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Department of
Veterans Affairs

Memorandum

Via Facsimile

Date: March 29, 1993

From: Assistant General Counsel (025)

Subj: Impact of Public Law 102-585 on Federal Supply Schedule (FSS)
Contract Pricing

To: DAS for Acquisition & Materiel Management (90)

1. As you know, Public Law (P.L.) 102-585 requires manufacturers to agree in writing to sell their covered drugs to DoD, VA and PHS (including the Indian Health Service) (hereinafter Federal Agencies) at a minimum of a 24% discount from the preceding year's non-Federal Average Manufacturer Price (non-FAMP) whenever such products are procured by a Federal agency under a depot contracting system or from the FSS. Because there are many other governmental agencies and even non-governmental not-for-profit organizations that are authorized users of the FSS, it is inconsistent with the statute to routinely insert a Federal ceiling price (FCP) calculated under the Law as the FSS contract price for the same year. The statutorily prescribed FCP for a covered drug always remains separate and distinct from the price determined under the disclosure and negotiation procedures of the FSS. Thus, where the lowest price obtainable by DoD, VA or PHS is the statutory ceiling price, orders by these agencies must be filled by the manufacturer at that price, but orders from other agencies using FSS may be filled by the manufacturer at the negotiated FSS contract price (unless the manufacturer agrees to sell to all FSS users at the FCP).

2. Section 8126(d) of the Law requires that, during the second and subsequent years of a multiyear contract for a covered drug, the FCP applicable to the three Federal agencies will be the depot or FSS contract price charged during the preceding year, increased by the percentage increase in CPI-U during that year, unless the Subsection (a)(2) calculation based on non-FAMP and additional discount yields a lower figure. (This interpretation of Subsection (d) is contained in the Master Agreement signed by all covered drug manufacturers and will be more clearly spelled out in the technical corrections amendment to P.L. 102-585 which will soon be enacted by Congress.) The contract price referenced in 8126(d) is the MFC negotiated contract price and can never be the FCP.

3. In order to facilitate the separate statutory requirements described in the above two paragraphs, contracting officers administering depot and FSS drug contracts must know and insert into their files both the statutory FCP and the FSS negotiated most-favored-customer (MFC) price for each covered drug. The negotiated MFC price for a covered drug must be

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continuously determined and maintained in the contract file so that non-"Federal agency" FSS users can be properly billed for their purchases of covered drugs (assuming a manufacturer does not agree to a single price to all users not exceeding the ceiling price). The negotiated MFC price must be in the file in order to track the Price Reduction clause because the FCP can never be the tracking price for purposes of the Price Reduction clause. (See GSA 1992 Desk Guide, Chapter 38, Section P, Page 8.) Also, the MFC negotiated price will always be needed in second and subsequent years of a multiyear contract to determine what the ceiling price will be for those subsequent years.

4. Before December 7, 1992, the Pharmaceutical Products Division (904E) of the VA National Acquisition Center expected most existing negotiated FSS MFC prices for covered drugs to be below the statutory ceiling prices. However, when Pharmacy Service/Drugs & Pharmaceutical Product Management Division (119) issued a report of ceiling prices for products that were already on the FSS, it became clear that, in the vast majority of instances, the FCP was below the negotiated FSS price. Instead of the new Law having an infrequent impact on prices paid by the Federal agencies for FSS covered drugs, it became clear that the Federal agencies would, in most instances after January 1, 1993, be paying the ceiling price rather than the negotiated FSS price. Thus, the problem of a disparity between the negotiated FSS price and FCP price is a more real and immediate problem than anyone expected.

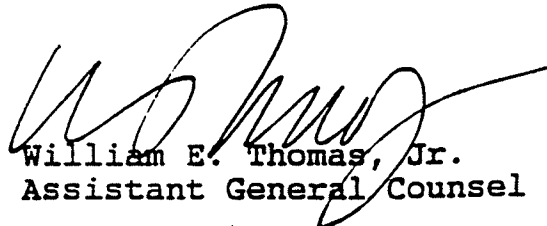
5. We have learned from discussions with 904E and from the reviewing of certain contract files that, contrary to the previously stated procedure, FCPs have frequently been inserted into the contract as the new FSS prices, with no attempt to figure and negotiate an MFC price. In order to meet the statutory needs described above, this practice in 904E must be halted and negotiated FSS MFC prices be determined for every covered drug for the 1993 contract year. In those cases where the covered drugs were already on contract, we believe that the MFC prices which had previously been negotiated can be revived. The more difficult task is presented by the instances where new covered drugs were added to existing contracts at the FCP price or new offers were made and MFC negotiations did not take place.

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This will require reopening of discussions with several manufacturers of covered drugs, but the task should not involve a huge amount of additional contracting officers' time because DSMD sheets and MFC discount disclosures have (presumably) already been obtained and can be applied to determine the FSS contract price. Negotiations to determine the customer class comparable to VA and the best discount available to VA have already been conducted and, therefore, the additional negotiations should not be protracted.

6. As you know, I have scheduled a meeting with 904E this afternoon to discuss the above points and the most practical ways to implement our recommendations. I will inform you of the results of that meeting. If you have any comments on these matters, please do not hesitate to call me.



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Assistant General Counsel

cc: Chief, Pharmaceutical Products Division (904E)
Chief, Pharmacy Service/Drugs & Pharmaceutical Product
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Chief, Clinical Pharmacy (111H)
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MAN:gsd