

2016-2017

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James A. Hughes
3734 N Woodrow St
Arlington, VA 22207
(571) 382-0700

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Aaron P. Silberman
311 California St, 10th Floor
San Francisco, CA 94104
(415) 956-2828

VICE-CHAIR

Kara M. Sacilotto
1776 K St, NW
Washington, DC 20006
(202) 719-7107

SECRETARY

Linda Maramba
2980 Fairview Park Dr
Falls Church, VA 22042
(703) 280-4086

BUDGET AND FINANCE OFFICER

Jennifer L. Dauer
500 Capitol Mall, Ste 2200
Sacramento, CA 95814
(916) 492-5073

SECTION DELEGATES

Mary Ellen Coster Williams
717 Madison Pl, NW, Ste 612
Washington, DC 20005
(202) 357-6660

Michael W. Mutek
6645 Briar Ridge Lane
Plano, TX 75024
(214) 673-7197

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Wilmington, DE

SECTION DIRECTOR

Patricia A. Brennan
321 N Clark St, M/S 19.1
Chicago, IL 60654
(312) 988-5623

Writer's Address and Telephone

James A. Hughes
3734 N. Woodrow St.
Arlington, VA 22207
ty@hugheslawplc.com

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Via osd.pentagon.ousd-atl.mbx.cpic@mail.mil

Defense Procurement and Acquisition Policy

Attn: Mr. John Tenaglia

Deputy Director, Contract Policy and International Contracting

OUSD (AT&L) DPAP/CPIC

Room 5E621

3060 Defense Pentagon

Washington, DC 20301-3060

**Re: Comments on Department of Defense (“DoD”) Guidebook for the
Acquisition of Commercial Items, Part A Commercial Item
Determination and Part B Commercial Pricing (February 24, 2017)**

Dear Mr. Tenaglia:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed Guidebook cited above.¹ The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section of Public Contract Law and have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.²

¹ Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the consideration of these comments and abstained from voting to approve and send this letter.

² This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Accounting, Cost and Pricing” and “Commercial Products and Services.”

I. INTRODUCTION

On August 11, 2016, the Department of Defense (“DoD”) proposed a rule to amend the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement the requirements of two National Defense Authorization Acts (“NDAAs”): (a) Sections 851 through 853 and 855 through 857 of the Fiscal Year (“FY”) 2016 NDAA (Pub. L. No. 114-92, enacted November 25, 2015); and (b) Section 831 of the FY 2013 NDAA (Pub. L. No. 112-239, enacted January 2, 2013). The Section submitted comments on that proposed rule.³ Those comments advised that the Section appreciates DoD’s efforts to address these requirements given the imperatives of Congress and the Executive Branch to increase DoD’s access to cutting edge-technologies available in the commercial marketplace and to reduce barriers to entry for commercial item providers. But the Section also indicated that more must be done to reduce barriers to entry and keep commercial contractors in the DoD supply chain. Then on February 24, 2017, DoD published the draft Guidebook and solicited comments on this Guidebook.⁴ Indications are that the DoD intends to publish both the final version of the commercial item rules, discussed above, and the Guidebook together following this notice and comment process.

The Section applauds DoD’s efforts to assist contracting officers (“COs”) in determining whether an item is a “commercial item” and whether the agreed-upon price for such items is fair and reasonable. The Section notes, however, that Parts A and B of the proposed Guidebook appear to somewhat conflate three decision points in commercial item contracting: (1) whether a supply or service is a commercial item; (2) what acquisition procedures are available (e.g., FAR part 12); and (3) what constitutes a fair and reasonable price for the supply or service. The Section offers comments and suggestions below to disentangle these three decision points. The Section believes this separation will promote a greater understanding of these areas, particularly for users of the Guidebook who have minimal exposure to or knowledge of commercial item acquisition.

II. COMMENTS ON GUIDEBOOK PART A: COMMERCIAL ITEM DETERMINATIONS

A. The Section Appreciates DoD’s Thoughtful Improvements to the Guidebooks

The Section supports several changes to the proposed Guidebook. Most notably, the Section strongly supports the decision to divide the Guidebook into two distinct parts to delineate the separate considerations that arise when making commercial item determinations (discussed in Part A) and when pricing commercial items (discussed in Part B). In the past, acquisition professionals have conflated these two separate analyses, sometimes leading to negotiation positions at odds with the FAR, DFARS, and statutory requirements. The Section believes that segregating these two analyses into the two distinct parts of the Guidebook, grounded in the law

³ Letter to Mr. Mark Gomersall from James A. Hughes, Chair, American Bar Association Public Contract Law Section re: Defense Federal Acquisition Regulation Supplement: Procurement of Commercial Items (DFARS Case 2016-D006), 81 Fed. Reg. 53101(August 11, 2016), dated October 12, 2016.

⁴ The Guidebook was published at http://www.acq.osd.mil/dpap/cpic/cp/commercial_item_guide.html.

and regulation that uniquely govern each subject, will reduce confusion and promote better decision-making.

Additionally, the proposed Guidebook is visibly more user-friendly and accessible than its predecessor. For instance, for the variety of definitional grounds that may be used to establish whether an item is “commercial” in accordance with the definition of “commercial item” in FAR 2.101, the proposed Guidebook provides a common framework for understanding and applying each ground. Users should benefit from the simple and uniform presentation of bulleted “Questions to Consider” as well as relevant “Application” and “Key Concepts” for each such definitional ground. The Section also noticed and appreciated that practical examples are also presented in a standard format according to “Objective, Background, Analysis, Results, and Take Aways.”

The standard formats adopted by the proposed Guidebook not only make it easier to navigate and comprehend, but also serve to instruct users as to the relevant and important considerations that should guide their decisionmaking. Particularly for the more challenging commercial item determinations, such as those involving “of a type” and “modified items,” the real-world examples provide sufficient detail to allow users to make meaningful comparisons to the situation at hand.

The Guidebook also identifies numerous market research resources in an improved format, which should reduce time spent searching for such resources and should ultimately streamline commercial item determinations. The Section also appreciates the DoD’s increased attention to the acquisition of commercial services. The Section believes this is a step in the right direction and, as discussed in further detail below, suggests additional enhancements in that regard.

B. Recommended High Level Changes

1. The Guidebook Should Acknowledge that Most Commercial Item Determinations Are Readily Made.

Though the Section greatly appreciates the enhancements outlined above, we note that the Guidebook could better emphasize that most commercial item determinations (“CIDs”) are readily made. The Section believes this misperception about the complexity of commercial item determinations may be an inadvertent and unintended consequence of the proposed Guidebook’s (appropriate) focus on the small share of supplies and services for which commerciality may be challenging to assess. But to avoid any misunderstanding among DoD personnel, the Section recommends that DoD place the following at the beginning of the Guidebook:

- 1) A clear statement of the intent for this Guidebook, such as, “This Guidebook focuses on those commercial item procurements in which commerciality may be challenging to discern. It is only when a Commercial Item Determination (“CID”) cannot be readily made that the user may need to dive deeply into the guidance in this document.”

- 2) An abbreviated quick reference guide to give those less familiar with the procurement of commercial items an overall sense of how decisionmaking should proceed (and indeed, how easy it may be in some circumstances).

The Section suggests that DoD base this “quick reference guide” on the Commercial Item Checklist located at Appendix B of the predecessor Guidebook. The Section suggests placing this Commercial Item Checklist at the very beginning of the discussion on “New Determinations.” Without a quick reference guide (or something similar) to frame the discussion at the outset of the proposed Guidebook, less experienced users may become unduly focused on the more detailed decision trees instead of focusing on the overall CID analysis, which is more evident when presented in a streamlined form such as in the Commercial Item Checklist.

a. Commerciality Decisions Should Be Made for Product Groups Where Appropriate.

The proposed Guidebook eliminates guidance in its predecessor recommending that, “[w]henever possible, logical groupings of items should be identified as commercial without conducting an individual technical review of every item.” *See* Commercial Item Handbook, Version 2, at 8. Instead, the proposed Guidebook emphasizes the need for individualized CIDs. Overall, compared to the former version, the proposed Guidebook appears to set forth a presumption *against* commerciality by requiring an individual analysis of each item. The Section believes this change is inconsistent with DoD’s expressed policy of streamlining commercial item acquisitions.

If this change to a presumption against commerciality was intended, the Section recommends that DoD reconsider it. Such a change would represent a significant and undesirable break from current practice. In addition, the change could confuse both contractors and contracting officials if different CIDs are made for substantially similar items. And to the extent that COs are advised to defer to prior CIDs, this would create problems concerning how to properly accord deference to the many prior commercial items that DoD has recognized relating to logical groupings of items.⁵

b. DoD Should Consider Expanding the Sources That May Support CIDs.

The proposed Guidebook states that DoD COs may rely upon prior CIDs by other DoD COs for future purchases of the same item. Draft Guidebook Part A at 13 (citing FY 16 NDAA Section 841). It extends this presumption to CIDs made by prime and higher-tier subcontractors when the CIDs are included in contracts negotiated by DoD COs. *Id.* at 14. Although this guidance is explicit with respect to prior DoD CIDs, it should more explicitly address (1) CIDs made by non-DoD agencies; (2) existing CIDs made before the FY 2016 NDAA; (3) the

⁵ Along similar lines, the Guidebook should clarify that replacement items that are components of a commercial end item are themselves commercial items. This is in keeping with the prior Handbook’s direction concerning “logical groupings of items”. *See* Commercial Item Handbook, Version 2.0 at 8.

deference appropriate for prior CIDs; and (4) access to prior CIDs by prime contractors and higher-tier subcontractors. The Section recommends that the Guidebook clarify these ambiguities in a manner consistent with the FY 2017 NDAA's and FY 2016 NDAA's clear preference to limit burdens on the procurement of commercial items.

First, the Section recommends that the Guidebook state that DoD COs may rely upon CIDs made by COs from any federal department or agency, including civilian agencies, departments, and components. The Guidebook's predecessor allowed COs to rely on such prior CIDs and required that "[a]ny decision to overturn a previous commercial . . . determination by any Government agency must be documented." Guidebook Version 2.0 (2011), at 13. Nothing in the 2016 or 2017 NDAs suggests Congress's desire for DoD to modify this longstanding policy. Accordingly, the Section does not believe that there is any legal or practical basis to retreat from prior guidance and to presume the acceptability of existing CIDs only if made by DoD. Presuming non-DoD CIDs are valid is not prohibited by Section 851 of FY 2016 NDAA and would be consistent with the Government's overall approach to commercial items. Indeed, the definition of commercial item is the same across DoD and civilian government agencies.⁶ See FAR 2.201; *see also* Guidebook at 12-13 (quoting the FAR 2.101 definition of commercial item). For example, by law, items listed on Federal Supply Schedules ("FSS") have been determined to qualify as commercial items.⁷

The Section believes that neither the Government nor contractors will benefit if DoD requires a DoD CO to re-assess commerciality of items also listed on the FSS. Expanding the presumption to all agency CIDs would ensure consistency and improve efficiency. Relying on CIDs by General Services Administration ("GSA") and Department of Veterans Affairs ("VA") alone would eliminate a significant number of redundant CIDs.

Second, the Section recommends that the proposed Guidebook confirm that DoD COs may rely on existing CIDs made before the FY 2016 NDAA's enactment when purchasing the same item in the future. The FY 2016 NDAA Section 851 explicitly authorized this presumption. While Part A of the Guidebook recognizes that Section 851 of the 2016 NDAA permits COs to rely on CIDs made before the 2016 NDAA in future procurements, the Guidebook does not mention the presumption or expressly state that these CIDs may be relied on for that purpose. Although the prior CIDs might not be automatically included in the CID archive being created by the Defense Contract Management Agency ("DCMA") in accordance with Section 851 of the 2016 NDAA, these prior determinations should be considered when making CID determinations in future procurements if the prior determinations are made available to the CO by or on behalf of the contractor. The Guidebook should confirm the acceptability of reliance on such prior CIDs and include them, when made available during a future procurement, in the DCMA CID archive.

⁶ Compare DFARS 212.102(a)(i)(A) (requiring DoD CO determination "that the acquisition meets the commercial item definition in FAR 2.101") with GSAR 538.271 (noting Multiple Award Schedule "awards will be for commercial items as defined in FAR 2.101").

⁷ See *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015) (establishing that items or services listed and ordered through the FSS program are commercial items acquired under FAR part 12).

Further, the Section recommends that DCMA supplement the CID archive to include these pre-2016 determinations as they are identified in future procurements.

Third, the Section recommends that the Guidebook convey that DoD COs should presume that prior CIDs are reasonable and supported. The proposed Guidebook states that DoD COs may presume the validity of prior CIDs, but then details a process for reviewing, questioning, and overturning a prior DoD CID. Without an explicit endorsement of the presumption of validity, the additional guidance could be misread to suggest that DoD COs must always re-evaluate CIDs. These re-evaluations would add unnecessary effort and contradict Congress's intention to streamline commercial item procurement.

A clear statement in the Guidebook confirming that DoD COs do not need to re-evaluate each CID would prevent any confusion. To accomplish this objective, the Section recommends adding the following statement as the second sentence of the "Prior CID Logic and Conclusion" section: "If the CID appears reasonable on its face and is adequately supported, the contracting officer does not need to conduct any additional analysis and shall rely on the CID."

Fourth, the proposed Guidebook states that DoD COs will have access to prior DoD CIDs for the purposes of ensuring consistency in making such determinations. It is silent, however, about whether prime or higher-tier subcontractors will have access to prior DoD CIDs, despite recognizing that most CIDs are made by prime or higher-tier subcontractors. At a minimum, the Section recommends that the Guidebook provide direction on the type of information that a prime contractor or higher-tier subcontractor should consider when determining the commerciality of an item subject to prior CIDs made by DoD COs or other prime contractors and specifically state if this information includes access to prior DoD CIDs.

2. DoD Should Consider Including Additional Guidance Regarding Commercially Available Off-The-Shelf Items.

The Section believes that the Guidebook would benefit from a more robust discussion of commercially available off-the-shelf ("COTS") items.⁸ As the draft Guidebook points out, analyzing COTS items may appear straightforward but can often be complex in practice. *See* Draft Guidebook, Part A, at 46. The ensuing guidance, however, seems to focus on a few problem areas without embracing the regulatory scheme for COTS items. The Section believes DoD should amplify the guidance as set forth below.

First, the Section suggests revising the order of the COTS guidance. As it stands, the COTS section is organized as follows: (1) Definition; (2) Questions to Consider; (3) Obsolescence; (4) Significance to DoD Procurement; and (5) Practical Example. Reordering the

⁸ Although outside the scope of these comments, the Section believes that DoD should consider whether it would be appropriate to use DCMA's Commercial Items Group for training DoD contracting personnel. Because this DCMA group has significant experience with making commercial item determinations, it could provide practical guidance on an ongoing basis. This might be achieved by the creation of short videos on commerciality questions, which could be made available to DoD procurement personnel and through Defense Acquisition University ("DAU") for access and use by contractor and subcontractor personnel.

subsections may make the logic clearer: (1) Definition; (2) Significance to DoD Procurement; (3) Questions to Consider; (4) Obsolescence; (5) Practical Example. The section on “Significance to DoD Procurement” should be promoted to an earlier section because it supports the preamble’s statement that, while apparently intuitive, COTS analysis still presents non-obvious issues that warrant careful analysis. Moreover, the Section suggests that discussions of COTS parts vis-à-vis COTS assembly should be elevated to its own topic (or sub-topic), rather than a mere “takeaway” lesson.

Second, the Section recommends clarifying, with more examples, that a non-COTS item still may be a commercial item. In this regard, the Guidebook could use examples such as commercial items that are not sold in substantial quantities. Another good basis for illustration would be a side-by-side comparison of COTS and non-COTS items in the same industry. Conversely, the Section is concerned that the Practical Example No. 7 provided in the Guidebook may be a source of confusion. That example presents a scenario in which customizing preferences did not preclude COTS designation of an engine discussed in the example. Given questions that arise in this area, the Section suggests that the Guidebook delineate where customizing preferences would, or would not, preclude COTS designation.⁹

3. DoD May Wish to Consider Adding 2017 NDAA Requirements.

The Section believes that the Guidebook should include, in addition to Sections 855 of the FY 2016 NDAA and Section 867 of the FY 2017 NDAA, additional provisions from the FY 2017 NDAA in the Statutory Overview Chapter (p. 10):

- Section 876 prohibits the head of an agency from entering into a contract exceeding \$10,000,000 for facilities-related services, knowledge-based services (except engineering services), construction services, medical services, or transportation services that are not commercial services unless the service acquisition executive of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) determines in writing that no commercial services are suitable to meet the agency’s needs as provided in 10 U.S.C. § 2377(c)(2); and prohibits acquiring the same types of services for contracts between the simplified acquisition threshold and \$10,000,000 unless the CO makes the same determination. The Section believes that DoD should consider adding this requirement to the Guidebook.
- Section 877 requires treating as a commercial item those items that are valued at less than \$10,000, are purchased by a contractor for use in the performance of multiple

⁹ The Section notes a concern with the example of a modification to a commercial item that renders it noncommercial. DoD refers to the acquisition of a base radio as an acquisition of a commercial item, but the addition of an encryption requirement renders that base radio no longer a commercial item. Given increasing commercial and Government use of encryption to address cybersecurity concerns, the Section suggests that the DoD reconsider whether the inclusion of encryption is still a modification that is not commercial.

contracts with DoD and other parties, and are not identifiable to any particular contract.

- Section 878 requires that services provided by a business unit that is a nontraditional defense contractor (as defined in 10 U.S.C. § 2302(9)) shall be treated as commercial items for purposes of this chapter, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methods similar to methods used for commercial pricing. This section is especially important to the extent it trumps FAR 12.207, which restricts the use of time-and-materials and labor-hour contracts for the acquisition of commercial services.

The Section believes that these sections warrant inclusion because they are additional statutory requirements for CIDs. Because DoD understandably does not update its commercial item guidance on an annual basis, it may wish to consider including these provisions in its 2017 Guidebooks.

III. COMMENTS ON GUIDEBOOK PART B: PRICING COMMERCIAL ITEMS

The discussion below presents the Section's comments organized to correspond to the draft Guidebook Part B: Pricing Commercial Items. Thus, the major headings below are drawn from the table of contents of that Part B document.

Overall, the Section believes that Part B of the draft Guidebook makes progress toward providing useful guidance to COs in determining whether a proposed or agreed-upon price for a commercial item should be considered fair and reasonable. Still, the Section suggests that the DoD further improve this draft guidance to ensure it is consistent with the intent, language, and purpose of the laws and regulations governing the acquisition of commercial items. In so doing, the Section recommends continued engagement with industry, both traditional and nontraditional contractors.

A. Overview

The Section believes that COs could benefit from additional and/or more specific information regarding several topics: (1) what constitutes a fair and reasonable price; (2) the contractor's role in pricing commercial items; and (3) the CO's authority and responsibility to exercise business judgment in determining both commerciality and fair and reasonable prices.

First, the Guidebook would benefit from a succinct overview of "fair and reasonable" in layman's terms. A fair and reasonable price is not necessarily the lowest price. Instead, a fair and reasonable price could be any price within a range and is unrelated to how much "profit" an offeror may or may not make for a particular opportunity. In addition, the Section suggests that the Guidebook include a more definitive statement to COs on adhering to proposal analysis techniques and using price analysis, in lieu of cost analysis, for assessing fair and reasonable price for a commercial item. *See* FAR 15.404-1(b)(1). The Guidebook should, therefore, emphasize that the Government will pay a price in the same manner as other buyers in the commercial marketplace.

Second, the Guidebook discusses the contractor's role in supporting price reasonableness determinations, and asserts that an offeror has an "obligation to support the reasonableness of its proposed prices if it chooses to supply goods and services to the Department of Defense" and if "an offeror refuses to comply with requests for information to support CIDs or price reasonableness determinations, contracting officers should request [that] the offeror assert its position in writing along with the associated rationale for not providing the requested information." Draft Guidebook, Part B, at 2.¹⁰ This language could be read to suggest an affirmative disclosure obligation on an offeror as a precondition to contract, which is not consistent with statutory or regulatory obligations. This language also suggests that contractors must satisfy any CO request for information, regardless of the merits of that request. The Section submits that any such suggestions are contrary to the hierarchy and purposes of the Guidebook.

Based on FAR 15.404-1(a)(1), the CO is responsible for ensuring the final price is fair and reasonable. If the CO requests information under FAR 15.403-3(c) and the offeror refuses to provide it, then FAR 15.404-2(d) and 15.405(d) specify how the disagreement is to be resolved. The Section is concerned that the tone of the Guidebook might prompt a CO to react negatively when not receiving all requested information, potentially leading to avoidable disputes that can be counterproductive and that are inconsistent with commercial practices. This approach, ultimately, could interfere with the Government's ability to gain access to the very non-traditional defense contractors that it seeks to attract and purchase from. *See* S. Rep. No. 114-255, at 234-35 (2016).

Finally, the Guidebook also should emphasize that it is a source of guidance, not a regulation or statute, and that COs remain empowered and are encouraged to make business judgments as to whether an item or service qualifies under the commercial item definition and can be purchased at a fair and reasonable price. A potential danger of the Guidebook is that it will be narrowly construed and then relied upon to conclude unnecessarily that products or services are not commercial items or that excessive amounts of other than cost or pricing data are required to determine whether DoD is purchasing at a fair and reasonable price.

B. Value Analysis

In addition to the non-prices-paid information discussed below, the Section recommends that the Price Analysis section of the Guidebook include a relocated (from page 3 of Part B) and refocused discussion of "value." In more routine commercial item acquisitions where data and competition are prevalent, the concept of "value" often precedes price analysis (e.g., whether to pave the parking lot with concrete or asphalt) and may be less of a factor in the price analysis itself (e.g., unless the solicitation did not specify the Government's preference for asphalt or concrete).

DoD has identified many relevant considerations in the current Value Analysis section, including the variability of terms and conditions. But in the context of the five challenging

¹⁰ Part B is available at [http://www.acq.osd.mil/dpap/cpic/cp/docs/Version_2.1_Commercial_Item_Pricing_Guidebook_Part_B_\(Final_Draft--24_Feb_2017\).pdf](http://www.acq.osd.mil/dpap/cpic/cp/docs/Version_2.1_Commercial_Item_Pricing_Guidebook_Part_B_(Final_Draft--24_Feb_2017).pdf).

circumstances discussed further in the Price Analysis section below at b.7, the concept of “value” may be a significant, albeit highly subjective and ambiguous, factor in determining price reasonableness and developing a reasonable negotiation range. Under these circumstances, DoD should acknowledge higher orders of value that COs should consider in collaboration with senior procurement officials and end users. These factors may include the value of:

1. Maintaining the DoD’s technological edge and advantage over adverse interests;
2. Maintaining the DoD’s readiness, uptime, and responsiveness (particularly when relying on obsolete commercial items and technologies);
3. Quality and durability relative to existing alternatives;
4. Speed/efficiency (*i.e.*, allows the DoD to accomplish more);
5. Saving or preserving warfighter or civilian lives; and
6. The complexity of a particular problem and consequences of failing to solve it.

How the DoD may measure any of these value considerations will depend heavily on the circumstances and the willingness of DoD stakeholders to collaborate with the CO in developing a reasonable price negotiation objective. These same considerations, and the overall complexity of the procurement, should determine the time and energy spent on performing the value analysis—a point that the Section recommends emphasizing in the Guidebook.

The Section recommends that the Guidebook state that a CO cannot request cost data from the seller of a commercial item as a means to avoid performing a value analysis and conducting price negotiations. Additionally, the Guidebook should provide more express guidance that not all elements of value analysis must be monetized. In many situations, the value of an item or service is subjective such that the need to monetize the value would be impracticable and therefore unduly restrictive.

In connection with the directive to “evaluate price, not cost,” the Guidebook states that in “a commercial marketplace, some companies will charge the highest price the market will bear irrespective of the damage it may cause to their long term business prospects.” *Id.* at 4. That the market will bear the price indicates that the price has been deemed fair and reasonable: other buyers have concluded they need the item or service, and there is sufficient value to justify the purchase at that price. In most cases, although the Government might perceive a price as high, perhaps even the highest among comparable options, a CO nonetheless can find such a price to be fair and reasonable because the competitive commercial marketplace values the item(s) at such prices. Moreover, whether the price the seller is charging might damage the seller’s long term business prospects is speculative and seems to be irrelevant to the point the Guidebook is making. The Section, therefore, recommends that the above quoted sentence be removed.

Regarding “reasonable knowledge of the marketplace,” the Guidebook correctly notes the importance of contracting officers’ becoming familiar with industry-specific terms and conditions. *Id.* at 5. The Section suggests that the Guidebook should also specifically state that if

COs wish to purchase a commercial item, they should accept industry-standard and industry-specific terms and conditions to the extent consistent with statutory and regulatory obligations.

Finally, with regard to Practical Example No. 1, the reference to the DCMA's Commercial Item Group ("DCMA CIG") determining a fair and reasonable price should be revised to ensure the CO understands that it is still his/her responsibility to determine whether a price is fair and reasonable. *Id.* at 6-7. The DCMA CIG is a technical advisor and is not a substitute for the CO, who is the designated decision maker.

C. Market Research & Information Sources

The Guidebook provides helpful instruction on information resources available to COs but should be further refined to encourage COs to follow the processes for commercial item acquisitions.

1. First Source: Government Resources

In describing government experts, the Guidebook refers to the Defense Contract Audit Agency. This reference suggests that a CO may skip to the end of FAR 15.402 and acquire information from the business systems of the contractor before exhausting other sources. *Id.* at 9-10. But FAR 15.402 specifically refers to price data available "within the Government" as the first source of data other than certified cost or pricing data. Data obtained from contractor business systems appear to constitute "data obtained from the offeror" and should be last in the hierarchy of information-gathering. The Section suggests that this portion of the Guidebook be revised to remain consistent with FAR 15.402.

Similarly, the Guidebook should remove the reference to memoranda of agreement between COs and contractors in the first section regarding government resources. *Id.* at 9.¹¹ This placement seems to undermine the FAR 15.402 progression of information to support pricing determinations. Instead, this material should be in the section on information obtained from the offeror.

2. Third Source: Information from the Offeror

The Guidebook also presents a disproportionate discussion of information to be obtained from the contractor or offeror. There are many direct and indirect references to contractor cost data, should-cost reviews, and other cost-based information. *Id.* at 14-15. Yet COs should need none or almost none of this type of information in most commercial item acquisitions. The Guidebook should reflect this state of practice by emphasizing that price information is the regulatory and legislative preference, and that cost data obtained from contractors must be the last resort after exhausting alternatives in the information hierarchy.

¹¹ The Guidebook would also benefit from examples of key concepts or terms that typically would be found in such memoranda of agreement, perhaps in an attachment or appendix.

For example, this section of the Guidebook includes specific references to contractors' enterprise resource planning ("ERP") systems. *Id.* at 15. The first paragraph states: "If the Government is granted access to an ERP system, this may be useful in obtaining relevant data." *Id.* Not only may COs' access to ERP systems exceed the scope of information contemplated by FAR 15.403-3(c), but discussing such access as the Guidebook does could lead contracting personnel to seek direct access to contractor ERP systems specifically to obtain data to validate commercial item pricing. Such access, if given, would run contrary to the data source hierarchy, which contemplates accessing contractor data last, after all relevant data from the Government and third-party sources are obtained and a reasonable conclusion is reached that the proposed price cannot be determined fair and reasonable based on that information. The Section is concerned that many commercial companies do not provide this type of access and suggests that this portion of the Guidebook be revised or that the point be removed.

3. Prohibition on Obtaining Certified Cost or Pricing Data

In connection with the prohibition on obtaining certified cost or pricing data, the Guidebook should revise the language in this section and reaffirm that, while the CO can request data other than certified cost or pricing data, the CO should not do so if price reasonableness can be determined without such information. The current draft language appears to suggest that the CO should default to seeking such information. *Id.* at 17. This approach is contrary to established pricing policy in the FAR.

D. Pricing Analysis

The proposed Guidebook includes a robust section on Price Analysis that tracks and expands upon the price analysis techniques contained in FAR 15.404-1 and duplicates at least some of the extensive guidance in Volume 1 of DoD's Contract Pricing Reference Guide ("CPRG").¹² Although the Section appreciates DoD's effort to tailor existing guidance for inclusion in the Guidebook, which is intended solely for commercial item acquisition, the Section believes the majority of commercial item prices can be readily evaluated using the existing CPRG. The Section thus recommends that DoD reframe and refocus the draft Guidebook's Price Analysis section, including its Practical Examples, to address DoD's most challenging commercial item price evaluation circumstances:

1. New items (*i.e.*, products, services, and technologies) that have not yet been sold commercially in sufficient quantities (an area of focus in the FY 16 and FY 17 NDAs);
2. Older items that were once sold commercially in substantial quantities but are now purchased exclusively or almost exclusively by the Government (e.g., spare parts);
3. Items "of a type" for which government-specific modifications make price comparability difficult in the absence of competition;

¹² The Contract Pricing Reference Guide is available at <https://acc.dau.mil/CommunityBrowser.aspx?id=406579&lang=en-US>

4. Items sold with a variety of terms and conditions that make price comparability difficult in the absence of competition (recognizing that Practical Example No. 8 addresses this subject to some degree); and
5. Services other than productized services (e.g., knowledge-based services, such as engineering, and facilities-related, construction, medical, and transportation services, as specifically identified in Section 876 of the FY 17 NDAA).

As above, the Section also recommends that the draft Guidebook include stronger language than a “preference” for price analysis when acquiring commercial items. Each one of the five challenging circumstances above should be discussed in light of this hierarchy.

For when market research, competition, and the availability of prices-paid information (as prescribed in the FY16 NDAA) do not permit the CO to set a reasonable price range for negotiations, the Guidebook should elaborate on “other relevant information that can serve as the basis for determining price reasonableness.” This fourth element of the hierarchy specified by the FY 16 NDAA provides a range of options for COs to explore, the last of which—and only when all other alternatives are exhausted—should be to request cost data.

As for the meaning of “other relevant information that can serve as the basis for determining price reasonableness,” the Section recommends that the draft Guidebook prompt COs to engage with offerors to learn about the following “other relevant information”:

1. The offeror’s pricing objectives (*see* CPRG Volume 1, Section 0.1.1);
2. The offeror’s pricing process/approach, including consistency of use among other/similar products or services and among commercial customers;
3. The offeror’s profitability objectives;
4. The offeror’s historical financial performance (available from financial statements) and contributions to profit from different product/service lines;
5. The amount of investments made, or that will be made, to develop and produce the item (not how much it “costs” to produce a unit); and
6. The offeror’s plans to launch, market, maintain, and retire the item, including the price and sales volume expectations throughout its lifecycle.

Separately, the Section applauds DoD's use of Practical Examples throughout the Price Analysis section of the Guidebook.¹³ Nonetheless, we observed several areas that might be improved. In this regard, we recommend the following:

- Reformulate the Practical Examples to track the five challenging commercial acquisition item scenarios above. Providing more-complex examples will help COs with the tough situations at the root of the DoD's commercial item acquisition challenges. Offering robust examples also will help avoid rote application of more straightforward practical examples to situations warranting new or different approaches.
- Weave the FY 16 NDAA's hierarchy of data requests into each example, explaining each step and what information was or was not available, and why.
- In at least three examples, explain how the CO worked with the seller to explore "other relevant information." Explain how this additional information was sufficient to develop a negotiation objective.
- In at least two examples, illustrate DoD's value analysis and how it contributed to the CO's negotiation objective. One of these examples should be designed primarily to illustrate how a CO can reduce non-price qualitative (warranty, delivery, etc.) and value considerations into "price adjustments." In this vein, the Section suggests that the current "price adjustment" section of the draft Guidebook be revisited as it is vague and in some places confusing.
- Within the reformulated examples, the Section suggests removing references to contractor cost data, contractor business systems, the Cost Accounting Standards, and other FAR part 15 non-commercial item pricing and compliance concepts that are inapplicable when determining whether a proposed or offered commercial price is fair and reasonable.
- Make the CID a given for all examples to reinforce the fact that the CID and price reasonableness determination are two distinct and separate events, consistent with Parts A and B of the Guidebook

E. Prime and Subcontract Price Analysis

The Section recommends that the DoD either rework or remove the Prime and Subcontract Price Analysis section. This section's purpose is unclear, as is how the section may

¹³ The Section notes that Practical Example No. 9—Future Contract Work for Large Dollar Buy raises some concerns. The hypothetical states that the CO asked the contractor to provide "the complete set of relevant sales data." The hypothetical contractor did not include information about a sale that was being negotiated, but was not finalized. The example states: "The offeror's response was incomplete." The example appears to conflate the hypothetical request for sales data with a requirement that information provided in response be equivalent to certified cost or pricing data, which may have included information on anticipated (but incomplete) sales. We recommend that DoD revisit this example in light of this observation.

relate to DoD's determination of a fair and reasonable price for a commercial item. It is unclear what regulations (or other authority) this section relies on to decompose an offeror's commercial price into prime and subcontract elements. The considerations within this section may be relevant for FAR Part 15 non-commercial item contracts, but the placement of these concepts within the Guidebook is confusing and should be reconsidered.

If the DoD believes this section is necessary, then the Section recommends that DoD clarify its purpose and cite applicable regulatory or statutory authority related to commercial items. Even if the section is kept, we recommend deleting or explaining the relevance of the seller's long-term agreements ("LTAs") and the status of its business systems to the determination of a fair and reasonable price for a commercial item.

The Section's other specific concerns/comments include:

- Consistent with comments above, this section should more explicitly remind COs that data other than certified cost or pricing data should be requested only if necessary to establish price reasonableness and there is no other means for determining a fair and reasonable price.
- The section refers to prime contractors' and subcontractors' business systems, suggesting that commercial item acquisitions could be used to, in effect, test such business systems and report concerns to the administrative contracting officer ("ACO") or divisional ACO.¹⁴ But the DFARS business systems rules do not apply to commercial item contracts, and commercial item contracts are generally excluded from Contractor Purchasing System Reviews.¹⁵ The Section suggests deleting the references to business system reviews or clarifying the purpose of their inclusion.
- The section proposes steps to incentivize commercial-item prime contractors to competitively award supporting subcontracts.¹⁶ This topic would benefit from examples of such incentives to focus COs' inquiries in this area.
- The FAR does not require the Government to obtain the level of detailed data from subcontractors as suggested in the Guidebook on pages 37-41. The FAR requires only that prime contractors "[c]onduct appropriate cost or price analyses to establish the reasonableness of proposed subcontract prices," and to include such analyses in its price proposal. FAR 15.404-3(b). The FAR also requires the CO to analyze the contractor's

¹⁴ See Draft Guidebook, Part B, at 37 ("If you find areas during your review that may impact a business system review or forward pricing monitoring, you should contact the cognizant DCMA D/ACO or the cognizant ACO if not DCMA").

¹⁵ See, e.g., DFARS; Business Systems—Definition and Administration (DFARS Case 2009-D038), 77 Fed. Reg. 11355-01 ("In accordance with FAR 12.301(d)(1), the clauses at DFARS 252.242-7006, Accounting System Administration, and DFARS 252.244-7001, Contractor Purchasing Systems Administration, are not applicable to T&M and FFP labor-hour contracts for commercial items.").

¹⁶ See, e.g., Draft Guidebook, Part B, at 37 ("Ask yourself if the prime contractor is incentivized to compete subcontracted items, and if not, consider what steps you can take to establish that incentive.").

submission as part of determining the reasonableness of the prime contract price. *Id.* The FAR does not, however, provide for the Government to conduct its own subcontract price analysis or insert itself into the prime-sub negotiation. The Section suggests this part of the section be revised or removed.

- The section states about LTAs: “As the benefits drive primes to enter into LTAs, we must remember to keep our mindset on competition. *We do not want to encourage an LTA* if it is highly likely it would result in a sole source provider in future acquisitions when those acquisitions could be competed. We should encourage open competition which includes multiple sources.” Draft Guidebook, Part B, at 39 (emphasis added). In the Section’s view, this discussion of LTAs does not appear to fit with the Guidebook’s purpose or contents. The Section, therefore, recommends either clarifying this passage or removing it.
- The section recognizes that interorganizational transfers in a commercial procurement ordinarily include profit, but implies that such transactions must be conducted at cost when supporting government contracts. *Id.* at 41. The Section notes that the Guidebook’s suggestion that such transfers must be at cost is incorrect under the material cost principle and FAR Part 44.5 if the transfer is for a commercial item at an established price.

F. Services Price Analysis

Practical Example No. 11—Service Acquisition states: “In this case, these services are not customarily available in the commercial market; therefore, the service proposed is not commercial” without clarifying how the Guidebook reaches the conclusion that the services are not commercial. *Id.* at 41-42. The Example further states that the “aircraft requires military unique MR&O services that should not be procured as commercial services.” *Id.* It is thus not clear why Practical Example No. 11 fits within the discussion of commercial service price analyses at all. The Section recommends that the Example be replaced with a hypothetical that helps explain the circumstances when service acquisitions meet the commercial item definition in FAR 2.101 and that such a discussion be located in Part A of the Guidebook.

G. Beyond Price Analysis

This section of the Guidebook cautions COs that cost data are required only in rare circumstances, and points COs to the FAR for the hierarchy of data requests. The Guidebook nevertheless states that “a typical situation where cost analysis is necessary is when acquiring a commercial item that includes minor modifications.” *Id.* at 43. The Section suggests revising this passage to clarify that although cost or pricing data may be required for certain non-commercial minor modifications, depending on the value of such modifications, cost analysis may not be required for all such modifications.

In addition, the Section notes that the phrase “uncertified cost data,” *id.*, does not equate to data exempt from the Truthful Cost and Pricing Data Act, f/k/a Truth in Negotiations Act (“TINA”). TINA applies regardless of whether: (1) the CO asks for a certification; or (2) such a certification is in fact provided. 10 U.S.C. §§ 2306a(b)(1)(C), 2306a(e)(3)(D). The Section

suggests replacing all references in the Guidebook to “uncertified cost data” with “data other than certified cost or pricing data.”

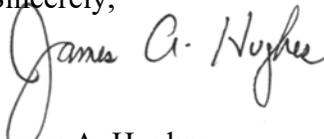
H. Preparing for & Conducting Negotiations

The Guidebook appears to suggest that *de facto* debarment is warranted for sellers that are unwilling to negotiate price. While the Government may choose whom it wants to purchase items from, the statement that “[i]f a seller is unwilling to negotiate, this behavior should be elevated through the appropriate chain of command, documented in the business clearance/negotiation memorandum and considered in future source selections” strongly suggests that this could rise to a *de facto* prohibition on contracting with an entity that is unwilling to negotiate its commercial item pricing. *See* Draft Guidebook, Part B, at 44. The Section suggests deleting the statement or adding language to clarify that a contractor is not required to negotiate its commercial item pricing, and its unwillingness to do so is not grounds for negative treatment in future source selections.

IV. CONCLUSION

The Section appreciates the DoD’s efforts to issue the draft Guidebook for comment on this important topic. The Section is available to provide additional information or assistance as you may require.

Sincerely,



James A. Hughes
Chair, Section of Public Contract Law

cc:

Aaron P. Silberman
Kara M. Sacilotto
Linda Maramba
Jennifer L. Dauer
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Accounting, Cost and Pricing Committee
Chairs and Vice Chairs, Acquisition Reform and Emerging Issues Committee
Chairs and Vice Chairs, Commercial Products and Services Committee
Craig Smith
Samantha S. Lee