

Changes in Government Contract Pricing: From Red Tape to Black Ink?

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INTRODUCTION

- o Agenda, Lunch, Facilities
- o Presentation Materials
- o Speakers Qualifications
- o Orientation of Presentation

1990 MILAERO SEMINAR

LE BARON HOTEL

SAN JOSE, CALIFORNIA

AGENDA

8:00 - 8:45 a.m.	Registration/coffee
8:45 - 9:00	Introduction
9:00 - 10:00	New Direction in DOD Procurement
10:15 - 10:30	Break
10:30 - 11:30	Current Pricing Law/Regulations
11:30 - 12:00	The "Based On" Exemption - Government Items
12:00 - 1:00 p.m.	Lunch
1:00 - 2:00	Examples of Exemption Policy/Claims
2:00 - 2:45	Proposed Revisions FAR 15.804-3
2:45 - 3:00	Break
3:00 - 3:45	New Product Pricing
3:45 - 4:00	Questions and Answers

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INTRODUCTION

Two distinctly different procurement systems emerging:

- o Nondevelopmental items (commercial/modified commercial)
- o Developmental items (non-commercial/public development)

DOD is in no position to further resist:

- o Deficit reduction pressures
- o Peace dividend pressures
- o Cheney out of step with administration and Congress

Major impacts may not be felt for three to five years.

Main thrust:

Save money through maximum use of nondevelopmental items and a commercial way of doing business.

Near term impact:

Revised pricing policy for nondevelopmental items.

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PREFERENCE FOR NON DEVELOPMENTAL ITEMS

(Sec. 2325, Title 10, United States Code)

(National Defense Authorization Act - FY 87)

- (A) Preference - The Secretary of Defense shall ensure that to the maximum extent practicable -
 - (1) Requirements of the DOD with respect to a procurement of supplies are stated in terms of -
 - (A) functions to be performed
 - (B) performance required, or
 - (C) essential physical characteristics.
 - (2) Such requirements are defined so that non developmental items may be procured to fulfill such requirements, and
 - (3) such requirements are fulfilled through the procurement of NDI.
- (B) Implementation - The Secretary of Defense shall carry out this section through the Under Secretary of Defense for Acquisitions, who shall have the responsibility for its effective implementation.
- (C) Regulations - The Secretary of Defense shall prescribe regulations to carry out this section.

(D) Definition - In this section, the term "non developmental item" means -

- (1) any item of supply that is available in the commercial marketplace;
- (2) any previously developed item of supply that is in use by a department or agency of the United States, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;
- (3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency, or
- (4) any item of supply that is currently being procured that does not meet the requirements of paragraph (1), (2), or (3) solely because the item -

(A) is not yet in use; or

(B) is not yet available in the commercial marketplace.

FEATURES OF NEW PROCUREMENT SYSTEM - DOD

- o Specifications
 - = Nondevelopment item preference
 - = Functional descriptions (no detailed designs)
 - = Performance descriptions
- o Source selection
 - = Two step/best value/no discussions
- o Contracting
 - = U.C.C. + mandatory federal law
- o Pricing
 - = Price analysis/market research
 - = Less strict interpretation of commerciality
 - = More exemption options:
 - o Alternate method
 - o New products with no prior sales
 - o Discontinued products - no public sales
 - o Modified commercial products
- o Rely on contractors' Q.A./warranty
- o Eliminate audit, access to records, reporting
- o Commercial rights in technical data/software
- o Limited flowdown to subcontractors

COMMERCIAL CONTRACT

1. Solicitation/award = FAR 14 and 15 (?)
2. Uniform commercial code = Incorporated as applicable
3. Rights in technical data = Per DFARs, limited rights
(?) = However 7XXX is out
4. Restricted use of software = Per DFARs, however 7XXX is out
(?)
5. Warranty = Contractor's standard commercial warranty, plus
Limitation of Liability (FAR 52.246-23)
6. Inspection = FAR 52.246-1 Contractor Procedures Versus - 2
7. Change order = FAR 52.243-1 Except Delays Are
8. Audit/cost or pricing data/price reduction = deleted
9. CAS/cost principles/unit price integrity = deleted
10. Examination of Records (FAR 52.215-1) = still in (?)
11. Socio-economic/environmental = still in

Ref: New contract draft, see Appendix.

BENEFITS OF NDI

(GAO Report, February 1989)

According to the Congress, DOD, vendors and various industry associations, the potential benefits of appropriately procuring NDI, instead of non NDI, include:

- o reduction or avoidance of R&D costs;
- o decrease in procurement lead time, resulting in more rapid delivery and fielding;
- o use of state of the art technology available in the commercial marketplace;
- o increase in competition, and
- o simplification of contracts, including firm fixed price contracts.

OTHER CITED BENEFITS OF NDI

1. Inventory carrying cost, administrative overhead
2. Reduced decentralization of commercial versus defense
 - 2.1 Duplication of fixed cost through divisionalization
 - 2.1 Amortized over lower defense volume
 - 2.2 Less administrative expense
3. No more hammers/coffeepot scandals

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THE NDI CALENDAR

1. By June '90
 - o Prepare legislation needed
 - o Prepare regulations needed
2. By September '90
 - o Finalize legislation
 - o Finalize regulations
6. Conduct pilot programs: 3 to 5 years
7. Initial impacts
 - o Remove impediments in law, regulation, or policy
 - o Train personnel in NDI, market research, price analysis
 - o Specification writing, functional/performance
 - o Commercial source selection techniques used
 - o Commercial pricing in lieu of cost analysis
 - o Commercial contracting

NDI PROGRAM AGENDA

SHORT TERM GOALS	<u>Target Date</u>
1. Meet with subcommittee staff and contractors	Ongoing
2. Review guidance on contract clause usage based on meetings with contractors	Continuous
3. Acceptance of General Service Administration certification of commercial	Completed
4. Establish accountability of specifications and standards	Completed
5. Issue policy letter on the use of market acceptability as an evaluation criteria or, if necessary, request an amendment to the Competition in Contracting Act	July 89
6. Send hearing follow up letter to Senator Levin enclosing this agenda and the Defense Science Board report	July 89
7. Initiate change to Part 10 of the Federal Acquisition Regulation (FAR) to eliminate preference for the use of specifications	August 89
8. Finalize FAR case on the use of the price analysis	In review
9. Issue program letter from the Deputy Secretary of Defense <ul style="list-style-type: none"> a. Enlist support of Acquisition Executives b. Establish commercial acquisition program objectives and milestones 	August 89
10. Designate an agency to program and budget funds for standardization	September 89
11. Issue new guidance on the preparation of commercial item descriptions	September 89
12. Revise and issue DOD directive 5000.37, Acquisition and Distribution of Commercial Products	October 89
13. Develop plan for automation of the specifications and standards database	November 89

NDI PROGRAM (DOD)

LONG TERM GOALS	<u>Target Date</u>
1. Develop best value nondevelopmental item evaluation model	December 89
2. Develop guidance for management of logistics support, technical data, configuration management in buying nondevelopmental items	December 89
3. Publish handbook on nondevelopmental item acquisition	December 89
4. Identify appropriate contract provisions for commercial product solicitations	December 89
5. Devise training plans for user, program and item managers, standardization and contracting communities	January 90
a. Defense System Management College	
b. Workshop	
c. Video	
6. Submit update to Part II of the Federal Acquisition Regulation, Acquisition and Distribution of Commercial Products	March 90
7. Initiate a pilot program using commercial buying practices to pinpoint beneficial statutory and regulatory reforms	March 90
8. Expand pamphlet, "Locating Off the Shelf Items," to include additional data bases	March 90
9. Simplify nongovernmental standards adoption procedures	May 90
10. Establish database to measure progress in commercial acquisition	June 90
11. Complete review of all specifications and standards for accuracy	December 90
12. Establish a components demonstration program, using microcircuits as a case study	December 90
13. Establish multiple award schedule pilot program Evaluate results, expand and institutionalize	Completed October 91
14. Establish better working relationship with industry	Continuous
15. Conduct workshop on buying commercial products	To be determined

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CURRENT LEGISLATIVE ROADMAP

- o DOD Authorization Act - FY 90 (PL101-89, Sec. 824)
- o Defense Management Improvement Act (Senate Bill S.2440, Senator Nunn)

GENERAL DIRECTION OF LEGISLATION

P.L. 101-89, SEC. 824

ACQUISITION OF COMMERCIAL AND NDI

November 29, 1989

- (a) In general - the Secretary of Defense shall
 - (1) prescribe regulation
 - (2) conduct an analysis
- (b) Regulations:
 - (1) 180 days to publish new and rescind any conflicting -- (May '90)
270 days to publish final regulations (August '90)
 - (2) develop a simplified/uniform prime contract for acquisition of commercial items to the maximum extent practicable
 - (3) same for subcontracts
 - (4) -- shall require, in appropriate circumstances, a modified inspection clause with streamlined procedures
-- to a contractor that (A) has a proven record of high quality production, and (B) offers an appropriate warranty --
 - (5) -- shall require, in appropriate circumstances, standard commercial warranties
 - (6) Truth-In-Negotiations Act (TINA), P.L.87-653, FAR 15.804
-- the secretary (A) shall address the standards for applying such exemption to contract and subcontract for items which are:
 - o modifications to commercial items
 - o components of commercial items
 - o spare parts for commercial items

- o new commercial items, or
- o commercial items which are no longer sold to the public,

and (B) shall ensure that cost or pricing data are not required in connection with contracts and subcontracts qualifying for an exemption under the regulations as revised.

(c) Analysis:

- (1) The Secretary of Defense shall conduct an analysis of impediments to the acquisition of nondevelopmental items.

-- the Secretary of Defense shall consider as a minimum the following:

- (A) Whether to expand regulations governing acquisition and distribution of commercial products to address the procurement of NDI (see FAR 11.0).
- (B) Whether to revise regulations governing specifications, standards, and other purchase descriptions (see FAR 10.0).
- (C) Whether to establish a presumption that the DOD should not request technical data on commercial items.
- (D) Whether the Secretary of Defense should make greater use of authority in law to exempt defense contracts for commercial items from application of various requirements.

- (2) 9 months (August '90) -- the secretary shall develop and submit to the Committees on Armed Services - House and Senate -

- o A plan of action addressing any impediments identified in the analysis.
- o The plan shall include a specific schedule for:
 - (A) Rescission of existing regulations
 - (B) Publication of new regulations for public comment
 - (C) Submit to Congress proposals for legislative changes

(d) Training:

(1) The Secretary shall establish an NDI training program.

(2) The program shall provide as a minimum:

(A) The Preference for NDI statute, and regulations.

(B) Training of contracting officers in the fundamental principles of price analysis.

(C) Training in market research and in drafting functional and performance specifications.

(e) Demonstration Program: Uniforms of Armed Services

DEFENSE MANAGEMENT IMPROVEMENT ACT

SENATE BILL S.2440

April 5, 1990

TITLE II - ACQUISITION:

Sec. 201: Amends 10 U.S.C. 2306(h) and repeals section 9021 of P.L. 101-165 Multiyear Contracts.

Eliminate requirement for 10% savings on multiyear contracts.

Sec. 202: DOD to place greater reliance on commercial products and commercial style procurement practices.

Greater use of product descriptions rather than detailed specifications.

→ Requires that a product have achieved commercial acceptance in order to compete as a commercial product.

Products that have been supplied under recent or current contracts for the same agency requirements -- if such meet the criteria that commercial products are equally evaluated.

Enable C.O. to avoid using detailed specifications and having to conduct extensive source reviews and product tests and evaluations.

Permit selecting products on the basis of the greatest benefit to the agency.

→ Make inapplicable to the purchase of commercial products provisions of law that relate generally to source preferences and unique contract requirements if they are not equally applicable to contracts to which the U.S. Government is not a party.

Establish in DOD a 3 year pilot program for the filing of protests by interested parties in connection with a commercial acquisition with an official designated to hear protests. During the 3 years, this procedure shall be the sole administrative remedy available.

Sec. 203: Repeals the commercial pricing certificate. Remove the contractor's warranty of lowest price applicable to spare and repair parts on negotiated contracts.

Sec. 204: Authorize DOD to evaluate competitive proposals and award a contract without discussions to the offer whose proposal represents the greatest benefit to the government based upon the evaluation factors set out in the solicitations.

Under C.I.C.A., such an award can be made based on overall lowest cost to the government.

DOD is seeking the authority to award to the best technical proposal at a reasonable price, which may not be the lowest cost to the government.

Sec. 205: Exempt small purchases from certain socio-economic provisions and establish a uniform threshold at the small purchase threshold. (\$25,000)

Sec. 206 Excuse the USD(A) from attending all FAR council meetings.

Sec. 207 Require a cost benefit analysis before dual sourcing (follower/leader) of major programs and subsystems. Preference for dual source retained, more flexibility allowed the Secretary of Defense.

Sec. 208 Revises the threshold for mandatory SF1411s from \$100,000 to \$500,000.

Sec. 217 Authorizes the Secretary to conduct up to 6 pilot programs to test methods to increase the effectiveness and efficiency of the acquisition process.

Permits the Secretary to waive any provision of law or regulation that is not equally applicable to a contract to which the U.S. Government is a party, and that:

(1) prescribes procedures for the procurement of supplies or services;

(2) prescribes preferences to certain sources or mandates particular sources;

(3) prescribes requirements be imposed on contractors that relate to performance, or that

(4) prescribes requirements governing cost allowability, cost accounting, or auditing, except for provisions intended to secure financial integrity on government use of funds.

SENATE BILL S.1352
DOD AUTHORIZATION ACT
(COMMITTEE REPORT 101-81)

3. Cost or Pricing Data -- The Truth in Negotiations Act provides that a contractor need not provide the government certified cost or pricing data where the contract price is based upon established catalog or market prices of commercial items sold in substantial quantities to the general public. However, the committee understands that the regulations interpreting this exception create a rigid test for commerciality which in many cases creates an impediment to the purchase of commercial products.

In particular, existing regulations establish percentage tests for sales to the general public and sales at catalog prices that many commercial products cannot meet. In addition, substantial questions have been raised about the applicability of the regulations to new commercial products, old commercial products, modified commercial products, and spare parts for commercial products.

The Department has advised the committee that it can revise the regulations to address these problems without amending the Truth in Negotiations Act. Section 822(d) directs the Secretary to issue regulations ensuring that a contractor is required to submit cost or pricing data in commercial or competitive procurements only if the head of the agency determines that data is necessary to be determine whether the contract price is reasonable.

The committee directs that this exception only be applied where there is no adequate alternative basis to requesting certified cost and pricing data. Alternatives to requesting cost and pricing data include, but are not limited to, situations where the price is fair and reasonable based on adequate price competition, a price analysis, market research, a review of prices for the same or similar commercial products or services, or other similar techniques.

CONFERENCE REPORT ON H.R. 2461
DOD AUTHORIZATION ACT
ARMED SERVICES COMMITTEE - SENATE AND HOUSE

Page S14179. 6 November 1989 of the Congressional record:

Third, the Secretary would be required to re-examine and revise regulations requiring contractors to provide certified cost or pricing data to ensure that this requirement is applied in contracts for commercial products only when necessary.

In revising the regulations, the Secretary shall consider the following:

- (1) revising the percent tests in the regulations;
- (2) revising the sales categories established in the percent tests;
- (3) allowing greater flexibility in the time periods for the application of the tests;
- (4) creating an alternative test based on volume of commercial sales (as opposed to percent of sales);
- (5) placing a greater emphasis on competitive market prices (as opposed to catalog prices); and
- (6) generally requiring the submission of cost or pricing data only when there is no adequate alternative basis for determining the reasonableness of price.

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DEFINITION OF COMMERCIAL ITEMS

FAR 11.001

"Commercial product" means a product such as an item, material, component, subsystem, or system, sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. (See 15.804-3(c) for explanation of terms.)

Commercial type product means a commercial product (a) modified to meet some government peculiar physical requirement or addition, or (b) otherwise identified differently from the normal commercial counterparts.

DEFINITIONS

FAR 15.804-3, AS REVISED

(c)(3)(iii) "Commercial products" are items, supplies or services regularly used for other than U.S. Government purposes and sold or traded to the general public in the course of normal business operations.

(c)(3)(vi) "New commercial product" is a newly introduced or recently improved commercial product for which substantial orders, shipments to the general public have not yet been achieved.

A "modified" commercial product is a commercial product that has been modified to meet some government peculiar physical requirement or addition, or is otherwise identified differently from its normal commercial counterpart. (See FAR 11.001)

A "discontinued" commercial product is a commercial product that has ceased being supplied by the manufacturer or vendor to the commercial market place in substantial quantities but is still required by the government.

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TRUTH IN NEGOTIATIONS ACT

PL87-653

Contracting officers must require contractors to submit certified cost or pricing data before:

- o awarding a negotiated prime contract over \$100,000;
- o pricing a negotiated contract change or modification over \$100,000;
- o awarding a negotiated subcontract in excess of \$100,000 at any tier, if the prime contractor and each higher tier subcontractor have furnished certified cost or pricing data; or
- o pricing a negotiated change or modification over \$100,000 to a subcontract;
- o awarding a negotiated prospective subcontract over \$100,000 and 10% of the prime contract price.

Exceptions:

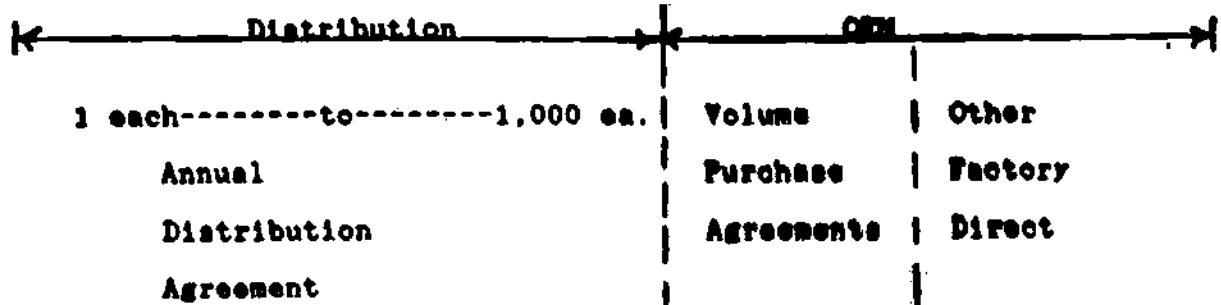
Contracting officers shall not require submission or certification of cost or pricing data when they determine the prices are:

- o based on adequate price competition;
- o based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
- o set by law or regulation.

SPECIFIC PROBLEMS WITH SF1411 PRICING

1. Not a market price
2. Creates an artificial/inconsistent price
3. FAR 30/31 compliance forces:
 - o Product line average costing
 - o Disallows or limits 19 items of cost
 - o Above average cost not recovered
 - o Expensive cost accounting required
 - o Expensive proposal processing required
4. Acceptable profit margins not achievable
 - o Cost disallowances
 - o Arbitrary profit margin constraints
5. Factual data disclosure index
6. "Forward" pricing to period of manufacture
7. Transfer pricing (residuals/affiliates)
8. Risks of non compliance with certificates
 - o Price reductions or worse

SEMICONDUCTOR CHANNELS



Market Price

Database

Distribution Resale

Sales Price History

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10 WAYS TO BE EXEMPT

FAR 15.804-3

1. Adequate price competition
 2. Based on adequate price competition
 3. Established catalog price of a commercial product
 4. Based on the established price of a commercial product
 5. Established market price of a commercial product
 6. Based on the established market price of a commercial product
 7. Buyer's waiver based on knowledge of established catalog, market or competitive prices
 8. Acceptance of the buyer of a prior exemption
 9. Individual or class exemption where the claim of exemption isn't technically perfect
 10. Waiver by head of a federal agency when submission required by law
- ADD
11. Alternate method (new)

"BASED-ON" ADEQUATE PRICE COMPETITION: FAR 15.804-3(b)

Competition is adequate if:

1. Offers are solicited;
2. Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements; and
3. These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

Unless:

1. One or more known and qualified offerors are unreasonably denied an opportunity to compete.
2. The lowest evaluated price is by an offeror "practically immune from competition."
3. There is a finding supported by a statement of the facts -- that the lowest price is unreasonable.

FAR 15.804-3

SF 1412 REQUIREMENT

1. Established catalog price of commercial item
2. Established market price of commercial item
3. Price set by law or regulation

NOTE: One SF1412 for each item over \$25,000

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		12 FORM APPROVED OMB NO 3090-0116	
OFFEROR (Name, address, ZIP Code)		3. SOLICITATION NO.	
DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED		4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED	
5. QUANTITY		6. TOTAL AMOUNT PROPOSED FOR ITEM \$	
<p>Submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.</p>			
SECTION I - CATALOG PRICE (See Instructions for items 7 thru 11 on reverse.)			
7. CATALOG IDENTIFICATION AND DATE		8. SALES PERIOD COVERED FROM TO	
9. CATEGORIES OF SALES	TOTAL UNITS SOLD *	10. REMARKS	
U.S. Government sales			
Sales at catalog price to general public			
Other sales to general public			
<p>If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10. REMARKS. Continue on a separate sheet, if necessary.</p>			
11. LIST THREE SALES OF THE ITEM OFFERED			
SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE UNIT
<input type="checkbox"/> B <input type="checkbox"/> C			\$
<input type="checkbox"/> D <input type="checkbox"/> C			\$
<input type="checkbox"/> E <input type="checkbox"/> C			\$
SECTION II - MARKET PRICE (See Instructions for item 12 on reverse.)			
<p>12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.</p>			
SECTION III - LAW OR REGULATION (See Instructions for item 13 on reverse.)			
<p>13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED</p>			
REPRESENTATION (See Instructions for item 14 on reverse.)			
<p>The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of the award of a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.</p>			
14. OFFEROR NAME, TITLE, AND FIRM	15. SIGNATURE	16. DATE OF SUBMISSION	

ESTABLISHED CATALOG PRICE: FAR 15.804-3(c)

A COMMERCIAL ITEM

1. The item being acquired is "a commercial item." i.e., not a government item, not affiliate sales.

"An item regularly used for other than U.S. Government purposes and sold or traded to the general public in the course of normal business operations."

2. The item is sold in "substantial quantities."

"Customarily provided by offeror, using personnel and equipment regularly maintained solely or principally to provide the service."

- ♦ Commercial item sales are not negligible, and comprise at least 55% of total sales of the item, and

Sales at published catalog prices and discounts comprise at least 75% of the commercial sales.

- ♦ Sales at published catalog prices and discounts are at least 35%.

3. Established catalog prices must be recorded in a form regularly maintained by the manufacture or vendor.

- ♦ Maybe a catalog, price list, schedule or other verifiable and established record

- ♦ Published or otherwise available for customer review must state current or last sale price to a significant number of buyers constituting the general public .

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		FORM APPROVED OMB NO. 3090-0116
1. OFFEROR (Name, address, ZIP Code) AEC Corporation 1214-A Oakmead Parkway Sunnyvale, CA 94086		3. SOLICITATION NO. DAAB07-87-B-N087
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED Federal Products Division		4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED ABC Part Number 1234, Rev.A. Superconductor
5. QUANTITY 900		6. TOTAL AMOUNT PROPOSED FOR ITEM \$ 109,000
<p>By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.</p>		
SECTION I - CATALOG PRICE (See instructions for items 7 thru 11 on reverse.)		
7. CATALOG IDENTIFICATION AND DATE ABC Corporation Price List, May 1987		8. SALES PERIOD COVERED FROM January 1987 TO June 1987
9. CATEGORIES OF SALES		10. REMARKS
a. U.S. Government sales	TOTAL UNITS SOLD*	Supporting data, catalog and purchase order records are located at ABC Corporation Sales office, located above, for audit verification.
b. Sales at catalog price to general public	4500	
c. Other sales to general public	4125	
11. LIST THREE SALES OF THE ITEM OFFERED		
SALES CATEGORY	DATE	NO. OF UNITS SOLD
a. <input checked="" type="checkbox"/> B <input type="checkbox"/> C	January 1987	1000
b. <input type="checkbox"/> B <input checked="" type="checkbox"/> C	February 1987	1000
c. <input type="checkbox"/> B <input checked="" type="checkbox"/> C	March 1987	375
12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.		
<p>Per marketing survey conducted by Star Search Marketing for sale of same or similar item from January through June 1987, the average sales price was \$116.67 for quantities sold in 1000 unit lot sizes by five competitors of ABC Corporation. See report attached.</p>		
SECTION III - LAW OR REGULATION (See instructions for item 13 on reverse.)		
13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED Per Trade Agreement between the United States government and the Japanese government, the price in 1000 unit lots is \$116.67 each. Call U.S. State Department for copy of treaty (202-647-2320).		
REPRESENTATION (See instructions for item 14 on reverse.)		
<p>The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government granted access to books, records, documents, and other supporting data that will permit verification of the claim.</p>		
14. TYPED NAME, TITLE, AND FIRM Ernest Washington Vice President Sales ABC Corporation	15. SIGNATURE	16. DATE OF SUBMISSION

THE CATALOG EXEMPTION CRITERIA

COMMERCIAL BASE ITEM PRICE

<u>SALES CATEGORY</u>	<u>RARELY EXEMPT IF EITHER OF FOLLOWING ARE TRUE</u>	<u>REQUIRES INVESTIGATION</u>	<u>USUALLY EXEMPT IF BOTH OF FOL- LOWING ARE TRUE</u>
<u>B&C SALES</u> TOTAL SALES	LESS THAN 35%	35% - 55%	55% OR MORE
<u>B SALES</u> B&C SALES	LESS THAN 55%	55% - 75%	75% OR MORE

Note that Category B Sales are at Published Catalog Prices

Note that Category C Sales are at Unpublished Discounts

Note that to be exempt Category B Sales must be 55% or more of B + C Sales

Note the Requirements for lowest price of Category C Sales

- ♦ Comparable Quantities, if none
- ♦ Nearest to the Quantity being purchased
- ♦ If no C Sales, then show B Sales at nearest quantity

Note complete explanation is required if the price offered is not the lowest price at which a sale was made

CATALOG EXEMPTION

COMMERCIALITY TEST

Using ABC Corporation Example:

$$\frac{B + C \text{ Sales}}{\text{Total Sales}} = \frac{4,125 + 1,375}{4,500 + 4,125 + 1,375} = \frac{5,500}{10,000} = 55\%$$

$$\frac{B \text{ Sales}}{B + C \text{ Sales}} = \frac{4,125}{4,125 + 1,375} = \frac{4,125}{5,500} = 75\%$$

ESTABLISHED MARKET PRICE: FAR 15.804-3(c)

A COMMERCIAL ITEM

1. The item being acquired is "a commercial item." (same as catalog)
2. The item is sold in substantial quantities. Same as catalog except no specific ratios apply.
3. Established market prices are current prices that are:
 - ♦ Established in the course of ordinary and usual trade between Buyers and Sellers free to bargain.
 - ♦ Can be substantiated by date from sources independent of the manufacture or vender.

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THE BASED ON TECHNIQUE

(ASPM, VOL. 2, CHAPTER 13)

1. The base item is commercial
 - o Base item cannot be government
2. The base item is otherwise qualified for catalog or market price exemption
3. The differences between the government item and its commercial counterpart can be identified
4. The difference in price can be attributed to variations in items
5. The price difference is judged to be reasonable

NOTE: FAR 15.804-3(c)(7) permits use of cost analysis on differences only.

"COMPETITION" DEFINED

CONTINUED

A Sole Source Award can be "based-on" adequate price competition.
FAR 15.804-3(b)(3).

"If price analysis alone clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or substantially the same item(s) purchased in comparable quantities, terms and conditions under contracts that resulted from adequate price competition."

BASED ON ADEQUATE PRICE COMPETITION: SOLE SOURCE

- ♦ If the price analysis alone clearly demonstrates that the proposed price is reasonable.
- ♦ In comparison with current or recent prices for the same or substantially the same items.
- ♦ Purchased in comparable quantities, terms and conditions.
- ♦ Under contracts that resulted from adequate price competition.

THE "BASED ON" EXEMPTION - CATALOG/MARKET

- ♦ THE BASE ITEM IS COMMERCIAL (CANNOT BE A GOVERNMENT ITEM)
- ♦ THE BASE ITEM IS QUALIFIED FOR THE CATALOG OR MARKET PRICE (SF1412)
- ♦ THE DIFFERENCES BETWEEN THE GOVERNMENT ITEM AND ITS COMMERCIAL COUNTERPART CAN BE IDENTIFIED (DATA SHEETS, SPECS, DRAWINGS)
- ♦ THE DIFFERENCES IN PRICE CAN BE ATTRIBUTED TO THE VARIATIONS IN THE ITEMS, QTY., PASSAGE OF TIME, TERMS, ETC.
- ♦ THE PRICE DIFFERENCES ARE JUDGED REASONABLE
 - ♦ PRICE ANALYSIS OF DIFFERENCES IN PRICE
 - ♦ COST ANALYSIS (MODIFIED SF1411): FAR 15.804-3(c)(7)
- ♦ ORDER SIZE, ANNUAL VOLUME, TIME SINCE MARKET ENTRY, AMOUNT OF COMPETITION SHOULD BE EVALUATED

"BASED ON" CATALOG OR MARKET: FAR 15.804-3(c)(6)

COMMERCIAL OR GOVERNMENT ITEM

1. End item is "similar" to a "commercial item."
 - ♦ May be modification, upgrade, special quality required.
 - ♦ May be a substitution
 - ♦ May be a new product
2. The base item is a commercial item, sufficiently similar that price comparisons can be made without resort to cost analysis.
3. The end item may be a government item.
4. The base item is qualified for an exemption
 - ♦ catalog, or
 - ♦ market
5. The difference between the Government item and its commercial counterpart can be identified.
6. The difference in price is attributed to variations in the items, terms, volume, delivery, FOB point, commissions, inflation, etc.
7. The price difference is judged reasonable.

TABLE B

MARKET PRICE ANALYSIS

FAR 15.804-3(c)(6)

COMPARISON OF COMPANY VERSUS MARKET PRICES

3RD QUARTER 1989

	<u>Company</u>	<u>Market (Low)</u>	<u>Market (High)</u>
COMM-ABC A.S.P.	\$14.00	\$12.00	\$ 15.00
Adjustment Factor	<u>6.5 x (1.)</u>	<u>6 x (2.)</u>	<u>7 x (2.)</u>
Mil-ABC A.S.P.	\$91.00	\$72.00	\$105.00

(1.) Source of Data: See Table C.

(2.) Source of Data: See Step 4, above.

MARKET PRICE ANALYSIS

FAR 15.804-3(C)(6)

<u>ELEMENTS</u>	<u>SELLER(2)</u>	<u>MARKET</u>	<u>SOURCE</u>
Commercial Product A.S.P.	\$ 22.50	\$ 22.50	(1)
S/B DIP Package Adjustment	<u>X 1.5</u>	<u>X 1.90</u>	(1)
Adjusted Price S/T	33.75	42.75	
Class B Processing Adjustment	<u>X 3.59</u>	<u>X 3.35</u>	(1)
Class B Product Price	\$121.16 =====	\$143.21 =====	

Note (1): See DataQuest - MIL. I.C. Report, August 1989

Note (2): Seller's data is from seller's analysis of its sales price history, July 1989.

MODIFIED SF1411

STANDARD COMMERCIAL ITEM

♦ \$20 each @ 300,000 units = \$6,000,000

REF

SF1412
attached

ADDED PROCESSING TO MIL-STD:

	<u>Delete</u>	<u>Add</u>	<u>Dif.</u>	<u>Explanation</u>
Purch. Parts	-\$20K	+ \$50K	\$30K	attached
Mfg. Labor	-\$20K	+ \$40K	\$20K	
Mfg. O/H @ 150%			\$30K	
S/T Cost			\$80K	
G & A			\$10K	
Total Cost			\$90K	
Profit			\$ 9K	
Firm Fixed Price		=	\$99K	
			\$6,099M	

No SF1411, no certificate of cost or pricing data.
Difference is under \$100,000.

PRICE ANALYSIS: HIERARCHY OF TECHNIQUES

ASPM, VOLUME 2

- ♦ Techniques differ based on data available and procurement situations.
- ♦ They may be used in combinations -- they are not mutually exclusive.
- ♦ Some techniques allow prediction of prices in cases where new products or services are being procured, or where significant changes in quantity or quality are being made.

1. PRIMARY COMPARISONS

a. Competitive

- ♦ Competing offers

b. Published Prices

- ♦ catalog
- ♦ market
- ♦ set by law or regulation

2. SECONDARY COMPARISONS

- ♦ Prior contracts
- ♦ Prior quotes
- ♦ Similar items

- ♦ Cost equations (CER)
- ♦ Market data
- ♦ Gov't/buyer est.

3. AUXILIARY TECHNIQUES

- ♦ Value Techniques
- ♦ Visual Analysis

PRICE ANALYSIS, cont'd

MARKET DATA

- ♦ A broad collection of potential comparisons in this category helps you shape your ideas about prices, market trends, and technological advances.
- ♦ Newspapers, trade journals, and market indices can be used to validate assumptions, identify the need for adjustment, and even to make adjustments.

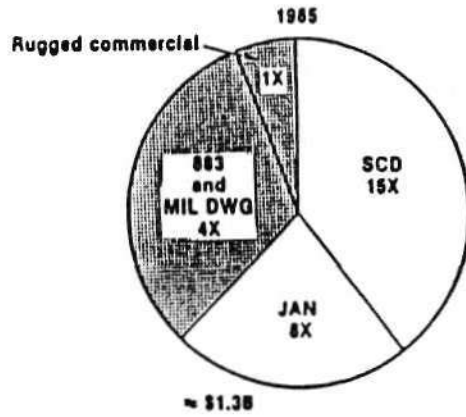
COST EQUATION RELATIONSHIPS (CER)

- ♦ CERs include yardsticks and parametric relationships such as dollars per pound, per square foot, per loaded labor hour, and other units of measure. they also can be used to adjust other comparisons by establishing common demoninators between dissimilar items.

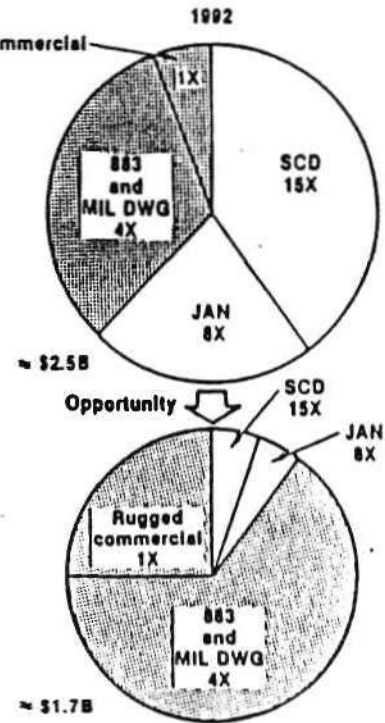
RATIO ANALYSIS

- ♦ Ratio analysis can be used to overcome differences in service and other contract offers that would otherwise make direct comparisons difficult.

DoD INTEGRATED CIRCUIT PROCUREMENT*



⇒
Growth
(status quo)



1710 Source Devices
1475 "883" Qual
450 SMDs
450 JANs
77500 SCDs

Potential
\$800 million
annual
savings

*June 1988 projections

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SF 1412 Uniform Pricing Policy

1. Identify your intent to offer a price based on the lower of Distribution Cost Catalog or recent Sales History for the same or similar items; requirements, schedules, and other terms being equal.
2. Confirm the use of your Distributor Cost Catalog as your "catalog" and your Average Recent Sales Price History as your "market price" data. Define how each is prepared and maintained and reserve the right to re-issue the Catalog without prior notice.
3. Establish as a policy that the buyer of MIL-grade devices gets the lower of your "catalog" (Distributor Costs) or "market price data" (your Sales Price History) for the same or similar terms of like order quantity.
4. Establish your practice of using Sales Price data for the MIL-grade device to determine the "reasonableness of price" by Price Analysis.
5. Reserve the right to offer lower prices and/or better terms to buyers on order sizes above the Distribution Cost Catalog quantity levels.

*** CASE EXAMPLE OF "BASED-ON" EXEMPTION ***

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA				FORM APPROVED OMB NO. 3090-0116	
1. OFFEROR (Name, address, ZIP Code) Government Contracts Associates 1230 Oakmead Parkway, Suite 218 Sunnyvale, CA 94086			3. SOLICITATION NO. ACME Missile Co. RFP No. ZIP2001		
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED Same			4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED GCA P/N 65GDU488BFC		5. QUANTITY 6955
					6. TOTAL AMOUNT PROPOSED FOR ITEM \$ 214,492
<p>By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804.3). Complete Section I, II, or III below as applicable.</p>					
SECTION I - CATALOG PRICE (See Instructions for items 7 thru 11 on reverse.)					
7. CATALOG IDENTIFICATION AND DATE GCA Distributor Catalog 1-2-88			8. SALES PERIOD COVERED FROM 10/28/87 TO 10/25/88		
9. CATEGORIES OF SALES		TOTAL UNITS SOLD*		10. REMARKS	
a. U.S. Government sales				See Schedule A Attached	
b. Sales at catalog price to general public					
c. Other sales to general public					
<p>* If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10, REMARKS. Continue on a separate sheet, if necessary.</p>					
11. LIST THREE SALES OF THE ITEM OFFERED					
SALES CATEGORY		DATE	NO. OF UNITS SOLD	PRICE/UNIT	
a. <input type="checkbox"/> B <input type="checkbox"/> C				\$	
b. <input type="checkbox"/> B <input type="checkbox"/> C				\$	
c. <input type="checkbox"/> B <input type="checkbox"/> C				\$	
SECTION II - MARKET PRICE (See Instructions for item 12 on reverse.)					
12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.					
SECTION III - LAW OR REGULATION (See Instructions for item 13 on reverse.)					
13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED					
REPRESENTATION (See Instructions for item 14 on reverse.)					
<p>The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.</p>					
14. TYPED NAME, TITLE, AND FIRM Richard B. Kelly President Government Contracts Associates			15. SIGNATURE		16. DATE OF SUBMISSION 11-22-88
<p>NSN 7540-01-142-9846 1412-101</p>			<p>STANDARD FORM 1412 (10-83) Prescribed by GSA FAR (48 CFR) 53.215-2(b)</p>		

SCHEDULE A
Claim for Exemption of Certified Cost or Pricing Data

1. The required part number and quantity are:

<u>GCA P/N</u>	<u>Quantity Required</u>
65GDU488BFC	6,955

2. The Firm Fixed Price quoted by GCA is:

<u>Unit Price</u>	<u>Extended Price</u>	<u>Delivery</u>
\$30.84	\$214,492.00	26 weeks ARO

3. Applicable GCA Division/Product Line:

Logic Division

4. Base Commercial Item

- 4.1 The "BFC" device is not listed in the GCA Distributor Catalog of 2 January 1988. The item required is a Carpak device and has relative low demand.
- 4.2 However, a same or similar commercial device of the same generic family, a 65GDU488BEC, in a CERDIP package, is listed in the GCA Distributor Catalog, page 35.
- 4.3 The Sales History Catalog Report "GCA-BFC88 dated November 25, 1988 for the period 10-28-87 through 10-25-88, shows that a majority of sales of comparable CerDIP devices analyzed were to the public, i.e., sold to distribution and OEM's. Therefore, the item is a commercial item. From page 290 of this Report, available for review at the GCA facilities in Sunnyvale, Ca., information supports the data summarized below:

<u>Sales History (Units)</u>		<u>Ratios</u>	
Category A Sales	= 0	(B+C) / (A+B+C) = 100%	
Category B Sales	= 980	(B) / (B+C) = 88%	
Category C Sales	= 130		
Total Units Sold = 1,110			

5. The differences between the Base Commercial Item and the Government End-Use Item required are identifiable and can be analyzed by Price Analysis.

- 5.1 The "EFC" device required is packaged in a Carpak, i.e., one in which the package is a flat profile with leads laying out flat from each of two opposite sides.

Product Variance: Both the "EFC" and the same or similar "BEC" devices are processed to MIL-STD-883, Rev. C, Class B, paragraph 1.2.1 specifications. Therefore, they are essentially the same except for bonding wire diagram and package type.

Volume: Carpaks are primarily for military surface mount packaging. Therefore, the volume of sales are small versus those of commercial sales, which are mostly in DIP and LOC packages. DIP, with the largest volume, enjoys economies of scale in package and automated assembly and test costs. Whereas, Carpak require much greater manual processing since the low volume demand does not justify the highly expensive automation involved with DIP. This difference in volume between CarDIP and Carpak creates a market price multiple of 2.57 to 3.47 times that of the CarDIP unit price.

- 5.2 To determine the price variance for CarDIP vs. Carpak, GCA examined, by Price Analysis and verification of unit price differences of MIL-STD-883B devices listed in the GCA Distributor Catalog for the part numbers listed below (note: "EC" means a DIP and "FC" means Carpak):

$$\begin{aligned}\text{Factor} &= \frac{65\text{GDU351FC} \quad \$25.00}{65\text{GDU351EC} \quad \$7.20} = \frac{\quad}{\quad} = 3.47 \\ \text{Factor} &= \frac{65\text{GDU356FC} \quad \$25.00}{65\text{GDU356EC} \quad \$9.70} = \frac{\quad}{\quad} = 2.57 \\ \text{Factor} &= \frac{65\text{GDU484FC} \quad \$25.00}{65\text{GDU484EC} \quad \$7.75} = \frac{\quad}{\quad} = 3.23\end{aligned}$$

Therefore, by examining the above, a Carpak typically sells for 2.57 to 3.47 times that of a CarDIP. A factor of 2.57, the lowest of the above factors, is selected to reflect the price differential between Carpak and CarDIP devices for this analysis. To verify the above information, see pages 25 to 49 of the GCA Distributor Catalog; a copy is on file at the GCA facilities in Sunnyvale, CA..

The price multiplier of 2.57 is also supported by actual sales data. For example, the 65GDU351EC vs. 65GDU351FC pricing, as documented in the Sales Price History Catalog, shows an average multiple of 3.3 times for the 12 months sales as summarized below:

65GDU351EC: 16,337 units sold at an average of \$6.88 each
65GDU351FC: 959 units sold at an average of \$23.97 each

$$\text{Factor} = \frac{65\text{GDU351FC} \quad \$23.97}{65\text{GDU351EC} \quad \$6.88} = \frac{\quad}{\quad} = 3.50$$

Therefore, a 2.57X factor is the lowest multiple shown from the data available and is applied to the base commercial item, which is the lowest at which GCA has sold a same or similar device to anyone over the last 12 months.

6. The unit price quoted for the 65GDU488BFC is calculated as follows:

$$\begin{aligned} \text{Unit Price} &= (\text{base item unit price}) \times (\text{package difference factor}) \\ &= \$12.00 \times 2.57 \\ &= \$30.84 \end{aligned}$$

Note: The \$12.00 for the base commercial item is the reflective of recent sales history and is lower than the Distributor Catalog. Offering the lower price is consistent with the GCA SF 1412 Pricing Policy.

7. The SF 1412 for the base commercial item 65GDU488BEC is attached as supporting data.

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA

FORM APPROVED OMB NO.

3090-0116

1. OFFEROR (Name, address, ZIP Code)

Government Contracts Associates
1230 Oakmead Parkway, Suite 218
Sunnyvale, CA 94086

3. SOLICITATION NO.

ACME Missile Company RFP No. ZIP2001

4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED

GCA P/N 65GDU488BFC

2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED

Same

5. QUANTITY

6. TOTAL AMOUNT PROPOSED FOR

ITEM

\$

By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.

SECTION I - CATALOG PRICE (See Instructions for items 7 thru 11 on reverse.)

7. CATALOG IDENTIFICATION AND DATE

GCA Distributor Catalog 1-2-88

8. SALES PERIOD COVERED

FROM 10/28/87

TO 10/25/88

9. CATEGORIES OF SALES

TOTAL UNITS SOLD*

a. U.S. Government sales

-0-

b. Sales at catalog price to general public

980

c. Other sales to general public

130

10. REMARKS

See Distributor Catalog page 35

See Sales Price Catalog page 290

* If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10, REMARKS. Continue on a separate sheet, if necessary.

11. LIST THREE SALES OF THE ITEM OFFERED

SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE/UNIT
a. <input type="checkbox"/> B <input checked="" type="checkbox"/> C	10/8/88	80	\$ 12.00
b. <input type="checkbox"/> B <input checked="" type="checkbox"/> C	10/8/88	80	\$ 12.00
c. <input checked="" type="checkbox"/> B <input type="checkbox"/> C	6/22/88	300	\$ 12.90

SECTION II - MARKET PRICE (See Instructions for item 12 on reverse.)

12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS

Note: Sales Orders used in the Block 9 count above are marked on the Sales History Records with an "A", "B", or "C" located in the GCA Estimating File for this Order and are used as codes to sum values.

SECTION III - LAW OR REGULATION (See Instructions for item 13 on reverse.)

13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED

REPRESENTATION (See Instructions for item 14 on reverse.)

The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.

14. TYPED NAME, TITLE, AND FIRM

Richard B. Kelly
President
Government Contracts Associates

15. SIGNATURE

16. DATE OF SUBMISSION

11-22-88

NSN 7540-01-142-9846
1412-101

STANDARD FORM 1412 (10-83)
Prescribed by GSA
FAR (48 CFR) 53.215-2(b)

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DB a company of
The Dun & Bradstreet Corporation

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		FORM APPROVED GMS NO. 3080-0110
1. OFFEROR (Name, address, ZIP Code) Company Silicon Valley, California		3. SOLICITATION NO. Verbal request from OEM thru Sales Rep 4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED Mil-ABC in CERDIP package and processed to Mil-Std-883, Class B, 1.2.1
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED Fab & test, S.V. Calif./Assy in S.Korea	5. QUANTITY 2400	6. TOTAL AMOUNT PROPOSED FOR ITEM \$ \$218,400.00

By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.

SECTION I - CATALOG PRICE (See instructions for items 7 thru 11 on reverse.)

7. CATALOG IDENTIFICATION AND DATE		8. SALES PERIOD COVERED FROM _____ TO _____	
9. CATEGORIES OF SALES	TOTAL UNITS SOLD *	10. REMARKS	
a. U.S. Government sales			
b. Sales at catalog price to general public			
c. Other sales to general public			

* If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in item 10, REMARKS. Continue on a separate sheet, if necessary.

11. LIST THREE SALES OF THE ITEM OFFERED

SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE/UNIT
a. <input type="checkbox"/> B <input type="checkbox"/> C			\$
b. <input type="checkbox"/> B <input type="checkbox"/> C			\$
c. <input type="checkbox"/> B <input type="checkbox"/> C			\$

SECTION II - MARKET PRICE (See instructions for item 12 on reverse.)

12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.

The price quoted is a market price based on the established market price of a similar market priced commercial product per FAR 15.804-3(c)(6). (See continuation sheet) The unit price is \$91.00 each, based on 3rd Qtr. 1989 published market data.

SECTION III - LAW OR REGULATION (See instructions for item 13 on reverse.)

13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED

REPRESENTATION (See instructions for item 14 on reverse.)

The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.

14. TYPED NAME, TITLE, AND FIRM Honest A. Lincoln, CFO Chips Incorporated	15. SIGNATURE <i>H. A. Lincoln, CFO</i>	16. DATE OF SUBMISSION 15 October 1989
---	--	---

**INSTRUCTIONS TO OFFERORS SUBMITTING
CLAIM FOR EXEMPTION FROM SUBMISSION
OF CERTIFIED COST OR PRICING DATA**

Item 7. Attach a copy of the catalog, or the appropriate pages covering price and published discounts, or a statement that the catalog is on file in the buying office to which this proposal is being made. Catalog price, is a price that is included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. To justify a catalog price exemption for the Government item, the catalog item must be identical or must be so similar in material and design that any price difference or its absence can be evaluated solely by price analysis (see FAR 15.805-2). In the latter case, a statement must be attached identifying the specific differences and explaining, by price analysis of the differences, how the proposed price is derived from the catalog price.

Item 8. This period should include the most recent regular monthly, quarterly, or other period for which sales data are reasonably available and should extend back only far enough to provide a total period representative of average sales. You may also attach sales data for a prior representative period if for any reason recent sales are abnormal and the prior period is sufficiently recent (not more than 2 years preceding) to support the proposed price for the Government item. In the latter case, you must explain, by price analysis only, how the proposed price is derived from the catalog sales for the prior period.

Item 9. (a) Include in Category A all sales of the catalog item (a) directly to the U.S. Government and its instrumentalities and (b) for U.S. Government use (sales directly to U.S. Government prime contractors, or their subcontractors or suppliers at any tier, for use as an end item, or as part of an end item, by the U.S. Government).

(b) Include in Category B all sales of the catalog item made strictly at the catalog price, less only published discounts, to the general public (i.e., catalog price sales other than those (i) to affiliates of the offeror or (ii) included in Category A (Instruction 9(a)).

(c) Include in Category C all sales to the general public that were not made strictly at the catalog price or that were made at special discounts or discount rates not published in the catalog.

Item 11. On line a, insert information on the lowest price which Category B or C sales of the offered item was made during the period, regardless of quantity.

On lines b. and c. insert sales information in the following manner.

- a. Give the lowest price Category C sales of comparable quantities. If there were no sales of comparable quantities, then give
- b. The lowest price Category C sales of quantities most nearly the quantity being offered. If there were no sales of Category C, then give
- c. The lowest price Category B sales of comparable quantities. If there were no sales of comparable quantities, then give
- d. The lowest price Category B sales of quantities most nearly the quantity being offered.

Attach a complete explanation (i) if you, during the period covered, offered special discounts not included in the catalog, or (ii) if the price proposed is not the lowest price at which a sale was made to any customer during that period for like items and comparable quantities.

Item 12. Market price is a current price, established in the usual and ordinary course of trade between buyers and sellers free to bargain, that can be substantiated from sources independent of the manufacturer or vendor. There must be a sufficient number of commercial buyers so that their purchases establish an ascertainable current market price for the item or service. The nature of this market should be described. To justify a market price exemption, the item or service being purchased must be identical to the commercial item or service or must be so similar in material and design (for supplies) or in work and facilities (for services) that any price difference or its absence can be evaluated solely by price analysis (see FAR 15.805-2). In the latter case, a statement must be attached identifying the specific differences and explaining, by price analysis of the differences, how the proposed price is derived from the market price.

Item 13. Identify the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

Item 14. Insert the name, title, and firm of the person authorized by the offeror to sign this form.

SE1412 CONTINUATION

This claim of exemption from the submission of certified cost or pricing data is prepared in accordance with FAR 15.804-3(c)(6) and the ASPM, Vol. 2, Chapter 13-8, "based on" the established market price of a similar, market priced commercial item.

It is the established policy of the company to sell at current market prices.

Per ASPM, Vol. 2, the following five steps are to be followed:

1. The base item is commercial.
2. The base item is otherwise qualified for the catalog or market price exemption.
3. The differences between the government item and its commercial counterpart can be identified.
4. The differences in price can be attributed to variations in items.
5. The price difference is judged reasonable.

Step 1: The required item is a Mil-ABC part, mounted in a ceramic-dual-in-line package, Mil-XYZ, and processed to Mil-Std-883, Class B, Para. 1.2.1. standards. The base commercial counterpart for Mil-ABC is part COM-ABC.

Table A displays the past twelve, consecutive months of sales of the COMM-ABC devices. Table A demonstrates that substantial sales of the COMM-ABC products have been made to the general public. Therefore, COMM-ABC is a commercial item within the meaning of FAR 15.804-3(c).

Step 2: The base item is qualified for exemption in that there is an established market price for COMM-ABC devices within the meaning of FAR 15.804-3(c)(2). Ref: Dataquest Report, Commercial Semiconductor Prices, August 1989, page 105, line 8 for the established market price of between \$12.00 to \$15.00 for 3rd Quarter 1989.

Step 3: The differences between the Mil-ABC and COMM-ABC are recapped as follows:

<u>COMM-ABC</u>	<u>Mil-ABC Required</u>
Package: Plastic DIP	CERDIP
Processing: Commercial	Mil-Std-883, Class B

An examination of the company published data book, Memory Devices - 1989, pages 101 versus 280 will provide product descriptions and specifications permitting a verification of specific differences. Also, see page 6 of the data book, which explains the company part number descriptions which are a means of comparing these products.

Step 4: The differences in price can be attributed to these primary differences in package and process. See Dataquest publication, Military Semiconductor Prices, August 1989, page 300 through 303, reflecting that the established market prices for military versions of this device, i.e., 256K SRAMS, are six to seven times the established commercial prices of 256K SRAMS, and that the explanation of price differences is as follows:

	<u>Low</u>		<u>High</u>
Package =	1.90 x	to	2.00 x
Processing =	<u>4.10 x</u>		<u>5.00 x</u>
Total	6.00 x	to	7.00 x
	=====		=====

Step 5: Table B summarizes the comparison of price analysis, based on the company's sales price experience versus the market price indicators published by Dataquest for the past quarter.

The company has determined the price of \$91.00 each to be reasonable, based on price analysis by comparison of company experience versus market price experience. (See Table B)

TABLE A

SALES HISTORY, COMM-ABC PRODUCTS (PLASTIC PACKAGE)
(EXCLUDES GOVERNMENT, FMS, AFFILIATES, DISTRIBUTION)

<u>MONTH</u>	<u>QUANTITY</u>	<u>QUARTERLY OEM UNIT AVE. PRICE</u>
Sept '89	10,000	\$14.00
Aug	9,000	
Jul	8,000	
Jun	7,000	\$16.00
May	6,000	
Apr	10,000	
Mar	9,000	\$18.00
Feb	8,000	
Jan '89	7,000	
Dec '88	6,000	\$20.00
Nov '88	10,000	
Oct '88	<u>8,000</u>	
Total	90,000 Units =====	

TABLE B

MARKET PRICE ANALYSIS

FAR 15.804-3(c)(6)

COMPARISON OF COMPANY VERSUS MARKET PRICES

3RD QUARTER 1989

	<u>Company</u>	<u>Market (Low)</u>	<u>Market (High)</u>
COMM-ABC A.S.P.	\$14.00	\$12.00	\$ 15.00
Adjustment Factor	<u>6.5 x (1.)</u>	<u>6 x (2.)</u>	<u>7 x (2.)</u>
Mil-ABC A.S.P.	\$91.00	\$72.00	\$105.00

(1.) Source of Data: See Table C.

(2.) Source of Data: See Step 4, above.

TABLE C

SALES HISTORY, MIL-ABC PRODUCTS

(CERDIP Package, 883B Process)

(Excludes Distribution)

MONTH	QUANTITY	QUARTERLY UNIT SALES PRICES <u>OEM/DIRECT FEDERAL SALES</u>
Sept '88	1,500	\$91.00
Aug	1,350	
Jul	1,200	
Jun	1,000	\$93.00
May	5,000	
Apr	5,000	
Mar	1,350	\$95.00
Feb	3,000	
Jan '88	2,000	
Dec '88	1,000	\$97.00
Nov '88	2,000	
Oct '88	<u>3,000</u>	
Total:	17,400	
	=====	

Price factor for military versus commercial, 3rd Quarter

Table B, 3rd Quarter Price = \$14.00

Table C, 3rd Quarter Price = \$91.00

\$91.00 - \$14.00 = 6.5 x

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FAR 15.804-3, REVISED
CHANGES IN CATALOG EXEMPTION

1. COMPUTATIONS FOR ITEMS OVER \$50,000

- o Category A: Government end use sales
 - o Exclude sales based on competition
 - o Exclude sales under GSA schedules
 - o Include sales to foreign governments
- o Category B: Sales to general public at established catalog
 - o Include government sales based on competition
 - o Include GSA sales up to 75% of total Cat. B.
 - o Exclude sales to affiliates
 - o Exclude government end use, foreign government sales
- o Category C: Sales to general public at other than catalog
 - o Exclude sales to affiliates
 - o Exclude sales to foreign governments
 - o Exclude government end use sales

2. CERTIFICATES ADDED TO CATALOG EXEMPTION

- o FAR 52.214-30 Price Reduction for Defective Catalog Price Data - Modification - Sealed Bidding
- o FAR 52.215-27 Price Reduction for Defective Catalog Price Data
- o FAR 52.215-28 Price Reduction for Defective Catalog Price Data - Modification

3. ENCLOSURES: CATALOG

- o Copy of catalog
- o Copy of discount policy
- o Identify applicable discount policy and explain why

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		FORM APPROVED GME NO. 3090-0116
--	--	--

1. OFFEROR (Name, address, ZIP Code)		3. SOLICITATION NO.
		4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED	5. QUANTITY	6. TOTAL AMOUNT PROPOSED FOR ITEM \$

By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.

SECTION I - CATALOG PRICE (See Instructions for Items 7 thru 11 on reverse.)	
7. CATALOG IDENTIFICATION AND DATE	8. SALES PERIOD COVERED FROM TO
9. CATEGORIES OF SALES	TOTAL UNITS SOLD
a. U.S. Government sales	
b. Sales at catalog price to general public	
c. Other sales to general public	
10. REMARKS	
* If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10, REMARKS. Continue on a separate sheet, if necessary.	

11. LIST THREE SALES OF THE ITEM OFFERED			
SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE/UNIT
1. <input type="checkbox"/> B <input type="checkbox"/> C			\$
2. <input type="checkbox"/> B <input type="checkbox"/> C			\$
3. <input type="checkbox"/> B <input type="checkbox"/> C			\$

SECTION II - MARKET PRICE (See Instructions for Item 12 on reverse.)
12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.

SECTION III - LAW OR REGULATION (See Instructions for Item 13 on reverse.)
13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED

REPRESENTATION (See Instructions for Item 14 on reverse.)	
The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.	

TYPED NAME, TITLE, AND FIRM	15. SIGNATURE	16. DATE OF SUBMISSION

THE CATALOG EXEMPTION CRITERIA

COMMERCIAL BASE ITEM PRICE

<u>SALES CATEGORY</u>	<u>RARELY EXEMPT IF EITHER OF FOLLOWING ARE TRUE</u>	<u>REQUIRES INVESTIGATION</u>	<u>USUALLY EXEMPT IF BOTH OF FOL- LOWING ARE TRUE</u>
<u>B&C SALES</u>	LESS THAN 35%	35% - 55%	55% OR MORE
<u>TOTAL SALES</u>			
<u>B SALES</u>	LESS THAN 55%	55% - 75%	75% OR MORE
<u>B&C SALES</u>			

Note that Category B Sales are at Published Catalog Prices

Note that Category C Sales are at Unpublished Discounts

Note that to be exempt Category B Sales must be 55% or more of B + C Sales

Line 11. If B less than C quantity, provide 3 price examples at B or C sales, as follow:

- o Three lowest cat. B sales, comparable quantity and terms
- o If not, lowest cat. B, nearest quantity and terms
- o If not, lowest cat. C, nearest quantity and terms

FAR 15.804-3, REVISED

Changes: Add alternate method - catalog

Eligibility: ~~When total corporate commercial sales are 90% or more of total corporate sales and commercial sales of the division or unit making the sale are 50% or more of the total division or unit sales.~~

Threshold: Not to exceed \$1.0 million.

Procedure: (1) Certify price(s) offered are no higher than lowest price charged any end user customer under similar terms, conditions and quantities (see 52.215-xxx).

(2) Prices offered were developed during most recent period sales data are readily available.

(3) Include price reduction clauses 52.214-30, 52.215-27 and 52.215-28.

(4) Include audit clauses 52.214-16 and 52.215-2.

ALTERNATE PROCEDURE CERTIFICATES

FAR 52.215xxx: Certificate for use in Alternate Procedure for Commercial Pricing.

- o "Price(s) offered are no higher than the lowest prices charged and U.S. general public customer in the same customer class" --
- o Access to records for three years

FAR 52.215-2: Audit - Negotiation

- o Data related to established catalog price
- o Access to records for three years
- o Flowdown to all subcontractors over \$50,000

FAR 52.214-30: Price Reduction for Defective Catalog Price Data - Modification - Sealed Bid

- o -- "government relied on Alternate Procedures" in 15.804-3(f)(6)

FAR 52.215-28: Price Reduction for Defective Catalog Price Data - Modifications

- o -- "when using Alternate Procedure in 15.804-3(f)(6)" --

FAR 15.804-3, REVISED

INDIVIDUAL OR CLASS EXEMPTION

1. Lowered authority level to contracting officer (buyer) -- up to \$1.0 million per order.
2. Chief's approval (supervisor) still required if order is over \$1.0 million per order.

FAR 15.804-3, REVISED

OTHER CHANGES

1. Requests for cost or pricing data on competitive source selections are prohibited.

Submissions are limited to cost realism cases only.
2. Based on competition and based on market exemptions are the same as before except they are expressly excluded from certificates.
3. Verification of claim by audit is mandatory on orders over \$1.0 million.
4. New products with no sales may be exempt.
5. Discontinued products may be exempt without substantial sales to the general public.
6. Products may be exempt by price analysis of differences only or by a price based on a commercial product.

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DUCTION AND
LOGISTICS

(P/CPF)

THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-6000

JUN 16 1989

MEMORANDUM FOR THE DIRECTOR, DAR COUNCIL

SUBJECT: Revision of Federal Acquisition Regulation
(FAR) 15.804-3, Exemptions from Submission of Cost or
Pricing Data and FAR 31.205-26 Material Costs

Section 2325, Title 10, United States Code, Preference for Nondevelopmental Items, states that the Secretary of Defense shall ensure that, to the maximum extent practicable, the requirements of the Department of Defense are fulfilled through the procurement of nondevelopmental items (NDI). The NDI statute expanded and strengthened the existing emphasis on procuring commercial products to cover all NDI, including previously developed items such as weapon systems or components and reflects the Congress' desire that all impediments or restrictions to the maximum practicable acquisition of NDI, including those in regulations and procedures, be identified and removed.

The General Accounting Office (GAO) Report No. 89-51 entitled "DoD Efforts Relating to Nondevelopmental Items," recommended that a Defense Acquisition Regulatory (DAR) case be established to examine whether changes to the regulations are needed to ensure that contractors do not face possible loss of such exemptions only because the amount of previous sales of the same type of items to the Government based on adequate price competition exceed established regulatory thresholds. The Office of the Secretary of Defense concurred with the GAO recommendation. In recent testimony before the Senate Committee on Government Affairs, both industry and the Department of Defense affirmed the need to simplify contracting for commercial products.

The proposed DAR case from the Acting Director, Cost, Pricing and Finance is attached for your consideration.

SIGNED

Eleanor R. Spector
Deputy Assistant Secretary of
Defense for Procurement

Attachment -



THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-6000

16 JUN 1983

DUCTION AND
LOGISTICS

(P/CPF)

MEMORANDUM FOR THE DIRECTOR, DAR COUNCIL

SUBJECT: Revision of Federal Acquisition Regulation
(FAR) 15.804-3, Exemptions from Submission of Cost or
Pricing Data and FAR 31.205-26 Material Costs

I. PROBLEM:

Commercial vendors that do not submit cost or pricing data to the Government are prohibited from selling to the Government unless they obtain an exemption under FAR 15.804.3, Exemptions from Submission of Cost or Pricing Data. Both industry and Government recognize that the current coverage of FAR 15.804-3 does not adequately address unique situations which currently prevent commercial vendors from obtaining an exemption from cost or pricing data and therefore prevent commercial vendors from doing business with the Government because they do not have the accounting systems to provide cost or pricing data.

II. RECOMMENDATION:

That the FAR be revised as set forth in Tab A.

III. DISCUSSION:

Section 2325, Title 10, United States Code, Preference for Nondevelopmental Items, states that the Secretary of Defense shall ensure that, to the maximum extent practicable, the requirements of the Department of Defense are fulfilled through the procurement of nondevelopmental items (NDI). The NDI statute expanded and strengthened the existing emphasis on procuring commercial products to cover all NDI, including previously developed items such as weapon systems or components and reflects the Congress' desire that all impediments or restrictions to the maximum practicable acquisition of NDI, including those in regulations and procedures, be identified and removed.

The General Accounting Office (GAO) Report No. 89-51 entitled "DoD Efforts Relating to Nondevelopmental Items," recommended that a Defense Acquisition Regulatory (DAR) case be established to examine whether changes to the regulations are needed to ensure that contractors do not face possible loss of

such exemptions only because the amount of previous sales of the same type of items to the Government based on adequate price competition exceed established regulatory thresholds. The Office of the Secretary of Defense concurred with the GAO recommendation.

In recent testimony before the Senate Committee on Government Affairs, both industry and the Department of Defense affirmed the need to simplify contracting for commercial products. Federal Acquisition Regulation (FAR) 15.804-3(a) provides exemptions to the requirement for submission of cost or pricing data when it is determined that prices are based on adequate price competition, are based on established catalog/market prices of commercial items sold in substantial quantities to the general public, or are set by law or regulation.

One of the main objectives of the proposed DAR case is to further the policy to buy commercial products by relying on price analysis techniques to the maximum extent possible in negotiations. The proposed change also addresses the following issues:

- o new and discontinued commercial products which in most cases do not meet the substantial quantities test for exemption from submission of certified cost or pricing data;

- o changes the threshold from \$25,000 to an extended value of \$50,000 or more for items requiring an SF 1412 "Claim for Exemption from Submission of Certified Cost or Pricing Data;"

- o restructures the designation of sales categories to eliminate the complex formula;

- o proposes an alternate procedure, up to a dollar threshold of \$1,000,000, that excludes highly commercial companies from submitting an SF 1412 when certain criteria are met; and

- o changes the authority for granting an exemption when the case does not strictly meet all the criteria for catalog - or market-price exemption from the Chief of the Contracting Office to the contracting officer up to a dollar threshold of \$1,000,000.

IV. COLLATERAL REQUIREMENTS:

Public comments should be sought as industry has expressed a wide interest in this area. The comments will allow an opportunity to assure that the final rule is as clear as possible. The proposed rule will be publicized in the Federal Register for a 60-day period after which any comments received will be considered before the final rule is issued.

DISCUSSIONS OF
RECOMMENDED PROPOSED REVISIONS
TO THE FAR

NOTE A. This change includes the Price Reduction clause included in DAR case 85-37 and approved by the CAAC but alters the clause to apply only when using the Alternate Procedure explained in Note T.

NOTES B and C. The addition of paragraph (c) (1) emphasizes the policy as reflected in Section 2325, Title 10, USC, Preference for Nondevelopmental Items, and the recent testimony before the Senate Committee on Government Affairs where both industry and the Department affirmed the need to simplify contracting for commercial products. Paragraph (c) (2) stresses the need to rely on price analysis techniques to the maximum extent possible in negotiations.

NOTE D. This change is made to broaden the meaning of "sufficiently similar" to allow as much flexibility as possible. Industry has complained that price analysts and auditors have gone to great lengths to show that terms and conditions are different and, therefore, not eligible for commercial based pricing.

NOTE E. Some companies use the computer as a "real time" catalog to eliminate pricing errors and to make price changes more immediate. Industry has complained that because the computer is not a written record, auditors have rejected this approach.

NOTE F. DAR Case 85-37 expanded the definition of established catalog price to include a provision for adjustment factors which can be applied to the catalog price. We have changed the wording slightly. The CAAC approved the DAR Case 85-37 change.

X NOTE G. Clarification of what constitutes sales data was included in DAR case 85-37 and approved by the CAAC.

NOTE H. "U.S." was added to clarify that the definition of Government sales includes only sales to federal agencies, not sales to state and local governments and clarification was needed to show that an FMS sale is a sale to U.S. Government (on behalf of a foreign Government) not a sale for U.S. Government end use. Both changes were in DAR Case 87-37 and were approved by the CAAC.

NOTE I. Defines "new", "modified" and "discontinued" commercial product.

NOTE J. This change is intended to emphasize that the responsibility for submitting the required information is on the offeror.

NOTE K. The threshold of the total proposed amount of items considered to be commercial products remains at \$100,000; however, the threshold

Tab A

has been changed from \$25,000 to an extended value of \$50,000 or more for items requiring the submission of a SF 1412.

NOTE L. This section states that if a product or service is included on an active GSA Multiple Award Schedule (MAS) contract, it is understood that the Government has determined that the vendor has demonstrated that the product or service meets the test of "commerciality" and the submission of a SF 1412 is not required and should not be requested.

NOTE M. The reference to U.S. Government sales of 65 percent to total sales is explained in Note N.

NOTE N. We have proposed restructuring the designation of sales categories to eliminate the complex formula, broaden commercial exemption criteria and give the contracting officer greater latitude for judgement in determining whether the product is sold in substantial quantities to the general public. For example, we are proposing that the category of sales to the Government exclude sales based on price competition. Price competition includes sales made from a GSA Multiple Award Schedule contract.

NOTE O. Clarification of what makes up Category C.

NOTE P. Clarified that GSA Multiple Award Schedule contracts cannot make up more than 75 percent of Category B sales.

NOTE Q. Combines both quantitative and qualitative assessment of the categories to provide further guidance in the analysis of the factors which make up the individual categories.

NOTE R. Further alternatives if not all catalog items satisfy the exemption criteria.

X { NOTE S. Mandatory verification of exemption request if total exceeds \$1,000,000. DAR Case 85-37 also had a mandatory preaward data verification of \$1,000,000. However, the FAC coverage prepared after the CAAC reviewed the case dropped the amount to \$100,000 with no explanation. It may possibly be a typo.

NOTE T. An Alternate Procedure, up to a dollar threshold of \$1,000,000, excludes highly commercial companies from submitting an SF 1412 when total commercial sales are 90 percent or more of total sales and commercial sales of the division or unit are 50 percent or more of total division sales. No preaward audit would be made, if the contractor certifies that the price(s) offered are not higher than the lowest price charged any customer under similar terms, conditions and quantities. However, we have included appropriate Audit and Price Reduction for Defective Catalog Price Data clauses (from DAR case 85-37 and approved by the CAAC) to be included when the alternate procedure is anticipated.

NOTE U. We changed the authority for granting an exemption when the case does not strictly meet all the criteria for catalog - or market-

price exemption from the Chief of the Contracting Office to the contracting officer up to a dollar threshold of \$1,000,000.

NOTE V. Emphasis on more comparability.

NOTE W. There is inconsistency in the FAR between the criteria for adequate competition under TINA and the criteria for adequate competition under the FAR cost principle for allowability of intra-company transfers. The essential difference is that intra-company transfers at price are allowable only if i) the price is established as a catalog/market price using SF 1412 standards or ii) the price resulted from an actual award on a competition which included one or more outside sources that produce the same or equivalent item in significant quantities. Except for intra-company transfers, however, a price may be acceptable for purchase based on adequate competition as determined by price analysis alone. The "based on" criteria does not require an actual competition.


* [FINAL NOTE: The audit and price reduction clauses (TAB F) are basically the same as those in the DAR 85-37 case as approved by the CAAC. However, the clauses were amended to be used only with the Alternate Procedure.

The Certification for Use in Alternate Procedure for Commercial Pricing (TAB G) is similar to the "Representation" clause in DAR case 85-37 and approved by the CAAC, but has been modified for use only with the Alternate Procedure.

The face of the SF 1412 was changed to provide a better numbering system, i.e. make categories agree with alphabetical numbers, etc. The instructions on the back of the SF 1412 are basically the same as in the DAR 85-37 case and approved by the CAAC, except Item 11 has been changed to incorporate some of the suggestions from the Arthur Young Group.

The proposed rule does not appear to have a significant impact on a substantial number of small entities because most prime contracts, as well as subcontracts, with small entities do not require the submission of cost or pricing data. Most awards to small entities at either level are on a competitive basis obviating the need for cost or pricing data or an exemption. In those rare cases when a small entity does receive a non-competitive prime contract or subcontract exceeding \$100,000, the basic requirements for submitting and obtaining an exemption from the requirement for submission of certified cost or pricing data remain essentially unchanged. Therefore an initial Regulatory Flexibility analysis has not been performed. Comments from small entities are invited.

There will be a favorable impact on the Paperwork Reduction Act because the increased threshold for submission of SF 1412's as well as the restructured description of sales categories will cause a significant reduction in submission of SF 1412's to the Government.


Carol Covey
Acting Director
Cost, Pricing and Finance

Attachments

TAB A - Discussion of Recommended Proposed Revisions to the FAR
TAB B - FAR 14.201-7
TAB C - FAR 15.804-3
TAB D - DFARS 15.804-3
TAB E - FAR 31.205-26
TAB F - FAR 52.214-30, 52.215-2, 52.215-27, and 52.215-28
TAB G - Certification for Use in Alternate Procedure for
Commercial Pricing
TAB H - SF 1412

FAR PART 14 SEALED BIDDING

SUBPART 14.2 SOLICITATION OF BIDS

SECTION 14.201 PREPARATION OF INVITATIONS FOR BIDS

REVISIONS DISPLAYED AS FOLLOWS:

~~Deleted Portion~~

[Added Portion]

14.201-7 Contract clauses.

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit - Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed \$100,000.

(b) (1) When contracting by sealed bidding, the contracting officer shall insert the clause[s] at 52.214-27, Price Reduction for Defective Cost or Pricing Data - Modifications - Sealed Bidding, [and 52.214-30, Price Reduction for Defective Catalog Price Data - Modifications - Sealed Bidding,] in solicitations and contracts if the contract amount is expected to exceed \$100,000. *Note A*

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause[s] in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it shall be in writing.

(c) (1) No change.

(2) No change.

(d) No change.

Tab-B

FAR PART 15 CONTRACTING BY NEGOTIATION

SUBPART 15.8 PRICE NEGOTIATION

SECTION 15.804 COST OR PRICING DATA

REVISIONS DISPLAYED AS FOLLOWS:

~~Deleted Portion~~

[Added Portion]

15.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(a) *General.* Except as provided in paragraphs (b) and (c) below, the contracting officer shall not require submission or certification of cost or pricing data when the contracting officer determines that prices are --

(1) Based on adequate price competition (see paragraph (b) below);

(2) Based on established catalog or market prices of commercial ~~items~~ [products] sold in substantial quantities to the general public (see paragraph (c) below); or

(3) Set by law or regulation (see paragraph (d) below).

(b) *Adequate price competition.* (1) Price competition exists if --

(i) Offers are solicited;

(ii) Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements; and

(iii) These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

(2) If price competition exists, the contracting officer shall presume that it is adequate unless --

Tab C

(i) The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;

(ii) The low offeror has such a decided advantage that it is practically immune from competition; or

(iii) There is a finding, supported by a statement of the facts and approved at a level above the contracting officer, that the lowest price is unreasonable.

(3) A price is "based on" adequate price competition if it results directly from price competition, or if price analysis alone clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or substantially the same items [products] purchased in comparable quantities, terms, and conditions under contracts that resulted from adequate price competition.

(c) Established catalog or market prices. [(1) Policy. Contracting officers should make greater use of components, systems, and services available from commercial sources, when such products and services meet Government needs, rather than relying on excessively rigid military specifications and standards. Increased use of commercial products results in significant savings in research and development costs, decreases procurement lead time, increases competition, and eliminates unnecessary government oversight.

*Note
B*

(2) Preference for price analysis. In furthering the policy favoring the procurement of commercial products to the maximum practicable extent, contracting officers shall rely on price analysis techniques to the maximum extent possible in negotiations. Price analysis is preferred because it is most analogous to commercial-style procurement procedures primarily used to

*Note
C*

acquire such products in the private sector; is the least burdensome and most cost effective method of determining price reasonableness; in many situations, price analysis is more accurate in assessing value than cost analysis; and encourages more companies to offer products to the Government, thereby increasing the competitiveness of these procurements.

(3) Exemption.] A proposal is exempt from the requirement for submission of certified cost or pricing data if the prices are, or are based on, established catalog or established market prices of commercial items ^{services} [products] sold in substantial quantities to the general public.

[Additionally,] ~~in~~ order to qualify for this exemption, the terms of the proposed purchase, such as quantity and delivery requirements, should be sufficiently similar to those of the commercial sales that the catalog or market price will be fair and reasonable[, or the differences can be determined and assigned a value for purposes of price analysis.]

Note
D

~~(i)~~ [(i)] "Established catalog prices" must be recorded in a form regularly maintained by the manufacturer or vendor [and which may be modified by adjustment factors]. This form may be a catalog, price list, schedule, [or machine readable media such as disk, tape, etc.] or other verifiable and established record. The record must ~~(i)~~ [(A)] be published or otherwise available for customer inspection[, and ~~(ii)~~ [(B)] state current or last sales price to a significant number of buyers constituting the general public (see paragraph (5) below)[, and (C) explain applicable adjustment factors and amounts such as provisions for discounts, rebates, etc.]

Note
E

Note
F

~~(2)~~ [(ii)] "Established market prices" are current prices that ~~(i)~~ [(A)] are established in the course of ordinary and usual trade

between buyers and sellers free to bargain and ~~(ii)~~ [(B)] can be substantiated by data from sources independent of the manufacturer or vendor.

~~(3)~~ [(iii)] "Commercial items [products]" are items, supplies or services regularly used for other than [U.S.] Government purposes and sold or traded to the general public in the course of normal business operations.

~~(4)~~ [(iv)] An ~~item~~ [commercial product] is "sold in substantial quantities" only when the quantities regularly sold are sufficient to constitute a real commercial market. Nominal quantities, such as models, samples, prototypes, or experimental units, do not meet this requirement. For services to be sold in substantial quantities, they must be customarily provided by the offeror, using personnel regularly employed and equipment (if any is necessary) regularly maintained solely or principally to provide the services. [For purposes of establishing that the product is sold in substantial quantities, contractors may use orders, shipments, invoices, or actual recorded sales so long as the method used is consistent.] No G

~~(5)~~ [(v)] The "general public" is a significant number of buyers other than ~~the Government or~~ [(i)] affiliates of the offeror; [(ii) direct sales to the U.S. Government and its instrumentalities;] ~~the item involved must not be for~~ [(iii) sales identified for U.S.] Government and user (directly to the U.S. Government prime contractors, or their subcontractors or suppliers at any tier, for use as an end item, or as part of an end item, or as a service, by the U. S. Government), or (iv) ~~For the purpose of this subsection 15.804-3, items acquired for "Government end use" include items acquired for~~ f[F]oreign m[M]ilitary s[S]ales. 76 #

[(vi) A "new" commercial product is a newly introduced or recently improved commercial product for which substantial orders, shipments, etc. to the general public have not yet been achieved; a "modified" commercial product is a commercial product that has been modified to meet some Government-peculiar physical requirement or addition or is otherwise identified differently from its normal commercial counterparts; a "discontinued" commercial product is a commercial product that has ceased being supplied by the manufacturer or vendor to the commercial marketplace in substantial quantities but is still required by the Government.]

*Note
I*

~~+(6)~~[(vii)] A price is "based on" a catalog or market price only if the ~~item~~ [commercial product] being purchased is sufficiently similar to the catalog - or market-priced commercial ~~item~~ [product, including new, modified and discontinued commercial products,] to ensure that any difference in prices can be identified and justified [using price analysis] without resort to cost analysis [in most cases].

~~+(7)~~[(viii)] If [a commercial product, including new, modified and discontinued products,] ~~an item~~ is substantially similar to a commercial ~~item~~ [product] for which there is an established catalog or market price at which substantial quantities are sold to the general public, but the price proposed is not based on this catalog or market price (see subparagraph ~~+(6)~~ [vii] above), the contracting officer ~~may if doing so~~ will ~~result in a fair and reasonable price,~~ limit any requirement for cost or pricing data to those data that pertain to the differences between the ~~items~~ [products]. When the [there is a] difference between the catalog or market price ~~of an item or items~~ and the proposed total contract price [to the Government, the offeror must provide adequate information in the

proposal, such as functional descriptions of both products and quantity price differences so that the contracting officer can establish that the product being purchased is sufficiently similar to another catalog-or market-price commercial product, and the offeror must provide pricing data in sufficient detail for the contracting officer to ensure that any difference in price is identified and justified by use of price analysis.] Note
J
~~is \$100,000 or more, the contracting officer shall require submission of certified cost or pricing data to identify and justify that difference unless an exemption or waiver is granted.~~

~~+(b)+~~[(ix)] Even though there is an established catalog or market price of commercial ~~items~~ [products] sold in substantial quantities to the general public, the contracting officer may require [certified] cost or pricing data [only] if ~~+(i)+~~ [(A)] the contracting officer makes a written finding that the price is not reasonable [or that price reasonableness cannot be determined based upon available data], including the facts upon which the finding is based, and ~~+(ii)+~~ [(B)] the finding is approved at a level above the contracting officer. [However, it should rarely be necessary to exercise this option.]

(d) *Prices set by law or regulation.* A price set by law or regulation is exempt from the requirement for submission of certified cost or pricing data. Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws, are sufficient to establish the price.

(e) *Claiming and granting exemption.* [(1)] To receive an exemption under paragraph (c) or (d) above, when the total proposed amount [of the items considered to be commercial products] exceeds \$100,000[,] and, [if

applying catalog pricing, one or more] ~~more than one catalog item(s) for which an exemption is claimed exceeds \$25,000.~~ [has an extended value of \$50,000 or more,] the offeror must ~~ordinarily claim~~ [submit a written request to the contracting officer.] ~~it on Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data.~~ [Each written request should clearly state that to the best of the offeror's knowledge and belief, the product for which the exemption is claimed meets the requirements of established catalog or market prices set forth in paragraph (c). With every written request,] ~~When an exemption is claimed for more than one item in a proposal,~~ a separate SF 1412 is required for each such [catalog] item exceeding \$25,000 [with an extended value of \$50,000 or more.] ~~except as otherwise provided in the solicitation.~~ [For each catalog item under \$50,000, no SF 1412 is required but the offeror must furnish support to the contracting officer which identifies the applicable catalog, pertinent terms and conditions, and other relevant information].

Note
X

[(2)] The contracting officer may [should] grant an exemption and need not require the submission of [an] SF 1412 when--

[(1)] Placing an order for a product or service which is included in an active GSA Multiple Award Schedule (MAS) contract when acquiring a product or service ~~through such contracts~~ as long as the Schedule is a Federal Supply Service (FSS) or, for automated data processing and telecommunications equipment and services, Information Resources Management Service (IRMS) Schedule contracts, supported by a Certificate of Established Catalog Price. The GSA telephone number listed in the Schedule price list may be used to confirm the issuance within the past two years of a Certificate of Established Price.

Note
L

(A) Contracting officers must not confuse the test of commerciality with the important and separate requirement to perform price analysis, when appropriate. Price analysis is not required on orders placed against FSS Schedule contracts. For IRMS Schedule contracts, guidance in FAR 39 (incorporating and referencing Federal Information Resources Management Regulation (FIRMR) 32 and 40) and DoD Federal Acquisition Regulation Supplement (DFARS) 270 applies. However, for products included on such an FSS or IRMS Schedule contract but not acquired through the Schedule contract, the contracting officer should obtain pricing information when appropriate so that price analysis in accordance with FAR 15.804-3(h) can be performed in order to determine the effect of any material alterations in the terms and conditions.

(B) If the solicitation calls for alterations to or unique combinations of items found on one or more GSA schedules described in (e) (2) (i) above, and the procurement is not awarded on the basis of adequate price competition, then the price differential due to the alterations or unique combining of functions must be justified;]

~~(i)~~ [(ii)] The Government has acted favorably on an exemption claim for the same item [product] or similar items [products] within the past [two] year[s]. In that case, ~~except as otherwise directed by the contracting officer,~~ the [contracting officer may require the] offeror may [to] furnish a copy of the prior claim and related Government action [or the applicable Government supply schedule catalog]. The offeror must also submit a statement to the effect that to its knowledge since the prior submission, except as expressly set forth in the statement, there have been no [significant] changes in the catalog price or discounts, volume of

actual sales, or ~~[and]~~ the ratio of sales for [U.S.] Government end use to
[total] sales in ~~other categories~~ which [has not risen above 65 percent, *Note*
and any change which has occurred] would [not] cause a cumulative change in *M*
[offered] price [of the catalog item] exceeding ~~\$25,000~~ [\$50,000 since the
prior submission. An exemption to an SF 1412 does not relieve the Con-
tracting Officer of determining reasonableness of price on the current
purchase;]

~~(2)~~ [(iii)] Special arrangements for the submission of exemp-
tion claims have been made in anticipation of repetitive acquisitions of
catalog items; or

~~(3)~~ [(iv)] There is evidence, before solicitation, that the
item [product] has an acceptable established catalog or market price or a
price set by law or regulation. Evidence may include ~~(i)~~ [(A)] recent
submissions by offerors or ~~(ii)~~ [(B) be based on] the contracting officer's
knowledge of market conditions, [or] prevailing prices[:], or sources.

[(v) When alternate procedures for highly commercial companies are
used (see paragraph (f) (6) below).]

(f) Verification. (1) When ~~a prospective contractor~~ [an offeror]
requests exemption from submission of certified cost or pricing data, the
contracting officer shall ensure that applicable criteria in either
paragraph (c) or (d) above, as appropriate, are satisfied before issuing
the exemption.

(2) [The] SF 1412 lists three categories of sales related to the
established catalog price of a commercial item [product] sold in substan-
tial quantities to the general public:

A, Sales to the U.S. Government ~~or to contractors for U.S. Government use~~; [and its instrumentalities; excluding sales based on adequate price competition, including sales from a GSA Multiple Award Schedule contracts]

Note
N

B, Sales at catalog price [or established discount] to the general public [including sales to the Government based on adequate price competition and sales made from a GSA Multiple Award Schedule as described in (e) (2) (i) above;] and

C, Sales to the general public at other than catalog price [or established discount.

It is not intended that all sales which deviate from the vendor's standard terms and conditions be reflected as Category C. Instead, Category C should include only sales at discounts that are not reasonably traceable to the catalog item. Sales of non-catalog products that were previously exempted on the "based on" approach under 15.804-3(b) (3) should not be included as part of the catalog item sales for any category. Sales to foreign governments (other than FMS) or sales to affiliates of the offeror are not to be included in either Category A, B, or C.] Although "substantial quantities" cannot be precisely defined (see subparagraph (c)-(4)[iv] above), the following [quantitative] guidelines are provided for ~~determining whether exemption claims submitted under the catalog price provision of SF 1412 meet the "substantial quantities" criterion~~ [to assist the contracting officer's assessment]:

Note
O

NEW

(i) Sales to the general public ~~are normally regarded~~ [should be presumed] as substantial if [(1) GSA Multiple Award Schedule contracts comprise no more than 75 percent of Category B]; ~~(A)~~ [(2)] Category B and C

sales are not negligible in themselves and compromise at least 55 [35] percent of total sales of the item [product] and (B) [(3)] Category B sales comprise at least 75 percent of the total of Category B and C sales. Note
P

~~(ii) Sales to the general public are rarely considered substantial enough to grant an exemption if (A) Category B and C sales comprise less than 35 percent of total sales of the item or (B) Category B sales comprise less than 55 percent of the total of Category B and C sales.~~

~~(iii)~~ (ii) When percentages fall between [below] those [stated] above, the contracting officer should analyze the individual situation in order to determine whether or not an exemption is justified.

[(3) The contracting officer's application of quantitative guidelines should be combined with a qualitative assessment which addresses factors such as the following: Note
Q

(i) The differences in terms and conditions of Category B and Category C sales and their relationship to the offeror's established commercial catalog price;

(ii) If a discontinued or reduced-in-volume commercial product, sales of successor products or previous exemptions approved by a contracting officer; or

(iii) If a new commercial product, actual and projected sales of the catalog product.

(4) If an offeror's claim includes a few catalog products that do not satisfy the exemption criteria, the contracting officer may still grant an exemption provided that (i) the products not considered to be commercial products total less than \$100,000 or 10 percent of the dollar value being offered on the basis of established catalog price, whichever is greater. Note
R

and (ii) a price analysis clearly demonstrates the prices to be reasonable.]

(3) [(5)] The contracting officer may verify or obtain verification (including audit or contract administration assistance) of the submitted data pertaining to catalog or market prices or prices set by law or regulation. [The contracting officer should obtain such verification of the submitted data pertaining to catalog prices where the total catalog exemption amount exceeds \$1,000,000. The contracting officer may waive this review with adequate justification and when such justification is included in the contract file.] Access to the prospective contractor's records [regardless of form] is limited to access to the facts bearing directly on the exemption claimed [and pricing data provided]. It does not extend to cost--[or] profit--[records] or other [similar] data relevant solely to the [contractor's determination of the prices to be offered in the catalog.] ~~reasonableness of the catalog or proposed price.~~

Note
S

[(6) Alternate procedures for highly commercial companies. When total corporation commercial sales are 90 percent or more of total corporation sales and commercial sales of the division or unit making the sale are 50 percent or more of total division sales, the following procedures are authorized for contracts not expected to exceed a dollar threshold of \$1,000,000:

Note
T

(i) The contractor certifies that to the best of his knowledge and belief the price(s) offered are no higher than the lowest price charged any end user customer under similar terms, conditions and quantities (see 52.215xxx);

[Signature]

(ii) The prices offered were developed during the most recent regular monthly, quarterly, or other longer period for which sales data are reasonably available, (or provide a written justification for the differences); and

(iii) A price reduction clause is included in the contract (see 52.214-30, 52.215-27 and 28).

(iv) When alternative procedures in (i) - (iii) above are used, the contracting officer may rely on the certification as evidence that the price is fair and reasonable unless the contracting officer has information which demonstrates the prices offered are unreasonable. However, if the contracting officer learns or suspects that any data furnished for a catalog item are or were defective, the contracting officer should request an audit to evaluate the accuracy, completeness and currency of the data. The right to audit is ensured by including in the contract the clauses set forth in 52.214-26 Audit - Sealed Bidding, and 52.215-2 Audit-Negotiation which is prescribed in 15.106-2(b). If the audit reveals that the contract price was increased by a significant amount because the data provided by the contractor were defective, and if that data were relied upon by the contracting officer to evaluate the reasonableness of the contract price, then the contract price shall be appropriately reduced.

The entitlement to a price reduction is ensured by including in the contract one of the clauses prescribed in 15.804-8 and set forth at 52.214-30, Price Reduction for Defective Catalog Price Data - Modifications - Sealed Bidding; 52.215-27, Price Reduction for Defective Catalog Price Data; and 52.215-28, Price Reduction for Defective Catalog Price Data - Modifications.]

(g) [~~Contracting officer exemption for substantial compliance.~~] ~~Individual or class exemptions.~~ The ~~chief of the~~ contracting office[r] may authorize [grant an] individual or class exemptions ~~for exceptional cases~~ when ~~the contracting officer recommends that an exemption should be made,~~ [substantial compliance exists,] even though the case does not strictly meet all the criteria for catalog - or market-price exemption [up to a dollar threshold of \$1,000,000. The Chief of the Purchasing Office may grant such exemption for contracts expected to exceed \$1,000,000]. The quantity and prices of actual commercial sales compared with [the quantity and] prices offered to the Government, and price relationships as influenced by prevailing trade practices, are the important factors for consideration. The Government's need and the prospective contractor's resistance are not appropriate considerations [for granting an exemption].

Note
4

(h) Price analysis. Even though an ~~item~~ [commercial product] qualifies for exemption from the requirement for submission of certified cost or pricing data, the contracting officer shall make [perform] a price analysis to determine the reasonableness of the price and any need for further negotiation. Unless information is available from Government sources, it may be necessary to obtain from the prospective contractor information such as that regarding --

(1) The supplier's marketing system (e.g., use of jobbers, brokers, sales agencies, or distributors);

(2) The services normally provided commercial purchasers (e.g., engineering, financing, or advertising or promotion);

(3) Normal quantity per order; and

(4) Annual volume of sales to largest [comparably situated] customers[, under similar terms and conditions;

(5) Comparative prices for products and associated services; and

(6) Other terms and conditions comparators.]

(i) Waiver for exceptional cases. The agency head (or, if the contract is with a foreign government or agency, the head of the contracting activity) may, in exceptional cases, waive the requirement for submission of certified cost or pricing data [when an exemption cannot be granted]. The authorization for the waiver and the reasons for granting it [the waiver along with a description of the attempts made to secure the data and the levels within the agency at which such attempts were made,] shall be in writing. The agency head may delegate this authority. When the agency head or designee has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to make available cost or pricing data for purposes of 15.804-2(a)(1)(iii). Consequently, award of any lower-tier subcontract expected to exceed \$100,000 requires the submission of certified cost or pricing data unless exempt or waived under this subsection 15.804-3.

15.804-4 thru 15.804-7 No change.

15.804-8 Contract clauses

(a)-(d) NO CHANGE.

[(e) Price Reduction for Defective Catalog Price Data. The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-27, Price Reduction for Defective Catalog Price Data, in solicitations and contracts expected to exceed \$100,000 when an exemption

From the requirement to submit certified cost or pricing data for a catalog item will be or has been required when following the alternate procedures for highly commercial items certification requirement (15.804-3(f)(6)).

(f) Price Reduction for Defective Catalog Price Data - Modifications. The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-28, Price Reduction for Defective Catalog Price Data - Modifications, in solicitations and contracts expected to exceed \$100,000 when (1) it is contemplated that an exemption from the requirement to submit certified cost or pricing data for a catalog item will be required for the pricing of contract modifications when following the alternate procedures for highly commercial items certification requirement, and (2) the clause prescribed in paragraph (e) of this subsection has not been included.]

DFARS PART 15 CONTRACTING BY NEGOTIATION

DFARS SUBPART 15.6 PRICE NEGOTIATION

DFARS SECTION 15.804 COST OR PRICING DATA

15.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(a)-(b) NO CHANGE

(c) (6) ~~In addition, cost or pricing data may be requested, if necessary, where there is such a disparity between the quantity being acquired and the quantity for which there is such a catalog or market price that pricing cannot be accomplished by comparing the two.~~

(i) [(j)] No change in coverage, just in paragraph lettering.

FAR PART 31 CONTRACT COST PRINCIPLES AND PROCEDURES
SUBPART 31.2 CONTRACTS WITH COMMERCIAL ORGANIZATIONS
SECTION 31.205 SELECTED COSTS

REVISIONS DISPLAYED AS FOLLOWS:

~~Deleted Portion~~

[Added Portion]

31.205-26 MATERIAL COSTS.

(a) - (e) NO CHANGE.

(1) NO CHANGE.

(2) ~~Is the result of [based on] "adequate price competition" [or
the certification of cost or pricing data is waived] in accordance with
15.804[-3.] and is the price at which an award was made to the affiliated
organization after obtaining quotations on an equal basis from such
organization and one or more outside sources that produce the item or its
equivalent in significant quantity.~~

*Note
W*

Tal-E

[52.214-30 Price Reduction for Defective Catalog Price Data - Modification

- Sealed Bidding. ~~(APR-1990)~~

As prescribed in 14.201-7(b), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CATALOG PRICE DATA - MODIFICATION - SEALED
BIDDING ~~(APR-1990)~~ [1989]

(a) This clause applies to any modification to this contract involving aggregate price increases and/or decreases of more than \$100,000 except that this clause does not apply to any modification for which the price is -

(1) Based on certified cost or pricing data;

(2) Based on adequate price competition;

(3) Based on established market prices of commercial items sold in substantial quantities to the general public; or

(4) Set by law or regulation.

(b) If any price negotiated in connection with any modification under this clause, was increased by any significant amount because the Government relied on a submission by the Contractor, subcontractor, or prospective subcontractor, when using Alternate Procedures in *delete* 15.804-3(f)(6), of price support data and data in support of a claim, in any form, for exemption from submission of certified cost or pricing data for a catalog item that were not complete, accurate, and current as of the date of its submission, then the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price

reduction is limited to that resulting from defects in data relating to modifications when this clause applies.

(End of clause).]

52.215-2 Audit - Negotiation.

As prescribed in 15.106-2(b), insert the following clause:

AUDIT - NEGOTIATION ~~(APR-1980)~~ [1989]

(a) NO CHANGE.

(b) NO CHANGE.

[(c) Data related to established catalog prices. If, in connection with pricing this contract or any modification to this contract, the Contractor has submitted data, when using Alternate Procedures in 15.804-3(f)(6), to support price negotiations and a claim, in any form, for an exemption from submission of certified cost or pricing data for a catalog item, the Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit the contractor's records (regardless of form) of sales and related documents, including contract terms and conditions, necessary to determine the accuracy, completeness and currency of the price support data and exemption data. Access does not extend to cost or profit information or other data relevant solely to the contractor's determination of the prices to be offered in the catalog.]

~~(c)~~[d] NO CHANGE.

~~(d)~~[e] Availability. The Contractor shall make available at its office at all reasonable times the materials described in paragraphs (a)[,] and (b)[and (c)] above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation, or for any longer period required by statute or by other clauses of this contract. In addition -

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes Clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are disposed of.

~~(e)~~ [(f)] The Contractor shall insert a clause containing all the terms of this clause, including this paragraph ~~(e)~~[(f)], in all subcontracts over ~~\$25,000~~[\$50,000] under this contract, altering the clause only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

[52.215-27 Price Reduction for Defective Catalog Price Data. As prescribed in 15.804-8(e), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CATALOG PRICE DATA [1989]

If any price negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because the Government relied on a submission by the Contractor, subcontractor, or prospective subcontractor, when using Alternate Procedures in 15.804-3(f) (6), of price support data and data in support of a claim, in any form, for an exemption from submission of certified cost or pricing data for a catalog item (see FAR 15.804-3) that were not complete, accurate, and current as of the date of its submission, then the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

(End of clause)]

done

[52.215-28 Price Reduction for Defective Catalog Price Data - Modifications
As prescribed in 15.804-8(f), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CATALOG PRICE DATA - MODIFICATIONS

(APR 1900) [1989]

(a) This clause applies to any modification to this contract involving a pricing adjustment expected to exceed \$100,000, except that this clause does not apply to any modification for which the price is -

- (1) Based on certified cost or pricing data;
- (2) Based on adequate price competition;
- (3) Based on established market prices of commercial items sold in substantial quantities to the general public; or
- (4) Set by law or regulation.

[(b) If any price, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because the Government relied on a submission by the Contractor, subcontractor, or prospective subcontractor, when using Alternate Procedures in 15.804-3(f) (6), of price support and data in support of a claim, in any form, for exemption from submission of certified cost or pricing data for a catalog item (see FAR 15.804-3) that were not complete, accurate, and current as of the date of its submission, then the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications when this clause applies.

(End of clause).]

[52.215xxx Certification For Use in Alternate Procedure for Commercial
Pricing

Unless otherwise identified, by submission of this offer/proposal, and using the Alternate Procedure in 15.804-3(f) (6), the Offeror/Contractor certifies that to the best of his/her knowledge and belief, all data provided on attachments submitted are current, accurate, and complete, and are for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The Offeror/Contractor further certifies that the price(s) offered are no higher than the lowest price charged any U.S. general public customer in the same customer class under similar terms, conditions, and quantities, during the most recent regular monthly, quarterly or other longer period for which sales data are reasonably available.

The Offeror/Contractor also certifies that, except as stated in an attachment, a similar claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Offeror/Contractor grants the Contracting Officer or representatives of the Contracting Officer who are employees of the United States Government the right to examine those books, records, documents, and other types of factual matter, regardless of form, that will permit verification of the claim and an adequate evaluation of the proposed price. Access does not extend to cost or profit information or other data relevant solely to the contractor's determination of the prices to be offered in the catalog.

(signature)]

T. W. G.

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		FORM APPROVED OMB NO. 3090-0116
1. OFFEROR (Name, address, ZIP Code)		3. SOLICITATION NO.
		4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED	5. QUANTITY	6. TOTAL AMOUNT PROPOSED FOR ITEM \$

By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable.

SECTION I - CATALOG PRICE (See instructions for items 7 thru 11 on reverse.)

7. CATALOG IDENTIFICATION AND DATE		8. SALES PERIOD COVERED FROM _____ TO _____	
9. CATEGORIES OF SALES	TOTAL UNITS SOLD *	10. REMARKS	
a. U.S. Government sales			
b. Sales at catalog price to general public			
c. Other sales to general public			

* If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10, REMARKS. Continue on a separate sheet, if necessary.

11. LIST THREE SALES OF THE ITEM OFFERED			
SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE/UNIT
1. <input type="checkbox"/> B <input type="checkbox"/> C			\$
2. <input type="checkbox"/> B <input type="checkbox"/> C			\$
3. <input type="checkbox"/> B <input type="checkbox"/> C			\$

SECTION II - MARKET PRICE (See instructions for item 12 on reverse.)

12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT, AND APPLICABLE DISCOUNTS.

SECTION III - LAW OR REGULATION (See instructions for item 13 on reverse.)

13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED

REPRESENTATION (See instructions for item 14 on reverse.)

The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.

14. TYPED NAME, TITLE, AND FIRM	15. SIGNATURE	16. DATE OF SUBMISSION

INSTRUCTIONS TO OFFERORS SUBMITTING CLAIM FOR EXEMPTION
FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA

[The offeror may use the SF 1412 to submit a claim for exemption from the submission of certified cost or pricing data. The offeror shall attach all supporting information described below to the SF 1412.

Complete Section I, Items 7 through 11, if you are proposing a catalog price. Complete Section II, Item 12, if you are proposing a market price. Complete Section III, Item 13, if you are proposing a price set by law or regulation.]

Item 7. Attach a copy of the catalog, or the appropriate pages covering price and published [established] discounts, or a statement that the catalog is on file in the buying office to which this proposal is being made. [Provide a copy of all discount policies (published or unpublished) applicable to each class of customer including affiliates, dealers, Original Equipment Manufacturers, other federal agencies, state or local governments, etc. These discount policies include: rebates, discounts applicable to multiple quantities or cumulative orders, and volume discounts applicable to the combination of products or services into one order. Identify the customer class which is proposed for this procurement and state the reasons for selecting that customer class.] Catalog price is a price that is included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, [as modified by any discount factors,] is either published or otherwise available for

inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. To justify a catalog price exemption for the Government item, the catalog item must be identical or must be so similar in material and design that any price difference or its absence can be evaluated solely by price analysis (see FAR 15.805-2). In the latter case, a statement must be attached identifying the specific differences and explaining, by price analysis of the differences, how the proposed price is derived from the catalog price.

Item 8. This period should include the most recent regular monthly, quarterly, or other [longer] period for which sales data are reasonably available and should extend back only far enough to provide a total period representative of average sales. You may also attach sales data for a prior representative period if for any reason recent sales are abnormal and the prior period is sufficiently recent (not more than 2 years preceding) to support the proposed price for the Government item. In the latter case, you must explain, by price analysis only, how the proposed price is derived from the catalog sales for the prior period.

Item 9. (a) Include in Category A all [U.S. Government] sales of the catalog item[. This includes sales: (i)] ~~(a)~~, directly to the U.S. Government and its instrumentalities[, and ~~(b)~~ (ii)] for U.S. Government use (sales directly to U.S. Government prime contractors, or their subcontractor or suppliers at any tier, for use as an end item, or as part of an end item, by the U.S. Government)[, and (iii) for Foreign Military Sales customers. Exclude sales based on adequate price competition, including

sales from GSA Multiple Award Schedule contracts which meet applicable criteria].

(b) Include in Category B all sales [to the general public] of the catalog item made strictly at the catalog price, less [or at established discounts to the catalog price which can be verified as conforming to the offeror's standard discount policy (whether or not published.) only published discounts, ~~to the general public (i.e. catalog price sales other than those~~ [Include sales to the Government based on adequate price competition and sales made from a GSA Multiple Award Schedule which meet applicable criteria. Do not include catalog price sales] (i) to affiliates of the offeror[,] or (ii) [to foreign governments, (iii) to contractors and subcontractors for U.S. Government use, (or (iv) sales already] included in Category A (Instruction 9(a)).

(c) Include in Category C all sales to the general public that were not made strictly at the catalog price or [that were not made at established discounts to the catalog price which can be verified as conforming to the offeror's standard discount policy (whether or not published) or] that were made at special discounts ~~or discount rates not published in the catalog.~~

[Do not include sales (i) to affiliates of the offeror, (ii) to foreign governments or (iii) already included in Category A (Instruction 9(a).]

Item 11. ~~On line a, insert information on the lowest price at which Category B or C sales of the offered item was made during the period, regardless of quantity.~~

~~On lines b. and c. insert sales information in the following manner.~~

[If Category B (catalog) sales are less than Category C (other than catalog) sales, on lines 1., 2., and 3. provide three price examples at

which Category B or C sales of the offered item were made during a recent representative period in the following manner. The period selected may be shorter than the period used to furnish sales information in Block 9.]

~~a. Give the lowest price Category C sales of comparable quantities. If there were no sales of comparable quantities, then give~~

[Give the three lowest prices of Category B sales made under comparable quantities, terms and conditions. If three such pricing examples are not available, then complete the remainder of Block 11 with]

~~b. The lowest price Category C sales of quantities most nearly the quantity being offered. If there were no sales of Category C, then give~~

[The lowest price of Category B sales for quantities, terms, and conditions nearest to that being offered. If Item 11 remains incomplete, then give]

~~c. The lowest price Category B sales of comparable quantities. If there were not sales of comparable quantities, then give~~

[The lowest price of Category C sales for quantities, terms, and conditions nearest to that being offered. If Item 11 remains incomplete, then give]

~~d. The lowest price Category B sales of quantities most nearly the quantity being offered.~~

[The lowest price of Category C sales for quantities, terms, and conditions nearest to that being offered.]

Attach a complete explanation ~~(i) if you, during the period covered, offered special discounts not included in the catalog, or (ii) if the price proposed is not the lowest price at which a sale was made to any customer during that period for like items[.] and comparable quantities.~~

Item 12. Market price is a current price, established in the usual and ordinary course of trade between buyers and sellers free to bargain, that

can be substantiated from sources independent of the manufacturer or vendor. There must be a sufficient number of commercial buyers so that their purchases establish an ascertainable current market price for the item or service. The nature of this market should be described. To justify a market-price exemption, the item or service being purchased must be identical to the commercial item or service or must be so similar in material and design (for supplies) or in work and facilities (for services) that any price difference or its absence can be evaluated solely by price analysis (see FAR 15.805-2). In the latter case, a statement must be attached identifying the specific differences and explaining, by price analysis of the differences, how the proposed price is derived from the market price.

Item 13. Identify the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

Item 14. Insert the name, title, and firm of the person authorized by the offeror to sign this form.

A P P E N D I X B

Senate Bill S.2440

Defense Management Improvement Act

April 5, 1990

provements in defense acquisition, military and civilian personnel management, and the management of real property. Enactment of this legislation will increase efficiency and effectiveness of our activities and reduce the size and cost of our defense structure. It will remove many legal road blocks that currently inhibit sound management of the Department. Enactment of the legislation will help the Department perform its crucial national security mission and over time realize substantial savings for America's taxpayers.

I urge prompt enactment of this legislation in this session of Congress.

Sincerely,

DICK CHENEY.

SECTION-BY-SECTION ANALYSIS

TITLE I—MILITARY PERSONNEL

Sec. 101

Amends 37 U.S.C. § 308 to allow the Secretary of Defense to terminate Selective Reenlistment Bonus (SRB) payments in cases where a member who is receiving such payments does not complete the term of enlistment or ceases to perform in the military specialty for which the bonus was paid.

Under current regulations, an SRB recipient who separates under hardship or dependency reasons receives the SRB balance upon separation regardless of time served in the SRB skill. Additionally, persons who are reclassified or reassigned out of the SRB skill for reasons beyond their control either separate and receive the SRB balance or remain and continue receiving SRB anniversary payments.

This section would prevent SRB recipients who separate under hardship/dependency from receiving the unearned portions of their reenlistment bonus upon separation. It would also include other not-for-cause reclassification such as humanitarian reassignment to other duties, loss of security clearance through no fault of the member, injury, illness or impairment not the result of the member's misconduct, pregnancy and failure to attain a higher standard of technical qualification required for effective performance in the military specialty after payment of the bonus. This provision would not suspend any SRB payments from members reclassified as a result of service-directed employment in another specialty to meet Continental United States (CONUS) and overseas rotation, sea and shore rotation, or other mission essential requirements, since these actions are used exclusively to meet the needs of the military service and suspending the full SRB contract would unfairly penalize service members and diminish the integrity of the SRB program.

Sec. 102

Repeals 37 U.S.C. § 308(g) and 308(h)(1) thereby providing the Department of Defense with permanent authority to pay bonuses under the Enlistment Bonus (EB) and Selective Reenlistment Bonus (SRB) programs.

Under the present statutes, authority to pay EB and SRB expires on September 30, 1992. This date coincides with the end of fiscal year 1992. Therefore, Congress must provide for continued authority in the fiscal year 1993 Defense Authorization Act. If an Authorization Act is not passed by Congress and signed by the President prior to the beginning of fiscal year 1992, the services will be unable to approve new contracts for enlistment or reenlistment into critical skills until such time as the new Authorization is enacted.

Sec. 103

Amends 10 U.S.C. § 521 by adding a new sentence at the end of subsection (a). The

THE SECRETARY OF DEFENSE

Washington, DC, April 5, 1990.

HON. DAN QUAYLE,

President of the Senate, Washington, DC

DEAR MR. PRESIDENT: I have the honor to

transmit for the consideration of the Sen-

ate the Administration's proposed

Defense Management Improvement Act. This

legislation further implements the recom-

mendations of the Packard Commission and

my July 1989 Report to the President on

Defense Management. The legislation is an

important element of the President's Pro-

gram and will substantially strengthen the

Department's ability to use available re-

sources effectively.

Shortly after his inauguration, the Pres-

ident announced his intention to implement

the Packard Commission recommendations.

When he asked me to become Secretary of

Defense, he made it clear that the effort to

strengthen and streamline the management

of the Department of Defense was one of

our top priorities. This legislative initiative

is a significant step forward in reaching this

goal.

The "Defense Management Improvement

Act" provides a statutory foundation for im-

amendment clarifies the authority of the Secretary of Defense to use the increase in officer strength authorized under 10 U.S.C. § 115(b)(1)(E) (as amended by section 204 of the bill) when determining the total number of officers authorized to be on active duty in an armed force at the end of a fiscal year, provided that the resulting number in an armed force does not exceed the number otherwise directed by Congress for that armed force, by more than one-half of one percent.

Section 104

Amends 10 U.S.C. § 115b to allow the Secretary of Defense to shift authorized end strength and reprogram funds between active and reserve components of each of the Armed Forces so that the Secretary of Defense has full use of authorized end strength and corresponding funds for all components of the Armed Forces when responding to contingency operations or force restructure. It would allow smooth transfer of units from active to reserve components as part of force restructure and provide the ability to work within congressionally authorized total force fiscal year end strength limits to conduct contingency operations directed by the President.

Section 105

Substitutes a new 10 U.S.C. § 630 that would retain existing provisions of section 630 that allow for discharge of regular officers with less than five years active commissioned service, but adds a new provision, that would permit the Secretary of the military department concerned to involuntarily release from active duty and transfer to the Ready Reserve any regular officer with less than eight years of active commissioned service, who has remaining obligated service, whether that obligation is pursuant to law (10 U.S.C. § 651) or service regulations. Assuming the officer is otherwise qualified, he or she shall be tendered a reserve appointment. Any officer who declines the tendered reserve appointment will be transferred to the reserve component in an enlisted status under existing provisions of law.

Existing statute provides no option, short of discharge, for the Secretary concerned to direct the release of a regular officer from active duty and to then utilize the officer in the reserve component for any remaining service obligation. The Secretary must discharge a regular officer or retain the officer on active duty, even though the officer's skills may be "excess" to active duty requirements and in short supply in the reserve component.

Subsection (d) of the revised section 630 specifies that this section does not apply to officers separated "for cause" pursuant to Chapter 60, nor to officers in the grade of captain, or lieutenant (senior grade) in the Navy, who are discharged for failure of promotion under section 632 of title 10.

Section 106

Adds 10 U.S.C. § 3583, 5509 and 5593 so as to permit the Secretary of the military department concerned to authorize an officer retired in a grade below the highest grade held on active duty, pursuant to 10 U.S.C. § 1370(a)(2), to retain the rank and insignia of grade of the highest grade in which the officer served on active duty satisfactorily for a period of at least 18 months. An officer who is allowed to retain the rank and insignia of the higher grade pursuant to the authority of this section shall, for all purposes of law other than computation of retired pay, be considered to have retired in that higher grade.

Current law requires that officers selected for promotion to the grade of lieutenant

colonel or commander and above, serve a full three years in grade before being allowed to retire in that pay grade. Officers who voluntarily retire prior to completion of the required time in grade must retire in the next lower grade. Allowing an officer to retire voluntarily at the pay scale applicable to the lower grade, but to retain the insignia of the higher grade and the nonfinancial deference accorded the higher grade in professional associations, would serve to eliminate any stigma, and encourage additional retirements without increasing retirement costs.

Section 107

Authorizes involuntary retirements of regular Navy officers designated for limited duty (LDOs) who are serving in the grades of commander and captain. Under this section, a commander not on a promotion list for captain, would be required to retire upon completion of 35 years of active naval service or the second failure of selection for promotion to the grade of captain, whichever occurred first. A captain would be required to retire upon completion of 38 years of active naval service.

Mandatory retirement of LDO commanders and captains are now governed by the same provisions that apply to non-LDOs in the same grade, 10 U.S.C. § 633 and 634. Those provisions require the retirement of a commander who is not on a promotion list when the officer completes 28 years of active commissioned service and of a captain on completion of 30 years of active commissioned service. In the case of the LDO community, retaining officers until those service points significantly restricts promotion flow points for more junior officers compared to flow points under a system that required separation following the second failure of selection for captain or a shorter term of service.

Section 108

Amends 10 U.S.C. § 611(a) to allow the Secretary of Defense to waive the requirement in existing law to convene a selection board to recommend officers for promotion to captain or lieutenant (senior grade), whenever the determination required by 10 U.S.C. § 622 reveals that the number of officers which should be recommended to meet projected vacancies in the grade and competitive category, is greater than or equal to, the number of officers eligible to be considered by the prospective selection board. Officers in the prospective zone of consideration would be considered for promotion under service regulations.

Also amends 10 U.S.C. § 624(a) to require that the names of officers approved for promotion under the waiver authority of the Secretary of Defense (as described above) be placed on a promotion list for the competitive category in order of seniority consistently with the existing statutory requirement for officers recommended for promotion by a selection board convened in accordance with 10 U.S.C. § 611(a).

Also amends 10 U.S.C. § 631 to add the provision that an officer who is considered for promotion under the waiver authority specified in subsection 213(a) of the bill, but whose name is not placed on the promotion list as required by subsection 213(b) of the bill, shall be considered to have failed of selection for promotion.

A board to select officers for promotion from lieutenant (junior grade) in the Navy to captain (lieutenant (senior grade) in the Navy) is not appropriate in those competitive categories where constructive service credit is awarded and the promotion process is "fully qualified." Consideration for promotion to this junior grade in some categories (e.g., Chaplains) is

essentially noncompetitive (i.e., "fully qualified") and occurs normally within three to six months of entry on active duty. Allowing the Secretary of Defense the option to utilize a board to select officers for promotion to captain (lieutenant (senior grade) in the Navy) would improve the effectiveness and efficiency of force management for professional branch officers.

Section 109

Authorizes the expenditure of appropriated funds to pay the meal and lodging expenses of members who are directed to reside at a location other than their normal duty location, but within the limits of the duty station. Such duty, performed within the limits of the duty station, does not fall within the provisions of 37 U.S.C. § 404 Code, as the members are not considered away from the permanent duty station. Therefore, the expenses associated with such duty are not reimbursable.

The proposal would amend 37 U.S.C. § 403 by adding a new subsection (b) that would authorize joint travel regulations to permit an entitlement to travel and transportation allowances under 37 U.S.C. § 404 when ordered to perform duty at a location within the normal limits of the duty station but at a location where the member would be away from his or her residence or duty location for a period of time that would require overnight accommodations.

Section 110

Replaces the fixed numerical limits on the number of personnel in pay grades E-8 through E-9 who may be on active duty as of the end of any fiscal year by substituting force structure requirements as adjusted within funding availability in the defense appropriation act or continuing resolution for that fiscal year. Also repeals 10 U.S.C. § 517, which provides the fixed numerical limits.

TITLE II—ACQUISITION

Section 201

Amends 10 U.S.C. § 2308(h) and repeals section 9021 of P.L. 101-165, to eliminate certain requirements that must be met before entering into a multiyear contract. Current law requires that multiyear candidates meet certain criteria prior to forwarding them to Congress for approval. Among these criteria is a requirement that the multiyear achieve a 10 percent savings over current negotiated contracts or over annual contracts. This requirement could result in the Department of Defense missing opportunities to realize significant savings simply because the arbitrary percentage threshold is not met. Section 201 will enable the Department to take greater advantage of potential savings and thereby promote greater program stability.

Section 202

Further the recommendations of the Defense Management Review that the Department of Defense place greater reliance on commercial products and commercial-style procurement practices. This section authorizes the head of an agency to use simplified commercial-style procurement procedures for the acquisition of commercial products. These procedures will place greater emphasis on the use of product descriptions rather than detailed specifications. Procurements using these procedures will be further streamlined by requiring that a product have achieved commercial acceptance in order to compete as a commercial product. However, products that have been supplied under recent or current contracts for the same agency requirements may also be considered if such products otherwise meet the criteria that commercial products must meet and are evaluated on an equal basis

with the commercial products. These procedures will enable contracting officers to avoid using detailed specifications and having to conduct extensive source reviews and product tests and evaluations. This section also will permit selecting products on the basis of the greatest benefit to the agency. This section would make inapplicable to the purchase of commercial products provisions of law that relate generally to source preferences and unique contract requirements if they are not equally applicable to contracts to which the United States Government is not a party. It is not the intent of this section to affect or impair existing authorities with respect to the required use of GSA as a source of supply. These are provisions that frequently prohibit or discourage many sellers of commercial products from competing for Government contracts. Finally, this section would establish in the Department of Defense a three year pilot program at components designated by the Secretary of Defense for the filing of protests by interested parties in connection with the acquisition of commercial products with an official designated to hear protests. During the period of the pilot program, this procedure shall be the sole administrative remedy available to interested parties.

Section 203

Repeals the commercial pricing certification requirement imposed by 10 U.S.C. 2323 (Public Law 98-523) as amended by section 926 of the Defense Acquisition Improvement Act (Public Law 99-500). Section 2323 requires the Department of Defense to obtain a certification from contractors that the Government is receiving the lowest commercial price for spare and repair parts procured using other than competitive procedures. The commercial pricing certification requirement is not cost-effective and its continued use imposes a burden on the procurement process without a beneficial return.

Section 204

Amends 10 U.S.C. 2305 (b)(4) to authorize the Department of Defense to evaluate competitive proposals and award a contract without discussions to the offeror whose proposal represents the greatest benefit to the Government based upon the evaluation factors set out in the solicitation.

The Competition in Contracting Act permits award of a contract without discussions only if, among other requirements, it is demonstrated that award of an initial proposal would result in the lowest overall cost to the Government. Recent OAO cases have interpreted this to mean that award can be made without discussions only to the lowest priced acceptable offeror.

In solicitations where an offeror other than the low offeror clearly provides the best technical proposal at a reasonable price, it is in the Government's best interest to award to that offeror. A round of discussions will not significantly improve the superior proposal, but will only result in unnecessary and potentially multiple requests for best and final offers and additional costs to the offerors and to the Government.

Section 205

Amends title 10, United States Code, and the Federal Property and Administrative Services Act to exempt small purchases from certain socio-economic provisions, and amends various socio-economic statutes to remove specific dollar thresholds in favor of language establishing a uniform threshold for their application at the small purchase threshold in section 2303 of title 10, United States Code or in section 303(c)(2) of the Federal Property and Administrative Services Act of 1949 for agencies other than

those subject to title 10. The Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949 initially authorized small purchase procedures for procurements up to \$1,000. Over the years, these Acts were amended to raise the small purchase threshold to \$2,500, \$10,000, and subsequently \$25,000. Threshold adjustments reflected Congress' recognition of the impact of inflation on low dollar value purchases. Also over the years, Congress enacted legislation, generally outside of the major procurement statutes, which nonetheless imposed significant requirements on government acquisition. These statutes were frequently drafted so as to have little or no application to small purchases setting a "floor" in terms of contract dollar value at the existing statutory "ceiling" for small purchases. Although the "ceiling" for small purchases was regularly adjusted to account for the declining purchasing power of the dollar, the "floors" for applying other statutory requirements did not keep pace. Procedures originally intended to expedite the economic acquisition of low dollar value items and services are now subject to a wide array of relatively complex and costly administrative steps, solicitation provisions, and contract clauses.

Section 206

Amends section 26 of the Office of Federal Procurement Policy Act, as amended by P.L. 100-679 (41 U.S.C. 421), to permit designation in the Department of Defense of an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition to serve on and attend meetings of the Federal Acquisition Regulatory Council. By law, only the USD(A) may be designated by the Secretary of Defense to serve on the FAR Council. This places the USD(A) in the unworkable position of having to attend all sessions of the Federal Acquisition Regulatory Council. With the other extensive responsibilities of the USD(A), this may result in DoD not being represented at a large number of Council meetings and could serve to unreasonably delay the issuance of needed policies and procedures. The other agency members of the FAR Council are not faced with a similar problem since those agencies were authorized to designate their Procurement Executives or serve on the Council.

Section 207

Amends 10 U.S.C. 2438 to require a cost benefit analysis before undertaking dual sourcing for major programs and subsystems. Currently, section 2438 assumes that dual sourcing is appropriate for most major systems and subsystems and requires detailed justification when dual sourcing is not considered appropriate. Dual sourcing decisions should be made on a case-by-case basis, with detailed consideration of cost and other factors. Any unit cost savings (times the number of units to be procured competitively) should be sufficient to amortize the costs associated with dual sourcing. These costs include facility costs, shorter production runs, lower production rates, duplicative qualification costs, "educational buys," and the costs associated with technology transfer. This amendment recognizes the fact that the dual sourcing decision is a complex one and that dual sourcing is not suited to every major program. The change retains a preference for dual sourcing, but allows the Secretary of Defense more flexibility in reaching a decision on this issue.

Section 208

Revises the threshold for the mandatory submission of certified cost or pricing data, established under the Truth in Negotiations

Act, from \$100,000 to \$500,000 (10 U.S.C. 2308a). Submission of certified cost and pricing data is required for contracts, modifications, and subcontracts, over the stated threshold, except when the price agreed upon is based on: adequate price competition; established catalog or market prices of commercial items, or, law or regulation. The current threshold should be escalated to reflect inflation. In addition, raising the threshold will significantly reduce the paperwork burden on the government and on contractors, and will be consistent with the threshold for Cost Accounting Standards, that was raised to \$500,000 in 1988.

Section 209

Repeals the exception to 10 U.S.C. 7299a(d) that requires that short term repair work (6 months or less) on ships assigned to the Naval Reserve Force that are homeported on the West Coast be competed without regard to area. This is an exception to the general provisions of section 7299a(d) that permit limited area for competition if adequate competition is available in that area. The proposal would repeal the exception to the general provision thereby affording the Secretary of the Navy the authority to permit short-term repairs to be solicited only in the homeport area unless inadequate competition exists, in which case the solicitation would be expanded to include the next adjacent homeport area.

Section 210

Repeals 10 U.S.C. 7313 that requires that the Secretary of the Navy ensure, prior to award of a project for repair, alteration, overhaul, or conversion of a naval vessel following competition between public and private shipyards, that the certain criteria must be met. The bid of the public shipyard must include (a) the full cost to the United States associated with future retirement benefits of civilian employees of that shipyard consistent with computation methodology established by the Office of Management and Budget Circular A-76 and (b) in a case in which equal access to the Navy supply system is not allowed to public and private shipyards, a pro rata share of the costs to the Navy supply system. Costs applicable to oversight of the contract by the appropriate Navy Supervisor of Shipbuilding, Conversion and Repair must be added to the bid of any private shipyard for the purpose of comparability analysis. The award is required to be made using the results of the comparability analysis. Repeal of the provision would allow the Navy to follow the intricate methodology worked out with Congress since the inception of the public/private competition program.

Section 211

Repeals a provision of the Department of Defense Appropriations Act, 1990 which provides that the Department of the Navy may use no funds in the fiscal year 1990 Appropriations Act to enter into contracts for the overhaul, repair or maintenance of any naval vessel homeported on the West Coast of the United States which includes charges for "interport differential" as an evaluation factor for award. Repeal of the provision would make 10 U.S.C. 7399a(c) the controlling provision. This section requires the Secretary of the Navy, in determining the cost or price of work to be performed in an area outside the homeport of the vessel, to consider foreseeable costs of moving the vessel and its crew from the homeport to the outside and from the outside area back to the homeport of the vessel after completion of the contract.

Section 212

Repeals 10 U.S.C. 2164 which restricts the acquisition of "core logistics functions" by commercial contractors. This provision of law is no longer necessary as adequate procedures have been developed by the military services and are in place to determine the applicability of performing depot maintenance functions organically or by contract.

Section 213

Repeals 10 U.S.C. 2405 and 10 U.S.C. 2466, pertaining to the performance by contractors of so-called "commercial activities" for the Government. Section 2465 bars the use of appropriated funds to acquire fire fighting and security guard services for military installation. Section 2466, as recently by section 313 of the 1990 National Defense Authorization Act, bars the Army and Air Force from compelling depot maintenance tasks among Government activities and private contractors.

Section 214

Creates an exception to the prohibition in 1 U.S.C. 232 (e)(1)(M) regarding payment of the costs of severance pay paid to foreign nationals employed by Government service contractors outside the United States. Currently such costs are allowable to the extent that they "exceed the amount in the industry involved under the customary or prevailing practice for firms in that industry performing similar services in the United States."

The proposed exception in the nature of a proviso at the end of the subparagraph would make severance pay paid in orders to comply with local host nation laws governing such payments allowable notwithstanding that such payments are out of line with the compensation practice of comparable United States firms.

Subsection (b) of section 214 would make clear that the proviso added by this amendment applies not only to contracts entered into after the date of the legislation's enactment, but also to contracts entered into prior to the date of enactment, provided in all events that the costs were incurred by the contractor after the date of enactment.

Section 215

Amends 10 U.S.C. 2208(b) to authorize armaments and other Army industrial activities to sell supplies, services, or work outside the Department of Defense if the articles to be sold may be incorporated into items to be sold or used in a contract with, or for the purposes of soliciting a contract with, a friendly foreign government, or will be used in commercial expendable launch vehicles.

Section 216

Authorizes the military departments and the defense agencies to require contractors to print technical data rather than requiring them to deliver the data as directed by the Government Printing Office for printing. This will reduce the cost of defense procurement of technical data, improve defense data management procedures, and remove one barrier to the use of commercial products by the Department of Defense.

Section 217

Adds a new section 2332 to title 1, United States Code. Subsection (a) would authorize the Secretary of Defense to conduct a pilot program for up to six major defense programs in order to test methods to increase the effectiveness and efficiency of the acquisition process. This section would also permit the Secretary to waive for purposes of the pilot program any provision of law or regulations that he is not otherwise entitled to waive, that is not equally applicable to contracts to which the United States government is not a party and that:

- (1) prescribes procedures for the procurement of supplies or services;
- (2) prescribes preferences to be given to sources or mandates particular sources;
- (3) prescribes requirements to be imposed on contractors that relate to the contractor's performance of the contract, or that
- (4) prescribe requirements governing cost allowability, cost accounting, or auditing, except for provisions intended to assure financial integrity for the conduct of government programs. "Assuring financial integrity" involves the determination that the government use of funds is accurately identified and reported.

Subsection (a) also would permit the Secretary to waive any provision of law or regulation that he is not otherwise authorized to waive that prescribes requirements for the management, testing, evaluation of, or reporting on, a program.

Subsection (b) would permit the Secretary to designate up to six major defense acquisition programs, as defined in 10 U.S.C. 2430, for participation in the pilot program.

Subsection (c) would require the Secretary to promulgate regulations to implement the pilot program within 270 days after the date of enactment of this law.

Subsection (d) would require the Secretary of Defense to provide the Congress notice of his intention to designate a major defense acquisition program for inclusion in the pilot program.

Section 218

Amends the Act of March 3, 1931 (the Davis Bacon Act) to raise the threshold for application of the statute to contracts in an amount of \$250,000. This will encourage greater participation by small and minority businesses and will reduce the administrative burden on agencies. This section would also permit greater use of entry- and training-level "helpers" by recognizing a semi-skilled helper classification; require separate wage surveys to be conducted for rural and urban areas; prohibit splitting up large contracts to avoid the threshold; move responsibility for debarment of firms or persons violating Davis Bacon from the Comptroller General to the Department of Labor. Finally, this section would significantly reduce the paperwork burden by reducing from weekly to quarterly the required submission of detailed payroll records to the government—at a minimum, three submissions would be required, at the beginning, midpoint, and conclusion of the contract period.

TITLE III—CIVILIAN PERSONNEL

Section 301

Repeals 5 U.S.C. 3326 which generally prevented employment of retired military members within 180 days of their retirement. The 180 day waiting period for retired military members often discourages well qualified and highly trained candidates from competing for civilian positions in the Department of Defense. Elimination of the waiting period will enable DoD to better compete with the private sector for applicants with critical skills.

Section 302

Amends 5 U.S.C. 4301(2) to exclude from system coverage temporaries serving on less than 1 year appointments within the Department of Defense except upon pay change or reemployment. Temporary appointments do not warrant the expenditure of time and resources required by the performance appraisal process. Such coverage overloads administrative systems, drains manpower and increases paperwork.

Section 303

Amends 5 U.S.C. 5724a to provide house-hunting trips to Hawaii and Alaska. This

will facilitate recruitment by providing the same relocation benefits to employees transferring to Alaska and Hawaii as to other states.

Section 304

Amends 5 U.S.C. 5742 to include employees or family members assigned in Alaska or Hawaii and employees who have signed mandatory mobility agreements as a condition of employment among those for whom transportation of remains, dependents and effects are authorized. Enactment on this change will remove a deterrent to recruitment for positions in Alaska, Hawaii or under mandatory mobility agreements.

Section 305

Amends 5 U.S.C. 5924 to include the Republic of Panama as a post of assignment for which separate maintenance allowance may be authorized. This will help avoid imposition of unacceptable economic burdens on current and future employees who would otherwise be required to establish and/or maintain a second residence at their own expense where family members may not accompany the employee to Panama or must be evacuated at the direction of the Government.

Section 306

Amends 5 U.S.C. 5912 by providing that the \$10 maximum allowance will not apply within DoD and by authorizing the Secretary of Defense to adjust the remote work-site allowance to alleviate deterrents to hiring and retaining employees. This will facilitate hiring and retaining employees and will increase an allowance set almost 20 years ago. The current rate is inadequate to cover the expenses, hardships, and inconveniences associated with assignments on isolated islands or sites in deserts or other areas remote from civilization.

Section 307

Repeals 10 U.S.C. 115(b)(2) which provides that Congress shall authorize civilian personnel end strength for each component of the Department of Defense. These work force floors and ceilings restrict the authority of the Secretary of Defense and the Service Secretaries, and their ability to effectively manage the Department's resources consistent with changing missions and overall personnel requirements.

Section 308

Amends 10 U.S.C. 129. These work force floors and ceilings restrict the authority of the Secretary of Defense and the Service Secretaries, and their ability to effectively manage the Department's resources consistent with changing missions and overall personnel requirements.

Subsection (a) of amended section 129 deletes the requirement to manage the civilian personnel of the Department of Defense on the basis of authorized end strength and provides that the management of such personnel shall not be subject to any statutory end strength, work year floor or minimum staffing level.

Subsection (b) of amended section 129 deletes the prohibition against military secretary control of the number of or funds available for indirectly funded employees of the Department of Defense.

Subsection (c) of amended section 129 reenacts existing subsection (c)(1). As amended, subsection (c) no longer includes in the definition of "indirectly funded" employees those "whose salary and benefits are funded from sources other than appropriated funds."

Section 309

Repeals 10 U.S.C. 194, 3014(f)(1), 6014D(f)(1) and 6014(f)(1) which enacted nu-

merical limits on the numbers of personnel assigned or detailed to management headquarters activities, management headquarters support activities or to Department headquarters staff. These work force floors and ceilings restrict the authority of the Secretary of Defense and the Service Secretaries, and their ability effectively to manage the Department's resources consistent with changing missions and overall personnel requirements.

Section 119

Amends the Demonstration Cities Metropolitan Development Act of 1960, as amended, 42 U.S.C. 3374, to apply to nonappropriated fund employees and to provide employees serving overseas with reemployment rights the same homeowner's assistance benefits that they would have received had they remained with the CONUS-based organization undergoing closure or reduction. Currently employees serving on overseas tours, accompanied by their dependents, and employees serving overseas 18 months or more after announcement of the closure or reduction in their CONUS organization are not covered by the homeowners assistance program. This is extremely disruptive to individuals overseas and might deter homeowners from accepting overseas assignments if there is the potential that their CONUS organization might undergo closure or reduction while they are overseas.

TITLE IV—REAL PROPERTY

Section 401

Amends sections 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 465) to permit the Department of Defense to receive half of the revenues generated by the sale of excess real property under the control of the Department. Under the proposal the Administrator would deposit half of the net proceeds into a special account of the Department of Defense in the manner and to the extent provided in an appropriation act. Currently, section 201 requires that these revenues be deposited into the Treasury as miscellaneous receipts. Section 201, as amended, would provide a strong incentive for managers of real property under the control of the Department of Defense to examine the long term requirements for land and determine if certain parcels are necessary for the nation's military strategy or could be deeded excess for sale.

Section 402

Amends 10 U.S.C. 2267 to permit the Secretary of a military department to retain half of the net proceeds received as rent for leases of property under the control of the Department. Under the proposal, the authority of the Secretary concerned to retain or to expend such proceeds would be exercised in the manner and to the extent provided in an appropriation act. Currently, section 2267 requires that this money be deposited into the Treasury as miscellaneous receipts, except for rent received under a lease for agricultural or grazing purposes. Section 2267, as amended, would encourage installation commanders and other real property managers within a military department to examine their immediate land use requirements with a view to increasing the use of leases where deemed appropriate.

Government's interest in the particular contract, as determined in writing by the contracting officer for such contract.

(3) The Secretary of Defense shall require that a prime contractor under a Department of Defense contract for the acquisition of commercial items be required to include in subcontracts under such contract only—

(A) those contract clauses that are required to implement provisions of law applicable to such subcontracts; and
(B) those contract clauses that are appropriate, as determined by the Secretary of Defense, for such a subcontract.

In addition to the clauses described in subparagraphs (A) and (B), a contractor under a Department of Defense contract for the acquisition of commercial items may be required to include in a subcontract under such contract only such clauses as are essential for the protection of the Federal Government's interest in the particular subcontract, as determined in writing by the contracting officer for such contract.

(4) The Secretary of Defense shall require the use, in appropriate circumstances, of a modified inspection clause with streamlined inspection procedures in each Department of Defense contract for the acquisition of commercial items awarded to a contractor that (A) has a proven record of high quality production, and (B) offers an appropriate warranty to protect the Federal Government's interest in acquiring a high quality product.

(5) The Secretary of Defense shall require the use, in appropriate circumstances, of standard commercial warranties in each Department of Defense contract for the acquisition of commercial items.

(6) The Secretary of Defense shall revise the regulations governing the applicability of the exemption contained in section 2306a(b)(1)(B) of title 10, United States Code, consistent with the public interest. In revising such regulations, the Secretary (A) shall address the standards for applying such exemption to contracts and subcontracts for items which are modifications to commercial items, components of commercial items, spare parts for commercial items, new commercial items, or commercial items which are no longer sold to the public, and (B) shall ensure that cost or pricing data are not required in connection with contracts and subcontracts qualifying for an exemption under the regulations as revised under this paragraph.

(c) ANALYSIS.—(1) The Secretary of Defense shall conduct an analysis of impediments to the acquisition of nondevelopmental items by the Department of Defense. In conducting the analysis, the Secretary shall consider, at a minimum, the following:

(A) Whether to expand the regulations governing the acquisition and distribution of commercial products to address the procurement of nondevelopmental items.

(B) Whether revisions to the regulations governing specifications, standards, and other purchase descriptions are necessary to implement the statutory requirement that product specifications be stated in terms of functions to be performed, performance required, or essential physical characteristics, and to minimize the use of specifications unique to the Department of Defense.

(C) Whether to establish a presumption that the Department of Defense should not request technical data on commercial items.

(D) Whether the Secretary of Defense should make greater use of the authority granted the Secretary in law to exempt

SEC. 824. ACQUISITION OF COMMERCIAL AND NONDEVELOPMENTAL ITEMS

(a) IN GENERAL.—The Secretary of Defense shall—

(1) prescribe regulations as provided in subsection (b); and
(2) conduct an analysis as provided in subsection (c).

(b) REGULATIONS.—(1) Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall publish for public comment new regulations to carry out the requirements in this subsection and rescind any regulations that are inconsistent with the requirements of this subsection. The Secretary shall promulgate final regulations to carry out such requirements not later than 270 days after the date of the enactment of this Act.

(2) The Secretary of Defense shall develop a simplified uniform contract for the acquisition of commercial items by the Department of Defense and shall require that such simplified uniform contract be used for the acquisition of commercial items to the maximum extent practicable. The uniform contract shall include only—

(A) those contract clauses that are required to implement provisions of law applicable to such an acquisition; and

(B) those contract clauses that are appropriate, as determined by the Secretary of Defense, for a contract for such an acquisition.

In addition to the clauses described in subparagraphs (A) and (B), a contract for the acquisition of commercial items may include only such clauses as are essential for the protection of the Federal



defense contracts for commercial items from the application of various requirements.

(2) Not later than 270 days after the date of the enactment of this Act, the Secretary shall develop and submit to the Committees on Armed Services of the Senate and House of Representatives a plan of action for addressing any impediments identified in the analyses required by paragraph (1). The plan shall include a specific schedule for the following:

(A) Revisions of any regulations that are identified as impeding to the acquisition of nondevelopmental items.

(B) Publication for public comment of new regulations to carry out the plan.

(C) Submission to Congress of proposals for such legislative changes as may be needed to carry out the plan.

(d) TRAINING.—(1) The Secretary of Defense shall establish a program for training contracting officers, program managers, and other appropriate acquisition personnel in the acquisition of nondevelopmental items.

(2) The training program shall provide, at a minimum, for the following:

(A) Training in the requirements of the regulations promulgated pursuant to this section, the requirements of section 2325 of title 10, United States Code, and regulations prescribed pursuant to that section.

(B) Training of contracting officers in the fundamental principles of price analysis and other alternative means of determining price reasonableness.

(C) Training of appropriate acquisition personnel in market research techniques and in the drafting of functional and performance specifications.

(e) DEMONSTRATION PROGRAM FOR ITEMS ISSUED TO MEMBERS.—(1) The Secretary of Defense shall carry out a demonstration program in accordance with this subsection with respect to the procurement of individual items of clothing issued to members of the Armed Forces. Under the demonstration program, the Secretary shall—

(A) identify those items of clothing that are the same as, or similar to, clothing items produced by commercial sources for sale to consumers other than the Armed Forces; and

(B) designate for acquisition in accordance with this subsection certain of such items (hereinafter in this subsection referred to as "demonstration items") as the Secretary considers appropriate for acquisition under the demonstration program.

(2) With respect to a portion (determined by the Secretary) of the contracts for demonstration items entered into by the Department of Defense, the Secretary shall—

(A) include in the solicitations for such items a specification reflecting design and functional requirements that are comparable to those used in the award of commercial contracts;

(B) require each offeror to submit a sample article of the item;

(C) provide in the evaluation criteria included in the solicitation that award of the contract will be made to the proposal which is most advantageous to the United States, considering only cost or price and other factors included in the solicitation;

(D) evaluate competitive proposals, either with or without discussions, and the sample article received in response to a solicitation for such items and award a contract in accordance with the evaluation criteria included in the solicitation, and

(E) require each contractor awarded a contract for such items to produce items identical in all major characteristics (including quality) to the sample article submitted with the contractor's bid or proposal.

(3) The demonstration program required under this subsection shall apply with respect to solicitations for demonstration items covered by the program issued after the end of the 180-day period beginning on the date of the enactment of this Act and before October 1, 1993.

SEC. 824. STUDY AND REPORT ON DEFENSE EXPORT FINANCING

(a) STUDY.—The President shall conduct a study of export financing of defense articles. In the course of the study, the President shall—

(1) examine the effect of export financing on the ability of United States industry to compete in the international market for defense products;

(2) determine the extent to which other countries support commercial financing for defense exports through official government credit programs;

(3) determine the extent to which United States private capital is used to support defense exports and the obstacles that United States lending institutions face in providing additional support; and

(4) determine the feasibility and desirability of using existing or new Government export guarantee programs to provide greater private capital support for United States defense exports.

(b) REPORT.—Not later than 120 days after the date of enactment of this Act, the President shall submit to Congress a report on the findings of the study under subsection (a).

**COMPACT'S
DRAFT STANDARD FORM
GOVERNMENT CONTRACT FOR
COMMERCIAL PRODUCTS**

SOLICITATION, OFFER AND AWARD				Page of	
1. CONTRACT NO.	2. SOLICITATION NO.	3. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (IFB) <input type="checkbox"/> NEGOTIATED (RFP)	4. DATE ISSUED	5. REQUISITION, PURCHASE NO.	
6. ISSUED BY COMPACT 1735 New York Avenue, N.W., Suite 500 Washington, D.C. 20006			7. ADDRESS OFFER TO (if other than Item 6)		
NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder"					
SOLICITATION					
8. Sealed offers in original and _____ copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if handcarried, in the depository located in _____ until _____ local time _____					
CAUTION - LATE Submissions, Modifications, and Withdrawals See Section L, Provision No. 52.214-7 or 52.215-10. All offers are subject to all terms and conditions contained in this solicitation.					
9. FOR INFORMATION CALL:		A. NAME William A. Shook		B. TELEPHONE NO. (Include area code) (NO COLLECT CALLS) (202) 628-1700	
OFFER (Must be fully completed by offeror)					
10. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s) within the time specified in the schedule.					
11. DISCOUNT FOR PROMPT PAYMENT	10 CALENDAR DAYS %	20 CALENDAR DAYS %	30 CALENDAR DAYS %	_____ CALENDAR DAYS %	
12. ACKNOWLEDGMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE	
13A. NAME AND ADDRESS OF OFFEROR	CODE _____ FACILITY _____		14. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (type or print)		
13B. TELEPHONE NO. (Include area code)	13C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE. ENTER SUCH ADDRESS IN SCHEDULE <input type="checkbox"/>		15. SIGNATURE	16. OFFER DATE	
AWARD (To be completed by Government)					
17. ACCEPTED AS TO ITEMS NUMBERED	18. AMOUNT		19. ACCOUNTING AND APPROPRIATION		
20. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION: <input type="checkbox"/> 10 U.S.C. 2304(c) () <input type="checkbox"/> 41 U.S.C. 253(c) ()	21. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)		ITEM		
22. ADMINISTERED BY (if other than Item 6)			23. PAYMENT WILL BE MADE BY CODE _____		
24. NAME OF CONTRACTING OFFICER (Type or print)	25. UNITED STATES OF AMERICA (Signature of Contracting Officers)		26. AWARD DATE		

SECTION B - SCHEDULE OF SUPPLIES							
ITEM NO.	PRODUCT DESCRIPTION	PRODUCT NUMBER and/or NATIONAL STOCK NUMBER	OPTIONS	QUANTITY	UNIT PRICE	DISCOUNT %	EXTENDED AMOUNT

SECTION C - PRODUCT DESCRIPTION/SPECIFICATION

C.1. Functional Specifications

C.2. Performance Specifications

SECTION D - PACKAGING AND MARKING

D.1. All products shall be packaged according to standard commercial practices in order to insure safe arrival at delivery destination.

D.2. All external product packaging shall be marked according to standard commercial practices. The following special external markings shall be added:

SECTION E - INSPECTION AND ACCEPTANCE

E.1. Inspection and acceptance will be performed at place and time of delivery.

SECTION F - DELIVERIES

F.1. Delivery terms:

___ FOB Origin

___ FOB Destination

F.2. Required Delivery Date(s):

Item No. ___ on or before _____
(date)

Item No. ___ on or before _____
(date)

Item No. ___ on or before _____
(date)

F.3. Desired Delivery Date(s):

Item No. ___ on or before _____
(date)

Item No. ___ on or before _____
(date)

Item No. ___ on or before _____
(date)

SECTION G - CONTRACT ADMINISTRATION DATA

G.1. The following information is for informational purposes only and is to be completed by the contracting agency.

SECTION H - SPECIAL CONTRACT REQUIREMENTS

H.1. This is a contract for commercial products. No requirements other than those found elsewhere in this contract will apply unless approved at a level above the contracting officer.

SECTION I - GENERAL TERMS AND CONDITIONS

Federal Acquisition Regulation (FAR) Applicability

- I.1. Solicitation, evaluation and award shall be made in accordance with FAR Part 14 or 15, as applicable.

Uniform Commercial Code

- I.2. Unstated terms and conditions will be governed by the applicable portions of the Uniform Commercial Code.

Change Orders

- I.3. If the government issues a change order causing a delivery delay or cancels an order less than sixty (60) days prior to scheduled shipment, the government shall pay a five percent (5%) charge based upon the contract price of the product. A government extension of delivery dates more than six (6) months beyond the original delivery date shall subject the government to an increase in product price equal to the percentage change in published catalog prices.

Patent and Copyright Indemnity

- I.4. The offeror shall, except as otherwise provided below, defend or settle any claim made or any suit or proceeding brought against the government so far as it is based on an allegation that any product furnished hereunder infringes a patent or copyright of the country in which the government takes delivery of said product, if notified promptly in writing and given information, assistance and the sole authority to defend or settle same at the offeror's expense, and the offeror shall pay all damages and costs finally awarded therein against the government. In case said product is in such suit held to infringe and the use of said product is enjoined, or in the case of a settlement as referred to above, the offeror shall have the option, at its own expense, to procure for the government the right to continue using said product; or replace same with a non-infringing product; or modify same so it becomes non-infringing; or refund the depreciated value of said product and accept return of same. The offeror shall have no liability for any infringement of patents, copyrights, trademarks or other intellectual property rights resulting from compliance with the government's designs, specifications, or instructions; from modification of said product; from use of said product other than as specified in relevant publications of the offeror or from use of said product with products not supplied by the offeror.

Technical Data Rights

- 1.5. Unless otherwise agreed, the Government shall have only limited rights in technical data specified for delivery under this contract pertaining to items, components, processes or computer software developed exclusively at private expense.

The term "technical data", as used in this clause, means recorded information, regardless of the form or method of the recording of a scientific or technical nature.

The term "limited rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the government, with the express limitation that such technical data shall not, without the written permission of the party asserting limited rights, be: released or disclosed outside the government; used by the government for manufacture; or used by a party other than the government except that the government may release or disclose technical data to persons outside the government, or permit the use of technical data by such persons, if--

Such release, disclosure or use--

- (1) Is necessary for emergency repair and overhaul; or
- (2) Is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the government and is required for evaluational or informational purposes;

Such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and the contractor or subcontractor asserting the restriction is notified of such release, disclosure or use.

Computer Software Rights

- 1.6. The government shall have restricted rights in the commercial computer software and related documentation delivered under this contract.

When acquired by the government, commercial computer software and related documentation shall be subject to the following:

- (1) Title to and ownership of the software and documentation shall remain with the contractor.
- (2) Use of the software and documentation shall be limited to the facility for which it is acquired.

- (3) The government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. Third parties do not include prime contractors, subcontractors and agents of the government who have the government's permission to use the restricted rights software and documentation at the facility, and who have agree to use the licensed software and documentation only in accordance with these restrictions.
- (4) The government shall have the right to use the commercial computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, provided that the unmodified portions shall remain subject to these restrictions.

Warranty

- I.7. The offerors standard commercial warranty for the product(s) being sold is hereby incorporated by reference.

FAR Clauses Incorporated By Reference

- I.8. This contract incorporates the following clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.

52.203.1 — Officials Not to Benefit

52.203.3 — Gratuities

52.203.5 — Contingent Fees

52.203.6, As modified — Restriction on Subcontractor Sales to the Government [Paragraph c which requires flowdown is eliminated.

52.203-7, As modified — Anti-Kickback Procedures [Paragraph (c)(5) which requires flowdown is eliminated. 52.203.7002 — Statutory Compensation Prohibitions and Reporting Requirements Relating to Certain Former Department of Defense (DOD) Employees

- 52.207.4 – Economic Purchase Quantity--Supplies
- 52.210.5 – New Material
- 52.210.6 – Listing of Used or Reconditioned Material, Residual Inventory and Former Government Surplus Property
- 52.210.7 – Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property
- 52.215.1 – Examination of Records by Comptroller General
- 52.219.8 – Utilization of Small Business Concerns and Small Disadvantaged Business Concerns
- 52.219.9 – Small Business and Small Disadvantaged Business Subcontracting Plan
- 52.219.13 – Utilization of Women-Owned Small Businesses
- 52.220.1 – Preference for Labor Surplus Area Concerns
- 52.220.3 – Utilization of Labor Surplus Area Concerns
- 52.220.4 – Labor Surplus Area Subcontracting Program (Contracts over \$500,000)
- 52.222.20 – Walsh-Healey Public Contracts Act
- 52.222.21 – Certification of Nonsegregated Facilities
- 52.222.22 – Previous Contracts and Compliance Reports
- 52.222.25 – Affirmative Action Compliance
- 52.222.26 – Equal Opportunity
- 52.222.35 – Affirmative Action for Special Disabled and Vietnam Era Veterans
- 52.222.36 – Affirmative Action for Handicapped Workers

- 52.222.37 – Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era
- 52.223.2 – Clean Air and Water
- 52.225.3 – Buy American Act--Supplies [Civilian Agencies]
- 52.225.8 – Buy American Act--Trade Agreements Act--Balance of Payments Program Certificate [Civilian Agencies]
- 52.225.9 – Buy American Act--Trade Agreements Act--Balance of Payments Program [Civilian Agencies]
- 52.225.7000 – Buy American-Balance of Payments Program Certificate [Defense Agencies]
- 52.225.7001 – Buy American Act and the Balance of Payments Program [Defense Agencies]
- 52.225.7005 – Buy American Act--Trade Agreements Act--Balance of Payments Program Certificate [Defense Agencies]
- 52.225.7006 – Buy American Act, Trade Agreements Act, and the Balance of Payments Program [Defense Agencies]
- 52.229.3 – Federal, State, and Local Taxes
- 52.232.1 – Payments
- 52.232.17 – Interest
- 52.232.23 – Assignment of Claims
- 52.232.25 – Prompt Payment
- 52.233.3 – Protest After Award
- 52.243.1 – Changes--Fixed-Price
- 52.246.1 – Contractor Inspection Requirements
- 52.246.16 – Responsibility for Supplies
- 52.246.23 – Limitation of Liability
- 52.249.8 – Default (Fixed-Price Supply and Service)

SECTION J - LIST OF ATTACHMENTS

J.1. This contract contains the following attachments:

SECTION K - REPRESENTATIONS AND CERTIFICATIONS

K.1. The following representations and certifications must be completed by the offeror.

52.219.1 – Small Business Concern Representation

The offeror represents and certifies as part of its offer that it __ is, __ is not a small business concern and that __ all, __ not all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands. "Small business concerns," as used in this provision, means a concern, including affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

52.219.2 – Small Disadvantaged Business Concern Representation

(a) Representation. The offeror represents that it __ is, __ is not a small disadvantaged business concern.

(b) Definitions.

"Asian-Indian American," as used in this provision, means a United States citizen whose origins are in India, Pakistan, or Bangladesh.

"Asian-Pacific American," as used in this provision, means a United States citizen whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, the Northern Mariana Islands, Laos, Cambodia, or Taiwan.

"Native Americans," as used in this provision, means American Indians, Eskimos, Aleuts, and native Hawaiians.

"Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

"Small disadvantaged business concern," as used in this provision, means a small business concern that (1) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals and (2) has its management and daily business controlled by one or more such individuals.

- (c) Qualified groups. The offeror shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and other individuals found to be qualified by the SBA under 13 CFR 124.1.

52.219.3 – Women-Owned Small Business Representation

- (a) Representation. The offeror represents that it __ is, __ is not a women-owned small business concern.
- (b) Definitions.

"Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominate in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

"Women-owned," as used in this provision, means a small business that is at least 51 percent owned by a woman or women who are U.S. citizens and who also control and operate the business.

52.222.19 – Walsh-Healey Public Contracts Act Representation

The offeror represents as a part of this offer that the offeror is __ or is not __ a regular dealer in, or is __ or is not __ a manufacturer of, the supplies offered.

52.223.1 – Clean Air and Water Certification

The Offeror certifies that--

- (a) Any facility to be used in the performance of this proposed contract is __, is not __ listed on the Environmental Protection Agency List of Violating Facilities;

- (b) The Offeror will immediately notify the Contracting Officer, before award, of the receipt of any communication from the Administrator, or a designee, of the Environmental Protection Agency, indicating that any facility that the Offeror proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities; and
- (c) The Offeror will include a certification substantially the same as this certification, including this paragraph (c), in every non-exempt subcontract.

52.225.1 – Buy American Certificate [Civilian Agencies]

The offeror certifies that each end product, except those listed below, is a domestic end product (as defined in the clause entitled "Buy American Act--Supplies"), and that components of unknown origin are considered to have been mined, produced, or manufactured outside the United States.

Excluded End Products

Country of Origin

.....

(List as necessary)

Offerors may obtain from the contracting officer lists of articles, materials, and supplies excepted from the Buy American Act (listed at 25.108 of the Federal Acquisition Regulation).

SECTION L - EVALUATION FACTORS FOR AWARD

- L.1. Award shall be made to the offer representing the lowest evaluated cost to the government based on initial product price and other evaluated quality costs.
- G.2. Options shall___ shall not___ be evaluated.
- G.3. Discounts for prompt payment shall not be evaluated.
- G.4. Quality cost factors to be evaluated and their relative weight are:

