



Report to the Chairman, Committee on
Armed Services,
House of Representatives

July 2017

DEFENSE CONTRACTS

Recent Legislation and DOD Actions Related to Commercial Item Acquisitions

GAO Highlights

Highlights of [GAO-17-645](#), a report to the Chairman, Committee on Armed Services, House of Representatives

Why GAO Did This Study

DOD purchases commercial items—generally defined as products and services readily available in the commercial marketplace—to meet many of its requirements. Relying on the commercial marketplace, when appropriate, enables DOD to take advantage of market innovations and reduce acquisition costs. Since 2013, Congress has enacted changes in the way DOD is to purchase commercial items.

GAO was asked to review the acquisition of commercial items by DOD. This report describes (1) what federal procurement data indicate about trends in DOD’s acquisition of commercial items; and (2) recent legislative changes in the National Defense Authorization Acts (NDAA’s) from fiscal years 2013 to 2017 related to the procurement of commercial items and DOD’s actions in response to this legislation.

To obtain a longer term view, GAO analyzed data from FPDS-NG—the government’s procurement database—for contracts awarded from fiscal years 2007 through 2016, reviewed applicable legislation and regulations, and interviewed DOD officials.

What GAO Recommends

GAO is not making recommendations in this report. The Department of Defense had no comments on a draft of this report.

View [GAO-17-645](#). For more information, contact William T. Woods at (202) 512-4841 or woodsw@gao.gov.

July 2017

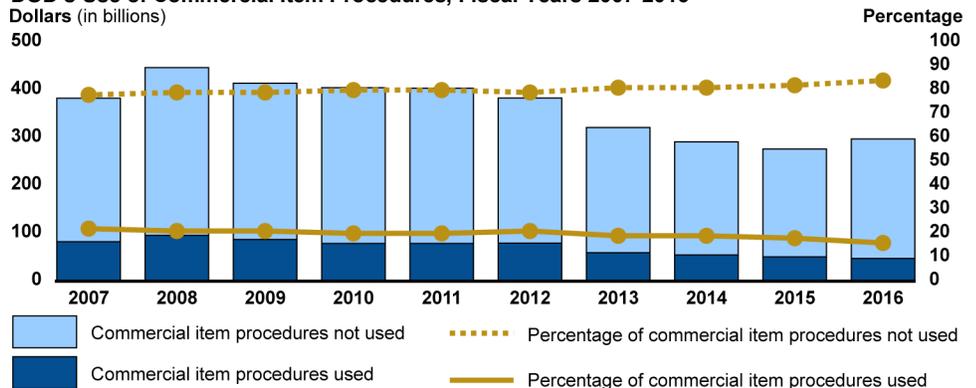
DEFENSE CONTRACTS

Recent Legislation and DOD Actions Related to Commercial Item Acquisitions

What GAO Found

Data from the Federal Procurement Data System-Next Generation (FPDS-NG) show that as a proportion of the Department of Defense’s (DOD) total contracting obligations, contracts awarded using commercial item procedures have gradually declined in a narrow range from fiscal years 2007 to 2016 (see figure). These numbers, however, do not reflect the full extent to which DOD acquires commercial items because FPDS-NG only captures information on whether or not commercial item acquisition procedures were used to acquire the product or service, and not whether items purchased are commercial or not commercial.

DOD’s Use of Commercial Item Procedures, Fiscal Years 2007-2016



Source: GAO analysis of Federal Procurement Data System-Next Generation data for fiscal years 2007 to 2016. | GAO-17-645

Note: Obligation amounts obtained from FPDS-NG were adjusted for inflation using the Fiscal Year Gross Domestic Product price index.

In addition, GAO found that for fiscal year 2016:

- 54 percent of DOD’s spending using commercial item procedures was on products, with the highest category being sustainment supplies and equipment;
- 46 percent of the remaining spending was for services, with knowledge-based services such as engineering and technical support accounting for the highest obligations; and
- 68 percent of DOD’s commercial spending was competitive, slightly higher than DOD’s past competition rate for overall contract spending.

Recent legislation from Congress includes a number of provisions related to commercial item acquisitions, including provisions intended to ensure contracting officers are negotiating fair and reasonable prices for commercial items. DOD has taken a number of actions to address this legislation, including updating its Guidebook for Acquiring Commercial Items and proposing Defense Federal Acquisition Regulation Supplement rules. When implemented, these rules will promote consistency in making commercial item determinations, among other things. Additionally, DOD has created six Commercial Item Centers of Excellence—a cadre of experts within DOD to provide advice to the acquisition workforce with regard to commercial item authorities.

Contents

Letter		1
	Background	2
	DOD's Use of Commercial Item Procedures Has Gradually Declined Over 10 Years Within a Narrow Range	5
	DOD Has Taken Action in Response to Recent Commercial Item Acquisition Legislation	9
	Agency Comments	14
Appendix	Summary of Recent National Defense Authorization Act Sections Related to DOD's Acquisition of Commercial Items	15
Tables		
	Table 1: DOD Obligations Under Contracts Awarded Using Commercial Item Procedures by Component, Fiscal Year 2016	8
	Table 2: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2013 National Defense Authorization Act (NDAA) and DOD Actions to Address Them	15
	Table 3: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2015 National Defense Authorization Act (NDAA) and DOD Actions to Address Them	17
	Table 4: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2016 National Defense Authorization Act (NDAA) and DOD Actions to Address Them	18
	Table 5: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2017 National Defense Authorization Act (NDAA) and DOD Actions to Address Them	20
Figures		
	Figure 1: DOD's Use of Commercial Item Procedures for Fiscal Years 2007-2016	6
	Figure 2: DOD's Top Commercial Products and Services by Obligation Under Contracts Awarded Using Commercial Item Procedures, Fiscal Year 2016	8

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

Abbreviations

CBAR	Contract Business Analysis Repository
DCMA	Defense Contract Management Agency
DFARS	Department of Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
FAR	Federal Acquisition Regulation
FSS	Federal Supply Schedule
FPDS-NG	Federal Procurement Data System-Next Generation
GSA	General Services Administration
NDA	National Defense Authorization Act
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology, and Logistics

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July 17, 2017

The Honorable Mac Thornberry
Chairman
Committee on Armed Services
House of Representatives

Dear Mr. Chairman:

The Department of Defense (DOD) purchases commercial items to meet many of its requirements. Relying on the commercial marketplace, when appropriate, enables DOD to take advantage of market innovations, avoid the costs of product development, increase the supplier base, and reduce acquisition costs, among other benefits. Many government-unique purchasing requirements do not apply when DOD buys commercial items, which generally include both products and services available in the commercial market.

Since 2013, Congress has provided legislation on various aspects of how DOD defines and purchases commercial items, and how DOD makes commercial item and price reasonableness determinations, through the National Defense Authorization Acts (NDAAs). You asked us to review the acquisition of commercial items by DOD. This first report describes (1) what federal procurement data indicate about trends in DOD's acquisition of commercial items; and (2) recent legislative changes in the NDAAs from fiscal years 2013 to 2017 related to the procurement of commercial items and actions taken by DOD in response to this legislation. We plan to complete additional work in this area in response to your request.

To determine what federal procurement data indicate about trends in DOD's acquisition of commercial items, we analyzed contract obligation data from the Federal Procurement Data System-Next Generation (FPDS-NG)—the government's procurement database—during the 10-year period from October 1, 2006 to September 30, 2016. To access the reliability of the FPDS-NG data, we reviewed related documentation and electronically tested for missing data, outliers, and inconsistent coding. Based on these steps we determined the data were sufficiently reliable to present commercial contract obligations for the 10-year period. We analyzed DOD obligations in FPDS-NG that were coded as having used Federal Acquisition Regulation (FAR) Part 12—Commercial Item Procedures.

To determine recent legislative changes related to DOD's acquisition of commercial items, we reviewed and summarized applicable sections of fiscal years 2013 to 2017 NDAs. To determine actions taken by DOD in response to this legislation, we examined policy documents from the office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and interviewed DOD officials from USD(AT&L) and the Defense Contract Management Agency (DCMA). We also examined relevant sections of the FAR and corresponding Defense Federal Acquisition Regulation Supplement (DFARS) sections. Additionally, to gain an understanding of what was being procured under commercial item contracts, we reviewed selected Air Force contract files. As part of our follow-on work we plan to look more in-depth across DOD at how the department makes commercial item determinations by reviewing selected contracts.

We conducted this performance audit from December 2016 to July 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Federal Acquisition Streamlining Act of 1994 established a preference within the federal government to procure commercial items rather than items developed exclusively for the government.¹ FAR Part 12—Acquisition of Commercial Items—prescribes the policies that apply to commercial item acquisitions. For example, contracting officers can use streamlined solicitation procedures, which can reduce the time needed to solicit offers. Contracting officers are required to use fixed-price contracts to buy commercial items, though the FAR also allows for the use of other contract types under certain circumstances.² We have

¹Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, 3390 Title VII, § 8104 (Oct 13, 1994).

²The requirement is to use firm-fixed-price contracts or fixed-price contracts with economic adjustments. The FAR also allows contracting officers to use time and material or labor hour contracts for commercial services in certain instances. See FAR 12.207.

previously reported on various aspects of commercial item procurements at DOD, including pricing and the commercial item test program.³

During the pre-award process for most procurement actions, a contracting officer must determine whether the product or service being procured is commercial. Once the product or service is deemed commercial, the contracting officer, prior to award, must determine that the price is fair and reasonable.

Commercial Item Determinations

The commercial item definition includes items customarily used by and sold (or offered) to the general public, including products and services with minor modifications.⁴ The decision to fulfill a government requirement using a commercial item is based on market research to determine whether an item satisfies the commercial item definition. Under DOD guidance, a DOD contracting officer must document the market research and commercial item determination in the contract file. According to DOD's Commercial Item Guidebook, the commerciality determination should clearly identify which elements of the definition qualify the item as commercial and therefore eligible for procurement under FAR Part 12 procedures.⁵

Price Reasonableness Determinations

Prior to contract award, contracting officers must determine that the price of the product or service the government is buying is fair and reasonable and document the determination. When purchasing commercial items, firm knowledge of market pricing information is necessary and the contracting officer must obtain sufficient information to negotiate a fair and reasonable price. At a minimum, the contracting officer must use some type of price analysis—such as comparing proposed prices in response to a competitive solicitation.⁶ As stated in DOD's Commercial

³GAO, *Contracting Data Analysis: Assessment of Government-wide Trends*, [GAO-17-244SP](#) (Washington, D.C.: Mar. 9, 2017); *Defense Contracts: DOD's Requests for Information from Contractors to Assess Prices*, [GAO-15-680](#) (Washington, D.C.: Aug. 12, 2015); *Federal Contracting: Commercial Item Test Program Beneficial, but Actions Needed to Mitigate Potential Risks*, [GAO-14-178](#) (Washington, D.C.: Feb. 4, 2014).

⁴For a complete definition of commercial item, see FAR § 2.101.

⁵DOD is in the process of updating its Commercial Item Guidebook, formally called the Commercial Item Handbook. The current version is from 2011.

⁶For more examples of price analysis techniques, see FAR 15.404-1(B)(2).

Item Guidebook, the fact that a price is included in a catalog does not necessarily establish that the catalog price is fair and reasonable.

If, after market research has been conducted, additional information has been obtained from sources other than the offeror, and the appropriate price analysis techniques have been applied, the contracting officer still cannot make the determination that the offeror's price for a commercial item is fair and reasonable, then the contracting officer must obtain additional data from the offeror to support further analysis.⁷ According to DOD guidance, contracting officers should not request more data than necessary to make the price reasonableness determination and they may not require contractors to certify any supporting cost information. DOD contracting officers must document any response to their request for additional data, including a contractor's failure to provide the requested data.

⁷This may be "data other than certified cost or pricing data." "Data other than certified cost or pricing data" is defined as pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, but without the certification. FAR § 2.101.

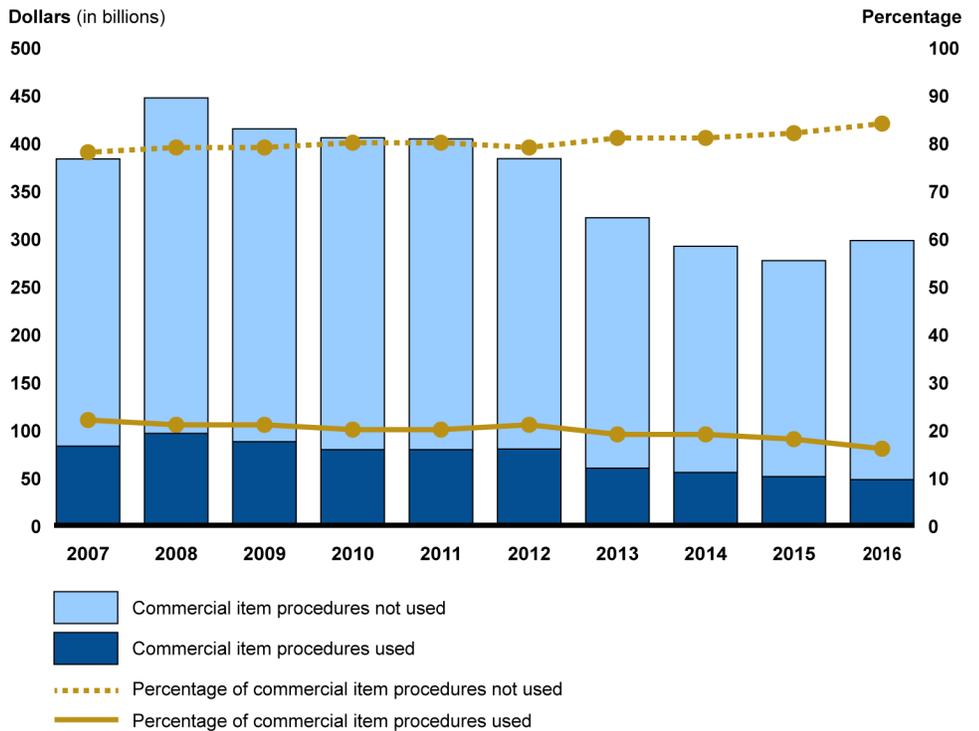
DOD's Use of Commercial Item Procedures Has Gradually Declined Over 10 Years Within a Narrow Range

DOD's Use of Commercial Item Procedures Was Consistently Less than 25 Percent of Total Obligations

FPDS-NG data show that obligations under DOD contracts awarded using commercial item procedures (i.e. FAR Part 12) declined since fiscal year 2007, yet as a proportion of DOD's total contracting obligations they have remained within a narrow range from 22 to 16 percent.⁸ Figure 1 depicts DOD's total obligations and commercial item obligations from fiscal years 2007 through 2016. To obtain a more in-depth view of commercial item spending, we analyzed spending for fiscal year 2016. For that year, DOD spent \$47.6 billion in commercial item obligations—a decrease of \$35.1 billion since fiscal year 2007. However, overall DOD contract obligations also declined during this time frame.

⁸All FPDS-NG data have been adjusted to represent fiscal year 2016 dollars, and thus include the effects of inflation or escalation. We adjusted for inflation using the Fiscal Year Gross Domestic Product price index. For the purposes of this report, we refer to obligations under contracts awarded using commercial item procedures, or FAR Part 12, as commercial item obligations.

Figure 1: DOD's Use of Commercial Item Procedures for Fiscal Years 2007-2016



Source: GAO analysis of Federal Procurement Data System-Next Generation data for fiscal years 2007 to 2016. | GAO-17-645

Note: Obligation amounts obtained from FPDS-NG were adjusted for inflation using the Fiscal Year Gross Domestic Product price index. We omitted DOD obligations that were coded in FPDS-NG as missing procedures used since this was a small amount, accounting for less than 0.1 percent of total DOD obligations for each fiscal year 2007 to 2016.

In fiscal year 2016, DOD obligated \$4.5 billion of its \$47.6 billion in commercial item obligations through the General Services Administration's (GSA) Federal Supply Schedule (FSS) program.⁹ The GSA's FSS program provides agencies a simplified method of purchasing commercial products and services at prices associated with volume buying. This \$4.5 billion includes nearly \$1.1 billion obligated through blanket purchase agreements. Blanket purchase agreements can be

⁹The \$4.5 billion does not include another \$1.1 billion that DOD obligated through FSS orders and FSS blanket purchase agreements using procedures other than commercial item procedures.

established under any FSS contract to fill repetitive needs for supplies or services.¹⁰

We could not determine the full extent to which DOD is procuring commercial items because FPDS-NG only captures information on whether or not commercial item acquisition procedures were used to acquire the product or service, and not whether items purchased are commercial or not commercial.¹¹ Further, DOD can purchase commercial items through a subcontract. Also, the data we present above do not include obligations on contracts awarded by other agencies on behalf of DOD through interagency agreements. We were unable to obtain reliable data in this area for our 10-year time frame; however, in fiscal year 2016, \$2.1 billion were obligated on contracts awarded using FAR Part 12 procedures, through interagency agreements, on behalf of DOD.

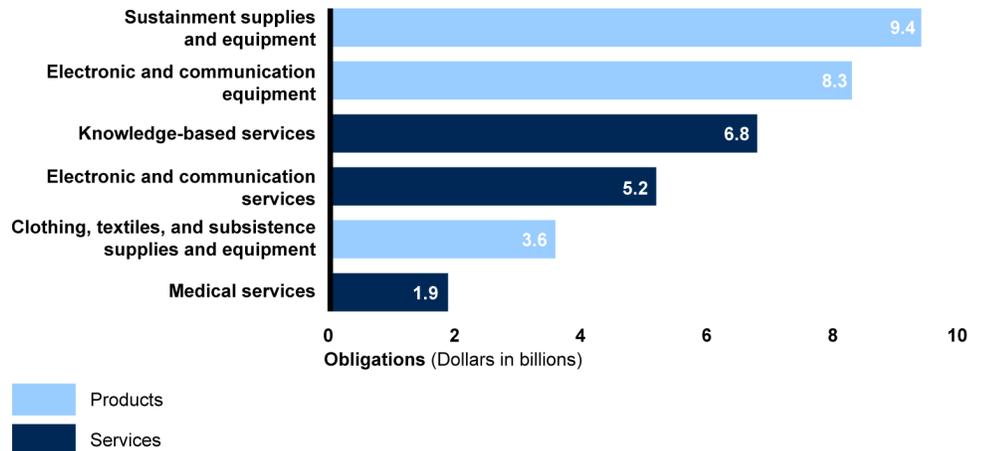
DOD Procures a Broad Variety of Products and Services, Most Competitively Under Firm-Fixed-Price Contracts, Using Commercial Item Procedures

DOD procures a broad range of products and services, using commercial procedures, from the relatively simple, such as office furnishings and housekeeping services, to the more complex, such as space vehicles and maintenance services. In fiscal year 2016, products accounted for 54 percent of DOD's commercial item obligations, while services accounted for 46 percent. Figure 2 depicts DOD's commercial item obligations by top three types of products and top three types of services in fiscal year 2016.

¹⁰GAO, *Contract Management: Agencies Are Not Maximizing Opportunities for Competition or Savings under Blanket Purchase Agreements despite Significant Increase in Usage*, [GAO-09-792](#) (Washington, D.C.: Sept. 9, 2009).

¹¹We have previously reported on this issue in: GAO, *Contracting Data Analysis: Assessment of Government-wide Trends*, [GAO-17-224SP](#) (Washington, D.C.: Mar. 9, 2017).

Figure 2: DOD’s Top Commercial Products and Services by Obligation Under Contracts Awarded Using Commercial Item Procedures, Fiscal Year 2016



Source: GAO analysis of Federal Procurement Data System-Next Generation fiscal year 2016 data. | GAO-17-645

Four components within DOD make up 82 percent—or \$39.1 billion—of DOD’s total commercial item obligations in fiscal year 2016.

Table 1: DOD Obligations Under Contracts Awarded Using Commercial Item Procedures by Component, Fiscal Year 2016

DOD Component	Obligations (Dollars in Billions)	Percentage
Defense Logistics Agency	13.22	28
Army	12.78	27
Air Force	6.75	14
Navy	6.33	13
Other DOD components	8.54	18
Total	47.62	100

Source: GAO analysis of Federal Procurement Data System-Next Generation fiscal year 2016 data. | GAO-17-645

According to FPDS-NG data, 68 percent of DOD’s commercial item obligations were awarded competitively in fiscal year 2016. Competition helps agencies get lower prices on products and services, and get the best value for taxpayers. The remaining 32 percent of obligations were coded as noncompetitive, such as sole source contracts or follow-on purchases. For example, we reviewed a \$295,000 sole source contract for a commercial geolocation system for the National Air and Space Intelligence Center. The Air Force justified this as a sole source contract

because the contractor is the only provider of the geolocation system, and this system is the only one fully compatible with existing hardware that the agency previously purchased from the same contractor through a competed contract.

Finally, FAR Part 12 requires that agencies use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for acquiring commercial items, with some exceptions.¹² In fiscal year 2016, \$46.8 billion, or 98 percent, of DOD's commercial item obligations were on firm-fixed-price contracts (\$40.8 billion) and fixed-price contracts with economic price adjustment (\$6 billion). The remaining \$738.6 million, or 2 percent, were on time and materials or labor hour contracts.

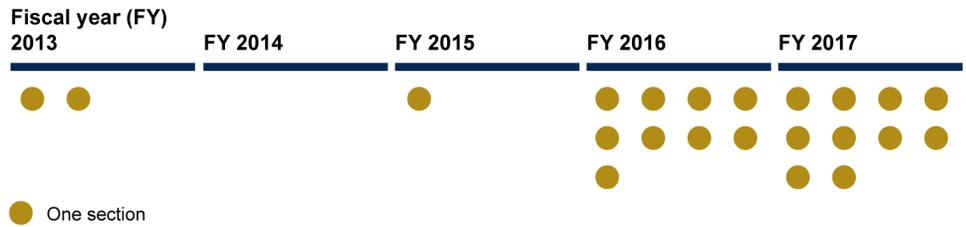
DOD Has Taken Action in Response to Recent Commercial Item Acquisition Legislation

Recent legislation from Congress includes a number of provisions related to commercial item acquisitions, including both commercial item determinations and price reasonableness determinations. The provisions touch on a variety of areas, from ensuring DOD uses commercial standards instead of military standards when possible, to developing a database of commercial item determinations, to improving guidance and training on how to determine the reasonableness of a commercial item price.

Figure 3 shows the distribution of NDAA sections containing provisions related to DOD's acquisition of commercial items for fiscal years 2013 through 2017. Although this figure highlights the increase in activity in the fiscal year 2016 and 2017 NDAA's, section 831 of the fiscal year 2013 NDAA resulted in a substantive shift in how DOD is to buy commercial items.

¹²A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. This contract type may be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. See FAR 16.203.

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

Several of the key actions DOD has taken in response to the recent legislation are highlighted below. For more details on all sections within the 2013, 2015, 2016, and 2017 NDAA's related to DOD's acquisition of commercial items, see Appendix I.

Fiscal Year 2013 NDAA

As noted above, section 831 of the fiscal year 2013 NDAA resulted in a substantive shift in DOD commercial item practices. This section required DOD to:

- issue guidance on standards for determining price reasonableness;
- ensure that requests for uncertified cost information, for the purposes of evaluating price reasonableness, are sufficiently documented;
- develop and begin implementation of a plan to train the acquisition workforce in the use of certain authorities for evaluating price reasonableness when procuring commercial items; and
- develop a cadre of experts within DOD to provide advice to the acquisition workforce with regard to commercial item authorities.

As a result, DOD issued memorandums in February 2015 and September 2016, which provided specific guidance to contracting officers on commercial items and price reasonableness determinations such as specific information that should be included in the contract file for ensuring that requests for cost information are sufficiently documented. DOD is also in the process of updating its Guidebook for Acquiring Commercial Items. The purpose of the Guidebook is to assist acquisition

personnel in developing sound acquisition strategies for procuring commercial items.¹³

To address the issue of training the acquisition workforce, according to Defense Procurement Acquisition Policy officials, all commercial item courses are being assessed and will be revised to be consistent with the legislation concerning commercial items as well as the DOD Guidebook for Acquiring Commercial Items. We have previously reported on the status of DOD's actions to develop guidance and training on determining price reasonableness. We also reported on circumstances under which DOD requested cost or pricing information from contractors for use in determining price reasonableness for noncompetitive contracts for commercial items awarded between January 2, 2013 and January 1, 2015. Overall, we found that contracting officials faced challenges when determining price reasonableness, such as data currency and contractor reluctance to share data.¹⁴

To develop a cadre of experts within the Department to provide advice to the acquisition workforce, DCMA's Commercial Item Group created six Commercial Item Centers of Excellence, aligned to various contractor market sectors, to assist in both the timeliness and consistency of commercial item determinations. The centers are staffed with engineers and price/cost analysts to advise procuring contracting officers in their determinations of commerciality. Specifically, these centers assist with and make recommendations on market analysis, commercial item reviews and determinations, and commercial pricing analysis. Additionally, the centers provide training and assistance to the DOD acquisition community on various techniques and tools used to evaluate commercial items and commercial item pricing. According to DCMA officials, experts at these centers began reviewing cases in June 2016 and since then have examined 437 cases that contained approximately 2300 items. They recommended that the contracting officer make a determination that an item was commercial in 94 percent of the cases reviewed. Results are included in a final report prepared by DCMA and

¹³The update will split the Guidebook into two parts: Part A, Commercial Item Determination and Part B, Pricing Commercial Items, and includes implementation guidance on some provisions in section 831 of the fiscal year 2013 National Defense Authorization Act (NDAA) and sections 851-853 and sections 855-857 of the fiscal year 2016 NDAA. Draft versions of both parts were released in February 2017 for public comment, with comments due by May 1, 2017.

¹⁴[GAO-15-680](#).

provided to the requesting official.¹⁵ According to DCMA officials the average turnaround time to complete a review, for both a commercial item recommendation and a price reasonableness determination, is 46 days.

Fiscal Year 2015 NDAA

The fiscal year 2015 NDAA had only one provision relevant to commercial items, which made permanent DOD's authority to use simplified acquisition procedures for certain commercial items.

Fiscal Year 2016 NDAA

The fiscal year 2016 NDAA included provisions that required DOD to provide guidance related to commercial items and price reasonableness determinations, among other things. For example, a contracting officer must consider recent prices paid by the government to determine price reasonableness of a commercial item if the prices previously paid are valid references for comparison, based on factors such as the quantities purchased by the government and how long ago the prices were paid. In 2016 DOD issued a proposed DFARS rule, which, when finalized, is intended to address many of these provisions by providing guidance to contracting officers for making price reasonableness determinations and promoting consistency in making commercial item determinations. It also is intended to expand opportunities for nontraditional defense contractors to do business with DOD by treating products and services offered by these companies as commercial items.

The 2016 legislation also required the Secretary of Defense to establish and maintain a centralized capability to oversee commercial item determinations for DOD procurements, and provide public access to these determinations. Subsequent legislation in fiscal year 2017 removed public access to this information and expanded the scope to include market research and price reasonableness analysis. Originally, DCMA intended to leverage the Contract Business Analysis Repository (CBAR), a DCMA database that captures contract-related information about companies, but DCMA officials later concluded that using CBAR would not be feasible due to the high cost of implementing technical changes. Instead, according to DCMA officials, they plan to create a new database; however, the system they will use for the database has not been

¹⁵In 2017 DCMA started to track the average turnaround time for commercial item recommendations and price reasonableness determinations separately. Prior to this they were tracked as an average turnaround time to complete a full review including both commercial item recommendations and price reasonableness determinations.

determined, and there is no funding or timeline to complete the database. As an interim solution, DCMA has created a publically available source that identifies certain items and services acquired by DOD where commercial item recommendations and determinations have been made.

Additionally, the fiscal year 2016 NDAA required the Secretary of Defense to establish an advisory panel on streamlining the defense acquisition process, with a focus on reviewing acquisition regulations applicable to DOD and making recommendations for amendment or repeal. The panel issued an interim report in May 2017, which describes the panel's objective as making recommendations that, if adopted, will enable the Department of Defense to more consistently buy what it needs in a timely and cost-effective manner—whether that be commercial items, information technology, services, weapon systems, or the full range of tools and equipment on which warfighters depend. The panel is working on its final report; no date has been set for issuance.

Fiscal Year 2017 NDAA

The fiscal year 2017 NDAA has numerous sections that relate to DOD's acquisition of commercial items. For example, it establishes a preference for certain commercial services by providing that the head of a DOD agency cannot enter into a contract above \$10 million for certain services, such as facilities-related or knowledge-based services, that are non-commercial unless a written determination is made that no commercial services can meet the agency's needs. Another provision requires DOD to use commercial or non-government standards instead of military standards and specifications, unless no practical alternative exists to meet user needs. DOD is drafting several proposed DFARS rules that would implement these provisions.

DOD Is Using Memorandums of Agreement to Support Commercial Item and Price Reasonableness Determinations

In addition to the actions mentioned above, while not a direct action in response to specific commercial item legislation, the Director, Defense Pricing and the DCMA Cost & Pricing Center Director are working closely with interested companies to define, through the use of memorandums of agreement, the types of information needed to support commercial item determinations and associated pricing determinations. According to DCMA, memorandums of agreement can be useful when delineating such processes and information. For now, DCMA has uploaded these agreements to CBAR but plans to include these agreements in its new commercial item database for use in the future by procuring contracting officers. Currently, three agreements have been completed and three are in process.

Agency Comments

We are not making any recommendations in this report. The Department of Defense had no comments on a draft of this report.

We are sending copies of this report to the appropriate congressional committee and the Secretary of Defense. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or woodsw@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. In addition, Tatiana Winger (Assistant Director), Kathryn (Emily) Bond, Michael Grogan, Julie Hadley, Julia Kennon, Liam O'Laughlin, Raffaele (Ralph) Roffo, Roxanna Sun, and Carmen Yeung made key contributions to this report.

Sincerely yours,



William T. Woods
Director, Acquisition and Sourcing Management

Appendix: Summary of Recent National Defense Authorization Act Sections Related to DOD's Acquisition of Commercial Items

Table 2: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2013 National Defense Authorization Act (NDAA) and DOD Actions to Address Them

Fiscal Year (FY) 2013 NDAA Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
Sec. 822 Extension of authority for use of simplified acquisition procedures for certain commercial items	Re-authorizes DOD's authority to use simplified acquisition procedures for commercial item acquisitions greater than the simplified acquisition threshold, ^a but below \$6.5 million (and below \$12 million for commercial item acquisitions in support of contingency operations) to be effective until January 1, 2015. ^b Section 815 of the FY15 NDAA makes this authority permanent.	Implemented, no action required by DOD
Sec. 831 Guidance and training related to evaluating reasonableness of price	<p>Requires DOD to issue guidance on standards for determining price reasonableness. The standards should address whether price information for similar items previously sold to the government is sufficient to evaluate price reasonableness and how much uncertified cost data to require from contractors when price information is not sufficient to evaluate price reasonableness.</p> <p>Requires DOD to ensure that requests for uncertified cost information, for the purposes of evaluating price reasonableness, are sufficiently documented. The contract file must contain specific documentation, such as a justification for the need for additional cost information, a copy of DOD's request to the contractor for additional cost information, and any response from the contractor to the request.</p>	<p><i>Guidance:</i></p> <ul style="list-style-type: none"> • Issued memos which provided specific guidance to contracting officers on commercial item and price reasonableness determinations <ul style="list-style-type: none"> • February 4, 2015 • September 2, 2016 • Updating DOD Guidebook for Acquiring Commercial Items • Proposed Defense Federal Acquisition Regulation Supplement (DFARS) rule (case 2016-D006)—which provides guidance to contracting officers for making price reasonableness determinations, promotes consistency in making commercial item determinations, and expands opportunities for nontraditional defense contractors to do business with DOD—would implement this provision when finalized.^d

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Fiscal Year (FY) 2013 NDAAs Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
	Requires DOD to develop and begin implementation of a plan to train the acquisition workforce in the use of certain authorities for evaluating price reasonableness in procurements of commercial items and develop a cadre of experts within DOD to provide advice to the acquisition workforce. ^c	<p><i>Training:</i></p> <ul style="list-style-type: none"> • Conferences addressing commercial item pricing occurring in 2014, 2015, 2016, and 2017 • Industry day on contracting with DOD November 2014 • DOD-wide pricing webinars • Week-long procurement contracting officer training for evaluating price reasonableness of commercial items • According to Defense Procurement Acquisition Policy officials, the agency is coordinating with Defense Acquisition University to update training to be consistent with the DFARS and DOD Guidebook for Acquiring Commercial Items, both of which DOD is working to finalize. <p><i>Cadre of experts:</i></p> <ul style="list-style-type: none"> • Defense Contract Management Agency created six Commercial Item Centers of Excellence.

Source: GAO analysis of National Defense Authorization Act for fiscal year 2013 and Department of Defense information. | GAO 17-645

^aThe simplified acquisition threshold is currently \$150,000. This threshold can be higher when acquisitions are used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack. See FAR Section 2.101.

^bThe House Armed Services Committee report that accompanied the fiscal year 2013 NDAAs mandated GAO to report on the use of the simplified acquisition procedures under the Test Program for Certain Commercial Items. See GAO, Federal Contracting: Commercial Item Test Program Beneficial, but Actions Needed to Mitigate Potential Risks, [GAO-14-178](#) (Washington, D.C.: Feb. 4, 2014).

^cSection 831 of the fiscal year 2013 NDAAs required GAO to review contracts awarded between January 2013 and January 2015 and report on the extent DOD needed cost data from the contractors to assess the reasonableness of price. See GAO, Defense Contracts: DOD's Requests for Information from Contractors to Assess Prices, [GAO-15-680](#) (Washington, D.C.: Aug. 12, 2015).

^dThis rule would implement portions of section 831 of the fiscal year 2013 NDAAs and sections 851-853 and sections 855-857 of the fiscal year 2016 NDAAs as laid out in the respective NDAAs when passed.

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Table 3: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2015 National Defense Authorization Act (NDAA) and DOD Actions to Address Them

Fiscal Year (FY) 2015 NDAA Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
Sec. 815 Permanent authority for use of simplified acquisition procedures for certain commercial items	Makes DOD's authority to use simplified acquisition procedures for certain commercial items, which had been re-authorized by section 822 of the FY13 NDAA, permanent.	Implemented, no action required by DOD

Source: GAO analysis of National Defense Authorization Act for fiscal year 2015 and Department of Defense information. | GAO 17-645

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Table 4: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2016 National Defense Authorization Act (NDAA) and DOD Actions to Address Them

Fiscal Year (FY) 2016 NDAA Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
Sec. 809 Advisory panel on streamlining and codifying acquisition regulations	Requires the Secretary of Defense to establish an advisory panel on streamlining the defense acquisition process, with a focus on reviewing acquisition regulations applicable to DOD and making recommendations for amendment or repeal. This panel is required to submit a final report to the Secretary about the history of each current acquisition regulation, and a recommendation on whether the regulation should be retained, modified, or repealed. The Secretary will then submit this report, with his comments, to congressional defense committees.	The Secretary of Defense established the section 809 panel to examine, among other things, DOD's ability to access commercial items. The panel issued an interim report in May 2017 and is continuing to work on its final report.
Sec. 844 Mandatory requirement for training related to the conduct of market research	Requires the Secretary of Defense to provide mandatory training, including teaching best practices for conducting and documenting market research and providing information on the function of market research in the acquisition of commercial items, for DOD employees who are responsible for conducting market research.	According to Defense Procurement Acquisition Policy officials, the agency is coordinating with the Defense Acquisition University to update training to be consistent with the Defense Federal Acquisition Regulation Supplement (DFARS) and DOD Guidebook for Acquiring Commercial Items, both of which DOD is working to finalize.
Sec. 851 Procurement of commercial items	Requires the Secretary of Defense to establish and maintain a centralized capability to oversee the making of commercial item determinations for DOD procurements, and provided public access to DOD commercial item determinations. Section 873 of the FY17 NDAA removes public access to this information and expands the scope to include market research and price reasonableness analysis. This provision allows a DOD contracting officer to use a previously established commercial item determination made by DOD as a determination for future procurements for the purpose of applying the commercial item exception to the required submission of certified cost or pricing data. If a prior determination is not used for an item previously determined to be a commercial item, the contracting officer is required to request that the head of the contracting activity review the prior determination and either confirm that the prior determination is still valid or issue a revised determination. Requires the DFARS be updated to reflect the requirements of this section.	<ul style="list-style-type: none"> • Defense Contract Management Agency Commercial Item Group is creating a database. • Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.
Sec. 852 Modification of information required to be submitted by offeror in procurement of major weapon systems as commercial items	Identifies actions a contracting officer must take to determine price reasonableness of a major weapon system sought to be procured as a commercial item, such as requiring the offeror to submit prices paid for the same or similar commercial items under comparable terms, and if the submitted pricing information is not sufficient to determine price reasonableness, requiring other information.	Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Fiscal Year (FY) 2016 NDAA Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
Sec. 853 Use of recent prices paid by the government in the determination of price reasonableness	Requires a contracting officer to consider recent prices paid by the government to determine price reasonableness of a commercial item if the officer is satisfied the prices previously paid are a valid reference for comparison, based on factors such as the quantities purchased by the government and how long ago the prices were paid.	Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.
Sec. 854 Report on defense-unique laws applicable to the procurement of commercial items and commercially available off-the-shelf items	Requires the Secretary of Defense to submit a report identifying the defense-unique law provisions that are applicable for commercial item procurements, at the prime contract and subcontract levels, to the congressional defense committees.	DOD issued "Report to Congress on Defense-Unique Laws Applicable to the Procurement of Commercial Items and Commercially Available Off-The-Shelf Items" in June 2016.
Sec. 855 Market research and preference for commercial items	Requires DOD to issue guidance concerning market research and commercial items, to ensure acquisition officials comply with the legal requirements concerning preference for acquiring commercial items. The guidance must provide that the head of an agency cannot enter into a contract above the simplified acquisition threshold for non-commercial IT products or services unless he or she determines that no commercial items are suitable to the agency's needs.	Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.
Sec. 856 Limitation on conversion of procurements from commercial acquisition procedures	Limits conversion of commercial item procurements under Federal Acquisition Regulation (FAR) Part 12 to Part 15 in excess of \$1 million. If the contracting officer wants to convert a procurement from FAR Part 12 to Part 15, he or she must determine, in writing, that the use of Part 12 was in error or based on inadequate information and that converting to Part 15 would result in cost savings. For procurements above \$100 million, the head of the contracting activity must approve of the written determination and provide a copy to the Under Secretary of Defense for Acquisition, Technology, and Logistics. Requires the Secretary of Defense to develop procedures to track conversions of future contracts and subcontracts, from Part 12 to Part 15 and to submit a report on the implementation of Sec. 856, including any procurement converted pursuant to this section, to the congressional defense committees.	Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.
Sec. 857 Treatment of goods and services provided by nontraditional defense contractors as commercial items	Provides that items and services provided by nontraditional defense contractors may be treated as commercial items.	Proposed DFARS rule (case 2016-D006) would implement this provision when finalized.

Source: GAO analysis of National Defense Authorization Act for fiscal year 2016 and Department of Defense information. | GAO 17-645

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Table 5: Summary of Sections Related to DOD's Acquisition of Commercial Items in the 2017 National Defense Authorization Act (NDAA) and DOD Actions to Address Them

Fiscal Year (FY) 2017 NDAA Sections	Summary of Sections regarding Commercial Items	Department of Defense (DOD) Actions as of May 2017
Sec. 871 Market research for determination of price reasonableness in acquisition of commercial items	Requires the Secretary of Defense to ensure DOD procurement officials conduct or obtain market research to support a price reasonableness determination for commercial items contained in a bid or offer.	DOD is drafting the proposed Defense Federal Acquisition Regulation Supplement (DFARS) rule (case 2017-D020) that would implement this provision.
Sec. 872 Value analysis for the determination of price reasonableness	Allows offerors to submit information or analysis related to the value of a commercial item for use by the contracting officer in making a price reasonableness determination.	DOD is drafting the proposed DFARS rule (case 2017-D020) that would implement this provision.
Sec. 873 Clarification of requirements relating to commercial item determinations	Makes the DOD commercial item determination information, required by section 851 of the FY16 NDAA, no longer publically available, and expands the scope of the centralized capability, to assist DOD in making commercial item determinations, conducting market research, and performing price reasonableness analysis.	Defense Contract Management Agency Commercial Item Group is creating a database.
Sec. 874 Inapplicability of certain laws and regulations to the acquisition of commercial items and commercially available off-the-shelf items	Addresses the applicability of certain government-wide and uniquely defense-related statutes to commercial items contracts and subcontracts.	DOD is reviewing the draft proposed DFARS rule (case 2017-D010) that would implement this provision.
Sec. 875 Use of commercial or non-government standards in lieu of military specifications and standards	Requires the Secretary of Defense to ensure that DOD uses commercial or non-government standards instead of military standards and specifications, unless no practical alternative exists to meet user needs, in which case a government-unique specification may be used. A waiver to use a military specification may be approved to define an exact design solution when there is no acceptable commercial or non-governmental standard, or when it is not cost effective. In addition, DOD is required to revise the DFARS to encourage contractors to propose commercial and non-governmental standards that meet the intent of military standards and specifications. DOD is also required to partner with industry associations to develop commercial or non-government standards to replace military standards and specifications where feasible.	DOD is reviewing the draft proposed DFARS rule (case 2017-D014) that would implement this provision.

**Appendix: Summary of Recent National
Defense Authorization Act Sections Related to
DOD's Acquisition of Commercial Items**

Sec. 876 Preference for commercial services	Establishes a preference for certain commercial services by providing that the head of a DOD agency cannot enter into a contract above \$10 million for services that are facilities-related, knowledge-based (except engineering), construction, medical, or transportation that are non-commercial unless a written determination is made by specified high-level officials, such as the service acquisition executive, that no commercial services are suitable to meet the agency's needs. Also, the head of a DOD agency cannot enter into a contract for these same services above the simplified acquisition threshold and below \$10 million unless he or she makes a written determination that no commercial services are suitable to meet the agency's needs.	DOD is drafting the proposed DFARS rule (case 2017-D020) that would implement this provision.
Sec. 877 Treatment of commingled items purchased by contractors as commercial items	Requires items valued at less than \$10,000 that are purchased by a contractor for use in the performance of multiple contracts with DOD and others, and are not identifiable to any particular contract, be treated as a commercial item.	DOD is drafting the proposed DFARS rule (case 2017-D020) that would implement this provision.
Sec. 878 Treatment of services provided by nontraditional contractors as commercial items	Requires that services provided by a business unit of nontraditional defense contractor be treated as commercial items if they are priced using a similar method to develop commercial pricing and are provided by a similar pool of employees who also assist commercial customers.	DOD is drafting the proposed DFARS rule (case 2017-D020) that would implement this provision.
Sec. 879 Defense pilot program for authority to acquire innovative commercial items, technologies, and services using general solicitation competitive procedures	Provides the Secretary of Defense and the Service Secretaries with the authority to carry out the "defense commercial solutions opening pilot program," under which the Secretary can acquire innovative commercial items, such as technologies and services, through the competitive selection of proposals via peer review under a general solicitation. Requires the Secretary to issue guidance for the implementation of this pilot program, and to notify congressional defense committees, within 45 days after award, about contracts over \$100 million awarded under this pilot program.	DOD received the draft proposed DFARS rule (case 2017-D029) that would implement this provision.
Sec. 887 Review and report on contractual flow-down provisions	Requires the Secretary of Defense to enter into contract with an independent entity to conduct a review of contractual flow-down provisions related to major defense acquisition programs on contractors, including, among other things, determining the effect, if any, of these provisions on the participation rate of commercial item contractors. A report on the findings of this review is due to congressional defense committees no later than August 1, 2017.	DOD has contracted with an independent entity to conduct this review and plans to brief the congressional defense committees on the interim findings of the independent entity by July 1, 2017.

Source: GAO analysis of National Defense Authorization Act for fiscal year 2017 and Department of Defense information. | GAO 17-645

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