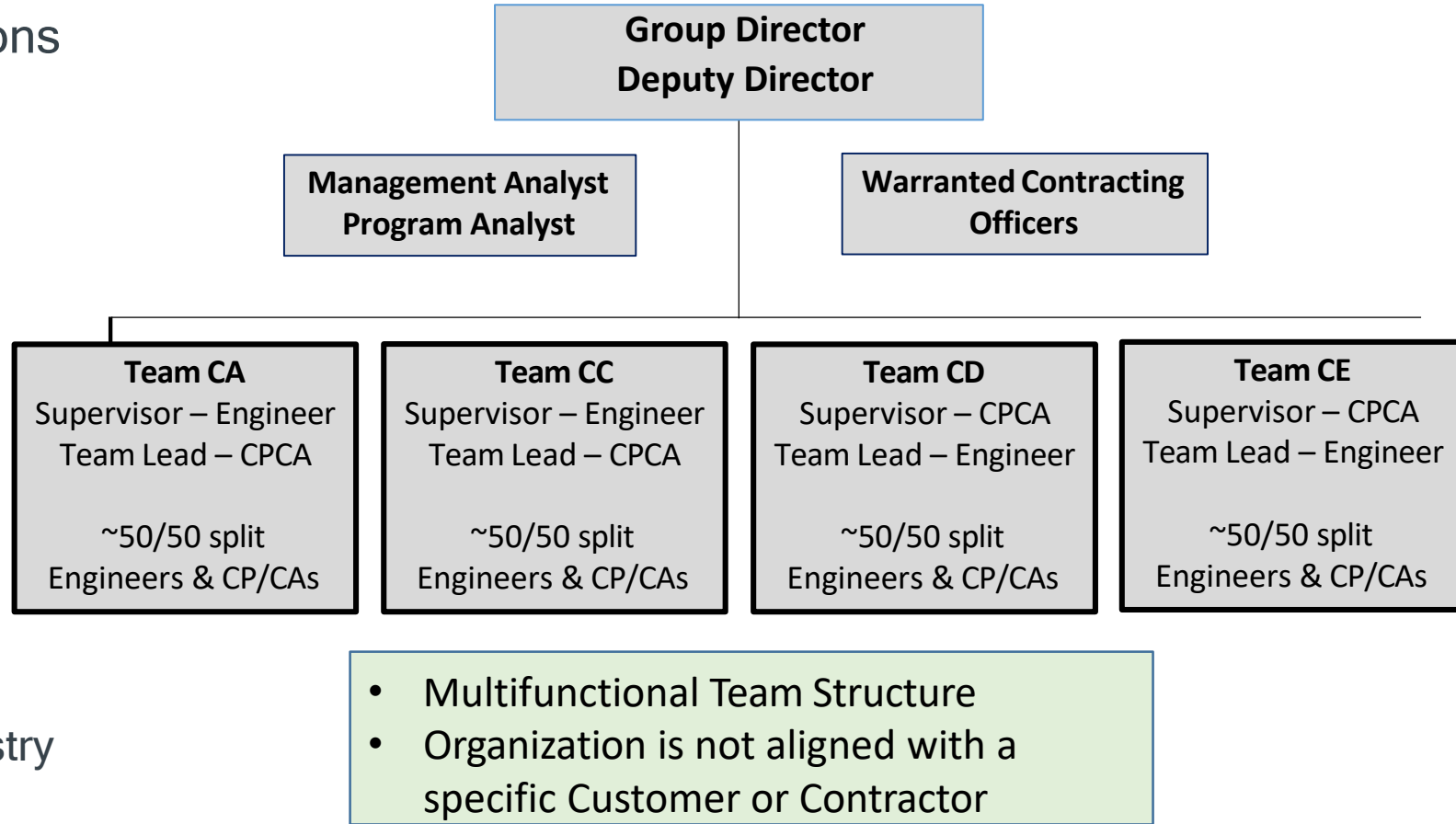


- 62-member team, across 8 locations
- Mission Focus (10 USC 3456)
 - Commercial Determinations
 - Price Analysis
 - Market Research
- Initiatives
 - Data Collection & Automation
 - Early Engagement
 - Constant Engagement with Industry



- For Government
 - Leverage the commercial marketplace
 - Technical Innovation
 - Emerging Technologies
 - Price Competition
 - Economies of Scale
 - Expand Supplier Base
 - Non-Trads
 - Streamlined Acquisition Process
 - Mutually Beneficial



- 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
 - 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 possible, 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, supporting public law exemptions like commercial items.

Buying Command

Prime Contractor

Subcontractor

DCMA CIG

- Performs market research to determine if commercial solutions are available, can be tailored to meet requirement, or if requirement can be tailored to leverage existing commercial solutions
- Determines appropriate contract vehicle (FAR 12, FAR 15, etc.)
- PCO makes a Commercial Determination (CD) for the specific proposed products and services
- PCO determines F&R price and whether exceptions apply to obtaining certified cost or pricing data
- For acquisitions over the TINA threshold, if the PCO determines a claimed commercial product/service to be Other Than Commercial (OTC), the contractor is required to submit certified cost or pricing data (FAR 15.403-1(c)(3))
- PCO has the ultimate authority to determine whether proposed products/services will be treated with commercial procedures

**TIP #1: Identify the specific PN/nomenclature being determined commercial.
Configuration at the time of the CD matters!**

Buying
Command

Prime
Contractor

Subcontractor

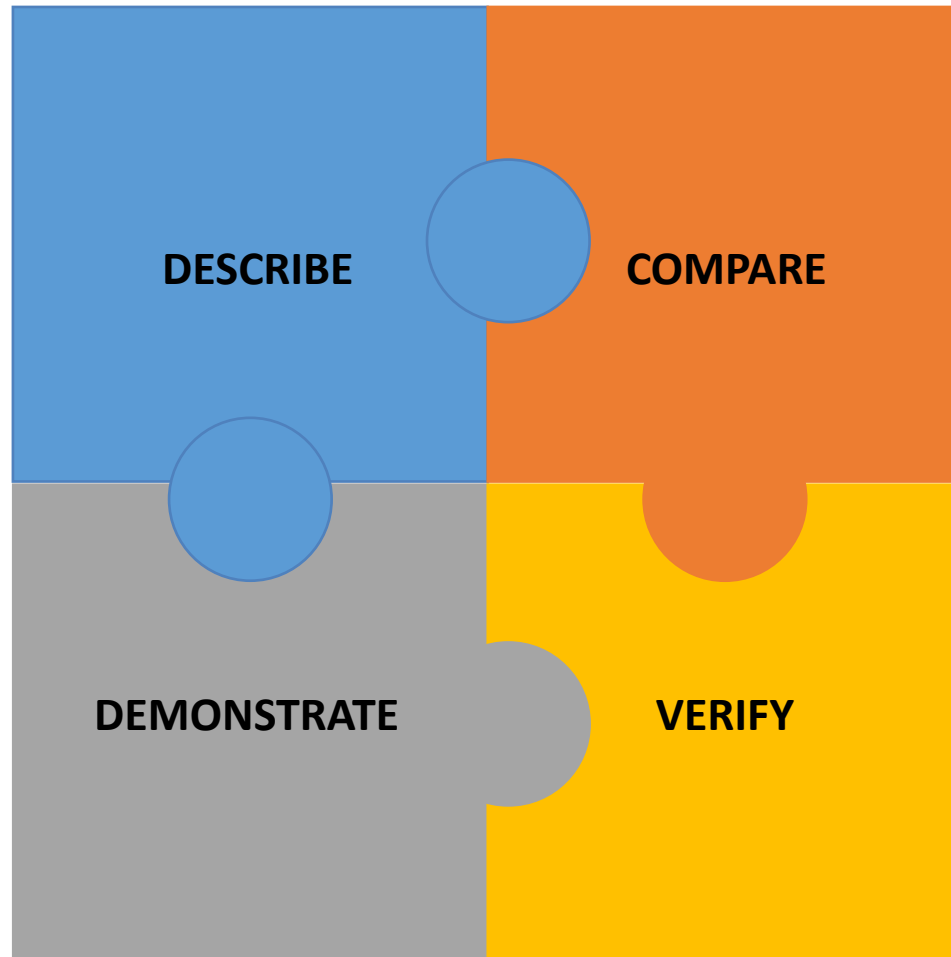
DCMA CIG

- Supports the Buying Commands upon request
- Primary services:
 - Market Research
 - Technical Analysis
 - Government Commercial Determinations
 - Price Analysis
- Also:
 - Support to Negotiations
 - Mentoring
 - CI Database maintenance
 - Support DoD commercial acquisition initiatives



- Evidence to Support Commerciality – the CD “Puzzle”
- Misconceptions About Commerciality

Provide a framework for how to evaluate and determine whether a product or service meets the FAR commercial definitions



- Describe the salient characteristics of the proposed product or service
- Compare the proposed product or service with those found in the commercial marketplace
 - *Commercial product definition paragraph (6) is an exception
- Demonstrate that the commercial comparison product or service is used by the general public
- Verify whether all elements of the applicable commercial definition are covered in the steps above – provide evidence to substantiate any missing pieces

Description provided:

- Off-road SUV
- 2022 model year
- Blue paint job / black roof
- Spare tire

How about these facts?

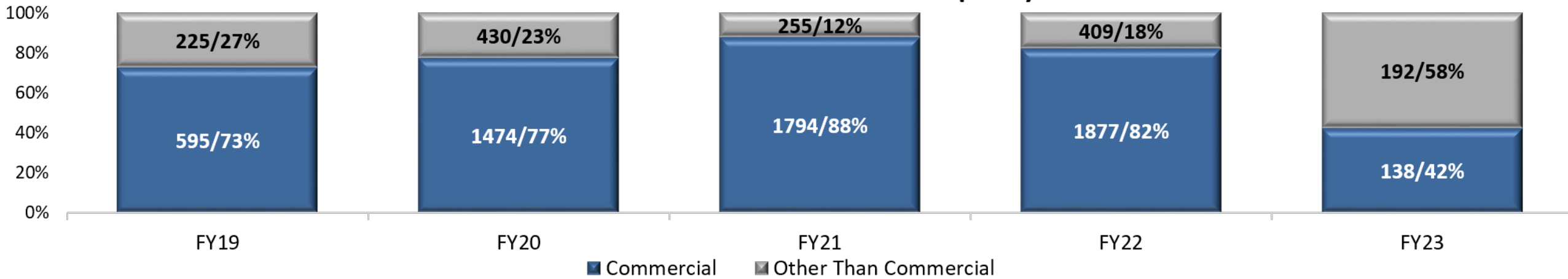
- 1:64 scale model
- \$3 MSRP



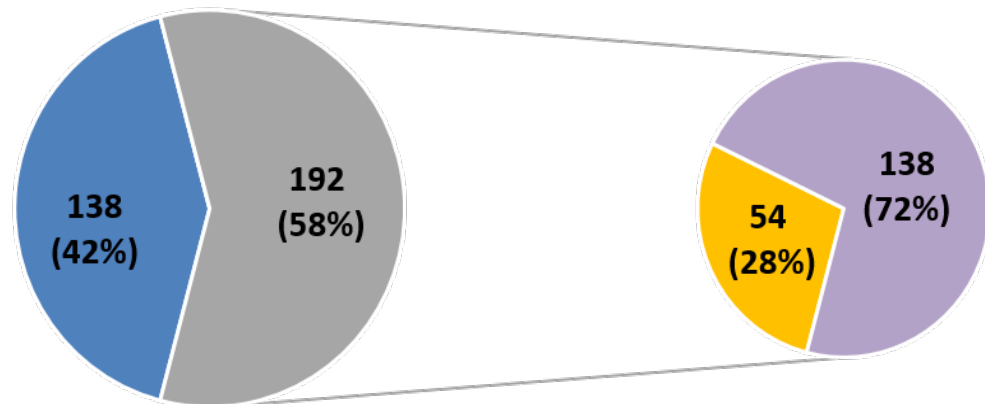
DESCRIBE

Ensure sufficient descriptive details are provided to lead a reasonable person down the correct path

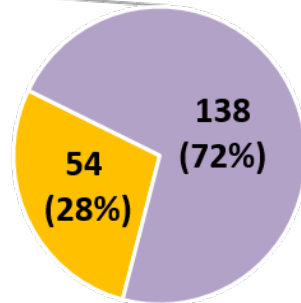
Commercial Determinations Output by FY



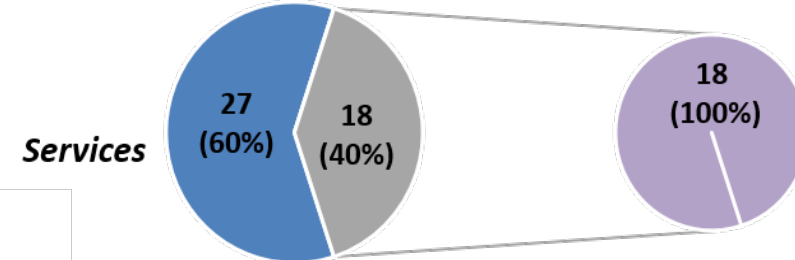
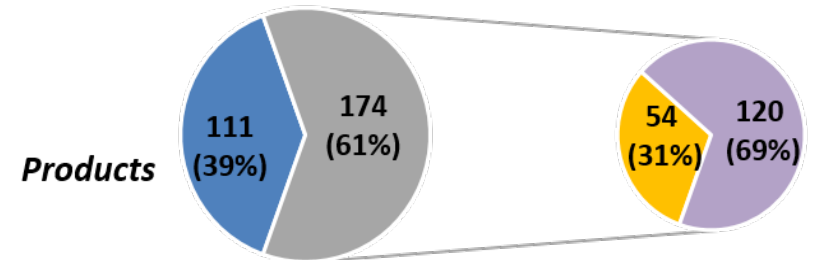
FY23 Breakdown of Commercial vs Other-Than-Commercial (OTC) Output



■ Commercial
■ OTC



■ OTC - Had Enough Information
■ OTC - Did Not Have Enough Information



Services

- The products of a “commercial company” are certainly commercial
- The output of a “commercial facility” is certainly commercial
- Nondevelopmental items are always commercial
- If a product or service is developed at private expense, it must be commercial
- A product that has no commercial sales cannot be commercial
- All you need to prove a product or service is commercial is to 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



- Determination requires use of sound judgment backed by data
- Must consider all available information in totality for each part on a case-by-case basis
- Market research is critical to understanding if parts (or modifications) are “of a type” available to the public
- Form and fit can help support price analysis, but function is vital to support commerciality

DoD Final Rule

A contract for an item using FAR part 12 procedures may serve as a prior commercial item determination (CID)

- Additional key changes/clarifications include:
 - \$1M CID threshold is removed – now required above SAT (\$250k)
 - Section DFARS part 212.70 (HCA overturning procedures) is removed, however this language is still incorporated into DFARS part 212.102.
 - Exception: FAR part 12 contracts that used FAR part 12 procedures for items that were only “treated as commercial items” cannot be relied upon as a prior CID.
 - Defense against cyber, nuclear, biological, chemical or radiological attack
 - Nontraditional defense contractors (NTDC)

- Previously required evidence of a prior CID, now required to search for prior FAR part 12 contracts – need to validate whether the FAR part 12 contract was awarded using other authorities
- Timing – No date/cutoff grandfathering relative to this case
- Prior FAR part 12 contract is precedent setting to a more recent Other-Than-Commercial (OTC) memo, unless we have the specific HCA (or delegated) overturning decision
- Note: “Prior FAR Part 12” can only exist in a contract between Government and Prime; FAR part 12 does not exist between Prime and sub

Commercial Contracting Authorities*

FAR 13.5 –

Use of Simplified Acquisition Procedures for commercial procurements under \$7.5M

Nontraditional Defense Contractor–

DFARS 212.102 allows the use of commercial acquisition procedures without the need for commercial determination

Nontraditional Defense Contractor–

DFARS 212.102 requires the use of commercial acquisition procedures for the procurement of services using same pool of employees/ similar pricing structure

Nontraditional authority may apply to Primes, subs. Specific to the top middle box, the permissive authority is retained at the PCO; e.g. a prime cannot grant this authority to a subcontractor

Commercial Preference –

FAR 10.001 (3) determine if commercial solutions are available to meet agency needs, modified to meet agency needs, or requirements could update to leverage commercial solutions

Commercial Contracting

FAR 12 – Acquire commercial products & services, exempt from certified cost or pricing data. Use SF1449

Commercial Preference (IT) –

DFARS 239.101 requirement to buy IT products and services commercial or HCA determine in writing no commercial are available

*Boxes shown are for discussion purposes – please see FAR & DFARs for specific regulation language