commercial customers, technical drawings, and a bill of materials. The technical drawings and bill of materials represent cost element details that are not required as a part of a price analysis for commercial items. Though the example suggests that a CID would have been confirmed without such information, the references to cost element details should be deleted to avoid any confusion for procurement officials. The recommended action is particularly necessary since contractors continue to receive excessive requests for cost-type data for commercial item procurements. We recommend the following changes to the example:

   > "The analyst conducted market research and identified both military and commercial vehicles contain APUs. The offeror provided multiple comparisons between different APUs sold to both military and commercial customers. ~~The analyst was fortunate to obtain the technical drawings and a bill of materials for the subject APUs and commercial equivalents. (It should be noted that contractors generally are not required to provide this type of cost element detail for commercial items and usually should not be asked to provide it.)~~ In the comparison analysis, the analyst identified comparatively minor differences between the commercial equivalents and the proposed APUs."

7. **Page 19 "Application"** – Practical Example 1 includes a reference to contractors submitting a "CID Package". This reference is also included in other sections of the Guidebook without an explanation of what should be included in a CID Package. We suggest adding a section to Part A of the Guidebook, like that included in Part B, entitled "Contractor Responsibilities to Support CIDs". We further recommend that the section describe information about the DoD expectations as to what should be included in a CID package submitted by contractors. The current practice of DoD is to require potential offerors to submit a technical side-by-side "matrix" and customer listing to

verify the item has been sold to the general public. Often too much information is requested and the APU example, above in the original, reflects this (see e, above).

Subparagraph 2: Items Evolved from a Commercial Item (Supply or Service)

1. **Page 21** The decision tree depicted in the Guidebook recommends a thought process in making a CID under subparagraph 2. The second diamond in the flow diagram creates confusion by stating that the evolved item must be in the marketplace before it is delivered under contract. The correct standard for an "of a type" item is sold or "offered for sale" rather than actually sold. To avoid any confusion, we recommend the following changes to the second diamond in the flow diagram:

   > "Will the item be "offered for sale" in the ~~commercial~~ marketplace before it is delivered under your contract?"

2. **Page 21** The text below the flow diagram misstates the rule for when an evolved item qualifies as commercial. The underlying commercial item, not the evolved item, needs to meet the definition in Subparagraph 1. The evolved item must be offered for sale, and does not have to have been actually sold to meet the "of a type" definition. We believe the suggested changes help clarify this important point:

   > "The definition of a commercial item only requires an item to be offered for sale to the general public; therefore the ratio of government to non-government sales is irrelevant when determining commerciality. If an item has evolved from a commercial item that meets the first two requirements of Subparagraph 1, but the evolved item has not yet been offered for sale to the general public, it may still be commercial. It must meet ~~two~~ three basic requirements:"

   - The item you are considering must have evolved from an item (either a supply or a service) fitting the definition in Subparagraph 1 due to improvements in technology or performance.

   - Services evolve just as readily as supplies, and related services follow the evolution of supplies. This frequently applies to services under subparagraph 5 of the FAR definition of a commercial item; as supplies evolve, so must the installation, maintenance, and repair of those same items (e.g.: maintenance of software).~~"This frequently applies to services under subparagraph 5 of the FAR definition of a commercial item; as supplies evolve, so must the installation, maintenance, and repair of those same items (e.g., maintenance of software).~~

   - The item ~~you are considering generally will be in~~must be offered for sale in the commercial marketplace ~~before it is~~prior to being delivered under

~~your~~the Government contract.

Subparagraph 3: Modified Items (Products and Services) "of-a-type"

1. **Page 23** The intent of the flow diagram and text directly below the diagram are to reflect the distinction between modifications "of a type" customarily available in the commercial marketplace, and modifications, which are not customarily available in the commercial market place, but are "minor" and therefore still allow an item to qualify as commercial. We recommend the following changes to the text below the diagram to provide more robust guidance and clarity regarding the distinction being made:

   "Any item that would satisfy a criterion expressed in [the "of-a-type" or evolved sections] of this definition, but for:

   i. Modifications "of-a-type" customarily available in the commercial marketplace, regardless of whether the modification is major, minor, or made to meet Federal Government requirements; or

   ii. Minor modifications "of-a-type" not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications mean modifications that do not significantly alter the nongovernmental function, core technology purpose, or essential physical characteristics of an item or component, or change the essential purpose of a process.

2. **Page 24** We recommend relocating the following paragraph regarding customary modifications, which is currently included after the further discussion under minor modifications, to directly follow the initial introduction of customary and minor modifications. We also recommend the following added language for more robust guidance and clarity regarding customary modifications:

   "Many markets allow for customization and modification as a standard commercial practice. ~~In addition, the minor modifications of a commercial product to allow the product to be used in a DoD application do not limit the product from being considered a commercial item~~Such modifications can take a variety of forms that may impact the form, fit, or function of the item or service. Moreover, end customers may have different purposes for desiring the modification, both of which are not dispositive. For modifications of a type customarily available in the commercial marketplace, the size or extent of the modifications is unimportant. The modification may be ordered as a commercial item if it is of a type customarily offered in the commercial marketplace. The key

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consideration as to whether the customization or modification is of a type customary in the commercial marketplace is whether it is generally made available as an option to commercial customers." "

3. **Page 24** Consistent with **1** and **2** above, we recommend relocating the following paragraph which provides further discussions on minor modifications to follow the further discussions regarding customary modifications (in 2 above). We also recommend adding the following language to the paragraph for more robust guidance and clarity regarding the standard to qualify as a minor modification.

> Considerations in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product.
>
> "Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor. The modified item must retain a preponderance of nongovernmental functions or essential physical characteristics. Modifications that adapt a commercial product for use by the government such as providing government specific interfaces, adapting products for use in more stringent environmental conditions, or additions of government security features are all examples of minor modifications that typically don't impact the preponderance of non-governmental functions of the commercial product. In any case, the source of funding for the modification does not impact its qualification as a commercial item. In addition, the minor modifications of a commercial product to allow the product to be used in a DoD application do not limit the product from being considered a commercial item."

4. **Page 24 "Questions to Consider".** As written, bullet two does not reflect that the "of a type" distinction may be based on two grounds: modifications made to an item are customary, or modifications are minor. We suggest the following addition to the bullet for clarification:

- "Does the supplier or other companies perform ~~similar~~ this type of mod~~s~~ for non-government customers?"
  - "If not, the modification is likely not "of-a-type"
- "Are there differences in the manufacturing processes used to perform the modification for the Federal government and non-government customers?"
  - "If yes, the modification is not likely "of a type."

5. **Page 25** "Practical Example No. 2". Includes text indicating conflict between the Contracting Officer and the offeror on providing data. The example states that the

offeror did not provide a CID in accordance with DFARS 244.402. The DFARS clause applies to subcontracts. There is no requirement for the offeror to provide a CID; that is the responsibility of the Contracting Officer. This discussion distracts from the "of a type" analysis and the bottom line of whether a CID was determined. We recommend that the messaging in this point, which speaks to contractor responsibilities during CIDs, be added to the separate section recommended under "Applications" (c) above. We further recommend the text of the example be modified as follows:

"Analysis: Upon receipt of the proposal, the reviewer requested the offeror provide their CID in accordance with DFARS 244.402. ~~The offeror did not provide the required support to determine if the product meets the definition of commercial. The reviewer worked with the offeror to illustrate a template of what should be included and make them aware of their DFARS responsibilities.~~ "

~~"Further inquiry resulted in learning the following"~~

6. **Page 25** "Practical Example No. 2". The example is not organized sufficiently to enable procurement officials to understand whether the facts are being analyzed under a customary modification, minor modification, or evolved item analysis. In any event, the conclusion that the encrypted add-ons do not qualify as a commercial of a type item appears to be incorrect. We suggest that the analysis and conclusion in the example be replaced with the following:

   "Relevant Facts of the Case:

   1. The offeror provided a proposal for radios, which were equipped with the ability to accept encryption add-ons quickly.
   2. The base radios had been offered to the general public and were therefore a commercial item. The base radios offered a limited level of security, such as frequency hopping technology. Such technology exists in the marketplace and is regulated. The purpose of the technology is to limit the number of channels that can be jumped and how fast they can be jumped. Cell phones use this capability.
   3. The proposed radios were offered to the Government as a base unit, with an optional encryption system (modification) that has the ability to be toggled, and when switched on, allows for secure communications to an aircraft.
   4. The optional encryption system is not available to the general public and market research has indicated that there is no need or use for the level of encryption being proposed.
   5. The encryption is double the price of the base radio.

- Do the proposed radios with encryption qualify as "of a type" commercial items because the modifications are customarily available in the marketplace? Yes. The facts state that the base radio is designed such that it has the ability to accept encryption add-ons of a type requested by the government customer. The fact that the government customer required an encryption level that was higher than what other customers requested or needed was inconsequential, as each customer had the right to determine the specific level of encryption needed and the base radio is designed to accommodate any type of encryption selected. The price of the encryption add-on is further inconsequential because price is not a factor to be considered when analyzing whether a modification is customarily available in the commercial marketplace. The example states that the cost of the modification exceeded the criteria. There are no criteria for determining minor in terms of costs as per the FAR 2.101 definition. The reference to FAR 15.403-1(c)(3) is incorrect in the context of non-commercial, as it describes a commercial item exception to certified cost or pricing data. In this case, encryption of higher, or lower levels, is available in the commercial marketplace. Therefore, the radios with encryption qualify as of a type items customarily available in the market place.

- The "Take Away" should include "of a type" in the description of modifications and remove the limiting minor *non-commercial* modification."

7. **Page 25** "Practical Example No. 2". With the example being placed at the end of the section which discusses "of a type" modifications, this provides a good opportunity for the Guidebook to demonstrate each type of analysis and how an item which does not qualify under one example of "of a type" modification may qualify for another, or if not, why not. Consider adding the following:

    - Do the proposed radios with encryption qualify as "minor modifications"? Maybe. Although the facts indicate that the encryption add-on is double the cost of the base radio, cost or price is not relevant in determining whether an item qualifies as a minor modification under the definition in FAR 2.101. Additional facts would be required to determine if the encryption modifications significantly alter the basic functionality of the basic radio, which has been found to be a commercial item.
    - Do the proposed radios with encryption qualify as evolved "of a type" items? Maybe. Additional facts would be required to determine if the encryption modification evolved through advances in technology related

to the baseline radio. Additionally, the encryption modification would need to be offered for sale prior to being delivered under the contract.

8. **Page 27** "Practical Example No. 3". This example illustrates many of the current issues with commercial item procurement. Market research should indicate that the brakes and bushing assemblies are available in the commercial marketplace. The modifications to the product to withstand severe vibrations should not change the function or purpose of the item. The technical review should not be concerned with the "how" of the modification but rather the "why" and therefore focus on performance characteristics and not design criteria. In the end, the Government and offeror do not agree. The Government might likely solicit under FAR Part 15 and receive no proposals under these non-commercial terms and conditions.

   Again, this example focuses on the back-and-forth between the contracting officer and the contractor with respect to whether the contractor provided sufficient data in support of a commerciality determination. Although this is a legitimate issue, it would be more appropriately addressed in the recommended section on contractor responsibilities to support CIDs. There is a missed opportunity here in providing guidance on the substantive issues of whether the brakes and bushing assemblies qualify as commercial items. Additionally, the example does not state what market research the contracting officer conducted prior to requesting information from the offeror. Perhaps a review of the market would have supported the contractor's claim that the exact brakes and bushing assemblies are available in the commercial market place, if not a similar of a type item. We recommend that the example be revised to focus on the market research conducted by the contracting officer. The additional discussion would reinforce the requirements of Public Law 114-92, Section 844, which states that Market Research is fundamentally the government's responsibility.

Subparagraph 4: A Combination of Commercial Items

Subparagraph 4 decision tree needs to be revised. Suggest another determination of commerciality between the two decision boxes. Rationale: Combination of items (1), (2), & (3) may be commercial without addition of services in paragraph 5 of the definition. Further, the decision tree adds a threshold requirement for a "preponderance" of services not otherwise contained in the FAR definition. We recommend removing that term.

1. **Page 29 "Combination of Items Key Concepts"**.
   a. The purpose of this section is to describe when one or more commercial items are combined to develop a commercial item. The guidebook's inclusion of the statement that "In most cases a combination of commercial items will result in a commercial item" indicates that there may be some instances when all items being combined are commercial, yet the end item is not commercial. We suggest that the drafters either explicitly indicate scenarios when such a circumstance

might occur, or clarify that where all items being combined are commercial, the end item **will be** a commercial item. In cases where commercial items are combined with at least one non-commercial item, a step-by-step analysis is required to determine if the end item is commercial. We recommend the following modifications to the text in Subparagraph 4, first sub-bullet:

> "When all items (including components and parts) being combined are commercial, the resultant item is commercial. In other cases, where commercial and non-commercial items are combined, the contracting officer with assistance of technical specialists, needs to determine whether or not the combination results in a commercial item~~In most instances, a combination of commercial items will result in a commercial item,~~. Keep in mind that ~~but~~ not every single ~~component~~item being combined needs to be commercial for the resulting item to be commercial. However, including non-commercial ~~components~~items may or may not render an item non-commercial, depending on the number and significance of non-commercial ~~parts~~items involved. ~~The contracting officer, with assistance of technical specialists, needs to determine whether or not the combination results in a commercial item.~~ The same ~~logic would~~rules of thumb apply to services."

b. The caveat that no classified or other Government-specific components or techniques are used to build the network is incorrect. The definition of commercial item at FAR 2.101 does not state these exceptions. The Key Concepts suggests a technical review to the component level. This is not prudent guidance as this exercise would be very costly and time consuming. As stated, the determination should be based on the combination of items being of a type sold to the general public. The last bullet states that CIDs for spare parts should be considered independently. This is not a correct statement. If an end item is commercial, then the parts used to produce it should be procured as commercial when spare parts are ordered. It would be very inefficient to conduct CIDs at the component level for commercial items.

   Recommend adding another bullet that would state that "services" performed to design and construct a computer network as used in the example would be treated as commercial under the Subparagraph 5 commercial services definition.

Subparagraph 5: Support Services for an Item (Commercial Product) (p. 30-36)

1. We recommend referring to subparagraph 5 of the FAR 2.101 definition as "services in support of a commercial item", instead of "support services for an item (commercial product)". The phrase "services in support of a commercial item" has long been used to refer to paragraph 5 of the FAR 2.101 commercial item definition, and the phrase is less confusing that the one used on page 30 of Part 1 of the guidebook.

2. **Page 30,** In the decision tree the word “currently” should be replaced with “contemporaneously”, which is the word that is used in the FAR 2.101 definition.

3. Both “no” answers in the decision tree point to instructions that the services are “Non-Commercial under Subparagraph 5”. Use of the term “non-commercial” could mislead the contracting officer to stop the analysis at subparagraph 5 even though a service could meet the definition of a commercial service under subparagraph 6. We request that the direction in the decision tree be rephrased to refer the reader to analysis of the service under subparagraph 6.

4. **Page 31**, we recommend stating that the paragraphs of the commercial item definition are those found in the FAR 2.101 definition of a commercial item. Readers may be confused about the reference to paragraph numbers, and we believe it is important for the contracting officer to continually refer to the definitions found in the acquisition regulations.

5. **Page 31,** in the first bullet does the guidance instruct the contracting officer to obtain a recommendation from the CIG and complete a new CID on the item as a prerequisite to determining that services in support of the item are commercial? If so, this guidance demands a process that is not found in the regulations and is likely to be unworkable.

6. **Page 31,** in the second bullet delete the word “currently”. The FAR definition uses the word “contemporaneously”, not “currently”.

7. **Page 31 “Questions to Consider”**:

    a. Regarding the first bullet, why does it matter if the item is commercial or commercial “of a type”? This consideration does not seem to be relevant. We recommend changing the bullet to read:

    > “Was the item being serviced purchased under a FAR Part 12 contract or subcontract, or does the item otherwise meet the definition of a commercial item under FAR 2.101?”

    b. The second bullet suggests that a service cannot be commercial if it supports a product that does not meet the definition of a commercial item. Services may indeed be commercial under subparagraph 6 of the FAR 2.101 definition of a commercial item. Furthermore, a service may support a commercial item and support government unique items; the fact that the same service may be performed on both types of products does not mean that the service is not a service in support of a commercial item. We recommend deleting the second bullet as it is confusing and does not help the analysis.

c. The third bullet erroneously suggests that the purchase of a commercial service to support a noncommercial product requires something other than a FAR Part 12 contract. If the third bullet is intended to address the purchase of a commercial service, it should be deleted since it is inaccurate. If the third bullet is intended to address the purchase of a noncommercial product and commercial services to support such product in the same contract with the same contractor, the guidance does not belong in this section because the guidance relates to the purchase of a noncommercial product. Additionally, the suggestion in #2 below the third bullet that it would be appropriate to issue a contract for a commercial service using anything other than a FAR Part 12 contract is simply wrong and should be deleted.

d. The use of a “hybrid contract” is not a desirable approach. These contracts are very difficult to administer and defeat the purpose of using the streamlined procedures of FAR Part 12. If there is a combination of items, then Part 4 of the commercial item definition should be used. If products are commercial then generally, ancillary services should also be commercial, except in unusual circumstances.

e. In the second set of bullets in the “Questions to Consider” box on page 31, bullets 2, 4, 5, 6 and 7 seem to relate to the negotiation of FAR Part 12 terms and conditions and are irrelevant to the determination of whether the services are commercial. We request that those bullets be deleted from this section of the guidance. Keeping those bullets in this section suggests that the contracting officer must determine the answers to all of those questions prior to making a commercial item determination, instructions that simply have no basis in the regulations.

f. Bullet 2 of the second set of bullets is not relevant. The lapse of time since the last nongovernment sale is irrelevant to commerciality, and the instructions to “make a judgment call regarding continued relevance” are too vague to be helpful.

g. The concept of similar services and terms and conditions is that the company sells a similar solution to both government and commercial customers. There is a mindset that this needs to be “proven” at a very detailed level. This is not the case; the Government should rely on the company’s input without requiring copies of commercial contracts at a detailed level. Providing examples from a commercial contract is often not permitted by the customer and is not a customary commercial practice.

h. Additionally, many terms and conditions, such as the majority of FAR and FAR supplement clauses, are specific only to government contracting in FAR part 12 contracts, and thus it would be nearly impossible for an offeror to have a

commercial contract with terms and conditions which are virtually identical to those offered to the Government, as the current draft of this handbook seems to suggest they need to be.

i. There is also a mindset that services cannot be similar if there is a difference in price offered. Services in the commercial marketplace might be contracted for much differently where there is a long-term purchase commitment for products and services. Government requirements vary by program and contract and there is no long-term commitment for these products and services. Thus, the comparison between prices in the commercial marketplace is not useful and has no part in determining whether an item meets the definition of "commercial item" under the FAR.

j. The difference in terms and conditions between government and commercial customers might be important to understand the price offered, but it is not relevant to determining commerciality.

k. What if the terms offered to the USG are similar but better than those offered to a commercial customer? Does not that make the terms different?

l. The discussion of risk in the last bullet on page 31 is misplaced and confusing. If the offeror is exposed to more risk on a USG contract than a commercial contract, is the government going to mitigate that risk? Are the terms different just because the Government-unique terms expose the contractor to more or less risk than a commercial contract? We do not understand the relevance of including the topic of risk in this guidebook; each contract, whether commercial or government, carries a different level of risk. Some terms that allocate risk also affect price negotiations, but risk is irrelevant to the determination of whether a service is commercial.

8. **Page 32**:

   a. The first example entitled "Application" is an example of the benefits of market research to find commercial solutions to DoD's needs and promote competition. The example does not belong under the section on determining commerciality of services in support of commercial items. Furthermore, the guidebook will be most useful when a contracting officer is facing the challenge of determining commerciality and particularly price reasonableness when only one source can meet the government's requirements. Introducing a competitive example in any section other than the market research section is not helpful for addressing a sole-source situation.

b. Regarding the first bullet under "Key Concepts"; why does it matter if the item is commercial or commercial "of a type"? This is irrelevant.

c. Under the section entitled "'Support Services' Key Concepts", the third bullet should be moved to the discussion of subparagraph 6 of FAR 2.101.

d. The second "NOTE" on page 32 makes an important point: FAR Part 12 contracts should be as similar to commercial terms and conditions as possible, and DoD should not plan to use terms and conditions that are different from those used in the commercial marketplace except as required by law. We recommend rephrasing the point, however, to emphasize the second sentence of the note and "clarify that FAR Part 12 instructs contracting officers not to use terms and conditions that are different from those in the commercial marketplace."

e. Example No. 4, page 32-33: the example leads to a noncommercial determination for services offered to support aircraft engines that are commercial items and are provided by a contractor that provides such services contemporaneously to commercial customers. The reason cited is that the Government's requirements included unplanned maintenance, while the contractor's work for commercial customers is for planned maintenance. The example does not demonstrate a difference in terms and conditions (i.e. contract clauses). The difference is one of timing of maintenance, which is a statement of work or scope of requirements difference but not a difference in terms and conditions. The fact that maintenance is planned or unplanned could impact price; however, the difference does not turn a commercial service (maintenance and repair of commercial aircraft engines) into a government-unique requirement. The fact that this small business performs similar services for commercial airlines should be an indicator of commerciality. Terms and conditions are the contract clauses that will be included, and the contracting officer should rely on those customary to the commercial marketplace. Unplanned maintenance and repairs pertain to a particular customer's performance requirements and would be expected to differ from customer to customer. This example would be a good one to illustrate how the Government's improper use of FAR Part 12 drives commercial companies and small businesses away from doing business with the Government.

f. Additionally, requiring that an item must be sold under terms and conditions no less stringent than the Government is seeking to be deemed commercial is not relevant to determining commerciality and would eliminate many items from being procured under commercial contracts. Government contracts, even those issued pursuant to FAR Part 12, contain many terms and conditions that are more stringent than those typically found in commercial contracts.

g. Finally, we recommend eliminating the phrase "at one third the price" from the Application example. This has no bearing on determining whether the service is commercial.

h. Example No. 5 on pages 34 and 35 is extremely confusing. It is unclear whether the facts relate to a prime contract or subcontract. It appears that the solicitation was issued as a competitive solicitation under FAR Part 12, yet the fact pattern refers to requests for detailed breakdowns of proposed maintenance services and a subcontractor's invoices to commercial contractors, all in support of a commercial item determination that should precede the issuance of a solicitation. This example points out that market research was performed and concluded that the service was commercial and the Government issued a Part 12 competitive solicitation. The Government then performed an extensive analysis by requesting copies of all invoices or contracts where this subcontractor has performed like/similar services within the commercial marketplace. This is an example of how CIDs and price reasonable determinations (PRDs) are being commingled to the detriment of getting to the correct application of the FAR and DFARS rules. The market research had already determined that commercial services were available; however, the DCMA price analyst repeated the effort by imposing his or her own ideas about what constitutes a "commercial item" and required contractors to submit detailed information about subcontract prices. The efforts of the price analyst might have been appropriate for the price analysis, but not for a CID. This example also points out the varying standard to determine what is "similar." Using words like "exactly the same", "apples-to-apples" comparison, or "identifying differences" leads to a much narrower view of commerciality and therefore excludes sources that could provide valuable services to the Government.

i. The introduction to Example 5 references DFARS 244.402. The statement that the prime contractor is responsible for submitting a CID in accordance with DFARS 244.402 is inconsistent with the stated policy that "Contractors shall determine whether a particular subcontract item meets the definition of a

commercial item." Rather, the prime contractor is to make the determination in accordance with its stated purchasing procedures. While DFARS 244.402 requires the prime contractor to make a CID, there is no requirement to provide a copy of the CID to the Government, nor should there be.

j. The first bullet at the top of page 36 erroneously directs the contracting officer to "cross reference and identify that these 'services' can be performed either exactly the same between Government and Commercial contracts". The FAR 2.101 definition of commercial item does not require that the same services must be performed exactly the same way or under the same terms and conditions in a government contract as in a commercial one. In fact, the FAR definition refers to "similar" terms and conditions. It is also unclear why the bullet puts the word "services" in quotation marks; does the use of quotations marks suggest skepticism that the work is a service?

k. The second bullet at the top of page 36 erroneously states that "any differences in terms and conditions" must be reflected in price analysis. There is no requirement in the FAR that each and every difference in terms and conditions between a government contract and a commercial contract be quantified and priced out in a price analysis.

Subparagraph 6: Services "of-a-type" (pages 37-40):

9. Page 38 of this section contains a misstatement: "Catalogs must be published or available to the general public." The FAR 2.101 definition states that a catalog "is either published or otherwise made available for inspection by customers", not that the catalog must be available to the general public.

10. The ratio of government to commercial sales is irrelevant to the determination of whether a service is commercial, so the instruction that "the contracting officer will need to identify the size of the market and sales volume" should be deleted or revised.

11. The "NOTE" on page 38 will confuse readers. The commerciality determination should be made separately from the price reasonableness determination. This note is misleading and should be rewritten to ensure the reader understands the two-step process.

12. Under the "Questions to Consider" section on page 38, the first bullet instructs the contracting officer to determine whether there are "sufficient" similar commercial services companies such that there is competition, yet the term "sufficient" is not contained in the

FAR 2.101 definition. We request that the first bullet be revised to remove the direction to determine that there are "sufficient" competitors. Also, the text "resulting in market driven prices" should be changed to read "based on established catalog or market prices" to be consistent with the commercial item definition. In the second bullet, the language that reads "the item is" should be changed to read "the item is of a type" sold in substantial quantities.

13. The "Application" section on page 39 lists some types of services, but certainly not all services that DoD buys. We are concerned that by listing some types of services, contracting officers may interpret the guidance to mean that a service must fit into the listed categories to be a commercial service.

14. Under "Key Concepts" on page 39, the second sentence in the first bullet should be removed. The established catalog or market price does not have to be advertised to the general public. Such prices are often considered company confidential and provided only to those parties with a "need-to-know." In the fourth bullet, once again the "of a type" service is required in the commercial marketplace.

15. Example 6 on pages 39 to 40 is an example of a service in support of a commercial item, not a stand-alone commercial service. We recommend that a different example be used. Moreover, the example and key take-aways cover other topics, such as prime contractor determinations of commercial item subcontracts.

16. Example 6 incorrectly interprets DFARS 244.402 (inadvertently referenced in the document as DFARS 224.244) for the practice of requiring a prime contractor to produce CID documentation for each commercial subcontract.

17. The first take-away in Example 6 on page 40 suggests a common disconnect between prime contractors and DoD: prime contractors may buy a supplier's products or services for incorporation into the prime contractor's sales to commercial customers, yet DoD questions such purchases as not commercial when purchased in support of a DoD contract. As used in this example, the facts seem to instruct on the issue of whether a stand-alone service is sold competitively. Nevertheless, we believe that the guidance should be clarified, in the appropriate sections, that a prime contractor's purchase of supplies or services for sale to the prime contractor's commercial customers is sufficient to establish that the supplies or services are commercial when sold by the prime in support of a DoD contract.

18. Under the second take-away in Example No. 6 on page 40, the use of the RFI process is acceptable if the magnitude of questions warrants, however the use of the term "it may be safer" is not necessary and may lead to unnecessary delays in the acquisition process.

19. The third bullet under take-aways essentially instructs the contracting officer to reject a prime contractor's commercial item determination if it is the subcontractor's assertion of commerciality. If the subcontractor's assertion of commerciality is sufficient to establish that the item is commercial, there is no requirement that the prime engage in a needless "paper the file" exercise to restate the subcontractor's assertion of commerciality.

20. The last bullet under Example No. 6 on page 40 should be removed as this is beyond the scope of making commercial item determinations.

Subparagraph 7: Items Transferred Between Divisions of a Contractor (pages 41-42):

1. There is no requirement to perform a CID on interdivisional transfers. Items transferred from a commercial division to a defense division are treated as commercial items. Price reasonableness would be part of the prime contractor's proposal. This is an area where the DCMA ACO can be consulted if there are any questions as to the commercial status of interdivisional transfers.

2. The paragraph below the "NOTE" states that "interdivisional sales should not be solely relied upon to establish commerciality." This statement should be revised, as some companies have subsidiaries that only supply components to other selling entities within the company. If one part of the company purchases products or services from a subsidiary in support of its commercial sales, and purchases the same or similar products or services from the subsidiary for its government contracts, the products or services would meet the definition of a commercial item.

3. Under "Application" on page 42, the example does not fit the interdivisional transfer definition. It would, however, be a good example for Paragraph 1 of the commercial item definition and should be moved accordingly.

Subparagraph 8: Non-developmental Item (Product) (pages 43-44)

1. The FAR 2.101 definition of Non-developmental Item should be added. The last sentence on page 43 is incomplete as it should also include use by Federal and foreign governments.

2. The Application example is in error as the product meets the definition of Non-developmental Item, but does not meet the narrower definition of what NDIs qualify as commercial items under Subparagraph 8 of the definition. The example indicates that the drone would qualify as a commercial "of a type" item under Subparagraph 1.

3. In the last bullet on page 44, delete the words “especially if the item is being sold in the commercial marketplace to non-government customers.” This statement inappropriately narrows the commercial item definition.

Other Considerations (pages 45 -46)

1. **Page 45:** Prime Contractor CIDs; this paragraph should explain under what circumstances the Contracting Officers will require a copy of the Prime Contractor’s CID. The copy should only be required to support a commercial item exception to the requirement for certified cost or pricing data. Subcontract proposals under $750K should not require a CID. The statement “pricing of component assemblies and parts in the supply chain” is too vague and not relevant to a CID. Additionally, the Guidebook should add clarifying language stating that it is not the prime contractors’ responsibility to perform CIDs on their subcontractors’ sub-tier suppliers. Each tier of the supply chain will perform commerciality determinations and price reasonableness on their subs when required by the regulations.

2. The Guidebook does not seem to interpret DFARS 244.402 as intended under the regulation. After stating that the prime contractor shall determine whether a subcontract item meets the definition of a commercial item, DFARS 244-402 states that the requirement “does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3).” FAR 15.403-1(c)(3) describes the contracting officer’s role in making commercial item determinations at the prime contract level and does not direct the contracting officer to make an independent determination for each commercial item subcontract that the prime contractor awards. In fact, the referenced FAR section is silent on the contracting officer’s role with respect to subcontract CIDs. Rather than referencing DFARS 244.402 to reinforce that subcontract CIDs should be reviewed during a CPSR rather than on a proposal-by-proposal, part-by-part basis, the guidebook seems to reference DFARS 244.402 to direct contracting officers to question and require documentation of the prime contractor’s subcontract CIDs at each opportunity as a way of verifying that the prime contractor is meeting its responsibility. This guidance seems to turn DFARS 244.402 on its head to mean something other than what was intended by the regulation and to discourage a prime contractor from incorporating commercial items into their products. The guidebook should be modified to clearly state that the prime contractor is responsible for subcontract CIDs, the sufficiency of the contractor’s CIDs is subject for the contractor purchasing system review, and the contracting officer need not review the prime contractor’s subcontract CIDs as part of proposal review.

3. **Page 45:** Nontraditional Defense Contractors, in the second paragraph delete the words “and does not mean the item is commercial”. Stating that the decision to apply commercial item procedures for nontraditional contractors does not mean the item is commercial was not included in the FY 2016 NDAA. Section 857 states: *“Notwithstanding section 2376(1) of this title, items and services provided by nontraditional defense contractors (as that term is defined in section 2302(9) of this title) may be treated by the head of an agency as commercial items for purposes of this chapter.”* This additional direction adds uncertainty for

nontraditional contractors for renewal contracts and could adversely impact their initial decision to sell to the DoD. Draft DFARS Rule 2016-D006 contained the following language addressing non-traditional defense contractors. We suggest including here as well to highlight the importance of doing business with non-traditional defense contractors to enhance defense innovation:

> *"Nontraditional defense contractors.* Supplies and services provided by nontraditional defense contractors and subcontractors may be treated as commercial items (A). This authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of "nontraditional defense contractor" even though they have been established under traditional defense contractors".

4. **Page 45:** 2017 NDAA, Section 878, updates treatment of services provided from a nontraditional defense contractor to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology use for commercial pricing. The Guidebook should be updated from "may be treated as commercial" to "shall be treated as commercial."

5. **Page 45:** There is also a statement that "[i]t should be common practice that prime contractors compete suppliers of components on a regular basis." This statement is about competition, not about commercial item determinations, and should be deleted as it is off-topic.

<u>Commercially Available Off-the-Shelf (COTS) Items (pages 46-49)</u>

This section should be clarified. We commend the guidance if COTS items retain their COTS status through the life of the program. This will allow DoD to continue to buy the same products as spare and replacement parts through the life of a DoD asset or program. The discussion of obsolescence could be read to discourage the purchase of COTS items, even when the items are perfectly suited to meet DoD's needs. Therefore, we recommend a clarification that maintaining the COTS determination mitigates the obsolescence issues and should not prevent DoD from choosing COTS items at the beginning of a program. We strenuously object to the first two bullets at the top of page 49, as there is no requirement in the FAR or DFARS for an offeror to provide a list of components made from specialty metals and the country of manufacture, nor is there a requirement for a certification under DFARS.

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Commercial Item Guidebook Part B - Price Analysis

General Comments on Part B

1. This Guidebook needs to communicate with greater clarity what pricing data is required to be submitted with a FAR Part 12 proposal, including proprietary issues regarding the disclosure of customers and prices paid between buyers and sellers.

2. The Title of Part B, "Pricing Commercial Items," and characterization of DoD's role creates the impression that the contracting officer is required to determine the lowest price in the market place prior to contract negotiations. The law only requires the contracting officer to determine price reasonableness of commercial items. We believe using the word "pricing" as a verb orients the reader to a traditional DoD cost+profit=price mindset.

3. There is ambiguity in the overview of what "fair and reasonable" means. It is not necessarily the lowest price. It does not need to be precise—it could be anything within a range. It has nothing to do with how much "profit" an offeror may or may not make. The Guidebook should emphasize that the Government will pay a fair and reasonable price that is consistent with any other commercial buyer.

4. In the absence of sufficient competition or market price data points, the Guidebook must emphasize an understanding of the offeror's pricing process. This has nothing to do with requests for contractor cost data. And, it does not mean the Government's FAR/CAS-based cost+profit=price equation. If there aren't any comparable market prices, then the Government should understand how the offered price was developed. The Guidebook could provide enhanced value by further exploring this topic.

Overview

1. **Vision Forward: The Competitive Mindset.** This section emphasizes the importance of an actual competitive market place for items and services to ensure that the government obtains a fair and reasonable price. To be consistent with Department of Defense (DoD) policy, the Guidebook should also discuss "competitive pressures," even in the absence of actual competition, as a valid means of obtaining a fair and reasonable price. Often, the threat of competition will cause a sole source supplier to continue to offer competitive prices to maintain the business relationship that was won through earlier activity. Under circumstances where the contractor believes that viable competitors willing to sell to the government exist, this can have an impact on prices favorable to the Government. Given guidance in the section that "the fact is the Department must acquire a significant amount of "sole source" items and services that meet the commercial item definition," we recommend that the section be modified to include additional discussion to ensure contracting officers understand the competitive pressures principle.

2. **Contractor Role in Supporting Price Reasonableness Determinations**

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Contracting Officers and Contractors both have important roles in supporting CID and price reasonableness assessments. To better reflect a shared responsibility and partnership between the two parties, we recommend that the following changes be made to this section.

3. **Page 2** Change the title to: "CONTRACTING OFFICER AND CONTRACTOR ROLES IN SUPPORTING PRICE REASONABLE DETERMINATIONS"
4. **Page 2** Modify the paragraph as follows:

   "We often hear that the Acquisition process described as a "team sport." The same can be said for Commercial Item Determinations (CID) and ~~the pricing~~ price reasonableness assessments of commercial items~~.~~, with both the contracting officer and the offeror having important roles during these stages of the procurement process. Contracting Officers are responsible for determining price reasonableness of commercial items and should do so in accordance with established laws and regulations including FAR 15.401-1 and DFARS Rule 2016-008. ~~Just as the contracting officer is responsible for following the regulations when requesting information from the offeror, it~~. In the event that information from the offeror is requested by the contracting officer, it is the role of the contractor to be responsive to those requests. If for some reason, the offeror ~~refuses~~ declines to ~~comply~~ submit with requested~~s for~~ information to support CIDs or price reasonableness determinations, contracting officers should request the offeror assert its position in writing along with associated rationale for not providing the requested information. At the end of the day, we should not be buying items or services at prices that we do not consider to be fair and reasonable. While it is our responsibility to perform adequate price analysis of commercial items, that responsibility does not relieve the ~~contractor~~offeror of its obligation to support the reasonableness of its proposed prices if it chooses to supply goods and services to the Department of Defense."

5. **Definitions** For precision and clarity, we recommend that the definitions for pricing data and cost data be modified as follows:

   a. **Page 3** "Pricing Data Pricing data are all facts, exclusive of separate cost elements or profit, that prudent buyers and sellers would reasonably expect to significantly affect price negotiations ~~significantly~~ of the item. Examples of pricing data include established catalog or market prices, or any form of data on sales to commercial and Governmental customers."

   b. **Page 3** "Cost Data Cost data are any facts, other than ~~prices~~pricing data, which ~~that~~ prudent buyers and sellers would reasonably expect to signifcantly affect price negotiations ~~significantly~~. Cost data should help you understand what the item did cost, will cost, or should cost."

6. **New Section Entitled "Fundamental Principles of Pricing Commercial Items.** The note relative to "did cost", "will cost" and "should cost" data currently under the definition of cost data focuses specifically on cost analysis even before fundamental principles regarding price analysis – the preferred method for determining the reasonableness of commercial items – is introduced. We recommend an alternative approach similar to what we recommend for Part A, insert a section after "Definitions" and before "Value Analysis" entitled "Fundamental Requirements for Pricing Commercial Items" to address the basic requirements and regulations for pricing commercial items. We recommend that the discussion address the following important topics. We further recommend that the discussion on "did cost," "will cost," and "should cost", through the Note at the end, be relocated after fully explaining the following fundamental principles:

   a. **Page 3 The Order of Preference for Obtaining Data** (whether price or cost) in support of a price analysis is outlined in FAR 15.402, and 15.403-3. Contracting officers will take reasonable efforts to gather information from within the Government and from sources other than contactors in accordance with FY 2017 NDAA Section 871 – Market Research for Determination of Price Reasonableness in Acquisition of Commercial Items. Where the information gathered provides an adequate basis to establish a fair and responsible price, no additional data will be requested from contractors. Where the information is insufficient to establish a fair and reasonable price, contracting officers may request other than certified cost or pricing data from the contractor.

   b. Price analysis using price data is the preferred method for determining price reasonableness for commercial items. There are multiple techniques available to contracting officers for price analysis as outlined in FAR 15.404-1. With the exception of value analysis, the available methods may be used in singular, or combined, as necessary, to assess the reasonableness of prices offered. [We recommend including a chart depicting the various methods available].

   c. Other than certified cost or pricing data. When data from the contractor is required, the order of preference in "a" continues to apply, and cost data should only be requested if price data (may include sales data) submitted by the offeror is insufficient for the assessment. The following order of preference applies to contractor submitted sales data:

      - Prices paid for the same or similar items under comparable terms and conditions by both Government and commercial customers
      - Prices paid for the same or similar items sold under different terms and conditions;
      - Prices paid for the same or similar levels of work or effort on related products or services
      - Prices for alternative solutions or approaches; and,

- Other relevant information that can serve as the basis for a price assessment

If the contracting officer determines that the information submitted pursuant to the subparagraphs above is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates. An offeror may not be required to submit information described in the paragraph above regarding a commercially available off-the-shelf item and may be required to submit such information regarding any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the pricing information submitted is not sufficient to determine the reasonableness of price.

d. **Format for Requesting Data** FAR 15.403-3, requires that all information be requested in the contractor's standard format that is consistent with their ordinary course of commercial business operations. [We recommend adding additional discussion on this point to assist procurement professionals with understanding why this is so crucial (i.e. increased costs related to requiring new systems and procedures for government unique formats].

Value Analysis

1. **Page 3** We recommend that the following definition of value analysis be included at the beginning of the first paragraph of the section to lay the foundation for the discussion in the section. We recommend that the sentence beginning "one must try" be deleted from the section.

   "Value Analysis involves monetizing higher levels of cost avoidance and benefits received from one item or service under consideration over another as a part of a price comparison."

   "~~One must try to monetize higher levels of cost avoidance and benefits received as a part of or in conjunction with price analysis. Some examples of items to consider are:"~~

2. **Page 4** The list of elements that qualify for value considerations is a good start. We recommend that the items identified below be included for a more robust list. We also recommend the points of clarification indicated for Performance Standards/Requirements and Quality Standards:

   - "Performance Standards/Requirements (capability)
   - Quality Standards (availability and reliability)
   - Warranty (both type and length)

- Ease of Replacement vs. Downtime and Re-work
- Total Cost of Ownership
- Cost Avoidance
- Intellectual Property Rights
- Technical Data
- Requalification/Recertification costs
- Past Performance
- When combined with a Public-Private Partnership – work hours and Depot improvements"

3. **Page 4 Evaluating Price, not Cost.** We applaud the direction provided to focus on price and not cost for price analysis. However, the statement "some companies will charge the highest price the market will bear irrespective of the damage it may cause to their long-term business prospects" is misleading and should be deleted. The statement mistakenly focuses solely on intentional price gouging as the sole reason for higher prices. The guidance should be written in a non-adversarial manner and should recognize that there are many market forces which may either require or enable contractors to charge higher prices. If the statement is not deleted altogether, we recommend it be modified as follows:

   "The difference between an offeror's cost and the selling price is profit. This may lead you to think cost plus a certain profit rate drives fair and reasonable pricing in the commercial marketplace. This is not completely accurate. Using value analysis, our determination of a fair and reasonable price, however, should be based on our assessment of the value to the Government. In a commercial marketplace, some companies ~~will~~ may charge the highest price the market will bear due to a number of circumstances beyond the buyer's control (e.g. scarcity, product differentiation, limited alternatives) ~~irrespective of the damage it may cause to their long term business prospects.~~ Understanding who is in the market is an important factor when evaluating price as it relates to value."

4. **Page 5 Understand the competitive market conditions.** We recommend that this section be modified as follows:

   a. Clarify that price analysis, not cost analysis, is the preferred method for commercial items as follows:

   b. Adequate price competition is the preference for commercial acquisitions. Understand that the competitive market conditions reinforce the importance competition plays in fair and reasonable pricing especially in the commercial environment since cost data m~~ay not be available~~ is not required.

c. Include an additional consideration to the list of questions procurement officials should be asking themselves to better understand the particular market segment they are operating in as follows:

> "Is the price for the supplies/services consistent with market prices?"

5. **Page 5** The discussion on value analysis appears to address two separate topics: value analysis for price reasonableness assessments and value analysis for requirements definition/source identification. We suggest the following administrative change to better transition the section into the latter topic:

> "In addition to utilizing value analysis for price analysis, ~~V~~value analysis should also be used to foster an understanding of the Government's acquisition need and help align the requirements with industry capabilities. For an effective acquisition, market research should provide information on the value of the item/service in comparison with possible ~~substitutes~~alternatives in the industry"

6. **Pages 6-7, Example 1**, concludes with a determination that the price quoted was "fair and reasonable," but then unnecessarily adds the idea that "the team recommended a quantity discount." The discount recommendation does not have anything to do with the determination that the price was fair and reasonable. Including it here suggests that, even when a price is in fact "fair and reasonable" and determined to be so by the government, the government should nevertheless get a discount anyway. The takeaway then becomes, even where the price is fair and reasonable, the government should pay something less.

Market Research

1. **Page 7** Both Part A and Part B discuss the contracting officer's responsibility to conduct market research during the acquisition process. Part A speaks to market research for requirements definition/source identification, while Part B speaks to market research for price reasonableness assessments. We recommend that the opening paragraph of the Market Research section be modified as follows to clarify this important distinction and provide an official definition for what it means to conduct market research as it relates to price analysis:

> Part A of this Guide addresses market research and techniques as related to making a CID.
>
> Part B of this Guide addresses market research and techniques for assessing whether the price of an offered item is reasonable. Market research for price analysis is the act of gathering and analyzing price information and price-related

information for same or similar items, and understanding unique market influences and price drivers, to enable sufficient comparison to a proposed price.

2. **Page 7** We further recommend that a new paragraph be added after the introductory paragraph. The new paragraph should provide additional guidance to procurement officials that describes what they should be looking for and considering as they perform market research. The recommended definition under 1 above provides a solid starting point by stating that market research involves gathering and analyzing price and price related information for the same or similar items as that being procured for a comparison analysis.

   Additionally, procurement officials should seek to understand two major factors: 1) the particular market space in which they are buying, including any market forces at play impacting prices, and 2) the differences between the products or services being compared. Too often, procurement officials conduct high level comparisons that do not provide due consideration to particular market nuances. We recommend the following for the new paragraph:

   > Procurement officials should seek to understand two major factors 1.) the particular market space in which they are buying, including any market forces at play impacting prices, and 2.) the differences between the two products or services being compared. Relevant factors include, but are not limited to the following:

   a. Understanding the market in which you are buying, including how relevant market forces are impacting prices, e.g.
      - Is there an excess or scarcity of suppliers and sellers in the market?
      - What are the pricing strategies and business models of sellers?
      - Customer demographics and buying behaviors e.g., who is buying, what are their buying purposes and intended uses for the products or services
      - Other market forces

   b. Understanding how differences between the products or services you are comparing impact price.
      - Are there differences in physical characteristics and capabilities of the products or services (i.e. form, fit, or function).
      - Quantity differences
      - Buyer Unique Requirements
      - Contract Terms and Conditions (e.g. performance requirements, (FAR and DFARS clauses).

3. **Page 7 2016 NDAA Impact to Market Research.** The statement that the FY2016 NDAA, requiring market research for price analysis, “reinforces existing practices” is subjective. Many, including those within the Government, agree that market research is not conducted enough or sufficiently. The statement may send the message that it is

okay to maintain the status quo, when language mandating market research for price reasonableness determinations is meant to change the current behavior of DoD procurement officials and ensure that market research is the first step in analyzing prices of offered items. We suggest deleting the sentence altogether or changing the last word to "policy" for better accuracy as follows:

> The 2016 National Defense Authorization Act (NDAA) clearly provides that Market Research shall be used, where appropriate, to inform price reasonableness determinations. This reinforces existing policy.

4. **Page 8** The guidance provides that by including the words "where appropriate" in the NDAA language, Congress intended to provide procurement officials with flexibility in determining when and to what extent to conduct market research. While this statement may be true, it should be clarified that the phrase does not excuse a contracting team from performing market research to the extent possible, as this is a very important step that allows a contracting team to build the necessary rationale and knowledge for effective negotiations. We recommend:

> The phrase "where appropriate" allows the contracting team flexibility in determining when and to what extent to conduct market research". However, the contracting team should perform market research to the extent possible to ensure the government acquires the necessary rationale and knowledge for effective negotiations.

5. **Information Sources**
    a. **Page 9 First Source: Government Resources, Advance Agreements.** We suggest moving the discussion on Advance Agreements to "Information from The Offeror," for a better flow. Advance Agreements typically address the types and amounts of data and support contractors agree in advance to provide that are deemed sufficient for a price reasonableness assessment.
    b. **Page 9 First Source: Government Resources, Government Experts.** Including the discussion on government experts under "First Source: Government Resources" is misleading as the text speaks to utilizing government experts (DCMA, DCAA) to request data from contractors. We recommend that this section be rewritten to discuss leveraging government resources on hand as part of market research without suggesting that the default is to have those experts seek out and require data from contractors.

       Additionally, the text providing guidance that DCAA should access contractor business systems, cost monitoring and forward pricing activity, compensation systems, books and records, etc. represents a cost-based approach and goes beyond the scope of commercial item procurements. Support of such practices and granting the government the requested access to books and records are inconsistent with standard commercial practices during

commercial item acquisitions. We recommend that any such references be deleted altogether or relocated to the section entitled "Beyond Price Analysis" and if relocated, be clarified to refer to records or data that the contractor has agreed to make available.

c. **Page 10 Second Source: Sources Other than the Offeror (public resources).**
The section directs procurement officials to request copies of invoices billed for items from contractors. We recommend that this section be rewritten to discuss leveraging data from non-government offerors, rather than requiring data from contractors.

d. **Page 13. Price Data**: This table repeatedly directs contracting officers to consider "commercial sales" and "commercial customers." The only citation in support of that approach is DAU's Contract Pricing Reference Guide, which is no longer a valid authority considering intervening changes in law and policy. Every one of these references should read "Government or commercial sales" or "Government or commercial customers."

e. **Page 14 Third Source: Information from the Offeror.** The section does not include clear guidance that describes the information that should be requested from the offeror as a part of a price analysis. We recommend rewriting the section with references to the FAR and DFARS as appropriate.

Additionally, the direction to procurement officials to obtain access to contractor Enterprise Resource Planning tools goes beyond the scope of price analysis and is a cost-based approach to price reasonableness assessment. We recommend deleting such references from the section.

f. **Page 14 Third Source: Information from the offeror.** This section, as well as other sections in Part B of the Guidebook, references an 18-month window for sales data to be valid. The suggestion will likely be viewed as a rule of thumb and inevitably equate to a threshold test for determining relevance of prior sales data. Similar threshold tests have been explicitly rejected in the past by Congress. The correct standard is that prior sales data should be reviewed based on a totality of circumstances. Whether data is too old should be a case-specific determination. We recommend deleting any references in the Guidebook to an 18-month window for sales data to be valid and replacing such references as follows:

> Instead of asking for copies of contracts and invoices to demonstrate sales based on your market research, ask for sales for a set period of time that is reasonable given the totality of circumstances for the item or the industry

The Information from the Offeror section does not adequately describe what information is required from the offeror. The FAR requirements for information required to be submitted should be delineated here. The access to contractor ERP and business systems is a cost-based focus and should not be included. This section needs to be rewritten in the context of Sec. 852/853 of the FY 2016 NDAA (as discussed on page 19). Reference to DFARS 212.209 is made, however this policy is part of DFARS Case 2016-D006 which is pending. This is such an important policy that the Handbook would benefit by including key text. For example, market research should be used to inform price reasonableness determinations, and if it is insufficient then the offeror is to provide information on recent prices paid for the same or similar items.

6. **Page 15** Public Law 114-92, Section 853 (NDAA FY 2016) directs consideration of non-government and government sales data as a part of a price reasonableness analysis. Guidance that suggests that DCMA or DCAA should verify that sales are to non-government entities undermines the current law. We recommend modifying the language in this section to clarify where sales data is required, both government and non-government sales data are to be considered during the government's price analysis.

7. **Page 15:** The guidance about the use of the contractor's ERP system should clarify that the request to utilize the contractor's EFP systems for purposes of examining cost data is subject to the FAR order of preference and hierarchy of data requests set forth in FAR 15.402(a)(2) and 15.403-3(a)(1).

8. **Page 17** Suggest the following change be made to the cautionary note for clarification:

   Prohibition on obtaining certified cost or pricing data on page 17; the cautionary note regarding sole source awards is misleading and should be deleted. Statements such as "sufficient data" and "anything that is necessary" are open ended and should be defined consistent with 10 U.S.C. 2306a. Further, the reference to PGI should be removed as these are Government internal guidance only and not applicable to offeror. It is recommended that all PGI references be removed from the Guidebook where it implies applicability to an offeror.

   NOTE: "The fact that an item has been determined to be a commercial item does not, in and of itself, prohibit the contracting officer from requiring data other than certified cost or pricing data. This includes data related to prices and cost data that would otherwise be defined as certified cost or pricing data if certified. Obtaining ~~sufficient~~ data for a price analysis, which may include obtaining information from the offeror is particularly critical in situations where an item is determined to be a commercial item in accordance with FAR 2.101 ~~and the contract is being awarded on a sole source basis~~."

9. **Page 18 Points to Consider About Market Research**
   a. It would be beneficial for the Guidebook to provide additional guidance on how much market research is enough. We recommend adding the following text to the first paragraph of the section:

      The extent of market research will vary depending on many factors, including but not limited to:
      - Dollar amount of the procurement
      - Complexity of the item or service
      - Past experience of the buyer and supporting functions (engineering, supplier program managers, program management, etc.) with purchasing a particular item.
      - Urgency of the procurement
      - Political environment/scrutiny or importance of the item being acquired.

      A buyer should always conduct a cost/burden/benefit analysis when determining the extent of market research necessary. Each of the factors should be considered from both the buyer's and seller's perspective. Simply requiring contractors to produce other than certified cost and pricing data does not mean that the government is avoiding cost. The burden on the suppliers to provide such data may translate into higher cost of products and services, as well as proposal cycle time delays. For commercial item procurements, the Government may experience higher costs incurred directly through bid and proposal actuals.

      Buyer key inquires for cost/burden/benefit analysis:
      - How much closer will this get me to determining a "fair and reasonable" price?
      - What is the burden on the supplier to provide the information?
      - What is the burden on the buyer to analyze the information?
      - Realistically, what is the level of savings I expect to achieve through market research and how does that weigh against the cost to the government and contractor in supporting market research activities.

10. **Page 18 Document, Document, Document.** We recommend the following administrative change to replace "uncertified" with "other than certified" for better accuracy:

    "Every time you request ~~uncertified~~ data other than certified cost or pricing data, you must document the request in the official file. At a minimum, you must include the following—"

11. **Page 18, Offeror Inability to Provide Requested Data.** This section conflates two

very different concepts—an offeror's "inability" to provide requested data and an offeror's "refusal" to provide such data. This should be clarified. The referenced DFARS PGI provision, PGI 215.404-1(a)(i)(F), covers instances of an "offeror's refusal" to provide requested information. The Guidebook, however, interchanges and equates "refusal" with "inability," "unable to provide," "fails to comply," and "does not furnish." There may be valid reasons an offeror "does not furnish" such information—i.e., that information simply does not exist. One cannot "refuse" to provide information one does not have. To the extent an offeror's "refusal" to provide requested information is to be documented in the offeror's performance assessment, there ought to be a distinction made here between an offeror's recalcitrant refusal to provide the requested information and an offeror's innocent inability to provide the requested information. By conflating these terms, the Guidebook does not seem to recognize the difference.

Pricing Analysis

1. **Page 20 2016 NDAA Impact to Price Analysis.** We recommend the following administrative change to the flow diagram for better accuracy:

   > "Is there sufficient government or public data available via market research to conduct price analysis?"

2. **Conducting Price Analysis**
   a. **Page 21** The graphic at the top of the page, box 2 on Market Research includes a reference to "DFARS 212.209 Order of Preference." This reference is invalid. We recommend deleting it.
   b. **Page 2**1 Price Analysis Techniques. We recommend inserting the word "items" in the phrase "same or similar quantities" so it reads "same or similar items and quantities."
   c. **Page 21** Price Analysis Techniques. Government procurement officials should be directed to especially consider FAR and DFARS clauses that are imposed on the commercial supply chain, which are inconsistent with commercial practices. Often, these are overlooked as part of "terms and conditions" with contractors expected to absorb associated costs as a part of the "cost of doing business with the government." Commercial suppliers do not deal with such requirements in the ordinary course of business and therefore have to adopt new or special policies, practices, and systems in order to comply. This drives up prices for commercial suppliers and makes them uncompetitive in the commercial market space. We recommend the following change:

      > "When conducting market research, it is critical that contracting professionals pay close attention to the terms and conditions under which items are offered and sold. Merely reviewing invoice prices may

not result in payment of a fair and reasonable price if the current terms and conditions differ significantly from those associated with prices paid. The terms and conditions in a contract may be significant drivers of cost and require commensurate analysis. This includes FAR and DFARS clauses embedded in a solicitation for commercial items. Suppliers of commercial items do not deal with such requirements in the ordinary course of their business and may therefore have to adopt new or special policies, practices, and systems in order to comply. This may drive up the prices from these commercial suppliers and therefore should be considered during price analysis."

d. **Page 22 Price Analysis Techniques.** We recommend including the following text from FAR 15.404-1(b)(2)(ii) after the reference:

The following section expands on the price analysis techniques listed in FAR 15.404-1(b)(2) "Comparison of proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial items including those 'of a type' or requiring minor modifications."

e. **Page 23 Price Analysis Techniques.** The second note of caution states that contractors may "consistently" provide discounts beyond the list price in catalogs and that the government should "confirm whether you are getting the same discounts being offered to other commercial and Government customers." Price discounts from listed prices are often based on contractor business models. The government may or may not be entitled to a discount under a contractor's standard commercial practices. We recommend the following changes to the note, which are consistent with the requirement that the government obtain fair and reasonable treatment:

In certain circumstances, listed prices (including GSA Schedules) may differ significantly from the actual final price paid by customers. For example, if a contractor consistently gives its customers a 10% discount beyond the list price in its catalogs, the catalog price is not the true price. To evaluate whether the price being offered to you is fair and reasonable, you will need to confirm through market research that the government qualifies for a discount consistent with the seller's standard business model, practices, and offerings to other commercial and Government customers.

f. **Page 25 Price Analysis Techniques, Relevant Factors.** The first bullet states that when a majority of sales are to non-Governmental buyers,

there is a "strong likelihood" of price reasonableness. In effect this statement establishes a presumptive test similar to what Congress declined to implement in the past. Congress directed in Public Law 114-92, Section 853 of NDAA 2016, a requirement that both government and non-government sales be duly considered in a price reasonableness analysis. To ensure both sets of data are given due weight, the sentence should be deleted as follows:

> "Verifying that the sales data reflect market pricing. Market pricing is the current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors. The seller may adjust prices multiple times for changes in supply/demand curves, or other economic changes. ~~When non- Governmental buyers in a commercial marketplace account for a majority of sales by volume of a particular item, there is a strong likelihood the item is market priced. This factor includes verifying that commercial market sales are to the general public and not to federal, state, local, or foreign Governments and that the end use of the item is not for Governmental purposes.~~"

g. **Page 25 Price Analysis Techniques.** On this and other pages in the Guidebook, there should be discussion on how much sales data should suffice—a comprehensive set versus a representative subset—and who/how to make the determination.

h. **Page 25 Relevant Factors**: The first bullet includes verifying that commercial market sales are to the general public and not to federal, state, local, or foreign Governments and that the end use of the item is not for Governmental purposes. Determination of the customer and the end use bear only on whether the item is deemed commercial in the first place. It belongs, if anywhere, in Part A. For pricing purposes, government sales are just as good as private sector sales. This sentence and others of the same tenor should be deleted. This privileged treatment of private vs. government sales contradicts both statute and regulation. Section 852 of the 2016 NDAA reads in relevant part as follows: (d) Information Submitted. --(1) To the extent necessary to determine the reasonableness of the price for items acquired under this section, the contracting officer shall require the offeror to submit-- (A) prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; This language contradicts any attempt to prefer "commercial" over government sales. If anything, listing Government before commercial customers would suggest the opposite preference. The long-standing regulation on price analysis reinforces this conclusion. (FAR 15.404-1(b)(2)(ii).

i. **Page 26 Price Analysis Techniques.** The last bullet suggests that an extensive review of prior negotiated prices must be performed in order to accept these prices as a basis for price comparison. This is a stretch from the statute which states: "A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial items in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions."

j. **Page 26 Price Analysis Techniques.** Related to the above comment and other pages in the Guidebook, the issue of prime and subcontractor access to CBAR and to DCMA COE assistance needs to be addressed. Will contractors be able to access CBAR and request assistance? If so, what is the process? If not, that position should be stated.

k. **Page 28 Price Analysis Techniques, Practical Example No. 6.** should be revised to explain how the Government and offeror need to conduct fact finding to understand the price drivers. The difference in price between $300 and $78 per unit suggests a major disconnect in the Government's unique requirements or in the market research.

l. **Page 30 Price Analysis Techniques, Practical Example No. 7.** at the top concerning the discussion of consistencies in quantities: This wording is problematic because there is little understanding or agreement on what is consistent. There is a narrow view here and little tolerance for fluctuations. Possibly propose some type of quantity variation study be allowed for extrapolations beyond the range of available data. An example is data was available on prices paid for large numbers of 1 to 625 unit buys and a single procurement of 10,000 units. The data fit a normal log-log linear regression which could be used to extrapolate a fair and reasonable price for 20,000 units. The contracting officer argument was the 20,000 unit and 10,000 unit buys were not consistent. From a log-log perspective, however, the 625 unit buy sees a doubling 4 to 5 times to reach 10-20,000 units. Yet the data provided many points in the range of 20 and 40 unit buys as compared to 625 (4 to 5 times) on a normal quantity variation slope. Theoretically, the quantity data could be judged to be consistent.

m. **Page 30 Price Analysis Techniques, Practical Example No. 7** is based on the Government conducting a price analysis on a subcontractor

proposal. This is not the Government's responsibility. While the price analysis methodology is sound, it would be best to not confuse this case as a subcontract example. Recently, a rise in duplicative efforts (at least anecdotally) is causing significant problems for prime and subcontractors. This practice should be discouraged, and if there are appropriate instances where the Government needs to conduct a price analysis those exceptions need to be defined.

n. **Page 30 Price Analysis Techniques, Practical Example No. 8.** suggests contacting DCMA for a status of business systems. These systems are not relevant to commercial item pricing. In addition, it is likely there are many commercial suppliers (especially the non-traditional defense suppliers) where system status will not be available. Otherwise, this is a very good example of price analysis.

o. **Page 33 Price Analysis Adjustments, Practical Example No. 8,** and in other areas of the Guidebook, the idea of limiting data to current (within 18 months) contradicts analysis training and logic. Generally, analysts prefer to have more, if not all, data that is available—especially when available in electronic form. Data then can be judged to be irrelevant, or outliers, upon review. As an example, economic trends (inflation/deflation) are not apparent from 18 months of history. Likewise, identifying improvement/learning versus program pricing over 18 month periods is difficult, if not impossible.

p. **Page 33 Practical Example No. 8** The concept of developing negotiation ranges is an excellent approach.

<u>Prime and Subcontract Price Analysis</u>

1. **Subcontractor Analysis Considerations**
   a. **Page 37** There should be no requirement for a prime contractor to demonstrate that a subcontract price analysis has been performed if the prime contract is FAR Part 12.

   b. **Page 37** the second bullet, how will this Government review/analysis take place? Under what auspices/parameters?

   c. **Page 37** Related to comment a. above, the bullet also states throughout that there needs to be a formal mechanism (similar to TINA assist audits) for the prime to engage the Government team (DCMA CIG) to solicit support and receive the results of independent analyses.

   d. **Page 37** Regarding the last two bullet points which discuss review of the offeror

business systems, FAR Part 12 contracts are not subject to the DFARS Contractor Business Systems rule.

e. **Page 37** concerning subcontractor disclosure agreements and restrictions, timely communication is critical to the prime contractor who may be unwilling to proceed not knowing if the Government is going to accept negotiated pricing, since the Government has more information than the prime.

f. **Page 38 Practical Example No. 9** is very helpful for the Government; however, Prime Contractors often do not have access to subcontractor systems, especially if the subcontractor is claiming to be a commercial source, nor do Prime Contractors have access privileges that Government agencies/services have to perform verification.

g. **Page 38 Practical Example No. 9**, future contract work for a large dollar buy, includes references to business systems, forward pricing rates, disclosure statements, and direct and indirect costs which are all cost-based processes and not part of a Part 12 acquisition. The price of tires is likely based on established catalog or market price and a review of prior prices paid by government and commercial customers should provide an adequate basis for a price analysis.

h. **Page 39 Long Term Agreements.** Much of the discussion leads to the conclusion that the Government does not view LTA's as being advantageous and therefore leads to reduced incentives for primes and subs to enter them, eliminating any potential benefits. Industry believes LTA's provide benefits to the government and should be encouraged. We recommend a brief discussion stating that LTA's should be encouraged when circumstances warrant them.

i. **Page 39 Practical Example No. 10** states that when conducting price analysis, you should "ensure you receive all sales history". This is common sense, but no regulation specifically states that all sales history for a certain time needs to be disclosed. This would potentially allow a subcontractor (or Prime contractor) to "cherry pick" the invoices provided to show the highest sales prices.

j. **Page 40 Practical Example No. 10, Takeaways** The last bullet directing procurement officials to "continuously" review LTAs is vague and is not feasible for most Government transactions. The term "periodically" would be a small improvement. However, the drafters may want to consider providing more realistic direction. An evaluation at approximately every three years might be more appropriate, depending on whether potential cost-savings warrant a review.

k. **Page 40 Non-disclosure Agreements from suppliers/vendors:** The Non-Disclosure Agreement discussion is very important as it pertains to release of

information on prior sales to commercial customers. In the first sentence after supplier/vendor, we recommend adding the words "and customers." This is an area where language from the proposed rule under DFARS Case 2016-D006 should be included.

l. **Page 40 Non-disclosure Agreements from suppliers/vendors:** Government concerns over redacted invoices and sales data is also a concern for prime contractors. Some contractors are not able to release their proprietary sales data outside of their company, and if they do provide it, the sales data is often redacted. In these instances, have the subcontractor who is submitting redacted invoices state in writing that the sales are to commercial companies for non-government use, and the terms and conditions are very similar. DoD needs to have a process where prime contractors can request a DoD verification audit on this data. What is the formal process for the prime to request assistance and the sharing of what could be considered a "commercial assist audit?"

Services Price Analysis

1. We recommend additional examples of stand-alone services. These are services that meet the definition at FAR 2.101, Paragraph 6, and are based on established catalog or market price for specific tasks to be performed or outcomes to be achieved.

2. **Page 41** The emphasis on differences in terms and conditions between customary commercial terms and those offered to the Government is overstated. An example of this is identifying DPAS as a term that would be a significant price-related factor. The commercial item Paragraph 5 definition requires the terms to be "similar." Also, the guidance should explain that injecting government-unique requirements into a FAR Part 12 contract can increase the price to the government and should be avoided. There are many government requirements that the contractor must follow that increase costs and risk, but this is often not taken into consideration during the procurement process.

3. **Page 41 Practical Example No. 11** has nothing to do with price analysis. As noted in the comments to Part A, the services do not need to be the same as those offered to commercial customers. The "of a type" broadens the definition such that ACME services would have the opportunity to submit a proposal under FAR Part 12 terms. It is unlikely that a commercial company like ACME would be willing to submit a government-unique proposal under FAR Part 15. The result would be a sole source buy from the OEM for these services, rather than broadening the aperture of available sources to allow for competition.

4. **Page 41 Practical Example No. 11.** The example reflects a frequent source of disagreement between contractors and DoD. Just because DoD operates a product in a manner or environment that causes more wear and tear (or sometimes different wear and

tear, but not more or less) than a commercial user of a commercial product does NOT mean that the services to maintain the DoD product are not commercial. After all, if one driver of an SUV uses the car to drive 50 miles per day to commute back and forth to work, and another driver of an SUV uses the car to drive 10 miles per day off-road as a camp instructor, each SUV may have different maintenance needs. If certain parts need to be replaced more often for the first driver and other parts need to be replaced more often for the second driver, the maintenance services are fundamentally the same. The extent or frequency of maintenance needs may affect price negotiations, but such differences do not transform a service from commercial to non-commercial. We recommend that the Guidebook pick a different, more relevant and instructive example of how to evaluate price differences in commercial services based on differences in requirements while not suggesting that such differences negate the commercial nature of the service.

Beyond Price Analysis – When is Cost Data Necessary:

1. **Page 43.** We recommend that the following changes be made to this section:

   Price analysis, not cost analysis, is the primary method used to evaluate commercial pricing. However, some degree of cost analysis may be necessary when prices cannot be established using price analysis techniques alone.

   The contracting officer is responsible for determining if the information provided by the offeror is sufficient to determine price reasonableness. This responsibility includes determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price, and determining the extent of uncertified cost data that should be required in cases in which price information is not adequate. Determining when it is necessary to request other relevant information to include other than certified cost data is based on the contracting officer's determination that the pricing information submitted thus far is not sufficient to determine the reasonableness of price.

   When determining whether cost analysis techniques are necessary, follow the FAR order of preference and the hierarchy of data requests. ~~No cost data may be required in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.~~ This will require you to understand the commercial item definitions and how they apply it to your item (Part A). Also, understanding how terms and conditions and requirements impact the sales data provided by the contractor will play an important role in whether the contracting officer can determine price reasonableness based on market research and sales data alone. ~~A typical situation where cost analysis is necessary is when acquiring a commercial item that includes minor modifications. Price analysis techniques are generally conducted on base commercial items; however, cost analysis is generally needed for minor modifications that are not commercial.~~ [This is not supported by the FAR]

> For those items that are similar or those items that have minor modification to meet governmental requirements – contracting officers should look at items that provide similar capabilities or performance measures. Commercial items that have minor modifications, that do not change the functions of the items, are typically modifications of form and fit. Typically, commercial items need minor modifications to account for size, weight, power, acceleration, encryption or temperature requirements of the military services. Traditionally, the military services seek smaller, lighter, more powerful, cyber protected and temperature neutral commercial items. Many times, the functions or outputs of these modified commercial items can be modeled by using price analysis techniques in FAR 15.404-1 that include: price analysis, parametric estimating, value-based analysis or regression analysis to establish a fair and reasonable price. Contracting officers should look to performance metrics and associated price escalations to account for physical differences in the functions or outputs they are acquiring.

There are several resources that can be utilized when conducting a cost analysis. These resources include the Contract Pricing Reference Guide (CPRG).

Remember, when obtaining uncertified cost data, the contracting officer shall require the offeror to provide the information in the form in which it is regularly maintained in the offeror's business operations. Cost analysis may lead you to conducting a "should cost" scenario. Utilizing market research tools such as public databases will aid you in identifying what items "should cost" by giving you access to other than certified cost data by component or task level. For example, some GSA schedules have labor rates for specific skill mix categories. Other databases such as those maintained by Amazon, may list components or parts for sale. This information, along with what you may learn through market research or may obtain from the contractor through requesting uncertified cost data, will aid you in developing what the item "should cost".

Page 43 Preparing for Negotiations: last paragraph, change "market research and other" to "price analysis".