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The Honorable Strom Thurmond  
SR-217 Russell Senate Office Building  
Washington, DC 20510-4001

RE: Sections 805 and 816 of S. 2057, the National  
Defense Authorization Act for Fiscal Year 1999

Dear Chairman Thurmond:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section’s governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Sections 805 and 816 of S. 2057 seek to amend the procurement statutes governing the pricing of commercial item contracts. The Section recommends that Sections 805 and 816 either be eliminated in their entirety or amended consistent with the comments set forth below. The Section’s position is based on the following:

- Sections 805 and 816 appear only in the Senate’s version of the bill and were included without the benefit of any hearings or other input from the public. In fact, Section 816 was added as the result of a floor amendment.
- The perceived problems with Defense Department sole-source procurement of spare parts that Sections 805 and 816 seek to address occurred between 1994 and 1996 at a time when the Federal Acquisition Streamlining Act and the Clinger-Cohen Act were not yet fully implemented in the regulations. Nor had the procurement workforce had much, if any, training on commercial item procurement.
- There is no credible evidence that the perceived problems could not be resolved through training Defense Department procurement officials in the better use of existing rules.
- Even though Sections 805 and 816 seek to address perceived problems associated with Defense Department sole-source procurement of spare parts, the actual language of the provisions is broad and extends beyond the Defense Department, beyond sole-source procurements, and beyond spare parts.
- Section 805 unnecessarily introduces a new category of “uncertified cost or pricing data,” with unintended consequences into the statutory scheme governing commercial item pricing.
- Section 805 unnecessarily requires further regulatory guidance on price analysis tools and the definition of commercial item even though the FAR currently provides adequate guidance.
- Section 816 unnecessarily adds superfluous language to the statutory scheme governing commercial item pricing.

## **I. GENERAL COMMENTS**

Revision of the Government’s system of purchasing commercial products and services has been the product of extensive legislative and regulatory effort that has been underway since before 1990 when Congress created the Section 800 Advisory Panel in the Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 800 (Nov. 5, 1990). After several years of effort, Congress produced the Federal Acquisition Streamlining Act (“FASA”), P.L. 103-355, 108 Stat. 3242 (Oct. 13, 1994), and the Clinger-Cohen Act, P.L. 104-106, 110 Stat. 642 (Feb. 10, 1996), legislation that

significantly changed the requirements for Government commercial item purchases. The legislation was designed to give the Government greater access to commercial products, technologies, and efficiencies by eliminating legal and regulatory barriers that discouraged commercial entities from dealing with the Government.

Prior to FASA and Clinger-Cohen, commercial business offering products to the Government were subject to cost and pricing disclosures, restrictive quality and technical requirements, and exposure to civil and criminal liability. The most troublesome requirement for commercial contractors to submit *certified cost or pricing data* prior to a contract award under certain conditions. Congress believed, and rightly so, that this and other disclosure requirements resulted in an unnecessary and expensive deprivation of commercial goods and services, including computer, telecommunications, and cutting-edge technologies.

The regulatory framework implementing FASA and Clinger-Cohen was finally completed in January, 1997. As Dr. Steven Kelman, former head of the Office of Federal Procurement Policy, has stated: “We are at an important crossroad in acquisition reform generally and our effort to buy commercial in particular. Transitions are often accompanied by temptations to revert to old ways. As a procurement community we collectively must resist this temptation.”

Temptation to revert back to the days of closely regulated cost disclosures has resulted from a recent review of incidents occurring between 1994 and 1996 in which inadequate Department of Defense (“DoD”) negotiation and contracting practices resulted in the Government paying more for airplane spare parts than it did in prior years. These are the problems that Sections 805 and 816 of S. 2057 attempt to resolve.

These incidents occurred before the FASA and Clinger-Cohen regulations were finalized and before any training programs on those regulations could be fully implemented. No laws were violated, and the DoD has moved rapidly to ensure that similar contracting mistakes are not made in the future. Neither the investigators of the incidents, the DoD Inspector General and the General Accounting Office, nor DoD officials have indicated any need for legislative action to prevent future mistakes.

Sections 805 and 816, if enacted, create the prospect that any commercial item vendor could be required to submit uncertified cost or pricing data as prerequisite to obtaining a contract or subcontract – even though the problem that the legislation purports to address is DoD sole-source spare parts pricing.

Unless eliminated or narrowly limited to apply only to Defense Department sole-source procurements of spare parts, the Government could well find itself once again in the same morass that prompted much of FASA and the Clinger-Cohen Act – unable to

procure leading-edge technology because it insists on disclosure of data (whether it is “uncertified cost or pricing data” or some other information) that the commercial vendor does not maintain in the regular course of business.

Sections 805 and 816 of S. 2057 come at a time when federal officials charged with implementing FASA and Clinger-Cohen have had insufficient time to incorporate the new legal tools at their disposal. In the absence of a demonstrated compelling need for additional legislative guidance, federal officials should have an opportunity to fully utilize the new tools and guidance regarding commercial item acquisitions before being required to accommodate another round of legislative changes. Rather, the emphasis should be on training the Government’s procurement officials in the better use of the existing rules.

For all of these reasons, the Section recommends that Sections 805 and 816 of S. 2057 be eliminated in their entirety.

## II. SPECIFIC COMMENTS

To the extent that Sections 805 and 816 are not eliminated in their entirety, the Section recommends that they be amended consistent with the following specific comments.

### **A. The Definition of “Exempt Item” Sweeps Too Broadly and Should Be Limited to the Defense Department**

The report accompanying Section 805 states explicitly that the rationale for the legislation is to “require the secretary to promulgate regulations to provide guidelines that would ensure price reasonableness in sole-source commercial item purchases.” S. Report No. 105-189, page 317. The report also states that less than 3% of DoD contracting dollars are affected by the perceived abuses in spare parts procurements that the legislation seeks to correct and acknowledges that “acquisition reform efforts . . . have resulted in savings of hundreds of millions of dollars and . . . provided DoD with more rapid access to leading edge commercial technology.” S. Report No. 105-189, pages 316-317. Yet, the legislation would apply to any “exempt item,” which Section 805 defines as *any* commercial item that falls under the commercial item exemption from the Truth in Negotiations Act. The commercial item exemption from TINA applies to all types of procurements of commercial items, not just sole-source spare parts procurements.

Further, Section 805 applies Government-wide, not just to the Defense Department. However, the perceived problems addressed in the Senate Report are exclusively within the Defense Department. No credible evidence exists that there are any problems in connection with civilian agencies’ acquisition of spare parts. Without such

credible evidence, Section 805 should be limited in its application to the Defense Department.

If Section 805 is not removed in its entirety, this overly broad language must be qualified so that it applies only to DoD sole-source procurements of spare parts. In this regard, the Section strongly recommends that Section 805(b) be amended to read as follows:

*For purposes of this section, the term “exempt item” means a commercial item of spare parts that is exempt under subsection (b)(1)(B) of section 2306a of title 10, United States Code, from the requirements for submission of certified cost or pricing data under that section and that is procured on a sole-source basis.*

Without such limiting language in the legislation, there is a strong possibility that the regulators may feel compelled to draft regulations to apply to all commercial item procurements Government-wide. This could spell the practical demise of the commercial item exemption to TINA and eliminate the acquisition reform benefits lauded by the Senate in the legislative history.

**B. The Legislation Unnecessarily Introduces a New Category of “Uncertified Cost or Pricing Data”**

Section 805(c)(2)(B) of S. 2057 requires that the DoD prescribe specific regulations on the circumstances under which contracting officers should require offerors of “exempt items” to provide “uncertified cost or pricing data” and “information on prices at which the offeror has previously sold the same or similar items.” The concept of “uncertified cost or pricing data” is new and has not appeared in prior statutory provisions. Rather, the existing statutory provisions simply refer to “data other than certified cost or pricing data” and state that, in circumstances where adequate price competition is not present, such data should include, at minimum, “information on the prices at which the same item or similar items have previously been sold.” 41 U.S.C. § 254b(d)(1); 10 U.S.C. § 2306a(d)(1). Introduction of a new category of “uncertified cost or pricing data” will only serve to unduly complicate the existing statutory scheme.

Moreover, the concept of *uncertified* cost or pricing data will likely have the same complicating effect as did prior statutory requirements for submission of *certified* cost or pricing data in the pre-reform era. Because commercial pricing is market-based, and not cost-based, commercial businesses do not generally collect or use this type of cost-based information. Providing this information to the Government will add time, expense, and

liability. In the commercial marketplace, an item's cost is generally independent of its market-generated price. Commercial entities generally utilize market competition, comparison shopping, and negotiation to obtain a reasonable price. Even though the cost or pricing data is labeled *uncertified*, a contractor can still be liable for submission of inaccurate, incomplete or not current cost or pricing data. Moreover, if a commercial vendor provides *uncertified* cost or pricing data, it may well trigger the unintended application of the Cost Accounting Standards.

Section 805(c)(2)(B) is simply not necessary. Under the current statutory and regulatory scheme, the Government's contracting officers may request from contractors "data other than cost or pricing data to the extent necessary to determine the reasonableness of the price." 10 U.S.C. § 2306a(d)(1); 41 U.S.C. § 254b(d)(1); FAR §§15.401, 15.403-3. The term "information other than cost or pricing data" is defined in FAR §15.401 and may include pricing, sales or cost information and includes cost or pricing data for which certification is determined inapplicable after submission. In addition, FAR §§ 15.402 and 15.403-3 sets forth specific guidance as to when contracting officers should ask for such additional data.

For these reasons, the Section recommends that even if Section 805 is not eliminated in its entirety, Subsection 805(c)(2)(B) should be eliminated.

### **C. The Legislation Unnecessarily Requires Further Guidance On Price Analysis Tools**

Section 805(c)(2)(A) of S. 2057 requires that the FAR be revised to provide specific guidance on the appropriate application and precedence of such price analysis tools as catalog-based pricing, market-based pricing, historical pricing, parametric pricing and value analysis. This provision is unnecessary because it does not expand current statutory and regulatory authority to determine price reasonableness. Rather, the provision unnecessarily focuses on an incomplete list of tools that are already provided for in the FAR and that agencies may or may not need to use to make a pricing determination.

The current regulatory framework provides agencies with the necessary power to obtain reasonable prices for commercial items. The current regulations describe analytical techniques and procedures, which may be used singly or in combination with others, to ensure that a price is fair and reasonable. See FAR § 15.404-1(a)(1). Agencies are explicitly authorized to require the submission of data other than certified cost or pricing data to the extent necessary to determine price reasonableness, and contracting officers are required to ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. See FAR §§ 15.402, 15.403-3.

The FAR authorizes contracting officers to obtain “information other than cost or pricing data,” including established catalog or market prices or previous contract prices. FAR § 15.402(a)(2)(i). The FAR specifies that this information must be obtained first from within the Government, then from sources other than the offeror, and finally from the offeror. An offeror must state the basis of the offered price and its relationship to the established catalog price and discount policies. FAR Clause 52.215-21. The contracting officer uses this information to determine if the offered price is fair and reasonable.

The FAR requires contracting officers to compare proposed prices with competitive published price lists, published market prices of commodities, similar indexes, discount or rebate arrangements, independent Government cost estimates, and prices obtained through market research for the same or similar items. FAR §§ 15.404-1(b)(2)(iv), (v), (vi). This price-related information is placed on the highest “order of preference” in determining price reasonableness. FAR § 15.402(a).

The current regulations also require that the procuring agency conduct market research prior to commercial item acquisition. FAR Part 10, FAR § 12.101(a). The importance of market research in the current regulations is inherent in its defined purpose: “an essential element for the acquisition of commercial items . . . [market research] establishes the foundation for the agency description of need, the solicitation, and resulting contract.” FAR § 12.202(a). Agencies use market research to determine commercial item sources and to determine whether those sources meet or can be modified to meet the agency's requirements. FAR §§ 10.001(a)(3)(ii)(B), (C). The FAR provides specific market research techniques including discussing market capabilities with Government and industry experts, reviewing similar, related market research, and publishing requests for information in scientific and business publications. FAR §§ 10.002(b)(2)(i), (ii).

The FAR also already provides guidance on the use of parametric estimating methods/ applications, e.g., dollars per pound, per horsepower, or other units, to highlight pricing inconsistencies. FAR § 15.404-1(b)(2)(iii). The FAR further provides that the Government should use cost analysis techniques to assess the reasonableness of estimates generated by parametric models or cost-estimating relationships. FAR § 15.404-1(c)(2)(ii)(C).

For these reasons, if Section 805 is not eliminated in its entirety, Subsection 805(c)(2)(A) should be eliminated.

**D. The Legislation Unnecessarily Requires  
Elaboration of the Phrase “Purposes Other  
than Governmental Purposes” Contained  
In the Definition of Commercial Item**

Section 805(c)(2)(D) requires that the FAR be amended to provide specific guidance on the meaning and appropriate application of the phrase “purposes other than governmental purposes” contained in the statutory definition of commercial item (41 U.S.C. 403(12)). This provision in S. 2057 also appears to stem from problems with sole-source spare parts procurements, but its reach is far more broad.

The regulatory definition of “commercial item” in FAR 2.101 already has addressed the meaning and application of the statutory phrase “purposes other than governmental purposes.” FAR 2.101 specifically recognizes that items with minor modifications that are not customarily available in the commercial marketplace that are made to meet Federal Government requirements can still qualify as commercial items. FAR 2.101 goes on to state that “minor” modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Further, FAR 2.101 also adds that nondevelopmental items may qualify as commercial items if the procuring agency determines that the item was developed exclusively at private expense and was sold in substantial quantities to multiple State and local governments.

Given the FAR’s existing guidance on the meaning of the qualifying phrase “purposes other than governmental purposes,” it does not appear necessary for Congress to statutorily require further guidance.

For these reasons, if Section 805 is not eliminated in its entirety, Subsection 805(c)(2)(D) should be eliminated.

**E. Section 816 Unnecessarily Complicates the  
Statutory Scheme Governing Commercial  
Pricing**

Section 816 of S. 2057 would alter the current statutory scheme which requires that, in procurements where adequate price competition is not present, the data submitted, at a minimum, include information on the prices at which the same or similar items have previously been sold. Section 816 would require that submission of such data be a condition for the eligibility of the offeror to enter into the contract or subcontract at issue. Contrary to the actual language of Section 816, the statement accompanying introduction of the amendment on the floor of the Senate indicates that it is intended to “close a loophole in existing law by requiring the submission of such cost and pricing data as the government contracting officer determines is necessary.” See Statement of Senator Warner, Congressional Record, June 23, 1998, page S6847.

However, no such loophole exists. The current statutory and regulatory scheme permits contracting officers to request appropriate information regarding the pricing of

commercial items, including pricing, sales or cost information (which may include cost or pricing data for which certification is determined inapplicable after submission). Clearly, if a vendor fails to submit information requested by a contracting officer during price negotiations, then the contracting officer is not required to find that the price offered is fair or reasonable and can deny the vendor the contract at issue. Moreover, the actual language of the statutory provision being amended deals only with “information on the *prices* at which the same or similar items have previously been sold.” 10 U.S.C. 2306a(d)(1); 41 U.S.C. 254b(d)(1). (Emphasis supplied.) This has nothing to do with cost data.

For these reasons, if Section 816 is not eliminated in its entirety, the proposed sentence which reads “[s]ubmission of data required of an offeror under the preceding sentence in the case of a contract or subcontract shall be a condition for the eligibility of the offeror to enter into the contract or subcontract” should be eliminated.

### III. CONCLUSION

The current statutory and regulatory scheme gives agencies ample power to obtain high quality commercial goods and services at reasonable prices. Sections 805 and 816 of S. 2057 are neither necessary nor appropriate. The Section recommends that they be deleted from S. 2057 or, at least, modified consistent with these comments.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Marcia G. Madsen  
Chair  
Section of Public Contract Law

cc: Officers and Council Members  
Chair and Vice Chairs, Commercial Products  
and Services Committee  
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1/ See generally Richard J. Wall and Christopher B. Pockney, *Revisiting Commercial Pricing Reform*, 27 PUB. CONT. L. J. 315 (1998).

2/ See Exceptions to Requirements for Certified Cost or Pricing Data, 62 Fed. Reg. 257 (1997) (implementing FAR Subpart 15.8 (1997); rewritten at FAR Subpart 15.4, which was the last regulation implementing Clinger-Cohen).

3/ Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L. J. 249, 261 (1998).

4/ See *Acquisition Reforms Save Money and Improve Services*, DEFENSE ISSUES, Mar. 1998, at 5 (Prepared statement of Jacques S. Gansler, Undersecretary of Defense for Acquisition and Technology, to the Acquisition and Technology Subcommittee, Senate Armed Services Committee, Mar. 18, 1998).

5/ See Mar. 18, 1998 Statement of Eleanor Hill, Inspector General, Department of Defense before the Subcommittee on Acquisition and Technology, at 7.