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Legal & regulatory implications associated with variable pricing of DeCA resale items

Items for consideration by Defense and Congressional policy makers

The Federal Government is a consumer, not a retailer in the marketplace today. It buys goods and services to be consumed by the government, its employees and beneficiaries. The Defense Commissary Agency, an appropriated fund Federal Agency, is a retailer of government property selling to designated beneficiaries and activities. Congress, through the acquisition laws of the United States found in Title 42 of the United States Code (USC). The purpose of this legislation is to ensure that the public business is conducted so as to promote competition, minimize administrative operating costs, ensure that public business is conducted with integrity, fairness and openness to meet public policy objectives. By doing so, app parties seeking to do business with the Federal government are on notice of the methods and processes used to procure the needs of the government.

The laws have been implemented in the Federal Acquisition Regulation (FAR), and Agency supplements to that regulation, in this matter the DFARS—Defense Acquisition Regulation Supplement. The Defense Commissary Agency contracting practices are dictated by these regulations and the DeCA Supplement to the DFARS.

DeCA procures resale merchandise using two different FAR contract types. It uses fully competed contracts to obtain items where there is no recognized brand, for example, meat and random weight produce. A solicitation is issued in conformance to the mandatory contracting practices of the Federal government contained in the FAR which govern the entire process from concept to completion of the contract. There are established processes and forms at each step of the contracting process that must be complied with. The second contract type that DeCA employs is known as the DeCA Resale Ordering Agreement. This agreement is modeled after the requirements found in the FAR governing Blanket Ordering Agreements, BOAs. BOAs are authorized as a simplified method of filling anticipated repetitive needs. The FAR also provides that the use of BOAs does not exempt the agency from the responsibility for keeping obligations and expenditures within available funds. The ROA is required to and does include the prescribed mandatory FAR clauses that are in every government contract, including a clause on how the order will be priced by the contractor—how the government cost will be established.

DeCA's two contracting methods have been reviewed by DoD in its oversight role over DoD contracting and approved. All DeCA contracts for resale merchandise must fit into one of these two processes.

The sale of DeCA resale inventory is governed by the provisions in Title 10 United States Code Section, Chapter 147, Section 2484 which requires sale at a price that recoups the actual cost of the item Section 651 of the FY 2016 National Defense Authorization Act (NDAA) authorizes the Secretary of Defense not to follow provisions contained in Chapter 147 of Title 10 governed by if a section adversely affects the ongoing effort to make the commissary benefit neutral in cost. If the SECDEF authorizes the deviation from the provision setting cost on the shelf as actual product cost, the Administrator of the GSA and the GSA regulations (Title 40 United States Code) still apply to the sales of DeCA resale items, they are still government property. There is no exemption in the FY 2016 NDAA from other laws that are not in Chapter 147.

Variable pricing proposed concept

DoD recognizes that the current statutory dictates on pricing commissary goods offered for sale does not allow DeCA top price goods with a margin similar to commercial grocery stores. As a result, DeCA is unable to generate funds that could be used to offset operating costs. Legislative flexibilities do not exist that would currently allow DeCA to use variable pricing to generate dollars on the margins to be used to offset operating costs. It argues that legislative flexibilities could allow DeCA to explore alternate pricing models and "behave more like commercial grocers."

The constitution and current law, recognize that the Federal Government has the power to contract for the goods and services it requires in order to execute its functions. Current law sets up the General Services Administration as the agency of the Federal Government with responsibility to oversee the acquisition of goods, services, and property needed to support the government. These acquisitions are governed by the Federal Acquisition Regulation (FAR) and supplements issued by the various Government agencies. The FAR specifies the acquisition process to be used by all parties acquiring the needs for their requiring activities. Contracting practices and contract language that must be followed are specified and must be followed by to all government activities.

GSA also has a system, based on law, for the disposal of unneeded government property. The Government is a consumer, not a retailer, so property acquired under the provisions of the FAR when it is no longer needed is disposed of in accordance with GSA regulation.

Section 651 of the FY 2016 National Defense Authorization Act has a specific authorization for the Secretary of Defense waive provision in Chapter 147 of Title 10 United States Code if the waiver will promote the effort to achieve budget neutrality for the Defense Commissary Agency, without affecting the commissary benefit. Section 2484 requires in part

that the sales price of merchandise be set at a level that will recoup the actual product cost. This specific statutory language deals with commissary pricing. There are no other sections of Federal law dealing with subject of setting prices on resale commissary merchandise. Specifically, the Federal Government Agency responsible for the acquisition and disposal of government property has no GSA statutory authority or implementing or regulations that deal with this issue. If the Secretary of Defense waives the pricing provisions of Chapter 147, there will be no law, implementing government regulations, or procedures that deal with the sale of United States Government property, specifically commissary inventory in a manner that will generate funds to be used to pay operating expenses of the commissary system. **There is no legal authority** to implement a pricing strategy by DeCA that will generate funds to offset operating costs.

Chapter 147 contains specific language specifying which DeCA operating costs are authorized for reimbursement with appropriated funds. The Defense Appropriations Subcommittee Committee has jurisdiction over the funds allocated to the DoD Operations Maintenance Account (O&M). The Report implies that eventually sufficient funds can be generated “on the margin,” i.e. profits on goods sold to servicemembers and other authorized beneficiaries. The SECDEF has the authority to waive the provision of Chapter 147 that specifies which DeCA O&M costs are to be funded with APF, if the waiver will contribute to the budget neutrality goal for DeCA. If that provision is waived, in whole or in part, revenues from profits will be the only source of money available to make up for the loss of O&M dollars.

The DoD authorization deals with policy issues, not the appropriation of funds. The appropriations subcommittee will lose all ability to oversee these revenues which are being used to fund an operating costs of DoD. These “unappropriated funds” will have no oversight by the subcommittee with jurisdiction over the payment dollars for O&M costs. For example, if the “profits” are insufficient to make up the difference between funds appropriated for commissary O&M costs, and DeCA continues to obligate O&M dollars beyond appropriation act amount, a reportable Antideficiency Act violation will be occurring. The jurisdiction of the subcommittee will be subverted by the variable pricing scheme since it will have no ability to oversee the amount and uses of the profits.

A secondary issue exists when it comes to the processing and using “margin dollars.” The receipts from the sale of commissary sales are deposited in the Defense Revolving Fund. There is no approved accounting system to account for the amount needed to pay the acquisition cost of an item sold and the margin funds. Without such an approved accounting system, there is no way to determine what part of the revolving fund should be earmarked for the payment of commissary operating costs. In addition, there is currently no regulatory method to transfer that amount out of the revolving fund into the O&M account to pay DeCA appropriated fund costs. Whatever accounting system that is developed MUST have Government Accountability Office concurrence since the monies are in the Treasury of the United States and can only be spent in

accordance with law. The GAO needs to receive a specific mandate from Congress to monitor the variable pricing practices and proper accounting of funds.

Only a contracting officer may enter into contracts that obligate United States government funds. DeCA currently has an approved contracting practice, the Resale Ordering Agreement, in place to deal with the acquisition of brand name products to be sold in commissaries. The current ROA was developed and entered into between the DeCA and industry based on the current law requiring goods be sold at cost. Both parties knew and understood this and built, now long standing, business practices based on that requirement. The ROA, by law, incorporates the FAR clause dealing with Changes. If DeCA notifies industry that it intends to begin variable pricing, a reopening of price warranty clause in the ROA and other provisions in the ROA may be required. Of particular concern may also be the application of other statutes dealing with pricing. The closer DeCA becomes to modeling a commercial supermarket, the closer the possibility that other statutes regulating price discrimination in the grocery industry may apply. The application of some of those statutes does not occur when selling to the Government; however, with the recommendations of the Report, this issue may be of legal concern to manufacturers and their General Counsels.

DeCA is on the street with a job announcement seeking an individual to oversee the development and application of variable pricing in its commissaries. The job series cited is broad enough to cover what is being sought. However, without legal authority to employ such a unique person without the legal authority to conduct such a program may call into question the validity of the announcement. Also there is no reference in the announcement that the position is covered by the Ethics in Government Act. There are numerous practices in the civilian grocery industry that are absolutely prohibited in government service, for example receipt of holiday gifts for individuals that have helped promote one's sales to a grocery store. In addition, government employees are prohibited from promoting one commercial firm's product over another's (endorsing). Engaging in pricing on a short term basis and allocating sales space based on margin returns is not permitted by a government employee—that is endorsing one firm's business practices over another. DeCA, in conjunction with DoD ethics officials and the Office of Government Ethics is required to develop a comprehensive ethics training program for this individual and those he supervises. Starting variable pricing without the comprehensive approved training program risks DeCA, its senior management officials, and the commissary benefit to intense Congressional and public scrutiny that may result in legislation that ends the commissary benefit.

BOTTOM LINE DeCA is chartered to provide a benefit to servicemembers and other authorized beneficiaries. DeCA patrons already pay a sales tax on their purchases, the surcharge which was intended to share the expense of the benefit by having the beneficiaries pay for the cost of constructing the facility it is being provided in. The commissary benefit was never intended to be operated as a business to generate "margin dollars" to offset what is a taxpayer responsibility, the cost of providing a nonpay benefit.