

Selected Excerpts Re Technical Data Provisions of National Defense Authorization Act for Fiscal Year 2008 (Pub.L. 110-181 [H.R. 4986] , January 28, 2008)

1. Section 815(a)(2)

Sec. 815. CLARIFICATION OF RULES REGARDING THE PROCUREMENT OF COMMERCIAL ITEMS.

(a) Treatment of Subsystems, Components, and Spare Parts as Commercial Items.--

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(2) Conforming amendment to technical data provision.-- Section 2321(f)(2) of such title is amended by striking "(whether or not under a contract for commercial items)" and inserting "(other than technical data for a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))".

//end 815(a)(2)

2. Conf. Report – H.Rpt. 110-477:

Clarification of rules regarding the procurement of commercial items (sec. 815)

The House bill contained a provision (sec. 811) that would amend the Truth in Negotiations Act, section 2306a of title 10, United States Code, to require the submission of cost or pricing data for sole-source contracts for commercial items if needed to determine that a price is fair and reasonable.

The Senate amendment contained a provision (sec. 822) that would amend section 2379 of title 10, United States Code, to narrow the categories of subsystems, components, and spare parts of major weapon systems that may be purchased as commercial items.

The House recedes with an amendment that would authorize the contracting officer in the procurement of a major weapon system, or subsystems, components, or spare parts for a major weapon system to require offerors to submit sufficient information to evaluate, through price analysis, the reasonableness of the proposed price. The information required to be submitted may include information on prices paid for the same or similar items under comparable terms and conditions and, if the contracting officer determines that price information is not sufficient to determine the reasonableness of price, other relevant information regarding the basis of price or cost, including information on labor costs, material costs, and overhead rates.

The conferees expect that a contracting officer's written determination under this section will include an explanation of the basis for the contracting officer's determination that: (1) the item is a commercial item; and (2) the information provided by the contractor is sufficient to evaluate the reasonableness of price.

//end ConfReport

3. House Committee Report for H.R. 1585 – H.Rpt. 110-146:

a. Section-by-Section:

SECTION 811--CHANGE TO THE TRUTH IN NEGOTIATIONS ACT EXCEPTION FOR THE ACQUISITION OF A COMMERCIAL ITEM

This section would amend section 2306 a of title 10, United States Code, to require the submission of cost or pricing data under the Truth in Negotiations Act (10 U.S.C. 2306a) for sole-source contracts for commercial items if the contracting officer is otherwise unable to locate sufficient sales data to determine that a price is fair and reasonable.

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b. Full Text of 815:

Sec. 815. CLARIFICATION OF RULES REGARDING THE PROCUREMENT OF COMMERCIAL ITEMS.

(a) Treatment of Subsystems, Components, and Spare Parts as Commercial Items.--

(1) In general.-- *Section 2379 of title 10, United States Code*, is amended--

(A) in subsection (a)--

(i) by redesignating paragraph (2) as paragraph (3);

(ii) in paragraph (1)(B), by striking "and" at the end; and

(iii) by inserting after paragraph (1), the following:

"(2) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such system; and";

(B) by striking subsection (b) and inserting the following new subsection (b):

"(b) Treatment of Subsystems as Commercial Items.--A subsystem of a major weapon system (other than a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (*41 U.S.C. 431(c)*)) shall be treated as a commercial item and purchased under procedures established for the procurement of commercial items only if--

"(1) the subsystem is intended for a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

"(2) the contracting officer determines in writing that--

"(A) the subsystem is a commercial item, as defined in section 4(12) of the Office of Federal Procurement Policy Act (*41 U.S.C. 403(12)*); and

"(B) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such subsystem.";

(C) by redesignating subsections (c) and (d) as subsections (e) and (f), respectively; and

(D) by inserting after subsection (b) the following new subsections (c) and (d):

"(c) Treatment of Components and Spare Parts as Commercial Items.--(1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (*41 U.S.C. 431(c)*)) may be treated as a commercial item for the purposes of section 2306a of this title only if--

"(A) the component or spare part is intended for--

"(i) a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

"(ii) a subsystem of a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (b); or

"(B) the contracting officer determines in writing that--

"(i) the component or spare part is a commercial item, as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)); and

"(ii) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such component or spare part.

"(2) This subsection shall apply only to components and spare parts that are acquired by the Department of Defense through a prime contract or a modification to a prime contract (or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value).

"(d) Information Submitted.--To the extent necessary to make a determination under subsection (a)(2), (b)(2), or (c)(1)(B), the contracting officer may request the offeror to submit--

"(1) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

"(2) if the contracting officer determines that the information described in paragraph (1) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.".

(2) Conforming amendment to technical data provision.-- Section 2321(f)(2) of such title is amended by striking "(whether or not under a contract for commercial items)" and inserting "(other than technical data for a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))".

(b) Sales of Commercial Items to Nongovernmental Entities.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall modify the regulations of the Department of Defense on the procurement of commercial items in order to clarify that the terms "general public" and "nongovernmental entities" in such regulations do not include the Federal Government or a State, local, or foreign government.

//end fulltext815 [*Emphasis added*]

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