

"The Price is Right!" Commercial Item/GSA Schedule Contracting

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SESSION AGENDA

**Overview of Commercial
Item Determinations**

**Commercial Item Updates
from the FY2017 NDAA**

**DOD's Proposed Rule &
Draft Guidebook**

**GSA's New Transactional
Data Reporting Rule**

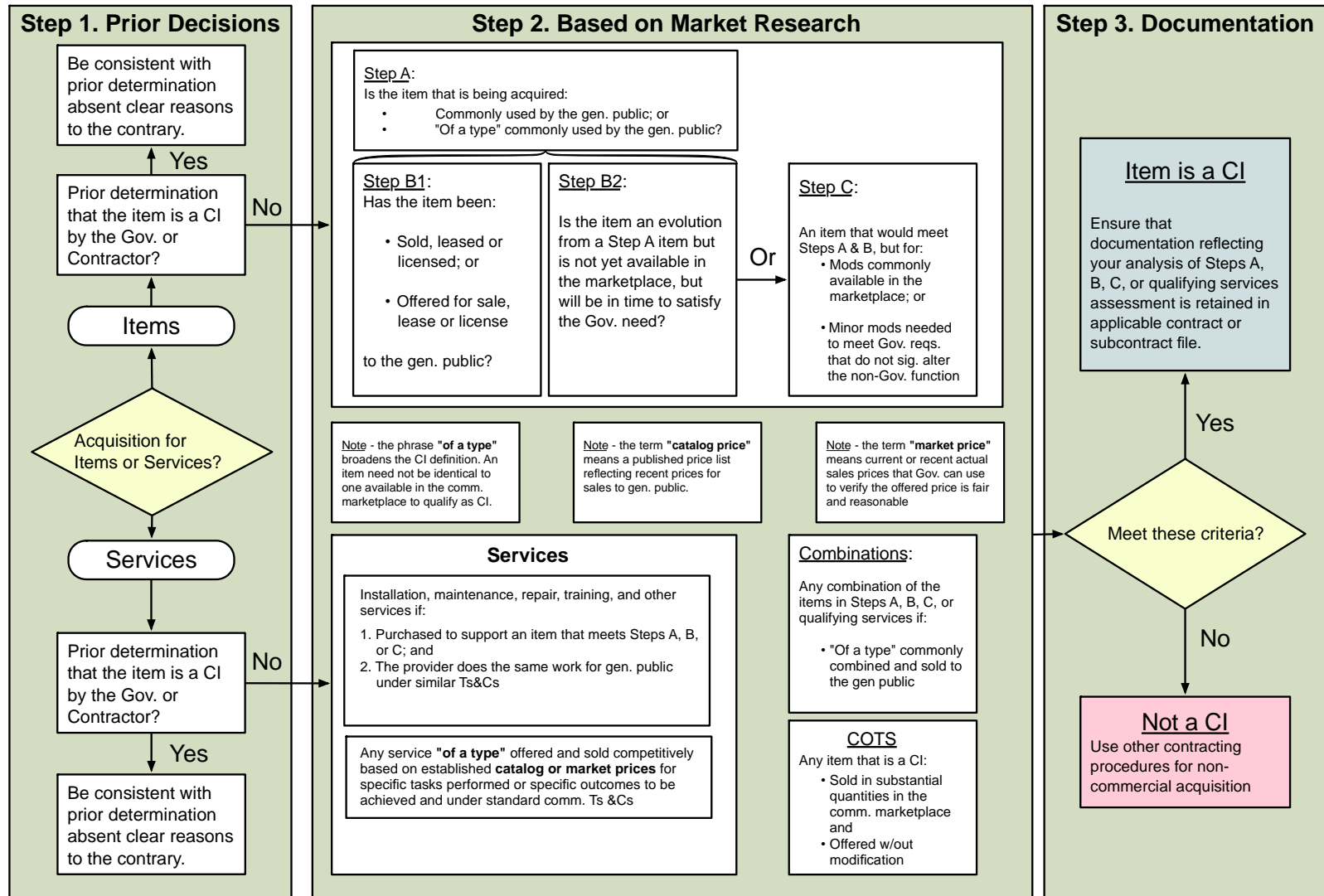


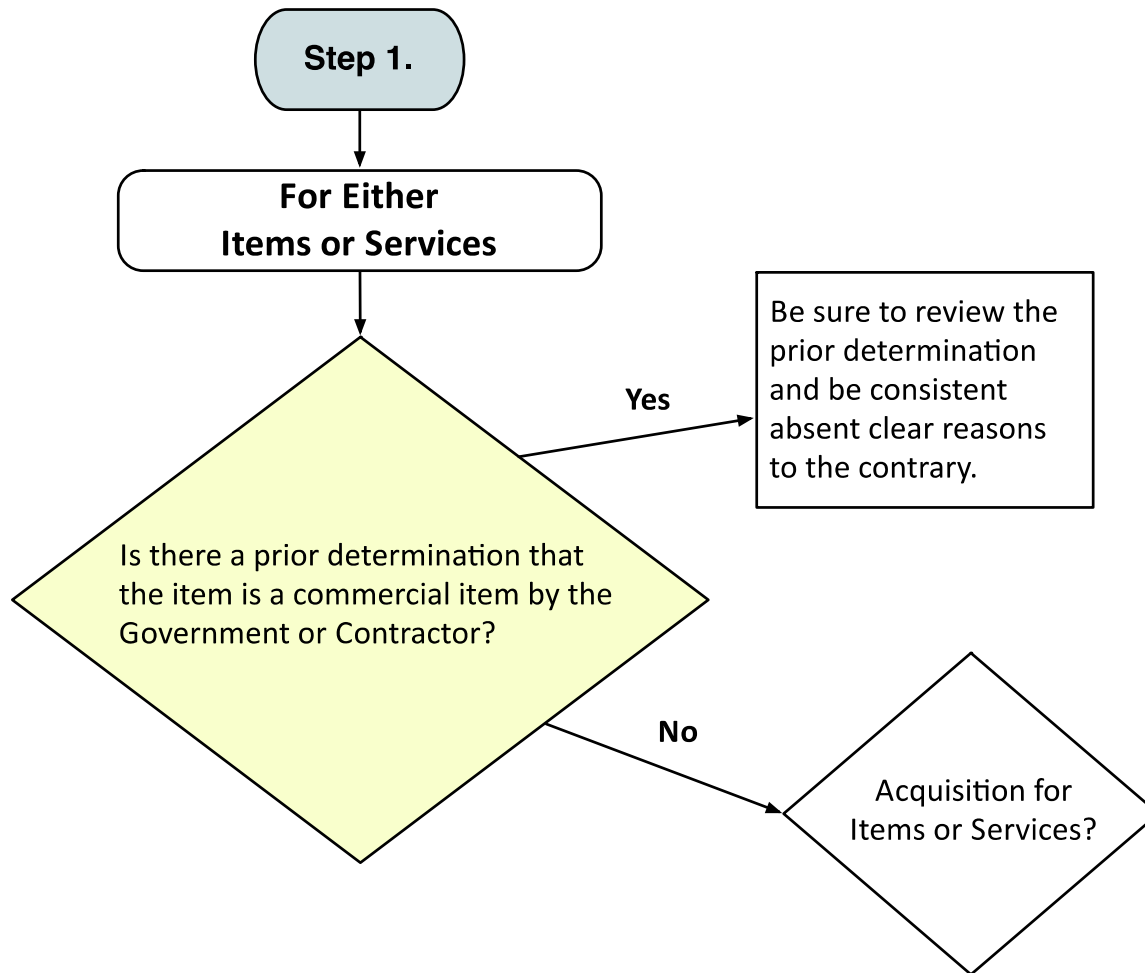
Commercial Item Acquisition

- FAR Part 12: Prescribes policies and procedures unique to the acquisition of commercial items
 - Implements federal government's preference for the acquisition of commercial items contained in the Federal Acquisition Streamlining Act of 1994
 - Mandates that both the government and prime contractors utilize commercial items to the maximum extent practicable
- FAR 2.101: Defines what qualifies as a commercial item
 - Includes both products and services

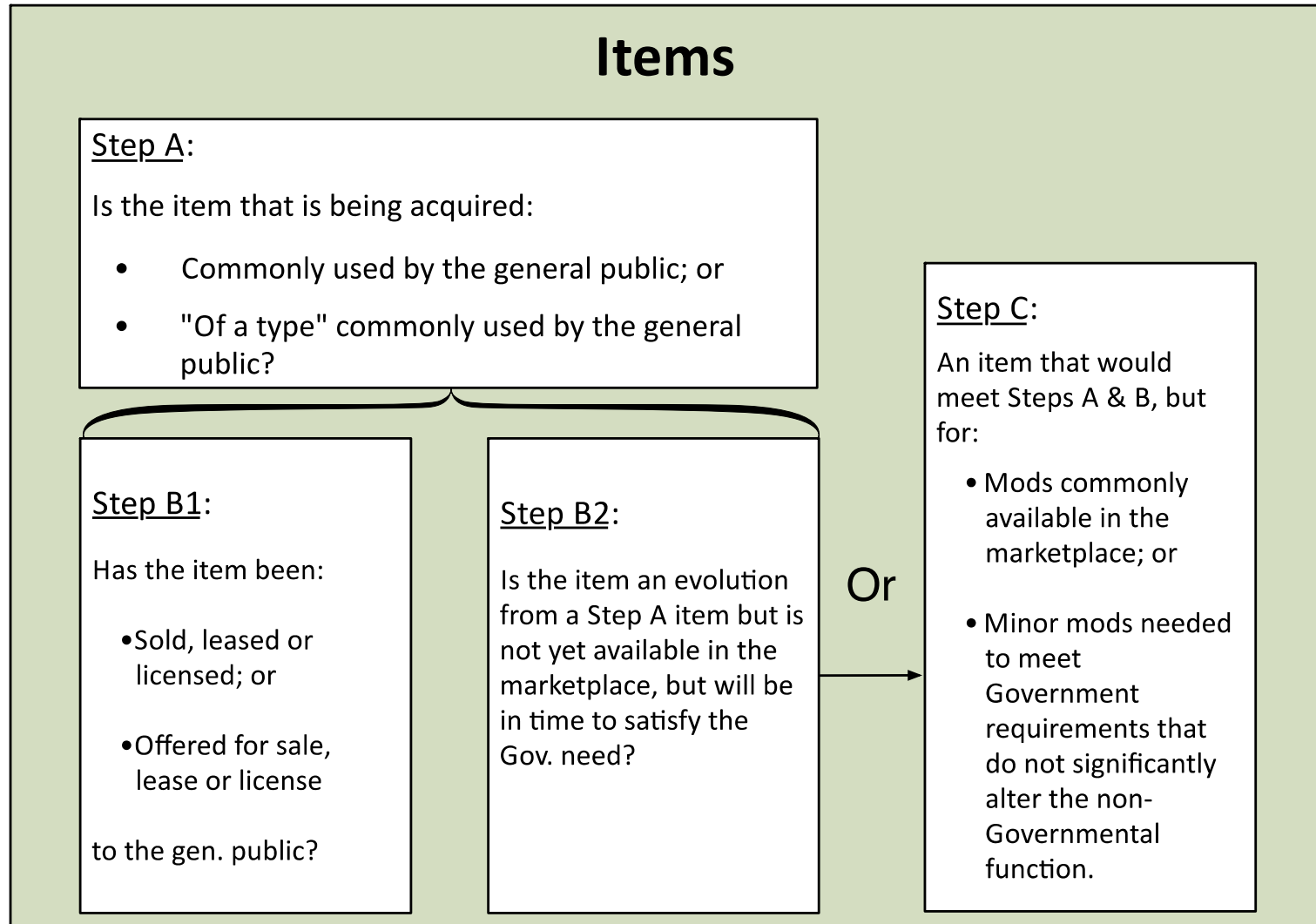
Overview

Commercial Item (CI) Determination - Process Diagram



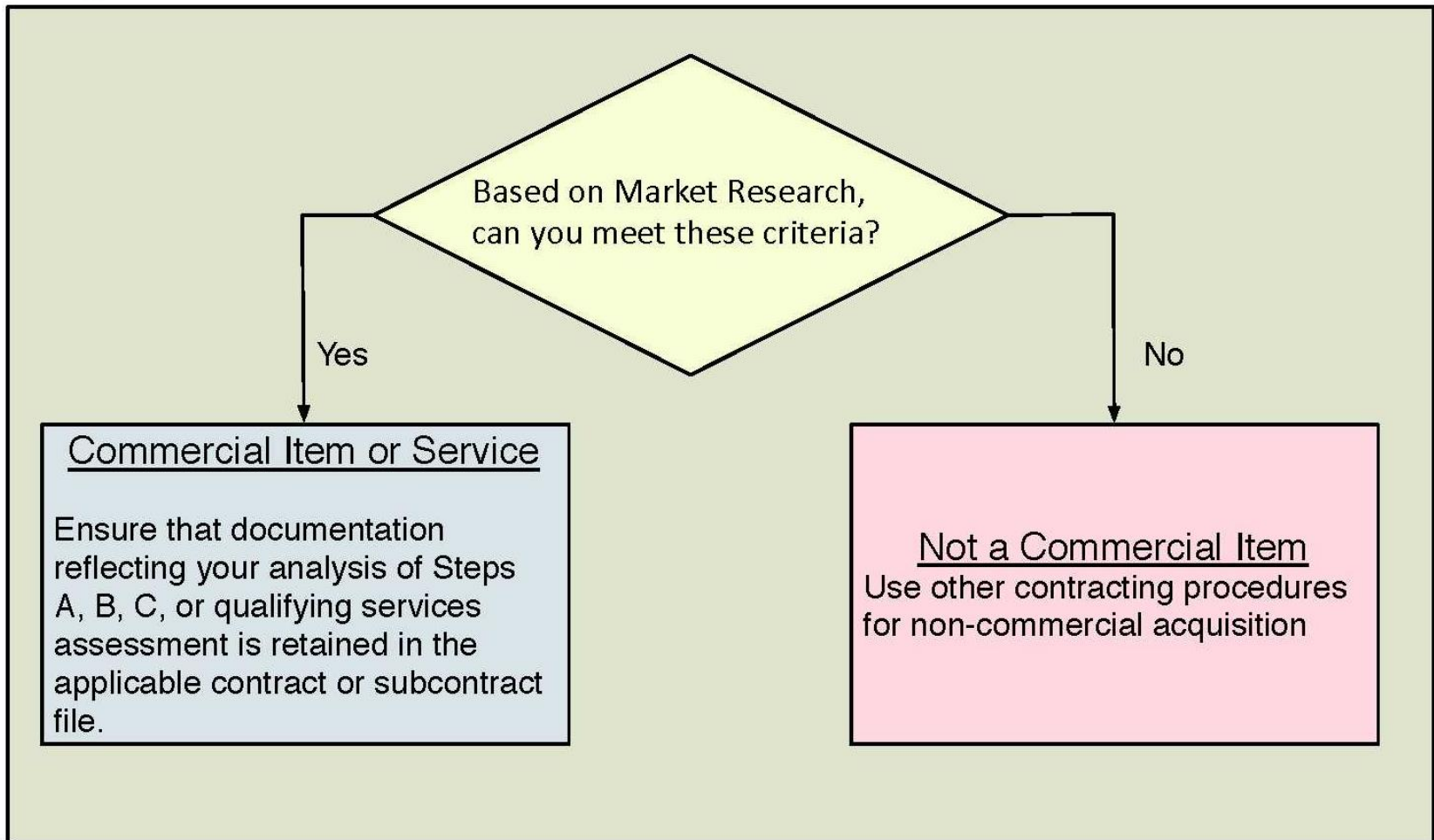


Step 2. Based on Market Research



Note - Real property (i.e. land and interests in land is excluded from this definition).

Step 3. Documentation



Some Key Terms

Of a Type:

- The phrase broadens the Commercial Item definition.
- An item need not be identical to one available in the commercial marketplace to qualify as a Commercial Item.

Commercial Off The Shelf (COTS)

Any item that is a Commercial Item:

- Sold in substantial quantities in the commercial marketplace; and
- Offered w/out modification.

Combinations:

Any combination of the **items** in Steps A, B, C, or qualifying **services** if:

- "**Of a type**" commonly combined and sold to the general public

Commercial Item Updates from the 2017 NDAA

The 2017 NDAA

Comm. Item Sections

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graph TD; A["The 2017 NDAA  
Comm. Item Sections"] --- B["871 - Market Research"]; A --- C["872 - Value Analysis"]; A --- D["873 - Requirements for CIDs"]; A --- E["874 - Mandate for List of  
Inapplicable Laws"]; A --- F["875 - Commercial v. Government  
Standards"]; A --- G["876 - Preference for  
Commercial Services"]; A --- H["877 - Treatment of Commingled  
Items"]; A --- I["878 - Treatment of Services"]; A --- J["879 & 880 - Pilot Programs"];
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871 - Market Research

879 & 880 - Pilot Programs

872 - Value Analysis

878 - Treatment of Services

873 - Requirements for CIDs

**877 - Treatment of Commingled
Items**

**874 - Mandate for List of
Inapplicable Laws**

**876 - Preference for
Commercial Services**

**875 - Commercial v. Government
Standards**

Items of Special Interest

Senate Committee Report from the 2017 NDAA

- Addresses DOD's "increasingly narrow interpretation of the definition of commercial items"
 - Notes several outside proposals to expand the underlying statutory commercial item definition
 - Opted to keep the definition the same, but noted that if DOD "continues to inappropriately limit the scope of the commercial items definition . . . committee will reconsider whether to expand the statutory commercial item definition" (see 2017 NDAA Senate Committee Report at 234-35)

DOD's Proposed Rule & Draft Guidebook

DOD's Proposed Rule

- Issued Aug. 11, 2016 and said to implement requirements from two NDAAAs
 - Secs. 851-853, 855-857 from FY2016 NDAA
 - Sec. 831 from FY2013 NDAA
 - And provide guidance to contracting officers to promote consistency and uniformity in the commercial item acquisition process
 - Replaces a 2015 proposed rule that was later withdrawn
- Proposed rule is an improvement but still has issues
 - Overly narrow definition of "market research"
 - Only prior DOD CIDs will qualify for the presumption
 - Commercial item determination still conflated with price reasonableness
 - Overly restrictive interpretation of nontraditional defense contractors and lack of clarity on application to subcontracts

A final DFARS rule has been drafted and is being considered

DOD's New Commercial Item Guidebook

- Published on DPAP website on Feb. 24, 2017
- Some good: splits the prior handbook into two parts
 - Pt. A: Commercial Item Determination
 - Pt. B: Determining whether proposed price is fair and reasonable
- Emphasizes these are distinct questions

Office of the
Secretary of Defense
Acquisition, Technology, and Logistics
(Acquisition Initiatives)



Department of Defense Guidebook for Acquiring Commercial Items

PART B: PRICING COMMERCIAL ITEMS

DOD's New Commercial Item Guidebook

- **Issues**

- While COs are to rely on prior CIDs, they should do so only after confirming they are adequately supported
 - Reliance limited to prior DOD determinations
 - Does not outline/identify any clear way to challenge a CID with which a contractor disagrees
- Check the practical examples; your product or service might be described in a way that is not helpful
- How the guide addresses a situation where a contractor refuses to provide "other than cost or pricing data" or negotiate when requested is troubling
- Remaining concern regarding the sources of data DOD will utilize to conduct price analysis
- Emphasis on value analysis is good, but the direction to monetize in the area of value analysis may be overly restrictive

The ABA, CODSIA, and others have prepared and submitted comments

GSA's Transactional Data Reporting Rule

GSA's New Transactional Data Reporting Rule

- Requires vendors to report transactional data; reporting must occur within 30 days after the end of the preceding month
- Contractors subject to the rule need not comply with
 - Commercial sales practices disclosures; proposed rule required continued compliance with CSP reporting
 - Price Reduction clause tracking
- Purpose
 - Enable GSA and other agencies to make "smarter buying decisions"
 - Shift from "vertical pricing" model to "horizontal pricing" model
 - Vertical pricing: comparing contractor's proposed prices and T&Cs to those offered to contractor's other customers
 - Horizontal pricing: comparing one contractor's prices and T&Cs to other contractors

**The most significant change to
schedule contracts in decades**

GSA's New Transactional Data Reporting Rule (cont.)

- Applicability
 - ID/IQ and GWAC
 - Currently applies to all new contracts
 - May be applied to existing contracts not containing other transactional data clauses
 - FSS Contracts
 - Implemented on pilot basis in phases
 - Applies to newly awarded FSS contracts and to all FSS contracts that are subsequently extended; note, this may change
 - Can be voluntarily incorporated in existing FSS contracts through a bilateral modification
 - Does not apply to Department of Veterans Affairs FSS contracts

GSA's New Transactional Data Reporting Rule (cont.)

- More than 1200 federal contractors have signed up for the TDR
- When announcing the final version of the TDR, GSA touted the rules benefits
 - Prediction that industry would save \$29M a year via removal of the CSP and Price Reduction Clause
 - But, GSA COs are still seeking data equivalent to that called for by the CSP so that they can determine proposed prices to be fair and reasonable
- GSA OIG also has raised concerns
 - Observed that FAS is "undergoing a seismic shift to its price analysis approach"
 - GSA OIG is currently conducting two audits of the TDR program
 - Assessing the pilot program and how it helps agency acquisition personnel make smarter, lower-cost buying decisions
 - Assessing the security of the system, including identifying vulnerabilities that could lead to disclosure of sensitive contractor data

Contractors Fear a Race to the Bottom in Prices Under the TDR

Questions?