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THE TRUTH-IN-NEGOTIATIONS ACT—AN EXAMINATION OF DEFECTIVE PRICING IN GOVERNMENT CONTRACTS

Charges of excessive profitmaking on government contracts have issued from the Senate floor¹ and the nation's press² and have provided the impetus for recent congressional investigations³ and proposals for remedial legislation.⁴ Profiteering by government contractors is a problem of potentially enormous dimensions since purchases by the federal government total more than seventy-seven billion dollars—over ten per cent of the gross national product.⁵ Because the greatest part of these purchases are made by the Department of Defense,⁶ congressional action aimed at minimizing excessive profits has focused upon Defense Department procurement activities under the Armed Services Procurement Act (ASPA).⁷

The Government has determined that formal advertising is the most economical and efficient method of purchasing,⁸ and ASPA requires the use of this method "in all cases in which [it] is feasible and practicable

¹ See, e.g., 113 CONG. REC. S5620-21 (daily ed. Apr. 20, 1967) (remarks of Senator Young); 113 CONG. REC. S7706-07 (daily ed. June 6, 1967) (remarks of Senator Proxmire).

² The most significant outcry from the press against excessive profits in Defense Department contracting under the Truth-in-Negotiations Act is a series of articles in the *Cleveland Plain-Dealer* written by S. Watzman and published on April 9-18, 1967. These articles are reprinted in 113 CONG. REC. S5621-26 (daily ed. Apr. 20, 1967).

³ E.g., *Hearings on Economy in Government Before the Joint Econ. Comm.*, 90th Cong., 1st Sess. (1967); *Hearings on Defense Contract Audit Agency Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess. (1967); *Hearings on Defense Procurement Policies and Practices Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 90th Cong., 1st Sess. (1967).

⁴ E.g., S. 1913, 90th Cong., 1st Sess. (1967) (to provide the Government with access to the accounting records of contractors); H.R. 12959, 90th Cong., 1st Sess. (1967) (to require certain contractors to certify that the price to the Government does not exceed the highest price charged by that contractor to other purchasers).

⁵ *Hearings on Economy in Government Before the Joint Econ. Comm.*, 90th Cong., 1st Sess., pt. 1, at 3 (1967).

⁶ See SUBCOMM. FOR SPECIAL INVESTIGATIONS OF THE HOUSE COMM. ON ARMED SERVICES, 90th Cong., 2d Sess., REVIEW OF DEFENSE PROCUREMENT POLICIES, PROCEDURES, AND PRACTICES, pt. 1, at 1 (Comm. Print 1968).

⁷ 10 U.S.C. §§ 2301-14 (1964).

⁸ STAFF OF JOINT ECON. COMM., 90TH CONG., 1ST SESS., REPORT ON ECONOMY IN GOVERNMENT 5-7, 45-48 (Comm. Print 1967). For a discussion of the mechanics of formal advertising, see *Dep't of Def. Presentation to the Procurement Subcomm. of the Senate Comm. on Armed Services* (Feb. 8-9, 1960) at 17-19.

under the existing conditions and circumstances."⁹ The Defense Department has outlined the conditions which must exist before effective procurement can be had through formal advertising:

- (1) A complete, adequate and realistic specification or purchase description
- (2) Two or more suppliers available, willing and able to compete effectively for government business
- (3) Selection based on price competition alone
- (4) Sufficient time to prepare a complete statement of the Government's needs and the terms upon which it will do business and [sufficient time] to carry out the necessary administrative procedures.¹⁰

The absence of any one of these factors in a particular purchase situation necessitates the use of negotiated contracts instead of formal advertising.

Wartime exigencies in the 1940's first required extensive use of negotiation as a method of purchasing. Since that time, the frequency of negotiation has increased, and currently the dollar volume of negotiated procurement far exceeds that of purchases by formal advertising. Of the over 121 billion dollars of services and supplies procured by the Defense Department in the period from 1963 through 1966, eighty-five per cent were purchased through negotiated contracts.¹¹

In the negotiation of government contracts the major portion of time is spent in arriving at the contract price. Individual contract terms and clauses are in most cases not subject to negotiation by the parties because they are prescribed by statute, regulation, standard form, or Government requests for proposals.¹² Furthermore, since many acquisitions involve

⁹ 10 U.S.C. § 2304(a) (1964).

The requirement of formal advertising is designed to give all persons equal right to compete for Government business, to secure to the Government the benefits which flow from competition, to prevent unjust favoritism by representatives of the Government in making purchases for public account, and to prevent collusion and fraud in procuring supplies or letting contracts.

34 Decs. Comptroller Gen. 551, 552 (1955), *quoted in* REPORT ON ECONOMY IN GOVERNMENT, *supra* note 8, at 5.

¹⁰ *Dept. of Def. Presentation to the Procurement Subcomm. of the Senate Comm. on Armed Services* (Feb. 8-9, 1960). 10 U.S.C. § 2304 (1964) indicates specific excepted situations in which contracts may be negotiated rather than formally advertised. .

¹¹ See REPORT ON ECONOMY IN GOVERNMENT, note 8 *supra* at 49.

¹² See generally Cibinic, *Contract by Regulation*, 32 GEO. WASH. L. REV. 111 (1963); Stone, *Contract by Regulation*, 29 LAW & CONTEMP. PROB. 32 (1964); Whelan & Phillips, *Government Contracts: Emphasis on Government*, 29 LAW & CONTEMP. PROB. 315 (1964).

ASPA and the extensive Armed Services Procurement Regulations (ASPR), 32 C.F.R. §§ 1.100 to 18.1001-4 (1967), issued under the authority of the Act, govern the procurement policies and procedures in the Department of Defense. Many of the contract clauses prescribed in ASPR are required in every government contract. More-

products being manufactured for the first time, prices cannot be determined by the normal forces of supply and demand. Consequently, the contract price must be fixed after extensive negotiations based upon cost projections. But government negotiators generally must rely on cost and pricing data furnished by contractors.¹³ There is often no independent standard to apply to a contractor's estimates, and the private contractor is usually better informed about past and future cost patterns than is the government negotiator. The opportunity for excessive profits through overstatement of cost and pricing data is obvious.

In an attempt to overcome these difficulties, Congress passed in 1962 the Truth-in-Negotiations Act,¹⁴ an amendment to ASPA. The Act, which

over, a controversial decision by the Court of Claims, extending the import of this requirement, holds that a contractor is bound by a "required" contract clause even though the clause is not included in his contract with the Government. *G. L. Christian & Associates v. United States*, 312 F.2d 418, 425-28 (Ct. Cl. 1963), *aff'd on rehearing*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964), *motion for rehearing denied*, 377 U.S. 1010 (1964), *cert. denied*, 382 U.S. 821 (1965). This case is discussed in Whelan & Phillips, *supra*, at 335-42. The controlling effect of ASPR on contract terms has caused government contractors to recognize that negotiation of contract clauses must be carried on with the committee which promulgates ASPR rather than with government negotiators at the bargaining table. But the actual impact of industry suggestions is difficult to ascertain; the final decision is always made by representatives of the Government. *See Stone, supra*, at 34-35.

¹³ *See, e.g.*, SUBCOMM. FOR SPECIAL INVESTIGATIONS, *supra* note 6, at 1. This problem is not peculiarly American. The British Ministry of Aviation has recognized that access to contractors' cost and pricing data is necessary to combat excessive profits and lower contract prices. *See* CHANCELLOR OF THE EXCHEQUER & MINISTER OF AVIATION, 2D REPORT OF THE INQUIRY INTO THE PRICING OF MINISTRY OF AVIATION CONTRACTS (1965). Although the British speak in terms of "equality of information" and access to contractors' records rather than submission of data, the problem is much the same. *Id.* at 10. Concluding that little can be done to increase the number of contracts awarded by competition, this report to Parliament has suggested a contract condition to ensure "equality of information." *Id.* at 11. The goals of such a contract condition are similar to those of the Truth-in-Negotiations Act.

¹⁴ 10 U.S.C. § 2306(f) (1964). The Act, also known as P.L. 87-653, provides:

A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submit[t]ed was accurate, complete and current—

- (1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed \$100,000;
- (2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency;
- (3) Prior to the award of a subcontract of any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed \$100,000; or
- (4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected

applies to procurements valued at approximately twenty billion dollars annually,¹⁵ was intended to ensure that cost and pricing data submitted by contractors is current, accurate and complete. Three functional requirements are included in the Act. First, the contractor must submit cost and pricing data to government negotiators prior to the contract award. Second, the contractor must certify that, to the best of his knowledge and belief, the data is current, accurate and complete. Third, each contract must contain a clause requiring adjustment of the contract price to exclude any significant sums by which the negotiated price was increased because the contractor's data was noncurrent, inaccurate or incomplete. Despite the apparent simplicity of these requirements, implementation of the act has generated congressional concern and extensive criticism.¹⁶ This Note will examine the legislative history of the Truth-in-Negotiations Act and explore three problems presented by the statute: (1) certification of cost and pricing data; (2) the Government's burden of proof with respect to the causation requirement; and (3) the availability of offsets to the contractor.

to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency.

Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as practicable), was inaccurate, incomplete, or noncurrent: Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

¹⁵ In fiscal 1966 negotiated contracts totalling about \$18 billion were awarded subject to the Act's requirements; the estimate for fiscal 1967 is \$21 billion. *Hearings on Defense Procurement Policies and Practices*, *supra* note 3, pt. 1, at 31.

¹⁶ Much of the criticism of the Truth-in-Negotiations Act has centered on the failure of both the implementing regulations and the Armed Services Board of Contract Appeals to fashion workable definitions for critical terms or phrases left undefined by the Act. See, e.g., R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 246-49 (1966); Pettit, *The Defective Pricing Law and Implementing Regulations—A Year and a Half Later*, 29 *LAW & CONTEMP. PROB.* 552 (1964). The extent of the definitional problems is illustrated by the uncertainty which persists, after five years, as to precisely what constitutes "data" which must be submitted by the contractor. The ASPR committee has attempted to clarify the meaning of this term, see 32 C.F.R. § 3.807-3(e), but application of the committee definition by the Board of Contract Appeals has resulted in tenuous distinctions and increased uncertainty. Compare *Cutler-Hammer, Inc.*, ASBCA No. 10900, 67-2 BCA ¶ 6432 (1967), with *Sparton Corp.*, ASBCA No. 11363, 67-2 BCA ¶ 6539 (1967), *on motion for reconsideration*, 68-1 BCA ¶ 6730 (price quotations from untried vendors). Consideration of the problems posed by inadequate definition of terms is beyond the scope of this Note.

Background and Legislative History

Some question as to the purposes of the Act has existed ever since its enactment.¹⁷ Disagreement has centered on the extent to which a contractor's intent is relevant to the operation of the Act. It is possible to conceive of the Act as a fraud statute, which merely relieves the Government of the burden of proving fraud when defective data is knowingly submitted by the contractor. On the other hand, one can assume that the Act's function, regardless of the contractor's intent, is to obtain current, accurate and complete data during negotiations. Legislative history is inconclusive with respect to these conflicting points of view, but it suggests that the Act, while originally intended by its sponsor to be a fraud statute, has evolved into a tool for providing the Government with accurate data during negotiations.

The General Accounting Office (GAO) provided the impetus for the Truth-in-Negotiations Act by submitting extensive reports to Congress on overpricing and excessive profits by government contractors.¹⁸ Because there was no legal basis for recovery of excessive contract payments, GAO recommended "voluntary" refunds from contractors in many instances where overpricing occurred.¹⁹ Largely as a result of this activity the Defense Department revised ASPR in 1960.²⁰ The revision required contractors to certify that their pricing data was current, accurate and complete²¹ when the amount of a procurement exceeded 100,000 dollars and the negotiated price was based upon a contractor's actual or estimated cost rather than on effective competition, established catalogue or market prices, or prices set by law or regulation.

Congressional action soon followed the ASPR revisions. A bill²² which

¹⁷ See, e.g., *Joint Econ. Comm. Hearings*, *supra* note 3, pt. 1, at 72.

¹⁸ E.g., *Hearings Pursuant to § 4, P.L. 86-89 Before Spec. Subcomm. on Procurement Practices of Dep't of Defense of House Comm. on Armed Services*, 86th Cong., 2d Sess., 64-70 (1960) [hereinafter cited as *1960 House Hearings*].

¹⁹ H. R. REP. NO. 1344, 89th Cong., 2d Sess. 9 (1966). These efforts were well received by Congress. See *1960 House Hearings* at 64-70; *Hearings on H.R. 5532 Before Senate Comm. on Armed Services*, 87th Cong., 2d Sess. 21 [hereinafter cited as *Senate Hearings on H.R. 5532*].

Refunds resulted in recovery of at least forty-eight million dollars between 1957 and 1962. *Hearings on Relation of Cost Data to Military Procurement Before Subcomm. for Spec. Investigations of House Comm. on Armed Services*, 88th Cong., 1st Sess. 6 (1963). Compare *Senate Hearings on H.R. 5532* at 21, where Congressman Vinson estimated the amount of recovery to be sixty-nine million dollars.

²⁰ The text of this ASPR revision is reprinted in *1960 House Hearings* at 145-55.

²¹ *Id.* at 152-53.

²² H.R. 5532, 87th Cong., 1st Sess. § (g) (1961):

No contracts shall be negotiated under this title containing a profit formula that would allow the contractor increased fees or profits for cost reductions or target cost underruns, unless the contractor shall have certified that the cost data he

passed the House in 1962 required, *inter alia*, certification of cost and pricing data for incentive-type contracts.²³ This bill was sponsored by Congressman Vinson to prohibit contractors from using padded figures in the negotiation of these contracts.²⁴ The Senate Armed Services Committee modified the bill so that it extended to all types of contractual arrangements.²⁵ The Committee was convinced that legislative action was necessary largely because of GAO findings which indicated that the ASPR certification

submitted in negotiations for the fixing of the target cost or price was current, accurate, and complete; and such contracts shall contain a provision that the target cost or price shall be adjusted to exclude any sums by which it may have been found after audit that the target cost or price may have been increased as a result of any inaccurate, incomplete or non-current data.

See also S. REP. No. 1884, 87th Cong., 2d Sess. (1962).

An earlier version of this bill, H.R. 12572, 86th Cong., 2d Sess. (1960), was passed by the House in 1960. However, the Senate Armed Services Committee concluded that "[m]ost, if not all of the procurement problems in the Department of Defense can be solved administratively." S. REP. No. 1900, 86th Cong., 2d Sess. 26 (1960). Accordingly, the Committee limited its action to making several recommendations to the Defense Department. In response to one of these recommendations ASPR was amended in 1961 to require a contract clause providing for a price reduction when defective data inflated the contract price. 32 C.F.R. § 7.104.29 (1961).

²³ Three basic types of contracts are currently used in government contracting: cost-plus, fixed price and incentive. At one extreme is the cost-plus contract, used primarily for purchasing new or untried products for which there is little historical or projected cost data. The contractor is reimbursed for all his costs plus a fixed profit or fee, regardless of how inefficient his operations prove. The Defense Department uses this type as infrequently as possible since there is little incentive for contractor efficiency. Fixed price contracts, particularly firm fixed price contracts, are at the other extreme. These contracts are negotiated at a specific price which will be paid to the contractor even if his costs exceed the contract price. Procurement officials in the Defense Department favor this type of contract. The incentive contract is a hybrid; it encourages efficiency in procurement situations where cost data are insufficient to arrive at a firm fixed price but are sufficient to avoid the cost-plus contract. An incentive contract includes a negotiated target cost and an incentive-sharing ratio. The Government and contractor split any difference between actual cost and target cost in proportion to the incentive-sharing ratio. For example, suppose negotiations result in a target cost of \$100,000 and a ratio of 80 to 20. If actual cost is \$90,000 the contractor will receive \$90,000 plus an extra profit of 20% of the saving, which in this case would be 20% of \$10,000 or \$2,000. Theoretically this bonus encourages contractor efficiency by inducing him to keep actual costs below the target cost.

²⁴ Congressman Vinson had charged that government savings from incentive contracts are illusory because contractors pad their figures in order to arrive at a high target cost and then receive a bonus for this padding when actual cost is less than the target cost. See *1960 House Hearings* at 429; H.R. REP. No. 1959, 86th Cong., 2d Sess. 32 (1960).

²⁵ S. REP. No. 1884, 87th Cong., 2d Sess. 9 (1962). The Senate also adopted from ASPR the \$100,000 floor for contracts required to comply with the act and provided that cost and pricing data would not be required when there is adequate price competition or established catalogue prices. *Id.* at 29.

requirements were being ignored.²⁶ This modified version of the bill passed the Senate²⁷ and became effective on December 1, 1962.

Thus while the Truth-in-Negotiations Act may have been intended originally as a fraud statute of rather limited application, its scope and arguably its function had broadened by the time it passed the Senate. In fact, the Senate Armed Services Committee was aware that the Act might extend to the innocent contractor whose defective data was entirely the result of inadvertent errors. Congressmen Vinson and Hebert testified before the Committee that "a truthful, honest contractor would have nothing to fear under this bill. It is only that contractor [who] is concealing actual information that he possessed at the time he negotiates that has problems. . . . [N]o one is ever accountable for things he does not know."²⁸ Nevertheless, Senator Saltonstall expressed concern that a contractor might be penalized because of changed facts or "held responsible for something when he was really truthfully trying to carry it out."²⁹ And Senator Symington commented that the bill was not aimed at the "integrity" of the contractor, but rather at his "efficiency and intelligence."³⁰ The House may have already reached a similar conclusion. A House Report had stated that "[i]t does not make much difference . . . whether the padding or the inflation is intentional or unintentional, willful or inadvertent."³¹

Much of the uncertainty with respect to the ultimate reach of the Act was removed by events subsequent to enactment. On August 1, 1963, prior to any interpretation by the Armed Services Board of Contract Appeals,³² Congressman Hebert, the Act's sponsor in the House, introduced

²⁶ Senator Russell, chairman of the Committee, expressed his concern as follows: I was very much concerned by the information and report on this bill by the Comptroller General . . . about the extent of noncompliance with these regulations. . . . If the Departments are not complying with these regulations which were drawn . . . two years ago, I believe, I see no alternative for us but to undertake to make it mandatory by passing a law on the subject.

Senate Hearings on H.R. 5532, at 46.

The GAO had found that of 276 negotiated pricing actions, 121, totaling 253 million dollars, were negotiated without obtaining the cost and pricing data certificates required by ASPR. COMP. GEN. REP. B-125050, REVIEW OF EXTENT TO WHICH MILITARY PROCUREMENT AGENCIES AND PRIME CONTRACTORS HAVE OBTAINED CERTIFICATION AS TO THE ACCURACY AND COMPLETENESS OF COST DATA USED IN NEGOTIATION OF CONTRACT PRICES (1960).

²⁷ 108 CONG. REC. 17351 (1962).

²⁸ *Senate Hearings on H. R. 5532*, at 25 (testimony of Congressman Vinson); *id.* at 57 (testimony of Congressman Hebert).

²⁹ *Senate Hearings on H.R. 5532*, at 25.

³⁰ *Id.* at 26.

³¹ H.R. REP. NO. 1959, 86th Cong., 2d Sess. 29 (1960).

³² For the charter and rules of the Armed Services Board of Contract Appeals, see 32 C.F.R. § 30.1 (1967). The decisions of the Board have had a significant impact on the implementation of the Truth-in-Negotiations Act because of the Board's role in the "disputes procedure" for government contracts. This procedure is initiated by the inclu-

a bill³³ which would have authorized price adjustments only when the contractor knew that his data was inaccurate, incomplete or noncurrent.³⁴ The Department of Defense opposed this amendment on the grounds that the Act was intended to rectify mistakes and not to punish dishonest contractors,³⁵ and the amendment was not passed. Failure of the amendment seems to confirm a literal reading of the statute; the contract price will be reduced regardless of the contractor's knowledge or belief. Furthermore, the recent emphasis on post-award audits³⁶ demonstrates that a contractor's

sion of a standard disputes clause in each government contract. 32 C.F.R. § 7.103-12 (1967). Claims which involve questions of fact must be submitted first to the contracting officer, and his decision may then be appealed to the Board of Contract Appeals. See generally R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW 690-746* (1966); Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *LAW & CONTEMP. PROB.* 39 (1964). Price adjustment actions under the Truth-in-Negotiations Act are governed by the disputes clause.

³³ H.R. 7909, 88th Cong., 1st Sess. (1963).

³⁴ 109 *CONG. REC.* 13930 (1963).

³⁵ A letter from John McNaughton, general counsel of the Department of Defense, to Congressman Vinson expressed the opposition of the Defense Department to this amendment. At page 3 of this letter the Department's interpretation of the impact of the Truth-in-Negotiations Act is clearly expressed:

Subsection 2306(f) of title 10, U.S.C. provides that the contract price will be decreased to exclude significant sums by which the price was increased because of the submission of erroneous cost or pricing data regardless of whether the contractor or subcontractor *knew* that such data was erroneous. Subsection 1(b) of the bill would limit such adjustment to cases where the contractor or subcontractor *knew* that the data was erroneous at the time of its submission to the Government. The theory apparently is that the contract price should not be adjusted if the contractor makes an honest mistake in his cost or pricing data. This Department does not agree.

The price adjustment provision in subsection 2306(f) of title 10 U.S.C. was not intended as a punitive provision, the application of which was to be dependent on any finding of "guilt." Rather, its purpose was to require that where a price negotiation was conducted on a mistaken premise (e.g., cost data which is later demonstrated to have been non-current at the time of negotiation), the mistake should be rectified whether or not it was an innocent mistake. A contractor should not receive a profit based on defective cost or pricing data where he had the responsibility of submitting correct data at the time the price was negotiated. Moreover, to impose on the Government the burden of proving that the contractor actually had knowledge of the error might effectively nullify the force of this portion of the law.

A copy of this letter is on file in the offices of the *Virginia Law Review*.

³⁶ In a series of reports to Congress beginning in February 1966, the General Accounting Office criticized the Defense Department's implementation and enforcement of the Act. The February 1966 report indicated a need for post-award audits to detect nondisclosure of cost and pricing data which was available prior to negotiation and award of contracts. GAO REPORT B-158193 (Feb. 23, 1966) [reprinted in *Hearings on Defense Contract Audit Agency Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess. 103 (1967)]. This report indicated that audits prior to contract award were not effective in disclosing cost estimates which were excessive at the time of negotiations. In 1966 the Defense Contract Audit Agency, which has been delegated the responsibility of enforcing the Act, initiated a program of post-

liability depends only on empirical evidence of the accuracy of data and not on distinctions between intentional and inadvertent errors in pricing. While the contractor's intentions may be relevant to punitive actions for fraud or false claims under other statutes, his mental state has no bearing upon contractual price reductions under the Truth-in-Negotiations Act. The purpose of the Act is to obtain the lowest possible contract price by obtaining accurate cost and pricing data from the contractor during negotiations.

The Certificate of Cost and Pricing Data

The Truth-in-Negotiations Act requires each contractor to "certify that, *to the best of his knowledge and belief*, the cost of pricing data he submitted was accurate, complete, and current."³⁷ The regulations promulgated pursuant to the Act compel the contractor to sign a certificate of cost and pricing data to satisfy this requirement.³⁸

The statutory requirement of certification is of minimal utility. An excessive contract price will be reduced regardless of the contractor's knowledge and belief. It is anomalous to require a contractor to certify that, to the best of his knowledge and belief, he has submitted accurate data, and at the same time require a price reduction without regard to the contractor's knowledge or belief. Arguably, retention of the certification requirement is harmless since it does not hamper the adjustment of defective contract prices. However, this requirement has been a source of confusion, and its elimination would ensure more consistent enforcement of the Act.

The function of the certificate has perplexed the Armed Services Board of Contract Appeals. The Board has stated that the certificate is understood by the parties only to "evinced an intent to certify that [the contractor] has disclosed to the government negotiating team complete, accurate, and current cost and pricing data for their use in negotiating the contract."³⁹ But the submission of complete, accurate, and current

award audits to determine contractor compliance with the law. Liability is now determined by an evaluation of the empirical evidence produced by these audits. Through June 30, 1967, the Agency had completed post-award audits of 373 contracts totaling \$9,084.7 million and had discovered possible defective pricing in the amount of \$27.8 million. *Id.* at 40. To strengthen this program, Senator Proxmire has introduced legislation to assure access to contractors' accounting records. S. 1913, note 4 *supra*. The Defense Department has amended ASPR so that Defense Department contracts authorize access to contractors' records. Defense Procurement Circular No. 57, at 3 8 (Nov. 30, 1967) [hereinafter cited as DPC No. 57].

³⁷ 10 U.S.C. § 2306(f) (1964) (emphasis added).

³⁸ 32 C.F.R. § 3-807.4 (1967). This certificate was recently modified by DPC No. 57, which included an extensive revision of the ASPR regulations implementing the Act.

³⁹ American Bosch Arma Corp., ASBCA No. 10305, 65-2 BCA 5280 at 24,850 (1965). The fact that this decision was based on a prestatutory certificate is irrelevant to this

cost and pricing data is already required by law. Under this interpretation, the certificate merely evinces the contractor's intent to comply with the law and is obviously superfluous.

Confusion concerning the certification requirement has been increased by the Board's recent decision in *Lockheed Aircraft Corp.*⁴⁰ In *Lockheed* the subcontractor failed to disclose significant changes in cost and pricing data received after execution of the certificate, but prior to final negotiation of the contract. The subcontractor contended that his obligation under the price reduction clause was dependent on the certificate of current pricing data. The Board dismissed this contention:

It is our opinion that the certificate as filed . . . plays no significant part in appellant's responsibility under the defective pricing data clause. The certificate and the clause are not interdependent but are independent and each stands on its own. Perhaps there is a relationship between the two and perhaps they were so intended. However, the action to be taken under either, or the obligations under either, are separate and distinct.⁴¹

The actual holding in *Lockheed*—that the Government's failure to request a more current certificate does not relieve the contractor from liability under the defective pricing clause and that the contractor's duty to disclose significant changes in cost or pricing data does not cease when the certificate is executed—is not troublesome. However, the Board's mention of "separate and distinct" obligations under the certificate is perplexing. Neither the Act nor its legislative history suggests any such obligations.

The Board's language may be attributable to the fact that, prior to revision in October 1964, the face of the certificate warned of possible criminal penalties under a statute⁴² prohibiting knowing and willful misrepresentations to the Government.⁴³ However, the Government may prosecute under this statute whenever a party knowingly and willfully falsifies a material fact. Thus even under this statute a contractor's liability is independent of the certificate.

The Board of Contract Appeals has not been the sole source of confusing applications of the certification requirement. In a case currently under

discussion; ASPR required price reductions whenever the contractor submitted incomplete, inaccurate or noncurrent data. See note 22 *supra*.

⁴⁰ ASBCA No. 10453, 67-1 BCA ¶ 6356 (1967).

⁴¹ *Id.* at 29,446.

⁴² 18 U.S.C. § 1001 (1964).

⁴³ See *American Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5280, at 24,843 (1965), for the text of the pre-revision certificate.

The warning of possible prosecution was deleted by an ASPR revision in 1964, and the certificate currently in force contains no such admonition. 32 C.F.R. § 3-807.4 (1967), *amended by* DPC No. 57.

consideration in a United States district court, *United States v. Honeywell, Inc.*,⁴⁴ the Government is attempting to use the certificate as the basis for relief in a civil suit for double damages under the False Claims Act.⁴⁵ The Government's complaint alleged that a false certificate of current pricing data had been executed by a contractor who failed to disclose significant changes in cost or pricing data which had occurred prior to the completion of negotiations. The Government further alleged that the Department of the Navy relied upon the certificate and awarded a contract at a price which exceeded what the Department would have awarded had the true facts been furnished by the contractor. The vouchers presented for payment were alleged to constitute false claims under the False Claims Act.⁴⁶

Defendant moved for summary judgment, contending that the Truth-in-Negotiations Act provides the Government with the exclusive remedy of contractual price reduction whenever cost and pricing data are submitted and a certificate is requested.⁴⁷ The Government countered this argument by asserting that defendant's false certificate, standing alone, would not support an action under the False Claims Act, and that the basis for its action was defendant's knowing presentation of false claims for payment, not defendant's failure to produce accurate and current pricing data.⁴⁸ The court denied Honeywell's motion.⁴⁹

The Government's burden of proof under the False Claims Act is different from the burden which the Government must meet to obtain a contractual price reduction under the Truth-in-Negotiations Act. An action under

⁴⁴ Civ. No. 67-181 (M.D. Fla., filed May 1, 1967).

⁴⁵ 31 U.S.C. § 231 (1964). The act provides, in relevant part:

Any person . . . who shall make . . . any claim upon or against the Government of the United States . . . knowing such [claim] to be false, fictitious, or fraudulent . . . shall pay to the United States the sum of \$2,000, and, in addition, double the amount of damages. . . .

⁴⁶ Complaint in *United States v. Honeywell Inc.*, Civ. No. 67-181 (M.D. Fla., filed May 1, 1967), paras. 4, 5, 6, 7.

⁴⁷ Memorandum in Support of Defendant's Motion for Summary Judgment at 17-20, *United States v. Honeywell Inc.*, Civ. No. 67-181 (M.D. Fla., filed July 7, 1967). The contract in issue was executed prior to the passage of the Truth-in-Negotiations Act but contained the pre-statutory ASPR version of the Price Reduction for Defective Pricing Data Clause as well as the standard disputes clause.

⁴⁸ Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 3-5, *United States v. Honeywell Inc.*, Civ. No. 67-181 (M.D. Fla., 1967). *But see* Defendant's Reply to Plaintiff's Memorandum in Opposition at 2, where Honeywell contends that the pre-statutory provisions in ASPR, under which the contract at issue was negotiated, provided a price reduction remedy when the contractor "knew or reasonably should have known" that data submitted was "false or misleading." This contention would be of no merit under current ASPR provisions.

⁴⁹ *United States v. Honeywell, Inc.* Civ. No. 67-181 (M.D. Fla., defendant's motion for summary judgment denied on Jan. 29, 1968).

the former is grounded in fraud,⁵⁰ and the Government must prove that the defendant knowingly presented for payment false claims against the United States.⁵¹ Contractual price reduction under the Truth-in-Negotiations Act, on the other hand, is available regardless of whether the contractor knew that the data submitted was defective.⁵² Nothing in either the language of the Truth-in-Negotiations Act or its legislative history indicates that Congress intended to preclude the Government from an action for double damages under the False Claims Act. However, the Government's use of the certificate of cost and pricing data as a basis for a False Claims Act action is objectionable. The primary purpose of the Truth-in-Negotiations Act is to achieve lower prices in negotiated contracts through increased accuracy of cost and pricing data. The False Claims Act, on the other hand, was intended "to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud. . . ." ⁵³ Each act should operate only in its own sphere.⁵⁴ To use the certificate as the basis of a double damage action under the False Claims Act is to disregard the scope and function of the certificate, as envisioned by the Truth-in-Negotiations Act.⁵⁵

Deletion of the certification requirement would lead to increased certainty in the application of the Truth-in-Negotiations Act. However, while elimination of this requirement would appear desirable, retention of the certificate could serve one useful administrative function. The Act provides for price reduction when the contract price is increased by significant sums because the data submitted by the contractor, "as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent. . . ." ⁵⁶ The Government's experiences in selecting the date after which data need not be submitted by the contractor have so far been unsatisfactory. The date of certification could be used to establish this cut off date; after execution of the certificate the contractor's duty to disclose would cease. Since a recent amendment to ASPR requires that the certificate be executed "as soon as practicable *after* agreement is reached on contract

⁵⁰ See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961).

⁵¹ See, e.g., *United States v. Priola*, 272 F.2d 589 (5th Cir. 1959).

⁵² See text at notes 28-36 *supra*.

⁵³ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943).

⁵⁴ This contention is supported by the Government litigators. Plaintiff's Memorandum, *supra* note 48, at 7-8.

⁵⁵ Furthermore, using the certificate in a False Claims Act action may present self-incrimination problems because of the Government's right of access to the contractor's accounting records under ASPR. For a comprehensive treatment of the problems in this area, see Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965).

⁵⁶ 10 U.S.C. § 2306(f) (1964).

price,"⁵⁷ use of the certificate for this purpose would fully comply with the statutory requirements.

Advocating that the certificate date be used as the cutoff date is not to suggest, however, that all data submitted must be current, accurate and complete as of the certificate date. Certain data cannot be considered reasonably available to the contractor as of this date. Overhead costs and production records, for example, may be available to the contractor only at certain periodic closing dates. The Defense Department has recognized this problem and, in a recent amendment to ASPR, has provided that an agreement on cut off dates for such cost items may be reached prior to the date of agreement on price.⁵⁸ Thus the certificate, if retained at all, should merely serve to establish a final date after which submission of any further cost and pricing data is not required.

The Causation Requirement

The language of the Truth-in-Negotiations Act permits price adjustments only where the Government shows a causal connection between defective cost and pricing data and an overstated contract price. The Act provides that the contract price shall be reduced by any "significant sums by which it may be determined . . . that such price was increased *because* the contractor . . . furnished cost or pricing data which . . . was inaccurate, incomplete, or noncurrent. . . ." ⁵⁹ Proof of causation has been one of the more troublesome requirements of the Act.

Since negotiations are conducted in a give-and-take atmosphere, it is usually impossible to ascertain with certainty the effect full and accurate disclosure would have had on the total negotiated price. Moreover, the substantial delay between negotiations and an appeal to the Armed Services Board of Contract Appeals or the courts makes proof of causation even more difficult.⁶⁰ The effect of these factors is compounded by the Defense Department's method of negotiating contracts on the basis of total price rather than individual cost elements. The total negotiated price usually does not specify the cost of individual items; it is virtually impossible to prove that overstated cost data for a particular element resulted in an

⁵⁷ DPC No. 57, at 11, *amending* 32 C.F.R. § 3-807.4 (emphasis added).

⁵⁸ DPC No. 57, at 12, *amending* 32 C.F.R. § 3-80/5(a) (1).

⁵⁹ 10 U.S.C. § 2306(f) (1964) (emphasis added).

⁶⁰ For a description of this problem in a particular factual setting, see *American Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5280, at 24,845 (1965). This case illustrates the difficulties caused by the negotiation and appeal procedure under the Act in conjunction with a contract involving production of complex equipment, several contract modifications negotiated under the pressure of delivery requirements, and a five-year interval between negotiations and appeal. In these circumstances, hazy memories are inevitable.

increased contract price.⁶¹ Nevertheless, the Government has consistently maintained that the total-price method of negotiation is more efficient and economical than negotiation of individual cost elements.⁶² Since the majority of contracts negotiated under the Act are negotiated by this method,⁶³ strict application of the causation requirement would seriously impair enforcement of the Act.

The Board of Contract Appeals attempted to alleviate this problem in *American Bosch Arma Corp.*,⁶⁴ where the undisclosed data in issue involved less than two-tenths of one per cent of the target cost.⁶⁵ The Board felt that an attempt to determine the actual effect of nondisclosure would be mere "speculation," and instead applied a "natural and probable consequences" test:

In the absence of any more specific evidence tending to show what effect the nondisclosure [sic] of the pricing data had on the negotiated target cost, we are of the opinion that we should adopt the natural and probable consequence of the nondisclosure as representing its effect.⁶⁶

The Board concluded that the "natural and probable consequence" of nondisclosure of a reduction in materials cost was an increase in the negotiated target cost of an equivalent amount.⁶⁷ Consequently, the contract price was adjusted to exclude the amount of the cost reduction.

In *FMC Corp.*⁶⁸ and *Defense Electronics Inc.*⁶⁹ the Board retreated from

⁶¹ Occasionally, however, negotiation memoranda may be available to indicate agreement on particular cost elements.

⁶² In *American Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5280 (1965), the Board outlined the Defense Department's position with respect to this method of negotiation. The Department has determined that negotiation of separate agreements on individual cost elements would hamper the use of fixed-price contracts and would result in higher negotiated prices. The Department conceded that separate agreements on individual cost elements "would facilitate price adjustments for defective pricing data, but stated that it was far more important that the negotiated price be the lowest reasonable price obtainable than that possible future price adjustments (which will always be a small fraction of the total price) be made as easy as possible to compute. . . ." *Id.* at 24,847.

⁶³ *Id.* at 24,853.

⁶⁴ ASBCA No. 10305, 65-2 BCA ¶ 5280 (1965).

⁶⁵ *Id.* at 24,852-53. The target cost of the contract was approximately \$14 million and the undisclosed data involved a total of \$20,746.

⁶⁶ *Id.* at 24,853.

⁶⁷ *Id.* at 24,852-53. The Board added that there was affirmative evidence that the Government's materials cost estimate was based on the inflated pricing data, but this evidence apparently was considered insufficient, by itself, to satisfy the causation requirement.

⁶⁸ ASBCA Nos. 10095 & 11113, 66-1 BCA ¶ 5483 (1966).

⁶⁹ ASBCA No. 11127, 66-1 BCA ¶ 5604, *on motion for reconsideration*, 66-1 BCA ¶ 5668 (1966).

the position it had taken in *American Bosch Arma*. Although the Board purported to apply the natural and probable consequences test in *Defense Electronics*, it held the Government to its burden of proving that a non-disclosure of data caused an increase in the negotiated price:⁷⁰ "It is incumbent on the Government to show that the change order price adjustment was overstated BECAUSE of the contractor's failure to disclose or its improper disclosure of data."⁷¹

The Board's retreat soon proved to be only temporary. In *Lockheed Aircraft Corp.*⁷² a subcontractor failed to inform the contractor or the Government that it had obtained firm prices on a substantial amount of materials; nor did it disclose its material purchase orders to the Government. The subcontractor contended that in the negotiations for the prime contract the Government had relied on an auditing review by a Government pricing team rather than on data furnished by the contractor or subcontractor and, therefore, that responsibility for nondisclosure had been assumed by the Government. The Board rejected this argument, found a failure to disclose data and summarily determined that the natural and probable effect of the nondisclosure was an increased contract price. The fact that the *Lockheed* case involved unrebutted proof of a failure to disclose significant data apparently led the Board to lighten the Government's burden of proving causation—a burden which was all but removed in *Cutler-Hammer, Inc.*⁷³

In *Cutler-Hammer* a contractor failed to disclose a quotation for components of a highly complex airborne reconnaissance system. The quotation was significantly lower than that used in negotiations, and the contractor admitted that the lower quotation was purposely withheld from the Government. The contractor contended, however, that disclosure would have had no effect on the negotiated price since the quotation was from an untried vendor and since production difficulties were to be anticipated because of industry unfamiliarity with the particular components.

The Board agreed with the contractor that, at the time of negotiations, the quotation was not data upon which a definite price reduction could have been reached. Nevertheless, it held that the contract price should be adjusted. The Board found it unnecessary to determine the effect which nondisclosure had upon the negotiated price and, instead, resorted to the speculation which it had attempted to avoid in *American Bosch Arma*:

⁷⁰ *Id.* at 26,206.

⁷¹ *Id.* at 26,202 (1966), citing FMC Corp., ASBCA Nos. 10095 & 11113, 66-1 BCA ¶ 5483 (1966) (emphasis in original).

⁷² ASBCA No. 10453, 67-1 BCA ¶ 6356 (1967).

⁷³ ASBCA No. 10900, 67-2 BCA ¶ 6432 (1967).

Of necessity, the very fact of [nondisclosure of the lower bid] to the Government leaves us to conjecture as to what precise effect a full disclosure might have had on these negotiations. However, since it was [the contractor's] failure to disclose the information which created this uncertainty, the consequence, if any, must be borne by [the contractor] and not by the Government.⁷⁴

The Board recognized that it could not determine with certainty the course of action which would have followed disclosure, but it was "convinced that something contractually different would have been developed to cover the situation as it then existed."⁷⁵

Although this reasoning seems to discard the Government's burden of proving causation, the Board nonetheless proceeded to discuss the causation requirement and to conclude that the government had met its burden:

In *Defense Electronics Inc.*, . . . we held that the Government had the burden of proving the causal relationship between significant, non-disclosed, pricing data and the resulting contract price reduction. However, we did not then, nor do we here, intend that that burden be an unreasonably heavy one.

Accordingly . . . we are of the opinion that the Government has established the reasonable probability that with a disclosure of the [lower] quotation, the parties would have agreed that the cost of the [component] would be excluded from the contract price, and reserved for further negotiations and addition to the contract price at a later date.⁷⁶

Regardless of the Board's language, the *Cutler-Hammer* opinion virtually eliminates the requirement that a causal relation be shown between a failure to disclose and an increase in contract price.⁷⁷ Even if the Government is required to show that disclosure of significant data would have caused it to modify its method of negotiation, such evidence discloses nothing with respect to any effect on the contract price. This conclusion is supported by the fact that the *Cutler-Hammer* case was remanded for further negotiations between the parties to determine the amount by which

⁷⁴ *Id.* at 29,828.

⁷⁵ *Id.* at 29,828-29.

⁷⁶ *Id.* at 29,829 (citations omitted).

⁷⁷ In a later case the Board used language which could be interpreted as an indication that the causation requirement has not been entirely eliminated. *Sparton Corp.*, ASBCA No. 11363, 67-2 BCA ¶ 6539 (1967), *on motion for reconsideration*, 68-1 BCA ¶ 6730 (1968). There, the Board stated that the Government did not sustain its burden of proving that undisclosed data caused an overstatement in price. 67-2 BCA at 30,379. However, the causation requirement was not in issue since the Board determined that there had actually been no overstatement in the price of the component involved. See note 94 *infra* and accompanying text.

the contract price should be reduced.⁷⁸ The Board found the evidence insufficient for this determination, although it had no trouble in deciding that a reduction was called for.

Whatever remained of the causation requirement following *Cutler-Hammer* was eliminated by a revision of ASPR to provide that "the natural and probable consequence of defective pricing data is an increase in the contract price in the amount of defect plus related burden and profit or fee."⁷⁹ The amended regulation further provides that the contract price should be reduced by the amount of the defect unless there is a clear indication that the defective data was either not used or not relied upon.⁸⁰ Thus the causation requirement has been displaced by the natural and probable consequences test, which is now no more than a legal fiction by regulatory definition.

The Board of Contract Appeals and the ASPR committee are, of course, open to criticism for eliminating part of the statutory framework in which they must operate. On the other hand, the fact that they have taken such action should provide sufficient indication that the causation requirement is an unworkable limitation upon enforcement of the Truth-in-Negotiations Act. Because of the total-price method by which the Defense Department usually negotiates its contracts and the delay between negotiations and the ultimate resolution of price adjustment actions, it is virtually impossible to prove a causal connection between defective pricing data and the negotiated contract price. This difficulty not only hampers enforcement of the Act in all defective pricing situations, but may even provide encouragement to contractors who would intentionally submit inadequate pricing data. Deletion of the causation requirement would rid the Act of these impediments. Furthermore, such action would stimulate all government contractors, regardless of their propensity for violation of the Act, to exercise greater care in gathering and submitting data and thus to further the Act's goal of eliciting the disclosure of current, accurate and complete pricing data. Moreover, while in any individual instance it may be impossible to prove that a failure to submit current, accurate and complete data actually caused an increase in the negotiated price, nondisclosure of such data results in higher contract prices in the aggregate. Legislative elimination of the causation requirement is desirable.

Offsets

While the Truth-in-Negotiations Act allows for downward adjustment of contract rates which have been inflated by incomplete or inaccurate pricing data, it does not permit upward adjustment of contract rates when the

⁷⁸ 67-2 BCA ¶ 6432 at 29,829.

⁷⁹ DPC No. 57 at 12.

⁸⁰ *Id.*

contractor's errors have tended to understate the contract price.⁸¹ This one-way street appears justifiable since allowing upward adjustment in all cases not only would insure the contractor against his own mistakes but also might encourage him to "buy into" a government contract by purposely underbidding. These objections obtain,⁸² but with diminished force, when a contractor can set off errors which understated the negotiated price only against reductions in price necessitated by the contractor's overstatement of cost items. Any advantages afforded the negligent or dishonest contractor by such offsets must be balanced against the equitable treatment which will be afforded to contractors generally.

The question of whether or not to allow offsets has been one of the most controversial problems under the Truth-in-Negotiations Act. The prestatutory version of the ASPR price reduction clause, which provided that the contract price "shall be *equitably* reduced,"⁸³ was broad enough to allow offsets in appropriate cases. Thus in *American Bosch Arma*⁸⁴ the Armed Services Board of Contract Appeals allowed a contractor to offset certain noncurrent pricing items, which would have reduced the contract price, with other items which would have increased the price.⁸⁵ In a subsequent case, *Lockheed Aircraft Corporation*,⁸⁶ the Board disallowed the contractor's contention that development costs and a royalty expense resulting from a patent infringement judgment should be set off against overstated material costs. The Board emphasized that only offsets closely related to the costs in issue were permissible under the equitable reduction clause:

It is obvious to us that these two cost items were only remotely related to the "material costs" in issue. . . . The obvious answer to the offsetting suggestion is that the equitable reduction permitted under the clause is intended to cover solely the cost items concerning which the pricing data was defective. To permit unrelated offsets would be tantamount to repricing the entire contract, which is not within the contemplation of the clause.⁸⁷

⁸¹ 10 U.S.C. § 2306(f) (1964). The legislative history is inconclusive with respect to offsets. Opposition to offsets may be found in *Senate Hearings on H.R. 5532*, at 100-02. *But cf. id.* at 25, 27.

⁸² This problem was discussed in the Senate hearings concerning the Truth-in-Negotiations Act. *See, e.g., Senate Hearings on H.R. 5532* at 22, 33.

⁸³ (Emphasis added). An example of the prestatutory clause may be found in *American Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5280 (1965) at 24,843.

⁸⁴ ASBCA No. 10305, 65-2 BCA ¶ 5280 (1965).

⁸⁵ The Government, however, did not object to these offsets, and the Board treated the issue as an agreement between the parties regarding the amount of overstatement to be recovered by the Government.

⁸⁶ ASBCA No. 10453, 67-1 BCA ¶ 6356 (1967).

⁸⁷ *Id.* at 29,450.

After passage of the Act, however, the Defense Department adopted a policy against allowing offsets. The Department opposed an amendment proposed by Congressman Hebert in 1963 which, if enacted, would have permitted offsets.⁸⁸ Furthermore, after the Act was passed, the ASPR clause was amended to provide that the price "be reduced accordingly";⁸⁹ all reference to "equitable" price reductions was eliminated.

The amendment of the equitable reduction clause was reflected in *Cutler-Hammer, Inc.*,⁹⁰ the first Board decision to consider the offset issue under the statutory price reduction clause. The contract in *Cutler-Hammer* called for the design, development and manufacture of a highly complex airborne electronic reconnaissance system referred to as the "Zero" system. One of the steps in formulating the contractor's price proposal was the preparation of a "family tree"—a block diagram from which figures for the final bill of materials were extrapolated. By comparing the bill of materials with the family tree, auditors discovered errors which had caused duplication in quantities of materials, and a resultant price overstatement.⁹¹ The contractor contended that he could properly offset against the price reduction sought by the Government other errors which had caused understatement in the price estimates. The Government opposed offsetting these errors for the fundamental reason that the defective pricing clause does not provide for offsets. The cost items which resulted in the understatement and the overstated costs both involved purchased parts and components, but despite this relationship the Board refused to allow an offset:

Although reasonable men may certainly differ on this interpretation, it is our conclusion that the Defective Pricing Statute . . . was intended solely as a vehicle for recoupment by the Government of overpricing resulting from any of the causes enumerated therein. On the other hand, there are now and were prior to the enactment of that legislation certain remedies available to contractors for the correction of mistakes such as appellant proposes by way of counterclaims and offset here. We must assume the Congress was aware of these remedial avenues when it enacted PL 87-653. In this regard we have not overlooked the fact that these remedies may be more restrictive than the corresponding remedy of the Government under the Defective Pricing procedure. The simple answer to this is that both the statute and the

⁸⁸ H.R. 7909, 88th Cong., 1st Sess. (introduced Aug. 1, 1963).

⁸⁹ 32 C.F.R. § 7-104.29 (1967).

⁹⁰ ASBCA No. 10900, 67-2 BCA ¶ 6432 (1967).

⁹¹ Using the vendor unit prices contained in the cost proposal, the Government claimed that the overstatement in target cost amounted to \$613,159. The Board sustained the contractor's position that the unit prices had been based on larger quantities and that, had a smaller quantity been used in the estimate, higher unit prices would have resulted. Thus the overstatement was actually \$75,000 less than the Government claimed.

contractual provision which it implements, literally limit the adjustment to pricing deficiencies which tend to overstate the contract price. As such we would need to be shown a clear Congressional intent that all cost and pricing deficiencies, regardless of their nature or direction, were correctable under the statute before we could grant that relief here. . . . We are therefore constrained to adopt a literal interpretation of the statute and, if we err, it is for others, be it the Congress or the courts, to set the matter right.⁹²

Although the decision in *Cutler-Hammer* appeared to establish the Board's position on offsets, its two subsequent decisions in *Sparton Corporation*,⁹³ involving price reductions under the prestatutory version of the clause, require consideration. In *Sparton* the Government introduced evidence that the pricing data submitted with respect to a component tube for a sonobuoy did not reflect a discount from ninety-five cents per tube to seventy cents per tube which the contractor had been able to obtain. However, the contractor's data also indicated that only one tube was needed per sonobuoy when, in fact, two tubes were required. Therefore, the cost of ninety-five cents per sonobuoy in the data submitted understated by forty-five cents the cost of tubes per sonobuoy. The Government argued that *Sparton* could not set off those mistakes which tended to reduce the contract price against those which would have increased it. The Board replied that this was not an offset at all, emphasizing that only one cost item was involved. The contractor had represented only that the tube cost per sonobuoy was ninety-five cents when in fact it was one dollar and forty cents. Consequently, the Board reasoned, there had been no overstatement in price.⁹⁴

The Government feared that, notwithstanding the Board's characterization of the sonobuoy as a single cost element, the decision raised serious doubts with respect to the Board's position on offsets and moved for reconsideration. The Board affirmed its earlier decision and found no conflict between *Sparton* and either *Cutler-Hammer* or *Lockheed*. The *Sparton* decisions are difficult to reconcile with the strong position against offsets which the Board had adopted in *Cutler-Hammer*.⁹⁵ While the Board chose to describe the sonobuoy as a single cost element, its balancing of an

⁹² 67-2 BCA at 29,826-27.

⁹³ ASBCA No. 11363, 67-2 BCA ¶ 6539, *on motion for reconsideration*, 68-1 BCA ¶ 6730 (1967).

⁹⁴ 67-2 BCA at 30,379, *on motion for reconsideration*, 68-1 BCA at 31,169-70.

⁹⁵ The *Sparton* case, like *Lockheed*, involved the prestatutory clause, which provided for an "equitable adjustment"; the *Cutler-Hammer* decision involved the statutory clause, which provided merely that the "contract price be reduced accordingly." The *Sparton* result could have been reached by the Board as an "equitable adjustment" of the price of the contract in issue; however, on the motion for reconsideration the Board held fast to its position that only one cost was involved. 68-1 BCA at 31,170.

overstatement in unit price against an understatement in quantity actually resulted in an equitable adjustment of the type which is normally regarded as an offset.

In a recent amendment to ASPR⁹⁶ the Defense Department has consented to limited offsets. Under the new regulation offsets are allowed in only two situations: (1) when there is a question as to the accuracy of a single item of data representing an average or composite rate, overstatements in making up the rate may be set off by understatements; and (2) overstated data relating to a single item may be offset by understated data relating to the same item. The regulation further provides that the contract price shall be adjusted only if the net adjustment is downward.

Offset should also be allowed in a third situation. The contractor who can demonstrate that some items have been inadvertently overstated, while closely related items have been unintentionally understated, should be entitled to an offset. To prevent "buying in," the burden of proving that understatements were unintentional should rest squarely on the contractor. Although substantial discretion would be vested in the contracting officer as well as the Board and the courts, clear standards should be promulgated to indicate when the relationship between cost items suffices to permit offsets. Cost items of labor or materials that are clearly unrelated should not be entitled to offset treatment under any circumstances. A more liberal approach to offsets is especially desirable now that the Defense Department's natural and probable consequences test has virtually eliminated the causation requirement. Whenever the contractor submits inaccurate, incom-

⁹⁶ DPC No. 57, at 13, amends ASPR 3-807.5(3) to provide:

As a general rule, understated cost or pricing data shall not be "set off" against overstated cost or pricing data in arriving at a price adjustment. However, where there is a question as to the accuracy of a single item of data which is an average or composite rate, overstatements in making up the rate may be set off by understatements for the purpose of correcting the rate submitted by the contractor. For example, when the contractor in his cost or pricing data submits an average rate for Class A Engineers and it is found that in the computation of the average rate the contractor has indicated that his highest price Class A Engineer was \$20,000 when in fact it was only \$18,000 and further when the contractor indicated that the price of his lowest paid Class A Engineer was \$10,000 when in fact it was \$12,000, these can be offset one against the other in recomputing the average or composite rate. Offsetting a Class A Engineer average or composite against a Class B Engineer average or composite is not permitted. Again, for example, if an overhead account had been overstated by reason of a failure to use the most recent available quarterly figures, the consequent downward price adjustment should be based on the net change in the total overhead account, including both the "minus" and "plus" elements. In addition, as a further exception to the general rule against set off, overstated data (such as unit price) relating to a single item (such as cement) may be offset by understated data (such as quantity) relating to the same item. For example, if the historical data submitted is 100 feet of pipe at \$1.00 a foot for a total of \$100 but it should have been 50 feet at \$2.00 a foot, setoff is permitted and no price adjustment is required. In any case, the contract price shall be adjusted only if the net adjustment is downward.

plete or noncurrent cost and pricing data, he is subject to the unilateral price reduction provided in the Act. Allowing offset of closely related items, with proper safeguards, would mitigate the effects of eliminating causation from the Government's burden of proof and would facilitate more equitable treatment for the contractor.

Conclusion

During its gestation period the scope of the Truth-in-Negotiations Act was quite limited—the act was intended by its sponsor merely to prevent “padding” of cost estimates in incentive-type contracts. But as the Act evolved, its base and function broadened. The Act now requires that contractors submit current, accurate and complete cost and pricing data and provides for reduction of the contract price without regard to the contractor's culpability. The Act, as implemented, is no longer a fraud statute; instead, it has become a tool for obtaining in a negotiated procurement situation the efficiency and savings otherwise achieved by formal advertising.

The Truth-in-Negotiations Act can be molded into a more functional tool for improving the Defense Department's contractual negotiations. Implementation and enforcement of the Act have been unnecessarily confused by the requirement that the contractor submit a certificate of current cost and pricing data. The certificate plays no substantive role in the operation of the Act and should either be eliminated altogether or retained only to establish a cut off date after which the contractor no longer has a duty to disclose current pricing information to the Government. Furthermore, the statutory requirement that the Government prove a causal relationship between the submission of defective cost and pricing data and an increase in contract price in order to obtain a price reduction is unrealistic. This requirement has spawned the natural and probable consequences test, a legal fiction which obviates the difficulty of proving causation in a particular case. Price reductions should be available to the Government whenever it can demonstrate that the contractor has submitted overstated cost and pricing data. However, in order to promote equitable application of the Act after causation requirements have been relaxed, the Defense Department should allow offsets whenever understated and overstated cost items are closely related and the contractor can prove that his errors were unintentional. Adoption of the proposals presented in this Note should improve enforcement of the Truth-in-Negotiations Act. In addition, a firm yet equitable policy should increase the efficiency of pre-contract negotiations and achieve economical solutions for post-contractual disputes.

M. J. G.