SEC. 806. REVISION TO DEFINITION OF TERM “COMMERCIAL ITEM” FOR
PURPOSES OF FEDERAL PROCUREMENT STATUTES PROVIDING
PROCEDURES FOR PROCUREMENT OF COMMERCIAL ITEMS.

(a) ELIMINATION OF “OF A TYPE” CRITERION.—Section 103 of title 41, United States
Code, is amended by striking “of a type” in paragraphs (1)(A), (3)(A), and (4).

(b) ELIMINATION OF ITEMS AND SERVICES MERELY OFFERED FOR SALE, LEASE, OR
LICENSE.—

(1) ITEMS.—Paragraph (1)(B) of such section is amended by striking “, or offered
for sale, lease, or license, ”.

(2) SERVICES.—Paragraph (6) of such section is amended by striking “offered
and”.

(c) ADJUSTMENT OF THRESHOLD RELATING TO PRIOR SALES.—Paragraphs (6) and (8) of
such section are amended by striking “substantial quantities” and inserting “like quantities”.

Section-by-Section Analysis

This proposal would permit the Government to acquire commercial items at better prices
by ensuring that such items are only those goods or services that actually have been sold, leased,
or licensed in comparable quantities in the commercial marketplace and therefore have prices
that clearly are based on competitive market pricing or established catalog prices.

After enactment of the Federal Acquisition Reform Act of 1996 (later renamed the
Clinger-Cohen Act of 1996 (divisions D and E of P.L. 104-106), and the Federal Acquisition
Streamlining Act of 1994 (P.L. 103-335), reports by the Government Accountability Office
(GAO), the DoD Inspector General (DoD-IG), and senior level advisory panels repeatedly have
criticized the ability of the Federal government, including the Department of Defense (DoD), to
effectively acquire commercial goods and services at fair and reasonable prices. For example,
GAO Report 06-838R dated July 7, 2006, cites “adequate pricing” as one of five key area
vulnerabilities of the DoD. In part, the report states that “Also, DoD sometimes uses commercial
item procedures to procure items that are misclassified as commercial items and therefore not
subject to the forces of a competitive marketplace. While the use of commercial item procedures
is an acceptable practice, misclassification of items as commercial can leave DoD vulnerable to
accepting prices that are not the best value for the department.” In addition, the DoD...
null
These amendments of the law would prompt commensurate adjustments of the Federal Acquisition Regulation and ensure that commercial goods and services are acquired by the DoD and other Federal agencies only at fair and reasonable prices consistent with comparable sales actually observed in the competitive market.

**Budget Implications:** None. This proposal simply amends the definition in law of the term “commercial item.” It has no other impact on the use of commercial item procedures in federal government procurement.

**Changes to Existing Law:** This proposal would make the following changes to section 103 of title 41, United States Code:

§ 103. Commercial item

In this subtitle, the term “commercial item” means—

1. an item, other than real property, that—
   - is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and
   - has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public;

2. an item that—
   - evolved from an item described in paragraph (1) through advances in technology or performance; and
   - is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation;

3. an item that would satisfy the criteria in paragraph (1) or (2) were it not for—
   - modifications of a type customarily available in the commercial marketplace; or
   - minor modifications made to meet Federal Government requirements;

4. an combination of items meeting the requirements of paragraph (1), (2), (3), or (4) that are of a type customarily combined and sold in combination to the general public;

5. installation services, maintenance services, repair services, training services, and other services if—
   - those services are procured for support of an item referred to in paragraph (1), (2), (3), or (4), regardless of whether the services are provided by the same source or at the same time as the item; and
   - the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

6. services offered and sold competitively, in substantial like quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions;

7. any item, combination of items, or service referred to in paragraphs (1) to (6)
even though the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) a non-developmental item if the procuring agency determines, in accordance with conditions in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial like quantities, on a competitive basis, to multiple State and local governments.