



## AMERICAN LOGISTICS ASSOCIATION

1101 Vermont Avenue N.W. Suite 1002 Washington D.C. 20005

Phone: (202) 466-2520 Fax: (202) 296-4419

[www.ala-national.org](http://www.ala-national.org)

# Robinson Patman Act application to Variable Pricing and Privatization

Items for consideration for Defense and Congressional policy makers

## Variable pricing

The Robinson Patman Act makes it unlawful, with certain exceptions, to knowingly sell goods “in commerce,” for use or sale within the United States at differing prices to contemporaneous buyers of those goods. The key elements are: first, **is DeCA a “contemporaneous buyer** of those goods; and second is the Government is buying goods at favorable prices **in order to compete commercially?** The variable pricing concept proposed by the BGCR and in the DoD Report has government employees doing the negotiations pursuant to a contract governed by the application of the Federal Acquisition Regulation.

Under the current business model used by DeCA and the variable pricing model being studied, the Federal government is not a contemporaneous buyer of goods; it buys goods for resale with appropriated funds of the United States using standard form government contracts for resale merchandise sold in Government facilities. The provisions of the Uniform Commercial Code apply to purchases of inventory by commercial grocery chains; DeCA transactions are governed by the FAR. DeCA, with its specifically limited customer base, is not competing with commercial grocery stores located off the installation within the meanings of the language of the Act. Further, by law, DeCA currently sells goods at cost so **there is no profit** involved in sales of government inventory to authorized patrons. The variable pricing concept being proposed that involves a government employee negotiating acquisition costs for merchandise with suppliers and making the variable pricing decisions is intended to generate revenues to pay operating costs, **not generate a profits for stockholders which will leave the installation.** While historically Congress in its legislation and report language has indirectly worried about the image that a commissary is competing against commercial grocery stores located in

surrounding communities, with the passage of time and the advent of the “big box stores” off post, this concern has diminished to almost zero.

It is reasonable to conclude that if an approved process is established in law, regulation and policy, the government employee conducting the negotiations on behalf of the Government will be acting within the scope of his/her employment. The Robinson Patman Act will not give the government an unfavorable advantage over off post businesses since the government does not compete with them. However, each supplier of goods under this plan will need draw its own conclusions with regard to the application the Act to this course of business when dealing with DeCA.

## Privatization

If DoD privatizes the commissary, there will be a commercial grocer operating commissaries that will take profit from commissary sales transactions. The argument that the commissary is not competing with off post grocery stores is considerably weaker under this approach. Sales of resale goods to the government contractor by manufacturers will be sales to a commercial corporation governed by the Uniform Commercial Code, not the FAR. I have found no writings or parallel cases that could be used to address this scenario to support an opinion on the application of the Act to the privatized business model proposed in the reports. There may also be an element of this issue directly related to whether the commissary is located on land subject to the exclusive jurisdiction of the United States or subject to one of the lesser forms of jurisdiction—concurrent or proprietary jurisdiction. If the commissary is located on land subject to either concurrent or proprietary jurisdiction, there is an argument that the activity is being conducted in the commercial world in competition with commercial supermarkets. State sales taxes apply to these lesser levels of jurisdiction which would be an indication that there is really no exclusivity to a commissary operation as a government entity and Robinson Patman may apply.

There are cases somewhat similar to this scenario involving pharmaceuticals where it has been held that price discrimination in drug sales to hospitals is not legal when the institution is **selling** the drugs **at a profit** in competition with local pharmacies.

The Federal Trade Commission has jurisdiction over the application of the Robinson Patman Act. If a commercial grocery chain that did not win the privatization contract makes an issue of price discrimination in the prices given to the government contractor because the goods are being sold in the commissary, the outcome may be decided on based on the principle that the contractor is making a profit and taking it off government land. The use of the privatization

model creates a question that may put each manufacturer at potential risk if they give the commissary contractor favorable treatment not available commercial customers. Based on the pharmaceutical examples, a risk is created if the contractor is making a profit and taking those dollars off post. In effect the privatization contractor may be a contemporaneous buyer of goods in competition with local retailers.