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Commercial Items: New Developments and Policies

2019 NCMA Boston Workshop

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Agenda

- ▶ Background
- ▶ Commercial Item Group Evolution
- ▶ Current CIG Structure
- ▶ Benefits of Commercial Acquisitions
- ▶ Commercial Item Definitions
- ▶ Market Research
- ▶ CIG Capabilities
- ▶ CIG Warrant Authority/Determinations
- ▶ DFARS and NDAA perspectives and objectives to reach a broader market
- ▶ Commercial Resources
- ▶ Today's CIG
- ▶ Recent 809 Panel's bold suggestions on commercial approach to the market
- ▶ Questions

Background

- ▶ Congressional encouragement for the Government to utilize commercial items/services to the maximum extent possible to meet its needs.
- ▶ Issues with Prior Commercial Item Determinations (CIDs)
 - ▶ Inconsistent determinations within Department
 - ▶ Challenging of prime CIDs due to varying interpretations or inadequacy
 - ▶ Timeliness of Government performing CIDs
 - ▶ Increased risk
- ▶ Challenges with price reasonableness
 - ▶ Contractor resistance to providing required data, especially at the subcontract level
- ▶ Market Research to find commercial comps was challenging
 - ▶ Differences in quantities, lack of recent buying history, outdated specs etc.

CIG Evolution & Timeline

- | | |
|----------------|---|
| October, 1994 | Federal Acquisition Streamlining Act: Promotes an increased use of commercial goods and services by the Government. |
| February, 2013 | NDAA 2013: Mandates the creation of a “cadre of experts” within the Department of Defense (DoD) to support commercial item recommendations and pricing. |
| October, 2014 | Pilot program (9 people) initiated within the DCMA Cost & Pricing Center. |
| June, 2016 | CIG becomes operational |

CIG Teams & Locations

Denver, CO

Markets: Space (Spacecraft and Lift), C4I (Systems, Cyber and Services), UAS

Indianapolis, IN

Markets: Automotive, Aeronautics, Aircraft Engines

Boston, MA

Markets: Services (MRO), Chemicals and Materials



Philadelphia, PA

Markets: Naval Transport & Equipment, Troop Supply (Shelters, Personal Equipment)

Phoenix, AZ

Markets: Heavy Machinery, Missiles

St. Petersburg, FL

Markets: Vehicles, Weapons, Ammo

CIG staff

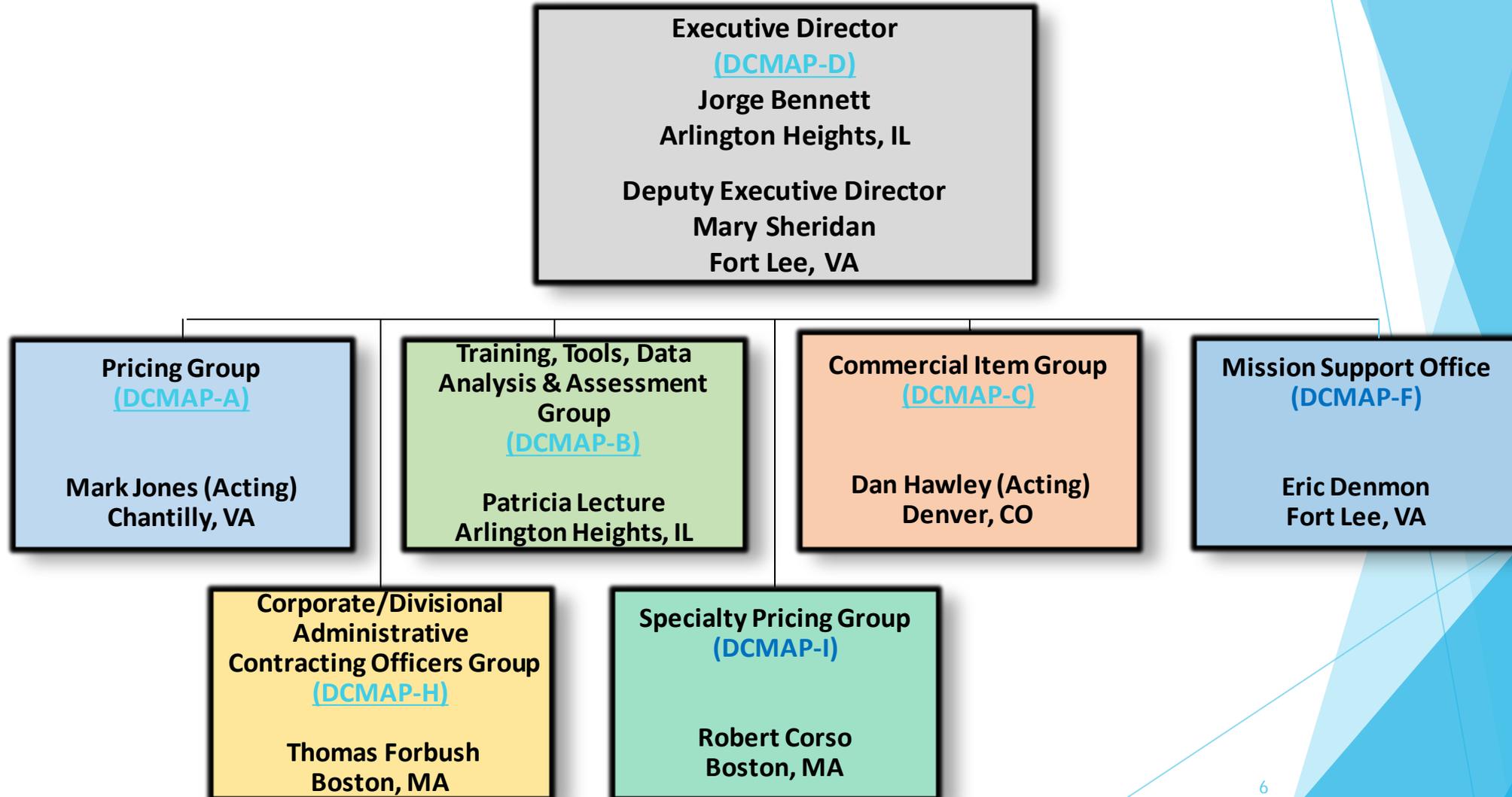
Price/Cost Analysts: 37

Engineers: 20

Management Analysts: 1

Director: 1

New Organization Structure



DCMA CIG Mission Statement



“Provide acquisition insight for the integration of commercial products and services within DoD to streamline procurements and ensure warfighters receive cutting-edge technology at fair and reasonable prices.”

Commercial Acquisitions, What's In It for You?

▶ For Industry

- ▶ Exemption from submitting certified cost or pricing data
- ▶ Streamlines the acquisition process
- ▶ Eliminates (most) government-unique terms and conditions
- ▶ Vendors do not need compliant business systems
- ▶ Potential opportunity for companies with no prior history working with the Government (non traditional defense companies)



▶ For Government

- ▶ Leverage the commercial marketplace
 - ▶ Technical Innovation
 - ▶ Emerging Technologies
 - ▶ Price Competition
 - ▶ Economies of Scale
 - ▶ Expand Supplier Base



Commercial Acquisition, Why Do It?

- ▶ Because the LAW says so...
 - ▶ The Federal Acquisition Streamlining Act of 1994 (FASA) promoted maximum use of commercial items to meet the government's needs.
 - ▶ Preference for commercial items is incorporated into FAR 1.102 and flowed down to prime contractors in FAR 52.244-6(b).
 - ▶ NDAA 2018 made commercial acquisition the default approach for IT products and services above the SAT.
 - ▶ FAR 52.244-6(b) specifically requires, to the maximum extent practicable, contractors to incorporate, and require its subcontractors at all tiers to incorporate, commercial items or NDIs as components of items to be supplied.
 - ▶ NDAA 2016 promotes solicitation of nontraditional defense contractors to capitalize on commercial market innovation and investments.
 - ▶ DFARS clause 252.244-7001, Contractor Purchasing System Administration, contractors are required to establish and maintain an acceptable purchasing system, which includes, commercial item determinations.

How to Determine if Somethings Commercial



Commercial Item Definition (1)

An item that is OF A TYPE customarily used by the general public or by non-government entities for non-government purposes, and has been sold or offered for sale, leased, or licensed to the general public.

Key Questions/Concepts/Considerations:

- Ensure you understand the item or service.
- Compare the proposed item to the commercial market options (are there variations? How does this affect the form, fit, and function?).
- Know who the buyers and sellers are.
- Are commercial/nongovernment invoices available?
- Are there catalogs offered to the general public?

Commercial Item Definition (2)

An item that would fall under definition (1) except that it hasn't hit the marketplace yet, but it will hit the marketplace by the time the government needs it.

Key Questions/Concepts/Considerations:

- Evaluate past/evolved item's commerciality/CID
- Is there product launch planning documents?
- Are there contracts in place for future delivery of the item?
- Will availability of the item be the same for the Government as it will be in the commercial marketplace?

Commercial Item Definition (3)

An item that would fit paragraph (1) or (2) BUT FOR

(i) Modifications that are customarily available in the commercial marketplace, or

(ii) Minor modifications to meet government requirements but do not significantly change the functional characteristics of the item

Key Questions/Concepts/Considerations:

- Comparison items and details of the modification
- Manufacturing process, same/different lines?
- Drawings, specifications, contract terms and conditions
- Government-unique functionality or mods that are outside of (i) and (ii).
- Does the supplier perform similar modifications for non-Government customers?
- Do manufacturers routinely modify items to meet customer needs?

Commercial Item Definition (4)

A combination of items that can fall under definitions (1), (2), (3), or (5)

Key Questions/Concepts/Considerations:

- In most instances, a combination of commercial items will result in a commercial item, but not every single component in an end item must be commercial for the item to be commercial.
- The contracting officer, with assistance of technical specialists, needs to determine whether or not the combination results in a commercial item.

Commercial Item Definition (5)

Installation, maintenance, repair, training, and other services, IF

(i) Such services are procured for support of an item that fall under definitions (1)-(4); and...

(ii) the services are available to the general public under similar terms & conditions

Key Questions/Concepts/Considerations:

- Previous CID on the product that the offered service is supporting.
- Does the provider have commercial clients?
- Review T&Cs
- Are there any Government-unique liability concerns (e. g., a hazardous work environment) would this affect the terms and conditions of the service?

Commercial Item Definition (6)

Services OF A TYPE offered and sold competitively in substantial quantities based on established catalog or market prices for specific tasks or outcomes, under standard commercial terms & conditions.

Key Questions/Concepts/Considerations:

- The mere fact that a service appears in a catalog does not make it commercial
- Is there adequate competition for the services?
- Based on the exact service, figure out what “substantial quantities” warrants
- Review T&Cs

Commercial Item Definition (7)

Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate division, subsidiaries, or affiliates of a contractor; or

Key Questions/Concepts/Considerations:

- Review the Contractor's internal policy and procedures for inter/intra divisional transfers/sales
- Was there a make/buy decision?

Commercial Item Definition (8)

A nondevelopmental item, if the procuring agency determines that the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.



Key Questions/Concepts/Considerations:

- Developed with private funding (tricky when a contractor does a lot of Gov R&D work, need to ensure it is not tied back to a Gov contract)
- Sold in substantial quantities
- Sold on a competitive basis to State and local governments.

CH-47 Chinook COOLS

- ▶ COOLS: Cargo on/off Loading System
- ▶ CIG asked to review commerciality of 4 kits that make part of the COOLS.
- ▶ Contractor asserted commerciality under definition (3)(ii), minor modification, but provided no comparable commercial information.
- ▶ CIG found there were no commercial comparable kits.
- ▶ MR resulted in 4 companies that provide similar loading systems and contacted each one.
- ▶ Through this new approach the CIG Engineer was able to determine that the COOLS is very similar in design and function to commercial variants sold for use on fixed-wing aircraft. The Boeing 787, 767, 777 and 777F consist of parts created with similar design elements.
- ▶ Blended analysis, between Engineer and PCA, results in the recommendation that the kits used to meet the Government requirements, do not significantly change the core function of the system and can be considered a minor modifications.

Misconceptions About Commerciality

- The products of a “commercial company” are always commercial.
- Non-developmental items are always commercial.
- If an item is developed at private expense, it must be commercial.
- An item that has no commercial sales cannot be commercial.
- To prove commerciality, list it on your company website.
- Invoices can be “too old” for consideration in commerciality.
- If it’s ITAR-restricted, it cannot be commercial.
- If it’s commercial, the asking price must be fair and reasonable.
- Catalog prices are automatically fair and reasonable.
- GSA catalog makes it commercial, and fair and reasonable.

What are Contractors Required to Provide?

- ▶ A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents FAR 52.212-1 (b)(4);
- ▶ Terms of any express warranty FAR 52.212-1(b)(5);
- ▶ Price and any discount terms FAR 52.212-1(b)(6);
- ▶ Product samples, when the solicitation so requires FAR 52.202-1(d); and
- ▶ Description, quantity, unit of measure, unit price and extended price of the items delivered FAR 52.212-4(g)(iv).
- ▶ FAR 15.403-3(a): If the contracting officer cannot find adequate data elsewhere to determine a fair and reasonable price, he/she shall require the offeror to submit other than certified cost or pricing data:
 - ▶ (1)(iv) At a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price (unless an exception applies); and
 - ▶ (1)(ii) Data to support a cost realism analysis.

How to Tackle Market Research?

▶ Prepare

- ▶ Ensure an understanding of the key characteristics of the items/service you are reviewing and identify any data necessary to support commerciality recommendation and price analyses.

▶ Collect

- ▶ First start with a large aperture approach, seek information that will establish commercial availability and capability, and establish a baseline.
- ▶ After gaging the market/industry as a whole, start focusing on tactical market research, key in on specifics of your item/service.
- ▶ Marry internet research with internal/institutional knowledge.
- ▶ NDAA 2017 *requires* market research for price reasonableness.

▶ Organize

- ▶ Consolidate market research findings into a priority of product(s) or service(s) considerations relevant to the proposed commercial item analysis.
- ▶ Remember FAR Part 10 requires that market research results be documented in a manner appropriate to both the size and complexity of the acquisition.

Market Research Reminders

- ▶ There is no single website, person, or tool that has all the answers.
- ▶ There is no checklist or template, since each part or service has its own unique circumstances.
- ▶ Be creative, use your own best judgment.
- ▶ Combine all sources of information to paint a complete picture, and...
- ▶ **...ALWAYS, ALWAYS DOCUMENT!**

CIG Capabilities

Our services:

- Commerciality Analysis
- Price Analysis
- Market Research
- Negotiation Support
- Training and Assistance
- Support for Contractor Purchasing System Reviews (CPSRs)
- Pre-RFP support
- Maintain Commercial Item Database
- Commercial Determinations



Determination Authority

- ▶ December 20, 2018 letter issued to Armed Services
 - ▶ “DCMA CIG Contracting Officers will serve as determining official for all commercial item review requests submitted to DCMA.”
- ▶ January 9, 2019 Determination Authority goes live for the CIG
 - ▶ CIG will only be issuing Commercial Determinations and no longer recommendations.
- ▶ February 8, 2019 Admiral Lewis, DCMA Director, issues letter to component heads:
 - ▶ Establishes DCMA CIG Contracting Officers as DCMA’s determining officials for all commercial items/service review requests submitted to DCMA from buying activities/PCOs.

NDAAs 2016 - Nontraditional Defense Contractors

▶ 212.001 Definitions

- ▶ *“Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).”*

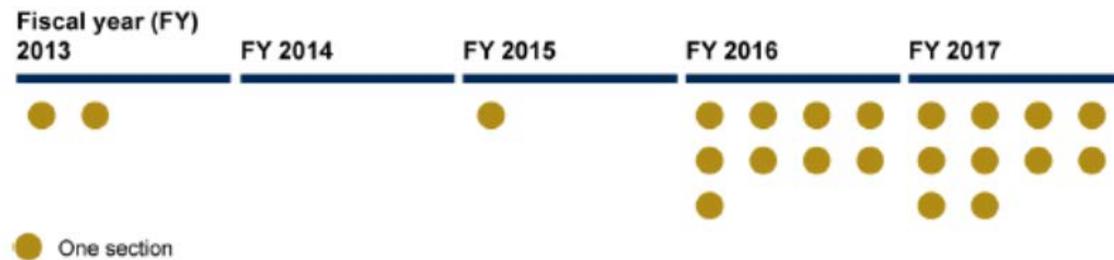
▶ DFARS 212.102 (a)(iii)

- ▶ In accordance with 10 U.S.C. 2380a, **contracting officers may treat supplies and services provided by nontraditional defense contractors as commercial items.** This permissive authority is intended to **enhance defense innovation and investment**, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors 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. **The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial.**

NDAA 2018 Sec. 848 – Commercial Item Determinations

- ▶ Section 848 provides that the DoD’s acquisition of an item through commercial item procedures constitutes a “prior determination” that the item is a commercial item that is binding on future DoD acquisitions unless (i) the head of contracting authority determines that the prior determination was improper or (ii) the senior procurement executive for a military service or the DoD determines that it is no longer appropriate to acquire the item under commercial item procedures. This change may improve consistency within the DoD acquisitions system and streamline the determination process for future acquisitions.

Figure 3: Distribution of National Defense Authorization Act Sections Related to DOD’s Acquisition of Commercial Items for Fiscal Years 2013 through 2017



Source: GAO analysis of National Defense Authorization Acts for fiscal years 2013 to 2017. | GAO-17-645

NDAA 2016 vs. NDAA 2018

- ▶ Conflict between 2016 NDAA and 2018 NDAA
 - ▶ 2018 NDAA directs reliance on prior FAR Part 12 contracts as the commercial item determination (CID); however, FAR Part 12 contracts don't necessarily mean the items are commercial.
- ▶ FAR Part 12 procedures = Commercial (NDAA 2018)
- ▶ Nontraditional Defense Contractors (NDAA 2016) = FAR Part 12 Procedures (212.102)
- ▶ Nontraditional Defense Contractor ≠ Commercial

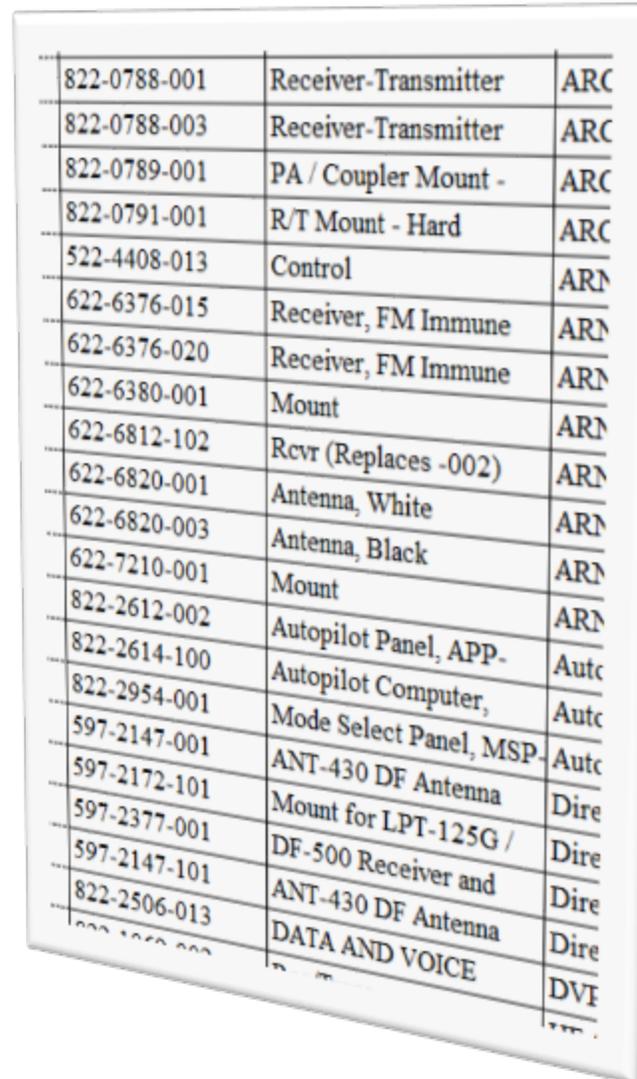


NDAA 2019 - New Definitions

- ▶ Revising Commercial Item Definition
 - ▶ Separating the old definition into two new definitions, to clarify the definition:
 - ▶ Commercial Product - A product of a type customarily used by the general public or nongovernmental entities for nongovernmental purpose and either (1) has been sold, leased, licensed, or offered to the general public, in its original or slightly modified state, or (2) is not yet available but will be in time to satisfy the Government requirements.
 - ▶ Commercial Service - Services provided to the public, sold competitively in substantial quantities in the commercial marketplace, and procured by the federal Government for support of commercial products.
 - ▶ New Definitions will take effect on January 1, 2020
 - ▶ DoD must submit an implementation plan to Congress by April 1, 2019

Commercial Item Database

- ▶ Currently maintained in Excel format
- ▶ DPC is exploring the next version of the database
- ▶ More than 15,000 parts – and growing
- ▶ Not all-inclusive (but we're working on that)
- ▶ Sources of data:
 - ▶ Commercial Item **Determinations** by Procuring Contracting Officers
 - ▶ Commercial Item **Recommendations** by CIG personnel
 - ▶ Will incorporate new Commercial Item Determinations performed by the CIG



822-0788-001	Receiver-Transmitter	ARC
822-0788-003	Receiver-Transmitter	ARC
822-0789-001	PA / Coupler Mount -	ARC
822-0791-001	R/T Mount - Hard	ARC
522-4408-013	Control	ARN
622-6376-015	Receiver, FM Immune	ARN
622-6376-020	Receiver, FM Immune	ARN
622-6380-001	Mount	ARN
622-6812-102	Rcvr (Replaces -002)	ARN
622-6820-001	Antenna, White	ARN
622-6820-003	Antenna, Black	ARN
622-7210-001	Mount	ARN
822-2612-002	Autopilot Panel, APP-	Autc
822-2614-100	Autopilot Computer,	Autc
822-2954-001	Mode Select Panel, MSP-	Autc
597-2147-001	ANT-430 DF Antenna	Dire
597-2172-101	Mount for LPT-125G /	Dire
597-2377-001	DF-500 Receiver and	Dire
597-2147-101	ANT-430 DF Antenna	Dire
822-2506-013	DATA AND VOICE	DVI

Resources at Your Disposal

- ▶ Department of Defense Guidebook for Acquiring Commercial Items (January, 2018)
- ▶ CIG Public Webpage <https://www.dcms.mil/Commercial-Item-Group/>
 - ▶ DCMA Commercial Item Deskguide (September 2018)
 - ▶ Helpful links for market research, website specific parts/items, escalation indices, industry resources, etc. (75+ sites, with a brief narrative about the link)
 - ▶ FAQ's
- ▶ If all else fails, contact US, we're here to support, mentor, troubleshoot, brainstorm...

Today's CIG

- ▶ New CIG Thresholds
 - ▶ Commercial Only Cases: \$1 M
 - ▶ Commercial and Pricing Cases: \$1 M
 - ▶ Pricing Only Cases: \$2 M
 - ▶ CMOs can perform price analysis requests under \$2M
- ▶ Commercial Request Form:
dcma.boston-ma.eastern-rc.mbx.Commercial@mail.mil
Or visit our website:
<https://www.dcms.mil/Commercial-Item-Group/>
- ▶ New Deliverables
 - ▶ CPAR - Drafted by Price/Cost Analyst
 - ▶ CTAR - Drafted by CIG Engineer, sent to CIG CO to assist in their CID
 - ▶ CID - Drafted and Signed by CIG ACO

The Future & Where We Go from Here...

- ▶ Warrant authority gives us a unique opportunity to have a direct affect on streamlining the acquisition process, and providing a more consistent product.
- ▶ 809 Panel Volume 3: Replace commercial buying and the existing simplified acquisition procedures and thresholds, with simplified readily available procedures for procuring readily available products and services and readily available products and services with customization.
- ▶ In the end, the statutory commercial definition is broad, and contracting officers must exercise sound business judgment in their determinations. The CIG can provide the necessary insight and now make those tough determinations to get the warfighters cutting-edge commercial technology at fair and reasonable prices.

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Questions?