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 DoDIG Report

D-2006-115, Commercial Contracting for the Acquisition of Defense Systems, dated September 26, 2006, found that the commercial item definition is broad and has allowed contracting officials to award contracts for defense systems and subsystems that had no commercial market.

Although updated policy guidance was issued on June 8, 2007 by the Director, Defense Procurement and Acquisition Policy (DPAP), subject: "Determining Fair and Reasonable Contract Prices – Revised Procedures, Guidance and Instruction (PGI)", the existing statutory language of 41 U.S.C. 103 (previously section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))) continues to complicate the ability of the DoD to ensure that commercial goods and services are acquired based on competitive market pricing that represents the best value or the best price. While changes in the National Defense Authorization Act for Fiscal Year 2008 were a step in the right direction, the changes did not address that the current statutory definition of commercial items is too broad to allow only truly commercial items to be treated as such.

This legislative proposal is consistent with section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), which directed the Department to recommend changes in the law to eliminate areas of vulnerability that allow fraud, waste, and abuse to occur. Section 813 also established the Panel on Contracting Integrity consisting of senior leaders representing a cross-section of the Department.

The Panel's 2009 Report to Congress recommended this change based on the Working Group for Adequate Pricing analysis. The Panel found commercial item acquisitions government-wide continues to be vulnerable to pricing deficiencies. The situation cannot be rectified unless the statutory definition of "commercial item" is amended and clarified appropriately. Their analysis reaffirmed the findings of GAO and DoDIG that the commercial item definition is too broad and continues to be a contracting vulnerability.

This proposal would (1) eliminate items "of a type" from the existing statutory prescription; (2) eliminate items or services merely offered for sale, lease, or license (but not yet sold, leased, or licensed) to the general public from the existing statutory definition; and (3) adjust the threshold that requires prior sale of "substantial" quantities to one that allows prior sale of "like" quantities. The first two changes would preclude any further abuse in the overly broad application of the statutory definition. The third change would recognize that a sale in the commercial market is sufficient for purposes of determining fair and reasonable prices if the magnitude of such sale is comparable, or "like", the quantity to be purchased by the DoD or other Federal agency.

The current statute is focused on the "nature" of the goods and services currently being sold in the competitive commercial marketplace, not the individual vendors selling (or the end users acquiring) those goods and services. It is the "nature" of the items or services, not the end user of such items or services, which should be considered in the determination of whether or not an item or service is considered to be "commercial." The removal of "of a type" and "offered for sale" would not restrict new vendors from qualifying their goods and services as commercial items. Additionally, it is important to note that "next generation" items may meet this criteria where new or additional functionality or value is available in the commercial market place.

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—

(A) is ~~of a type~~ customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

(B) has been sold, leased, or licensed~~, or offered for sale, lease, or license,~~ to the general public;

(2) an item that—

(A) evolved from an item described in paragraph (1) through advances in technology or performance; and

(B) 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—

(A) modifications ~~of a type~~ customarily available in the commercial marketplace; or

(B) minor modifications made to meet Federal Government requirements;

(4) an combination of items meeting the requirements of paragraph (1), (2), (3), or (5) 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—

(A) 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

(B) 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.