

1988

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Recommended Citation

W. Bruce Shirk, Bennett D. Greenberg & William S. Dawson III, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 Cath. U. L. Rev. 935 (1988).
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TRUTH OR CONSEQUENCES: EXPANDING
CIVIL AND CRIMINAL LIABILITY FOR
THE DEFECTIVE PRICING OF
GOVERNMENT
CONTRACTS

W. Bruce Shirk, Bennett D. Greenberg,** and William S. Dawson III****

In 1984, two of the authors published an article describing the civil and criminal liability that government contractors face if they submit defective cost or pricing data to the federal government.¹ The article focussed on the relationship between the Truth in Negotiations Act (the Act) and the false claims statutes, and noted that the federal government's intensified campaign to curb waste, fraud, and abuse in federal procurements had placed government contractors in an extremely vulnerable position in the procurement process.² More specifically, it examined how contractors could become entangled in a web of civil and criminal liability by submitting cost or pricing data that were not accurate, complete, and current in price negotiations with the government.³

Events in the four years since publication of that article have both confirmed the vulnerability of government contractors to the web of civil and criminal liability for defective pricing and significantly expanded the scope of that liability. Two converging trends in law enforcement have accelerated the process. First, the war against fraud, waste, and abuse in defense contracting continues unabated as major enactments and regulations are passed on a yearly basis, expanding the weapons in the government's already formidable antifraud arsenal. The recently publicized nationwide FBI and Naval

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1. Shirk & Greenberg, *An Analysis of the Web of Civil and Criminal Liability for Defective Pricing of Government Contracts*, 33 CATH. U.L. REV. 319, 321-45 (1984).

2. *Id.*

3. *Id.*

Investigative Service probe into fraud in Department of Defense (DoD) contracting assures the acceleration of the war on fraud for the foreseeable future.⁴ Second, a general expansion of corporate criminal liability has emerged, as exemplified by the recent proliferation of corporate criminal legislation.⁵ Eight recent developments exemplify these trends.

First, Congress has amended the Truth in Negotiations Act⁶ to codify existing case law holding that liability for defective cost or pricing data is not contingent upon a certification of the data by the contractor.⁷ The amendment also defines the term "cost or pricing data" in an expansive manner,⁸ and provides for double damages in defense contract cases where the contractor knew that the data was defective.⁹

Second, Congress has virtually rewritten the civil false claims statute.¹⁰ The amended statute increases damages and penalties recoverable by the government, expands the definition of "claims," eases the government's burden of proof, and broadens and relaxes the standard applicable to proof of a

4. See *Grand Jury Hearings on Defense Fraud Probe Set for July 19*, 50 Fed. Cont. Rep. (BNA) 164 (July 18, 1988); *Pentagon Stops Payment on Tainted Contracts, Begins Suspension Actions*, 50 Fed. Cont. Rep. (BNA) 97 (July 11, 1988); *Aspin Urges "Dramatic Move" by DOD to Curb Fraud, Suggests Contract Freeze*, 50 Fed. Cont. Rep. (BNA) 3 (July 4, 1988); *Four More Search Warrants Issued in FBI, Navy Fraud Probe*, 49 Fed. Cont. Rep. (BNA) 1246 (June 27, 1988); *FBI, Navy Search Defense Contractors, Pentagon Offices*, 49 Fed. Cont. Rep. (BNA) 1209 (June 20, 1988); Affidavits for Warrants to Search Offices of Joe Bradley of Varian Continental and Consultant Mark Saunders (June 1988), *reprinted in* 50 Fed. Cont. Rep. (BNA) 120 (July 11, 1988); Memorandum from June Gibbs, Inspector General, to Secretary of Defense, Frank Carlucci (June 1, 1988), *reprinted in* 50 Fed. Cont. Rep. (BNA) 75 (July 4, 1988); Warrant Authorizing Search of McDonnell Douglas Vice President Thomas Gunn's Office (undated), *reprinted in* 49 Fed. Cont. Rep. (BNA) 1234 (June 20, 1988); Warrant to Search Residence of Consultant Melvyn Paisley (undated), *reprinted in* 50 Fed. Cont. Rep. (BNA) 180 (July 18, 1988).

5. See, e.g., Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264 (codified at 17 U.S.C. § 78u (Supp. IV 1986)); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of title 18 U.S.C.); Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 59, 100 Stat. 3592 (codified at 18 U.S.C. § 666 (Supp. IV 1986)); Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, § 1352(a), 100 Stat. 3207-18 (codified at 18 U.S.C. § 981 (Supp. IV 1986)); Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (codified at 18 U.S.C. § 3611 (Supp. IV 1986)); False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. § 3701 (Supp. IV 1986)); Anti-Kickback Enforcement Act of 1986, Pub. L. No. 99-634, 100 Stat. 3523 (codified at 42 U.S.C. §§ 51-58 (Supp. IV 1986)).

6. 10 U.S.C. §§ 2304(a), 2304(a)(14), 2304(g), 2306(a), 2306(f), 2310(b), 2311 (1982 & Supp. IV 1986).

7. *Id.* § 2306a(d).

8. *Id.* § 2306a(g).

9. *Id.* § 2306a(e)(1)(B).

10. False Claims Act, 31 U.S.C. §§ 3729-3731 (1982 & Supp. IV 1986).

civil false claim.¹¹ The statute also protects whistle blowers and authorizes private parties to institute *qui tam* suits on behalf of the government.¹²

Third, the newly enacted Program Fraud Civil Remedies Act,¹³ a "mini-False Claims Act," has created an administrative process for the adjudication of smaller program fraud cases (up to \$150,000 damages) before an administrative law judge.¹⁴ The statute encompasses false statements as well as false claims.¹⁵

Fourth, the government is increasingly prosecuting contractors, who have defectively priced contracts, for criminal false claims or false statements.¹⁶ Moreover, recent federal criminal legislation has increased dramatically the maximum fines courts may impose on both individuals and corporations convicted of criminal false claims or false statements and has instituted guidelines mandating increased minimum sentences and fines.¹⁷

The fifth development is found in recent case law, potentially applicable to government contractors in criminal fraud cases, that has raised potential corporate criminal liability to an unprecedented level through the use of the collective knowledge doctrine.¹⁸ Sixth, the power of the DoD Inspector General to issue investigative subpoenas has been expanded. That power now includes the authority to issue investigative subpoenas to further Justice Department probes.¹⁹

The seventh development is the advent of the Voluntary Disclosure Program, through which contractors are encouraged to voluntarily disclose corporate transgressions, such as cases of defective pricing.²⁰ This program gives contractors an additional impetus to monitor their estimating and pricing processes as a fraud prevention measure, but does not guarantee that disclosed violations will not be prosecuted.²¹

11. *Id.* §§ 3731(b)-(c) (Supp. IV 1986).

12. *Id.* § 3730(b).

13. 31 U.S.C. §§ 3801-3810 (Supp. IV 1986).

14. *Id.* § 3803.

15. *Id.* § 3802.

16. *See, e.g.,* *United States v. White*, 765 F.2d 1469 (11th Cir. 1985); *United States v. JT Constr. Co.*, 668 F. Supp. 592 (W.D. Tex. 1987); *United States v. DiBona*, 614 F. Supp. 40 (E.D. Pa. 1984).

17. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 200, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.); Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 10, 98 Stat. 3134 (codified at 18 U.S.C. § 3611 (Supp. IV 1986)); Criminal Fines Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (codified at 18 U.S.C.A. §§ 3571-3574 (West Supp. 1988)).

18. *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987).

19. *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142 (D.C. Cir. 1987).

20. 47 Fed. Cont. Rep. (BNA) 303 (Feb. 23, 1987).

21. *Id.*

Finally, the United States House of Representatives recently passed legislation entitled the Major Fraud Act of 1988 (H.R. 3911) that would create a new criminal offense of "procurement fraud," applicable to government contract frauds of more than \$1 million.²² The bill's provisions contain a seven-year statute of limitations and, upon conviction, impose fines of up to double the amount of the contract (up to a \$10 million maximum) and imprisonment of up to ten years.²³ Additionally, the bill includes "bounty hunter" rewards that allow individuals whose testimony leads to a procurement fraud conviction to share in a percentage of the fines levied against the contractor, up to a \$250,000 maximum.²⁴

The foregoing examples demonstrate a very significant expansion of the government-wide campaign against fraud, waste, and abuse. Although this campaign is directed at the entire range of the government acquisition processes from pre-award stage to completion or termination of performance, one of the most important areas of concern is contract pricing. Indeed, DoD considers contract pricing a critical area of the overall campaign. Thus, a major section of the DoD Inspector General's "red book," entitled *Indicators of Fraud in Department of Defense Procurement*, and issued in June 1984, is devoted exclusively to the opportunities for fraud in contract pricing.²⁵

Similarly, in December 1986, the DoD Inspector General issued his *Handbook on Scenarios of Potential Defective Pricing Fraud*, which emphasizes that government auditors should "think fraud" when conducting a postaward review and should regard defective pricing, when identified, as an "indicator of fraud."²⁶ In June 1988, the DoD Inspector General issued a report entitled *Criminal Defective Pricing and the Truth in Negotiations Act*, which called for the use of a variety of remedies, not merely recovery under the Truth in Negotiations Act, to combat fraud in defective pricing.²⁷ The report analyzed several recent criminal cases of defective pricing and stated that the "confirmed existence of one or more of the [fraud] indicators [listed in the December 1986 Handbook] will often pave the way towards establishing the requisite scienter for criminal or civil liability."²⁸ The report concluded that "[t]he problem of defective pricing is more pernicious today than

22. *House Passes Procurement Fraud Bill*, 49 Fed. Cont. Rep. (BNA) 957 (May 16, 1988).

23. *Id.*

24. *Id.* However, persons who could have prevented the fraud by disclosing it to their employer or who actively participated in the fraud would be ineligible for the rewards. *Id.*

25. Inspector General, Dep't of Defense Pub. No. IG/DOD 4075.1-H.

26. Inspector General, Dep't of Defense Pub. No. IG/APO 7600.1-H.

27. *Defense IG Highlights Indicators of Criminal Defective Pricing*, 49 Fed. Cont. Rep. (BNA) 1113 (June 6, 1988).

28. OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, IGDPH 4200.50,

ever, despite legislative attempts to curb its magnitude.”²⁹

As recently as August 9, 1988, the front page of the *New York Times* disclosed a “confidential report” by the DoD Inspector General and the Defense Contract Audit Agency (DCAA) that described a “comprehensive audit” over the past four years of “774 pricing actions” on contracts held by ninety-five contractors.³⁰ The report concluded that “overpricing was a recurrent problem for the 95 contractors” and that “365 (47.2%) [of their pricing actions] were overpriced.”³¹ The report noted that the DCAA “has increased defective pricing audits to the point that they consume seven percent of its budget” and the inspectors who conducted the audit referred twenty-nine contracts involving twenty-four suppliers to federal investigators “because of potential contractor fraud.”³² Thus, defective pricing is closely related to the entire postaward audit process, which today is one of the principal sources of fraud allegations against government contractors. Moreover, the government is inclined to prosecute defective pricing cases because of the potential for recovery of substantial sums of money.

These developments have placed government contractors in an extremely vulnerable and precarious position in the procurement process. A defect or omission in cost or pricing data, even if minor and unintentional, can lead to a massive fraud investigation and entanglement in an expanding web of civil and criminal liability, with potentially serious consequences for both the contractor and individual employees involved.

This Article reexamines the government contractor’s potential liability for defective pricing in light of the recent developments in the law. Part I examines the recently amended Truth in Negotiations Act, with particular emphasis on the submission requirements for cost or pricing data, the elements constituting a prima facie violation of the Act, and government recovery under the Act. Part II discusses the newly amended civil false claims statute, focusing in particular on the significant changes that expand contractor liability and the government’s recovery for a violation of the statute. Part II also examines the newly enacted program fraud civil remedies statute, otherwise known as the “Mini-False Claims Act.”

Part III of this Article reviews the elements of a prima facie violation of

CRIMINAL DEFECTIVE PRICING AND THE TRUTH IN NEGOTIATIONS ACT (1988) (citing excerpts reprinted in 49 Fed. Cont. Rep. (BNA) 1163, 1164 (June 6, 1988)).

29. *Defense IG Highlights Indicators of Criminal Defective Pricing*, 49 Fed. Cont. Rep. (BNA) at 1113.

30. Cushman, *Review of Pentagon’s Contracts Finds Overcharges are Common*, N.Y. Times, Aug. 9, 1988, at A1, col. 2.

31. *Id.*

32. *Id.* at A13, col. 1.

the criminal false statements and false claims statutes, emphasizing the elimination of the requirement to prove specific intent to defraud the government and the significantly increased penalties upon conviction. Part III also discusses the impact of the recent "collective knowledge" doctrine on corporate liability for criminal false claims and false statements. Finally, Part IV uses hypotheticals to analyze the contractor's expanded liability for defective pricing and fraud, and highlights the inevitable erosion of the distinction between defective pricing and fraud resulting from that expanded liability.

I. THE OPERATION OF THE TRUTH IN NEGOTIATIONS ACT

In procurements using other than sealed bid procedures,³³ the Truth in Negotiations Act requires a government contractor to submit cost or pricing data and to certify that such data are accurate, complete, and current as of the date that the contractor and the government reach agreement on price.³⁴ Negotiated defense and civilian prime contracts, subcontracts, and modifications to any federal contracts that exceed \$100,000, fall under the Act.³⁵ Contractors may be exempted from the Act's requirements if their prices are based on adequate price competition, established catalog or market prices, or set by law.³⁶

Congress passed the original Truth in Negotiations Act to eliminate overpricing in the negotiation of noncompetitive defense contracts.³⁷ Congress

33. The sealed bidding method of contracting employs solicitation of competitive bids, public opening of bids, evaluation of bids without discussions with bidders, and award based only on price and price-related factors. 48 C.F.R. § 14.101 (1987). Contracts that are *not* sealed bid contracts are *negotiated* contracts, meaning "contracting through the use of either competitive or other-than-competitive proposals and discussions." 48 C.F.R. § 15.101 (1987).

34. 10 U.S.C. § 2306a (Supp. IV 1986); In the 1986 Continuing Appropriations Act, Congress amended and recodified the Truth in Negotiations Act from 10 U.S.C. § 2306(f) (Supp. IV 1986). The amendment provided that:

(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code (as added by subsection (a)), and the amendment [of section 2306(f) of title 10, U.S.C.] and repeal made by subsection (b), shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act [Oct. 18, 1986].

(2) Subsection (e) of such section [section 2306(c) of title 10, U.S.C.] shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.

Pub. L. No. 99-500, § 101(c), 100 Stat. 1783-169 (1986).

35. Prior to 1986, the Truth in Negotiations Act did not govern contracts with civilian agencies, but the agencies nonetheless adopted the Act's procedures as reflected in the Federal Acquisition Regulations (FAR). The 1986 amendments applied the Act to all civilian agencies as codified at 41 U.S.C. § 254 (Supp. IV 1986). Also, the certification threshold was reduced from \$500,000 to \$100,000 in the 1986 amendments. 10 U.S.C. § 2306a(j) (Supp. IV 1986).

36. 10 U.S.C. § 2306a(b) (Supp. IV 1986).

37. See Shirk & Greenberg, *supra* note 1, at 323.

perceived that the failure of contractors to disclose complete, current, and accurate cost and pricing data during the negotiations of defense contracts left the government in a weak negotiating position, thereby enabling the contractors to obtain inflated prices for their supplies or services.³⁸

The Truth in Negotiations Act and its implementing regulatory provisions, as set forth in the Federal Acquisition Regulation (FAR),³⁹ attempt to correct the perceived imbalance in negotiation strength by requiring a government contractor to submit cost or pricing data⁴⁰ with its proposal in a negotiated procurement exceeding \$100,000.⁴¹ The contractor also must certify that the submitted cost or pricing data is "accurate, complete and current" as of the date a price agreement is reached with the government.⁴² Should the contractor's submitted data be inaccurate, incomplete, or outdated, the government may bring a defective pricing action against the contractor for a reduction in the contract price equal to the amount that the contract has been overpriced, including profit or fee.⁴³

38. The Senate Report stated:

In determining the price under many types of negotiated contracts the Government must rely, at least in part, on cost and pricing data submitted by the contractor or his subcontractor. *In recent years the General Accounting Office submitted several reports to the Congress on cases in which contractors received unwarranted profits because the data used in establishing target costs or prices were inaccurate, incomplete, or out of date.* Although many of these reports were on incentive contracts, the objective of avoiding enhanced profits through failure to inform the contracting agency of the most current, accurate, and complete cost data is equally desirable in other types of negotiated contracts.

S. REP. NO. 1884, 87th Cong., 2d Sess. 3, *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 2476, 2477 (emphasis added).

39. 48 C.F.R. §§ 1-53 (1987).

40. *Id.* § 15.804-6(b). Contractors must submit cost or pricing data on Standard Form 1411. U.S. Government Printing Office, Standard Form 1411, Contract Pricing Proposal Sheet (1984); 48 C.F.R. § 53.301-141 1 (1987). This form took the place of the old Department of Defense Form 633.

41. 48 C.F.R. § 15.804-8(a), (b) (1987). The Act also applies to the modification of any formally advertised or negotiated contract involving a price adjustment exceeding \$100,000, the award of a subcontract exceeding \$100,000 if the prime contractor and each higher tier subcontractor have been required to submit data, or the modification of a subcontract involving a price adjustment exceeding \$100,000 if the original subcontract exceeded \$100,000. 10 U.S.C. § 2306a(a) (Supp. IV 1986).

42. 48 C.F.R. § 15.804-4 (1987) sets forth the certificate the contractor must execute when price negotiations are concluded and the contract price is agreed to.

43. 48 C.F.R. § 15.804-7(b) (1987) provides in pertinent part:

If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price given on the contractor's . . . Certificate of Current Cost of Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data.

*A. Determining If Submission of Cost or Pricing Data Is Required:
Exemptions from the Truth in Negotiations Act Requirements*

The Truth in Negotiations Act and the FAR provisions recognize that there are certain procurement situations in which the government does not require special protection against overpricing. Thus, where there is adequate price competition for a contract,⁴⁴ the price is set by law or regulation,⁴⁵ or the price is established in a catalog or by market price for a commercial item,⁴⁶ a contractor may qualify for an exemption to the Act.

Adequate price competition exists for a particular solicitation when the contracting officer determines that the following criteria have been met: (1) offers are solicited; (2) two or more responsible offerors that can satisfy the government's requirements submit priced offers responsive to the express requirements of the solicitation; and (3) these offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.⁴⁷

The contracting officer also has significant discretion in granting the "catalog or market price" exemption. This exemption applies to contracts priced according to "established catalog or market prices of commercial items, sold in substantial quantities to the general public."⁴⁸ To qualify for this exemption, a contractor must offer either an "established catalog price" or an "established market price." The former is a price that is maintained on a regular, published, or publicly available schedule and a price at which significant sales have been made.⁴⁹ The latter is a price set in the ordinary course of trade between free buyers and sellers capable of verification from sources independent of the manufacturer or vendor, such as from a trade publication.⁵⁰ The item offered at the established catalog or market price must be a

For a more detailed discussion of the government's recovery in a case of defective pricing, see *infra* notes 125-49 and accompanying text.

44. 10 U.S.C. § 2306a(b)(1)(A) (Supp. IV 1986).

45. *Id.* § 2306a(b)(1)(C).

46. *Id.* § 2306a(b)(1)(B).

47. 48 C.F.R. § 15.804-3(b)(1) (1987). The regulation states that the contracting officer "shall presume" that adequate price competition exists if the three criteria are met unless:

(i) The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;

(ii) [t]he low offeror has such a decided advantage that it is practically immune from competition; or

(iii) [t]here is a finding, supported by a statement of the facts and approved at a level above the contracting officer, that the lowest price is unreasonable.

Id. § 15.804-3(b)(2).

48. *Id.* § 15.804-3(c).

49. *Id.* § 15.804-3(c)(1).

50. *Id.* § 15.804-3(c)(2).

“commercial item,” meaning an item sold to the general public in the normal course of business, as opposed to one specially made for the government.⁵¹ Finally, the offered item must be sold to the general public in “substantial quantities,” meaning that commercial sales must be adequate to establish a real commercial market.⁵² In exceptional cases the chief of an agency’s contracting office has the power to authorize individual or class exemptions on the contracting officer’s recommendation even though the priced item does not strictly meet all the criteria for the catalog or market price exemption.⁵³

A contractor also may qualify for an exemption from the Truth in Negotiations Act where prices for an offered product or service are set by law or regulation. Qualification for this exemption requires that the price be set by a governmental body.⁵⁴ For example, utility rates set by law would qualify under this exemption.

Finally, the Truth in Negotiations Act provides that the head of a procuring agency or his delegee may authorize waivers of the cost or pricing data requirements.⁵⁵ A secretarial waiver, however, is very rarely granted.⁵⁶

B. Definition of “Cost or Pricing Data”

Although Congress enacted the Truth in Negotiations Act twenty-six years ago,⁵⁷ Congress did not define the term “cost or pricing data” until the Act was amended in 1986.⁵⁸ Congress took that definition almost verbatim from the FAR.⁵⁹ The inadequacy of the definition has spawned further attempts by Congress and the judiciary to clarify the definition of cost or pricing data.⁶⁰ Those efforts, however, have only served to further blur the distinction between what is and what is not cost or pricing data. The issue is not yet resolved.

The failure to establish a “bright-line” definition of cost or pricing data has created a serious problem for contractors, especially in light of the gov-

51. *Id.* § 15.804-3(c)(3).

52. *Id.* § 15.804-3(c)(4).

53. *Id.* § 15.804-3(g).

54. *Id.* § 15.804-3(c).

55. *Id.*; 10 U.S.C. § 2311 (Supp. IV 1986).

56. The Comptroller General has held that a waiver cannot be given to only one of several offerors on a contract since unequal competition would be the result. 46 Comp. Gen. 631 (1967).

57. Armed Services Procurement Act, Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified as amended at 10 U.S.C. § 2306 (1982)).

58. Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-500, § 101(c), 100 Stat. 1783-169 (1986) (codified at 10 U.S.C. § 2306a(g) (Supp. IV 1986)).

59. 48 C.F.R. § 15.801 (1987).

60. See *infra* notes 61-79 and accompanying text.

ernment's intensified scrutiny of contractor cost or pricing data submissions. Contractors are confronted with the dilemma of either disclosing to the government more data than is actually required in order to assure compliance, or withholding questionable data and risking charges of defective pricing or massive fraud investigations.

Prior to the 1986 amendments to the Truth in Negotiations Act, the FAR defined "cost or pricing data" as all facts existing up to the time of agreement on price that prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations.⁶¹ Contractors generally understood that this definition of cost or pricing data embraced more than historical accounting data. It was further understood that the term "facts" referred to in the definition meant factual data capable of being verified. Historically, litigation on the matter centered around the distinction between factual data, which were required to be disclosed, and judgmental data such as business judgments or estimates, which were not required to be disclosed.⁶²

Pressure from both administrative agencies and contractors for a more precise description of cost or pricing data, coupled with the government's widespread focus on contractor pricing practices, spurred Congress to attempt to clarify the definition in its 1986 amendments to the Truth in Negotiations Act. The amendments define "cost or pricing data" as "all information that is verifiable and that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly."⁶³ Later in 1986, Congress modified the definition by inserting "[s]uch term does not include information that is judgmental, but does include the actual information from which a judgment was derived."⁶⁴ This attempt at clarification only complicated matters, however, due to the practical difficulty in separating pure judgmental data from the factual data upon which the judgments are based.

*Texas Instruments, Inc.*⁶⁵ illustrates the practical difficulty in separating facts and judgments. During negotiations for a radar systems contract, the

61. 48 C.F.R. § 15.807-1(a) (1983).

62. See *E-Systems, Inc.*, ASBCA No. 17,557, 74-2 B.C.A. (CCH) ¶ 10,943 (1974); *LTV Electrosystems, Inc.*, ASBCA No. 16,802, 73-1 B.C.A. (CCH) ¶ 9957, *reconsid. denied*, 74-1 B.C.A. (CCH) ¶ 10,380 (1973); *Sylvania Elec. Prods.*, ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387 (1970); *Aerojet-General Corp.*, ASBCA No. 12,264, 69-1 B.C.A. (CCH) ¶ 7664, *modified*, 70-1 B.C.A. (CCH) ¶ 8140 (1970); *American Bosch Arma Corp.*, ASBCA No. 10,305, 65-2 B.C.A. (CCH) ¶ 5280 (1965).

63. 10 U.S.C. § 2306a(g) (Supp. IV 1986).

64. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3948 (1986).

65. ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195 (1987).

contractor furnished the government with detailed job order cost reports, project account summaries, and learning curve projections, as well as two computer generated "run cost" reports.⁶⁶ The second run cost report (Run Cost 2) incorporated system parts costs into a total estimated cost for a hypothetical radar system.⁶⁷ Run Cost 2 also presented a slice of the system cost history picture at a particular time in the production cycle of a product line and was an essential judgmental step in plotting the learning curve slope for estimating future production costs.⁶⁸ The government contended that Run Cost 2 was defective factual cost or pricing data because it did not include "later accumulated and more current costs."⁶⁹ The contractor countered that Run Cost 2 was not cost or pricing data, because of the judgmental nature of the unit values therein, and was useful only as a learning curve estimate.⁷⁰

In addressing the issue, the Armed Services Board of Contract Appeals (ASBCA) noted the difficulty in applying the Truth in Negotiations Act to computer generated reports and models increasingly used by contractors "to ascertain [cost] trends, plot learning curves, [and] estimate future production costs."⁷¹ Such reports invariably contain both verifiable factual data and elements of judgment in their content and in the manner in which they are prepared.⁷² The ASBCA concluded that it "may be impossible to incorporate into a single computer generated document the three requirements of the . . . Act with regard to the accuracy, completeness, and currency of that document."⁷³

Based on an extensive review of the FAR and case law, the ASBCA concluded that the key issue was *not* whether the documents or information in dispute constituted "cost or pricing data":

Rather, we believe there were two real issues in these types of cases that are often assumed but not articulated. The first was the issue of the scope of the certificate of accuracy, completeness and currency. . . . [I]t is possible, as in the instant appeal . . . that a single document may not contain all of the cost or pricing data covered by the certificate, and that such a document contains both "cost or pricing data" and information of a judgmental nature which is not cost or pricing data. The second issue relates to whether the data

66. *Id.* at 102,225-26.

67. *Id.* at 102,275.

68. *Id.*

69. *Id.* at 102,263.

70. *Id.* at 102,264.

71. *Id.* at 102,268.

72. *Id.*

73. *Id.*

in dispute were disclosed to the Government in a meaningful manner so that the Government was aware of their significance to the negotiation process⁷⁴

In *Texas Instruments, Inc.*, the ASBCA resolved these issues by holding that Run Cost 2 was cost or pricing data, "notwithstanding the fact that it was generated judgmentally and that it contained elements of judgment and estimates."⁷⁵ The contractor's submission of Run Cost 2 "served as a means for meaningfully disclosing the cost or pricing data" represented therein and it followed that Run Cost 2, together with the contractor's other data submissions, "placed the [government] in a position equal to appellant with respect to making judgments on pricing."⁷⁶ Furthermore, the ASBCA explained that Run Cost 2 was not defective data because it was the best data of its type available at the time of agreement on price, the contractor was not liable for judgmental errors therein, and the requirements of accuracy, completeness, and currency were not to be applied to that report in isolation from the contractor's other data submissions.⁷⁷

While the ASBCA wrestled with this issue, Congress made yet another attempt to clarify the definition of "cost or pricing data."⁷⁸ Although the latest amendment essentially left the definition intact, the phrase "all information that is verifiable" was replaced with the words "all facts." Thus, the current statutory definition of cost or pricing data reads as follows:

Cost or pricing data defined.—In this section, the term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.⁷⁹

The legislative history, however, indicates that Congress' definition of "cost or pricing data" is similar to that espoused in *Texas Instruments, Inc.*⁸⁰ The House and Senate conferees on the measure desired "to reaffirm that 'cost or pricing data' should be broadly construed to include all facts that a prudent buyer or seller would reasonably expect to affect price negoti-

74. *Id.* at 102,274.

75. *Id.* at 102,276.

76. *Id.*

77. *Id.*

78. National Defense Authorization Act For Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 804, 101 Stat. 1125 (1987) (codified at 10 U.S.C.A. § 2306a(g) (West Supp. 1988)).

79. 10 U.S.C.A. § 2306a(g) (West Supp. 1988).

80. ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195, at 102,273 (1987).

ations significantly.”⁸¹ The conferees noted that the definition was drawn directly from the FAR, and further acknowledged that “cost or pricing data” must in some instances include information that would be considered judgmental.⁸² For example, facts and data may be so intertwined with judgments that the judgments must be disclosed in order to make the facts or data meaningful.⁸³

Another defining characteristic of cost or pricing data is its significant effect on price negotiations. The Truth in Negotiations Act does not require submission of data that “a prudent buyer or seller” would *not* reasonably expect to “affect price negotiations significantly.”⁸⁴ The disclosure requirements, however, extend beyond data actually relied upon by the contractor to data that a prudent offeror would consider relevant in estimating its cost.⁸⁵

Finally, the definition of cost or pricing data excludes significant data not reasonably available before the “date of agreement on price” by the parties.⁸⁶ Conversely, data submitted must be current as of the time of price agreement, and contractors have a continuing obligation to update their data submissions until that time.⁸⁷

Prior to *Texas Instruments, Inc.* and the enactment of a statutory definition, cost or pricing data generally were considered to be verifiable factual data only, not judgmental data. Now, however, to the extent judgments and facts are inextricably bound together, or disclosure of judgmental data is necessary to make factual data meaningful, disclosure of such judgmental data will be required under the Truth in Negotiations Act. Although contractors and the government will continue to argue over whether intertwined judgments constitute cost or pricing data under the new statutory definition, the continued blurring of the distinction between factual data and judgmental data clearly leaves contractors more vulnerable to defective pricing charges than ever before.

81. H.R. CONF. REP. NO. 446, 100th Cong., 1st Sess. 657 (1987).

82. *Id.*

83. *See, e.g., Texas Instruments, Inc., ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195, at 102,268, 102,274, 102,276 (1987).*

84. *Id.* at 102,271.

85. *Hardie-Tynes Mfg. Co., ASBCA No. 20,717, 76-2 B.C.A. (CCH) ¶ 12,121, at 58,227 (1976); see also 48 C.F.R. § 15.801 (1987).*

86. 10 U.S.C. § 2306a(g) (Supp. IV 1986). The time of agreement on price has generally been construed to mean the “shake-hands date” or completion of negotiations. *Paceco Inc., ASBCA No. 16,458, 73-2 B.C.A. (CCH) ¶ 10,119 (1973); Aerojet-General Corp., ASBCA No. 12,873, 69-1 B.C.A. (CCH) ¶ 7585 (1969); see also 48 C.F.R. § 15.804-4(c) (1987).*

87. 48 C.F.R. § 15.804-4(c) (1987); *Conrac Corp., ASBCA No. 15,964, 74-1 B.C.A. (CCH) ¶ 10,605, aff’d, Conrac Corp. v. United States, 558 F.2d 994 (Ct. Cl. 1977).*

C. Submission of Cost or Pricing Data

Contractors are required to submit cost or pricing data on Standard Form 1411, Contract Pricing Proposal Cover Sheet or in its attachments or referenced documents.⁸⁸ The FAR requires cost or pricing data to be "either submitted or identified in writing by the time of agreement on price."⁸⁹ Merely making available books, records and other documents without identification does not constitute submission of cost or pricing data.⁹⁰

Generally, in order to comply with data submission requirements, the contractor must show that it: (1) furnished the data to authorized representatives or auditors designated by the cognizant contracting officer; (2) identified the relevant data; and (3) made the data's significance known to the government.⁹¹ The government assumes the burden of proving that it was not clearly advised of the data and lacked actual knowledge thereof.⁹²

Cost or pricing data must be submitted to the proper government officials. Submission of data to a government representative not involved in the subject negotiation, or not designated by the appropriate contracting officer,

88. 48 C.F.R. § 15.804-6(b)(1) (1987) states:

Cost or pricing data shall be submitted on Standard Form 1411 (SF 1411), Contract Pricing Proposal Cover Sheet, unless required to be submitted on one of the termination forms specified in Subpart 49.6. Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a format acceptable to the contracting officer.

89. 48 C.F.R. § 15.804-6(d) (1987) states:

(d) The requirement for submission of cost or pricing data is met if all cost or pricing data reasonably available to the offeror are either submitted or identified in writing by the time of agreement on price. However, there is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The latter does not constitute "submission" of cost or pricing data.

90. The SF 1411, Instructions for Submission of a Contract Pricing Proposal, Table 15-2, states in pertinent part:

3. There is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of cost or pricing data is met when all accurate cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the contracting officer or an authorized representative. As later information comes into the offeror's possession, it should be promptly submitted to the contracting officer. The requirement for submission of cost or pricing data continues up to the time of final agreement on price.

4. In submitting offeror's proposal, offeror must include an index, appropriately referenced, of all the cost or pricing data and information accompanying or identified in the proposal. In addition, any future additions and/or revisions, up to the date of agreement on price, must be annotated on a supplemental index.

48 C.F.R. § 15.804-6(b)(2) (1987).

91. *Id.*

92. Texas Instruments Inc., ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195 (1987).

may not constitute proper submission.⁹³ There is, however, no statutory or regulatory scheme requiring the contractor to physically submit cost or pricing data directly to the contracting officer or designated contract negotiator.⁹⁴

Contractors also must clearly identify the data being submitted. Effective disclosure requires that the government be clearly advised of the relevant data or have actual, as opposed to imputed, knowledge of such data.⁹⁵ Making data available without proper identification is not meaningful disclosure.⁹⁶ For example, in *M-R-S Manufacturing Co. v. United States*,⁹⁷ even though a contractor's bill of materials was in error because the contractor had submitted an outdated "card run" with the bill, a kardex file available to the government auditor contained the accurate, updated information. Although the government had access to the accurate, updated information, the contractor neither physically delivered the kardex file to the government nor advised the government that the kardex file contained accurate information that should have been used to update the bill of materials.⁹⁸ The court held that making the kardex file available to the auditor without making its significance known was not disclosure.⁹⁹ Contractors are not required, how-

93. See, e.g., *Singer Co., Librascope Div. v. United States*, 576 F.2d 905 (Cl. Ct. 1978) (data submitted to auditor relatively isolated from negotiations and preoccupied with other tasks not meaningful submission); see also *American Machine & Foundry Co.*, ASBCA No. 15037, 74-1 B.C.A. (CCH) ¶ 10,409 (1973).

94. 48 C.F.R. § 15.804-1 (1987); see also *Texas Instruments, Inc.*, ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195 (1987). In *Texas Instruments, Inc.*, the contractor delivered its computer-generated "Run Cost 1" report to the Defense Contract Audit Agency (DCAA) before the government issued its Request For Quotations. *Id.* at 102,267. The contractor's certification referred to the Run Cost 1 report, as did the pre-award audit. *Id.* The contractor's detailed job order cost reports and project account summaries were likewise delivered to the auditor, and the pre-award audit and price analyst reports were provided to the government's contract negotiator. *Id.* Also, the contractor's "Run Cost 2" report was submitted to a DCAA auditor who participated in the contract negotiations. *Id.* These aggregate submissions reasonably met the requirement of submission of data to the appropriate government representatives. *Id.* at 102,276-77.

95. *Sylvania Elec. Prods.*, ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387, at 38,999 (1970).

96. *Id.* (Physically handing over files that if examined would disclose differences between proposed and historical costs without advising government of kind and content of the data is insufficient.); see also *McDonnell Douglas Corp.*, ASBCA No. 12,786, 69-2 B.C.A. (CCH) ¶ 7897 (1969); *Plessey Indus.*, ASBCA No. 16,720, 74-1 B.C.A. (CCH) ¶ 10,603 (1974); *Hardie-Tynes Mfg. Co.*, ASBCA No. 10,717, 76-2 B.C.A. (CCH) ¶ 12,121 (1976).

97. 492 F.2d 835 (Ct. Cl. 1974).

98. *Id.* at 838.

99. *Id.* at 843; see also *Singer Co., Librascope Div. v. United States*, 576 F.2d 905 (Ct. Cl. 1978) (even though government auditor just conducted intensive study of data, no meaningful submission where auditor not involved in negotiating contract); *Sylvania Elec. Prods. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973) (disclosure of data to ACO on other contracts for pur-

ever, to generate additional data to analyze the relationship between the data submitted and the contract proposal.¹⁰⁰

The data submission requirement is fully satisfied if the government has *actual* knowledge of the specific cost or pricing data.¹⁰¹ As a general rule, however, the government has no duty to seek out data, and contractors cannot escape liability by showing that the government should have been aware of the data.¹⁰² Any doubt on this point has been removed by the 1986

poses not connected with the particular proposal, without request of forwarding to PCO on contract at issue not submission); *J.S. Latsis Group, ENG. BCA No. 4276, 86-2 B.C.A. (CCH) ¶ 18,853, at 95,017 (1985)* (contractor's transmission of a lease "to unknown Government representatives not shown to have been closely tied to administration of the contract, long before the price negotiations in issue, commingled with other data, and not identified during those negotiations, did not satisfy the submission requirements of the contracts defective pricing provision"); *Norris Indus., ASBCA No. 15,442, 74-1 B.C.A. (CCH) ¶ 10,482, at 49,547 (1974)* (government under no duty to compare price proposals on two separate contracts to find data errors).

100. Nevertheless, the ASBCA has come close to requiring contractors to explain the relationship in a few cases primarily dealing with questions of duplicative costs. *Sylvania Elec. Prods., 479 F.2d 1342 (Ct. Cl. 1973)*; *Hardie-Tynes Mfg. Co., ASBCA Nos. 20,367, 20,387, 76-1 B.C.A. (CCH) ¶ 11,827 (1976)*; *American Machine & Foundry Co., ASBCA No. 15,037, 74-1 B.C.A. (CCH) ¶ 10,409 (1974)*; *Libby Welding Co., ASBCA No. 15,084, 73-1 B.C.A. (CCH) ¶ 9859 (1973)*.

101. *See, e.g., Norris Indus., ASBCA No. 15,442, 74-1 B.C.A. (CCH) ¶ 10,482 (1974)*; *McDonnell Douglas Corp., ASBCA No. 12,786, 69-2 B.C.A. (CCH) ¶ 7897 (1969)*. Moreover, in *FMC Corp., ASBCA No. 30,069, 87-1 B.C.A. (CCH) ¶ 19,544 (1986)*, the board implied that something less than actual knowledge *may* be sufficient to relieve the contractor of liability. The contractor submitted a letter to the ACO at the agency's field office in the contractor's plant. *Id.* at 98,755. The letter disclosed the contractor's latest revised labor and indirect rates. *Id.* These rates were subsequently set forth in the contractor's Certificate of Current Cost or Pricing Data which referred to the letter revision. *Id.* The board found the government was not entitled to a reduction of contract price because:

[S]upplying the [data] to the ACO, who was not involved in [contract] negotiations, was consistent with the [contractor's] past practice and with the ACO's requirement that he receive and disburse new cost or pricing data; the officials negotiating for the government were aware of these practices; the data were submitted for audit and were clearly identified as new rate data; and accordingly, the government was aware or should have been aware of the updated data.

Id. at 98,754; *see also Whittaker Corp., ASBCA No. 17,267, 74-2 B.C.A. (CCH) ¶ 10,938, at 52,078 (1974)* (early notice to government of some type of price reduction created a heavy burden of proving that by the time of negotiation the government did not have information as to new quotation). A limited duty to inquire on the part of the government was also implied in *Conrac Corp., ASBCA No. 19,507, 78-1 B.C.A. (CCH) ¶ 12,985 (1978)* (post-price agreement letter explicitly identifying quantity discount read but ignored by government which should have inquired into connection between incomplete data and overstatement of contract price).

102. *M-R-S Mfg. Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974)*; *Conrac Corp., ASBCA No. 15,964, 74-1 B.C.A. (CCH) ¶ 10,605, aff'd, Conrac Corp. v. United States, 558 F.2d 994 (Ct. Cl. 1977)*; *Singer Co., Librascope Div. v. United States, 576 F.2d 905 (1978)*; *Singer Co., Librascope Div., ASBCA No. 17,604, 75-2 B.C.A. (CCH) ¶ 11,401, aff'd on reconsideration, Singer-General Precision, Inc., Librascope Div., ASBCA No. 17,604, 76-1 B.C.A. (CCH) ¶ 11,819 (1976)*.

amendments to the Truth in Negotiations Act, which state, in pertinent part, that it is "not a defense . . . that . . . the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor . . . took no affirmative action" to identify the data for the contracting officer.¹⁰³

Finally, under certain circumstances the contractor must go beyond required physical submission and identification, and advise the government of the "content of the cost or pricing data and their bearing on the prospective contractor's proposal."¹⁰⁴ This requirement appears to center on whether the significance of the data as submitted is "reasonably apparent" to the government.¹⁰⁵ The majority of cases in which contractors were held liable for failing to advise the government of the significance of submitted data involved contractor concealment or misrepresentation of a fact in the contract proposal that the government could have discovered only by a more or less laborious review and comparison of the data and the proposal.¹⁰⁶ Thus, contractors must not only follow specific requirements in the Act regarding cost or pricing data submission but must also insure that the data is submitted in a reasonably meaningful fashion.¹⁰⁷ The judiciary has construed sub-

103. 10 U.S.C. § 2306a(d)(3) (Supp. IV 1986).

104. *Sylvania Elec. Prods.*, ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387, at 38,999 (1970).

105. *Grumman Aerospace Corp.*, ASBCA No. 27,476, 86-3 B.C.A. (CCH) ¶ 19,091 (1986); *Plessey Indus.*, ASBCA No. 16,720, 74-1 B.C.A. (CCH) ¶ 10,603 (1974).

106. *Sylvania Elec. Prods.*, ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387 (1970); *see also Hardie-Tynes Mfg. Co.*, ASBCA Nos. 20,367, 20,387, 76-1 B.C.A. (CCH) ¶ 11,827 (1976); *American Machine & Foundry Co.*, ASBCA No. 15,037, 74-1 B.C.A. (CCH) ¶ 10,409 (1974); *Libby Welding Co.*, ASBCA No. 15,084, 73-1 B.C.A. (CCH) ¶ 9859 (1973). In *Hardie-Tynes*, the contractor represented that it was company policy not to stock parts in inventory. ASBCA Nos. 20,367, 20,387, 76-1 B.C.A. (CCH) ¶ 11,827, at 56,477. A handwritten listing of parts purchased over the previous years in the contractor's files suggested otherwise. *Id.* at 56,486. The contractor did, in fact, carry some parts in inventory and subsequently used the inventory parts in performance of the contract. *Id.* The ASBCA held that the contractor failed to meet its data disclosure requirements, stating that:

in light of appellant's implicit representation that new purchases would be made of the principal parts, and appellant's stated policy of not stocking parts, there was no reason for the auditor to undertake the laborious task of checking the quantities bought against the quantities required for previous contracts. In any event, a prospective contractor does not meet its disclosure obligation merely by physically handing over data. It is also necessary that the Government representatives be advised of the bearing that information has on the price proposal. The probability that appellant had stock on hand was too obscurely revealed in the lengthy listing of previous purchases to allow a prudent businessman to believe that it was not necessary to state expressly that inventory which might be used on the contract was in existence.

Id. (citations omitted).

107. *Plessey Indus.*, ASBCA No. 16,720, 74-1 B.C.A. (CCH) ¶ 10,603 (1974); *Texas Instruments Inc.*, ASBCA No. 23,678, 87-3 B.C.A. (CCH) ¶ 20,195 (1987).

mission duties rather strictly in interpreting the standards of meaningful submission of data.¹⁰⁸

D. *The Prima Facie Case of Defective Pricing*

The government must establish the following elements to make out a prima facie case of defective pricing under the Truth in Negotiations Act: (1) the existence of an executed Certificate of Cost or Pricing Data in the government's possession, or a procurement requiring submission of accurate, current, and complete cost or pricing data pursuant to the Truth in Negotiations Act; (2) government reliance on noncurrent, inaccurate, or incomplete data in its negotiations with the contractor; and (3) an increase in the contract price due to such reliance.

To establish the first element, the government must show that the contractor either executed a Certificate of Cost or Pricing Data or was required by the Act to submit accurate, current, and complete cost or pricing data.¹⁰⁹ The certificate is the contractor's statement that the cost or pricing data submitted is accurate, complete, and current as of the date the agreement on price is reached.¹¹⁰ Prior to the 1986 amendments to the Act, there was perhaps some question as to whether a contractor could be held liable for defective pricing in the absence of such a certificate.¹¹¹ Pursuant to the amended Act, the absence of a certificate is no longer a defense to a charge of defective pricing. The requirement for submission of accurate, current and complete cost or pricing data is statutorily based and becomes operational as a matter of law when the negotiated procurement or modification exceeds \$100,000 in the aggregate and is not subject to one of the cost or pricing data exemptions discussed above.¹¹²

The second element the government must establish in a defective pricing

108. R. BOYD & D. AYLWARD, *TRUTH IN NEGOTIATIONS* (Government Contract Briefing Paper 77-2) (2d ed. Apr. 1977). Disputes regarding submission of data generally have turned upon the specific facts of each case.

109. 10 U.S.C. § 2306a(d)(3)(D)(1) (Supp. IV 1986).

110. *Id.* § 2306a(a)(3).

111. In *Libby Welding Co.*, ASBCA No. 15,084, 73-1 B.C.A. (CCH) ¶ 9859 (1973), the contract contained the required clause permitting a reduction in price in the event of defective pricing. However, the contractor was not asked to and did not provide a Certificate of Current Cost or Pricing Data for a contract modification in excess of \$100,000. *Id.* at 46,076. The government later asserted a defective pricing claim, but the ASBCA held that the claim was precluded by the absence of a certificate. *Id.* at 46,092. The Board noted that the price reduction clause was tied directly to the certificate. *Id.* In its absence, the contractor was not liable under the price reduction clause of the contract. *Id.*; see also *Lockheed Shipbuilding & Const. Co.*, ASBCA No. 16,494, 73-2 B.C.A. (CCH) ¶ 10,157, at 47,768-69 (1973).

112. 10 U.S.C. § 2306a(d)(3)(D) (Supp. IV 1986).

action under the Act is that it relied on the defective cost or pricing data.¹¹³ The FAR establishes a rebuttable presumption that the government relied on the defective data.¹¹⁴ The presumption of reliance has been interpreted as shifting the burden of going forward with the evidence to the contractor.¹¹⁵ The contractor, however, may shift the burden back to the government by introducing evidence of nonreliance. Once the contractor introduces such evidence, the government then has the ultimate burden of proving that it relied on the defective data.¹¹⁶

Absent actual knowledge from other sources, the government is entitled to rely solely upon a contractor's data.¹¹⁷ However, the government's reliance must be reasonable. The government may not refrain from analyzing the contractor's proposal through the use of appropriate pricing, auditing, and technical specialists.¹¹⁸ Additionally, any time the contracting officer becomes aware of defective data, he or she is obliged to inform the contractor immediately.¹¹⁹ Thus, unreasonable government reliance may bar government recovery for defective pricing.¹²⁰ Similarly, if the contractor proves that in the negotiations the government considered the defective data irrele-

113. *Conrac Corp.*, ASBCA No. 15,964, 74-1 B.C.A. (CCH) ¶ 10,605 (1974); *American Machine & Foundry Co.*, ASBCA No. 15,037, 74-1 B.C.A. (CCH) ¶ 10,409 (1974).

114. *See* 48 C.F.R. § 15.804-7(b)(2) (1987); DOD FAR Supp. 15.804-7(b)(2) (1987).

115. *See supra* note 94.

116. In *Sperry Univac Div., Sperry Rand Corp.*, DOT CAB No. 1144, 82-2 B.C.A. (CCH) ¶ 15,812 (1982), the contractor succeeded in rebutting the presumption that an overstated contract price was the "natural and probable consequence" of inaccurate cost disclosure. The contractor had breached its disclosure duty by failing to notify the Government in writing of its arrangement to obtain a lower price from its subcontractor. *Id.* at 78,338-39. However, the Board ruled that the Government was not thereby entitled to reduce the contract price, because the contractor was able to demonstrate that its final offer to the Government had, *inter alia*, incorporated the inadequately disclosed savings on the subcontract. *Id.* at 78,339-40. "[T]he record clearly shows that the contract price was the best which respondent would have obtained even had it known the actual details of the subcontract pricing." *Id.* at 78,341; *see also Lockheed Aircraft Corp. v. United States*, 479 F.2d 1342, 1349 (Ct. Cl. 1973).

117. *Norris Indus.*, ASBCA No. 15,442, 74-1 B.C.A. (CCH) ¶ 10,482 (1974); *Sylvania Elec. Prods.*, ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387 (1970). Under certain circumstances, even if the government has actual knowledge of data other than that submitted, it may be entitled to rely solely on the contractor's data and representations. *Aerojet-General Corp. v. United States*, No. 298-74 (Ct. Cl. Nov. 12, 1976).

118. 48 C.F.R. § 15.805-1(b), (a) (1987).

119. *Id.* § 15.804-7(a).

120. *Boeing Co.*, ASBCA No. 20,875, 85-3 B.C.A. (CCH) ¶ 18,351 (1985) (unjustified auditor's conclusions regarding data partly prevented government from carrying its burden of reliance); *Conrac Corp.*, ASBCA No. 19,507, 78-1 B.C.A. (CCH) ¶ 12,985 (1978) (reasonable consideration of the facts should have led Navy to realize that discount was being used); *Levinson Steel Co.*, ASBCA No. 16,520, 73-2 B.C.A. (CCH) ¶ 10,116 (1973); *Sparton Corp.*, ASBCA No. 11,363, 67-2 B.C.A. (CCH) ¶ 6539 at 30,379 (1967) (government may not "choose one bit of defective data and close its eyes to other data and evidence which may represent the true state of the facts").

vant, the contractor may escape liability.¹²¹

The third element the government must establish as part of its prima facie case is that the submission of defective cost or pricing data caused the government to pay a higher contract price. The pre-FAR regulations created a presumption that the natural and probable consequence of defective data was an increase in the contract price.¹²² Although this presumption was deleted from the FAR, the Department of Defense regulations supplementing the FAR (DFARS) and the case law maintain this rebuttable presumption.¹²³ This presumption shifts the burden of going forward with the evidence to the contractor. Once the contractor introduces its rebutting evidence, the government then has the burden of proving that defective data *actually* increased the contract price.¹²⁴

E. *The Government's Recovery in a Case of Defective Pricing*

If the government establishes a case of defective pricing by the contractor, the government is entitled to a price reduction equal to the amount of the contractor's cost overstatement plus the appropriate burden, profit, or fee.¹²⁵ This rule of damages was clearly illustrated in *Sylvania Electric Products, Inc.*¹²⁶ In *Sylvania*, the contractor failed to disclose certain low quotations for six items of electronic equipment prior to agreement between the parties on the contract price.¹²⁷ In arriving at the price reduction due to the government, the ASBCA reduced the price of the six items of equipment by an amount equal to the difference between the contractor's proposal price and

121. Muncie Gear Work, Inc., ASBCA No. 18,184, 75-2 B.C.A. (CCH) ¶ 11,380 (1975); E-Systems, Inc., ASBCA No. 17,557, 74-2 B.C.A. (CCH) ¶ 10,782, *motion for reconsideration denied*, 74-2 B.C.A. (CCH) ¶ 10,943 (1974); Sparton Corp., ASBCA No. 11,363, 67-2 B.C.A. (CCH) ¶ 6539 (1967).

122. 32 C.F.R. § 3.807-5(a)(2) (1970); *cf.* 48 C.F.R. § 15.804-7(c), (d) (1987) (no such presumption in new general Federal Acquisition Regulations); *Sylvania Elec. Prods. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973); *Aerojet-General Corp.*, ASBCA No. 12,264, 69-1 B.C.A. (CCH) ¶ 7664, *aff'd on reconsideration*, 70-1 B.C.A. (CCH) ¶ 8140 (1970).

123. *See* DOD FAR Supp. 15.804-7 (1987); *Aerojet-General Corp.*, ASBCA No. 12,264, 70-1 B.C.A. (CCH) ¶ 8140 (1970).

124. *Lear Siegler, Inc.*, ASBCA No. 20,040, 78-1 B.C.A. (CCH) ¶ 13,110 (1978); *Shirk & Greenberg*, *supra* note 1, at 319, 328-29; *see also* *Universal Restoration v. United States*, 298 F.2d 1400 (Fed. Cir. 1986).

125. 48 C.F.R. § 15.804-7(b) (1987); *see also* 10 U.S.C. § 2306a(d) (Supp. IV 1986). *But see* *Grumman Aerospace Corp. v. United States*, 549 F.2d 767 (Ct. Cl. 1977) (where the Court arrived at a compromise price adjustment under a theory analogous to comparative negligence).

126. ASBCA No. 13,622, 70-2 B.C.A. (CCH) ¶ 8387 (1970), *aff'd*, 479 F.2d 1342 (Ct. Cl. 1973).

127. *Id.* at 38,999.

the low quotation plus the appropriate overhead and profit.¹²⁸ The cost overstatements for all six items of equipment totalled \$202,808.00 and, with the negotiated 6% for overhead and 11.6% for profit, the total price reduction equaled \$239,913.75.

The case law and the DFARS establish the presumption that the natural and probable consequence of defective data is to increase the contract price in the amount of the cost overstatement plus related overhead, profit, or fee. Thus, a contractor may be liable for a dollar-for-dollar reduction of its contract price based on the cost discrepancy between overstated cost data submitted to the government and corresponding undisclosed actual costs.¹²⁹ The presumption of an increased contract price may be overcome if the contractor demonstrates that, even if it had disclosed the correct data, the parties would not have negotiated a price that would have reflected the total amount of the overstatement. By reconstructing the course of its previous price negotiations with the government, the contractor can meet its burden of going forward with evidence to rebut the presumption of a price increase.¹³⁰

Additionally, a contractor may escape liability entirely by proving that during the pricing negotiations for an acceleration order the government weighed the impact of the defective data and reduced the price adjustment accordingly.¹³¹ Prior to recent amendments, a contractor might rebut the presumption that its nondisclosure of actual overhead rates resulted in increased prices by proving that in negotiations it would have accepted no less than its standard mark-up, from which it never waived.¹³²

Where the dollar-for-dollar reduction formula is too unreliable or speculative, alternative formulas may be used. In *S.T. Research Corp.*,¹³³ the contractor's total estimated labor costs were inflated to cover the manufacturing cost of certain contract items. The contractor subsequently purchased the

128. *Id.*

129. *E.g.* Aerojet-General Corp., ASBCA No. 12,264, 69-1 B.C.A. (CCH) ¶ 7664 (1969), *aff'd on reconsideration* 70-1 B.C.A. (CCH) ¶ 8140 (1970).

130. *See* Cutler-Hammer, Inc. v. United States, 416 F.2d 1306, 1316 (Ct. Cl. 1969); Muncie Gear Works, Inc., ASBCA No. 18,184, 75-2 B.C.A. (CCH) ¶ 11,380 (1975). In Kisco Co., ASBCA No. 18,432, 76-2 B.C.A. (CCH) ¶ 12,147 (1976), the contractor avoided liability altogether by establishing that the parties considered the impact of the defective data and reduced the price adjustment of an acceleration order accordingly.

131. Kisco Co., ASBCA No. 18,432, 76-2 B.C.A. (CCH) ¶ 12,147 (1976).

132. *E.g.* Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986). *But see* 10 U.S.C. § 2306a(d)(3) (Supp. IV 1986) (no defense that contractor, due to superior bargaining position, would not have changed price if accurate cost or pricing data had been submitted).

133. ASBCA No. 29,070, 84-3 B.C.A. (CCH) ¶ 17,568 (1984).

items without disclosing the data to the government.¹³⁴ Although the government sought a reduction based on the total proposed labor costs minus the actual labor costs, the ASBCA held that this method was too unreliable because (1) it simply assumed that the difference between actual total labor costs was attributable to the items purchased rather than manufactured, and (2) it did not account for efficiency gains, personnel turnover and other factors.¹³⁵ The ASBCA determined that a more reliable measure of recovery was the difference between a postcontract estimate of the amount of estimated labor hours attributable to the purchased items and the actual purchase price of the items.¹³⁶

In certain circumstances, a contractor may offset understatements of costs in defective cost or pricing data against overstatements of costs, thereby further reducing its liability for defective pricing. In other words, its liability can be reduced by the amount that other defective data decreased the contract price.¹³⁷ To obtain a set-off, the contractor must certify that to the best of its knowledge and belief it is entitled to the set-off.¹³⁸ It also must prove that the data upon which the set-off is based were available before the date of agreement on contract price but were not submitted as required by the Truth in Negotiations Act.¹³⁹ Set-offs are permitted only up to the amount of the government's claim in a single pricing action.¹⁴⁰ The set-off cost, however, need not be part of the same cost category (e.g. material, direct labor, or indirect costs) that forms the basis for the government's price reduction.¹⁴¹ Set-offs are not permitted if the contractor knowingly submitted a false certificate of cost or pricing data,¹⁴² or if the government proves that the price would not have been increased as a result of the submission of the data upon which the set-off is based.¹⁴³

In the past, contractors reduced or avoided defective pricing liability by establishing that: (1) there was no agreement on line item prices because the contract was negotiated on a "total cost" basis;¹⁴⁴ (2) the contractor was the

134. *Id.* at 87,547.

135. *Id.* at 87,548.

136. *Id.*

137. 10 U.S.C. § 2306a(d)(4)(A) (Supp. IV 1986); 48 C.F.R. § 15.804-7(b)(3) (1987); *see* *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306, 1309-12 (Ct. Cl. 1969).

138. 10 U.S.C. § 2306a(d)(4)(A)(i) (Supp. IV 1986).

139. *Id.* § 2306a(d)(4)(A)(ii).

140. 48 C.F.R. § 15.804-7(b)(3) (1987).

141. *Id.*

142. 10 U.S.C. § 2306a(d)(4)(B)(i).

143. *Id.* § 2306a(d)(4)(B)(ii).

144. *Bell & Howell Co., ASBCA No. 11,999, 68-1 B.C.A. (CCH) ¶ 6993 (1968)* (board split defective pricing proportionally according to relation between final price and parties' initial negotiating objectives, giving effect to total price negotiations).

sole source for the procurement or otherwise was in a superior bargaining position vis-a-vis the government;¹⁴⁵ or (3) the contracting officer "should have known" that the data were defective even though the contractor did not affirmatively so inform the government.¹⁴⁶ These defenses, along with the defense of absence of a Certificate of Cost or Pricing Data, are no longer available to contractors, having been specifically removed by the 1986 amendments to the Truth in Negotiations Act.¹⁴⁷

The amended Truth in Negotiations Act also provides that contractors doing business with the DoD will be liable for interest on any contract overpayment resulting from defective pricing.¹⁴⁸ Furthermore, if a defense contractor knowingly submits defective data, the government may now impose a separate civil penalty in the amount of the contract overpayment.¹⁴⁹

II. CIVIL FRAUD LIABILITY FOR DEFECTIVE PRICING

A. *The Civil False Claims Statute*

The DoD Inspector General considers defective pricing to be an "indicator of fraud," and defective pricing is one of the principal sources of fraud allegations against government contractors today.¹⁵⁰ In this regard, the civil false claims statute¹⁵¹ is the government's primary civil litigative tool for combatting fraud in government procurement, including defective pricing fraud.

The current civil false claims statute is an outgrowth of the original False Claims Act, adopted in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War.¹⁵² Contemporary debates suggest that the False Claims Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the government.¹⁵³ Originally, the False Claims Act provided for both civil and criminal penalties assessed against one who was found knowingly to have submitted a false claim to the government.¹⁵⁴ The civil penalty provided for payment of double the amount of damages suffered by the government as a

145. American Machine & Foundry Co., ASBCA No. 15,037, 74-1 B.C.A. (CCH) ¶ 10,409 (1974).

146. Norris Indus., ASBCA No. 15,442, 74-1 B.C.A. (CCH) ¶ 10,482 (1974).

147. 10 U.S.C. § 2306a(d)(3) (Supp. IV 1986); 48 C.F.R. § 15.804-7(b)(3) (1988).

148. *Id.* § 2306a(e)(1)(A).

149. *Id.* § 2306a(e).

150. *See supra* text accompanying note 26.

151. 31 U.S.C. § 3729 (1982 & Supp. IV 1986).

152. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

153. *See Shirk & Greenberg, supra* note 1, at 331.

154. Act of Mar. 2, 1863, ch. 67, §§ 2, 3, 12 Stat. 696.

result of the false claim, plus a \$2,000 penalty for each claim submitted.¹⁵⁵

The original False Claims Act remained in effect, practically unchanged, until 1986. In 1982, the civil provisions of the False Claims Act were recodified in the civil statute at section 3729 of title 31 of the United States Code.¹⁵⁶ The recodification made no substantive changes in the civil provisions, but merely substituted simple language for awkward and obsolete terms.¹⁵⁷

Through the False Claims Amendments Act of 1986,¹⁵⁸ Congress practically rewrote the civil false claims statute "[i]n order to make the statute a more useful tool against fraud in modern times."¹⁵⁹ The Senate report on the amendments stressed that the growing magnitude and pervasiveness of government procurement fraud necessitated "modernization of the government's primary litigative tool for combatting fraud; the False Claims Act."¹⁶⁰

To this end, the 1986 amendments to the civil false claims statute significantly increase recoverable damages, raise civil forfeiture penalties, eliminate the need to prove specific intent to defraud, reduce the government's burden of proof, and permit and facilitate "qui tam" actions against contractors by private citizens.¹⁶¹

1. *The Amended Civil False Claims Statute Expands Civil Liability for the Knowing Submission of a False Claim to a Government Agency—The Prima Facie Case*

As amended, the civil false claims statute imposes civil liability on any person who presents a false or fraudulent claim to the government.¹⁶² To establish a prima facie violation of the statute, the government must prove

155. *Id.* § 3.

156. Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 872, 978 (codified as amended at 31 U.S.C. 3729 (1982 & Supp. IV 1986)).

157. See H.R. REP. NO. 651, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1895, 1895. For further details of the early legislative and statutory history of the False Claims Act, see *United States v. Neifert-White Co.*, 390 U.S. 228 (1968); *Rainwater v. United States*, 356 U.S. 590 (1958); *Annotation, Specific Intent to Defraud Government as Necessary to Impose Liability Under Provisions of False Claims Act (31 U.S.C. § 231) Pertaining to "Fake" or "Fictitious" Claims as Statements*, 26 A.L.R. FED. 307, 310-11 (1976).

158. Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended 31 U.S.C. § 3729 (Supp. IV 1986)).

159. See S. REP. NO. 345, 99th Cong., 2d Sess. 1, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5266, 5266.

160. *Id.*

161. 31 U.S.C. § 3729 (Supp. IV 1986).

162. The full text of 31 U.S.C. § 3729 (Supp. IV 1986) prohibits seven types of conduct. For our purposes, we need focus only on the prohibition set out in the text; for reasons discussed in part IV, it encompasses a case of defective pricing.

by a preponderance of the evidence¹⁶³ that: (1) there was a presentation of a claim to a government agency; (2) the claim was false; and (3) the party submitted the claim knowing it to be false or with deliberate ignorance or reckless disregard of its truth or falsity.¹⁶⁴ Significantly, because the courts have construed the statute to permit recovery of the statutory minimum penalty without proving actual damages,¹⁶⁵ a violation of the statute often occurs upon the mere submission of a false claim. Government reliance on the false claim is not an essential element.¹⁶⁶

The civil false claims statute, as amended, significantly expands contractors' liability for submission of false claims to the government. Prior to amendment, the statute did not define the term "claim." The Supreme Court, however, filled this void by holding that a "claim" encompassed all attempts to cause the government to pay out sums of money.¹⁶⁷ The amended statute not only encompasses all direct and indirect attempts to cause the government to pay out sums of money, but also encompasses "reverse false claims," meaning false claims to avoid payment of money to the government.¹⁶⁸

163. 31 U.S.C. § 3731(c) (Supp. IV 1986).

164. *See id.* § 3729.

165. *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946) (permitting recovery of \$2000 under the pre-1986 amendment to the False Claims Act). Under the 1986 amendments the government may recover a minimum of \$5000, up to \$10,000, plus three times the amount of actual damages the government sustains. 31 U.S.C. § 3729(a) (Supp. IV 1986).

166. *See* 31 U.S.C. § 3729.

167. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968).

168. Section 3729(a) states in pertinent part that liability under the Act attaches if any person:

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used, a false record of statement to get a false or fraudulent claim paid or approved by the Government;
- (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
- (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
- (7) knowingly makes, uses, or causes to be made or used, a false record or state-

Prior to amendment, the statute did not expressly define the nature of the intent required for a violation of the false claims statute. Judicial authority was split on the element of intent.¹⁶⁹ Some courts held that liability depended upon a showing of specific intent to defraud the government,¹⁷⁰ while other courts required only a knowing submission of a false claim.¹⁷¹ The amended statute significantly expands contractor liability for civil false claims by eliminating the specific intent requirement. The element of intent is now satisfied by proof of a "knowing" submission, defined as either (1) actual knowledge of falsity, or (2) deliberate ignorance or reckless disregard of the truth or falsity of the claim.¹⁷² The amended statute specifically states that proof of specific intent to defraud is not required.¹⁷³

Before its amendment, the statute did not specifically address the government's burden of proof in a civil false claims action. Some judicial authority required the government to carry a heavier burden than ordinary preponderance of the evidence, demanding instead "clear and convincing," or "clear, explicit and unequivocal" proof.¹⁷⁴ The amended statute, however, requires only that the government "prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."¹⁷⁵

ment to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a) (Supp. IV 1986). Section 3729(c) states that:

For purposes of this action, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id. § 3729(c). However, section 3729(e) states that the Act "does not apply to claims . . . made under the Internal Revenue Code of 1954." *Id.* § 3729(e).

169. See generally Shirk & Greenberg, *supra* note 1, at 333-34.

170. *Id.*

171. Specific intent required by: *United States v. Mead*, 426 F.2d 118, 122 (9th Cir. 1970); *United States v. Ueber*, 299 F.2d 310, 315 (6th Cir. 1962); *United States v. Priola*, 272 F.2d 589, 594 (5th Cir. 1959); *United States v. National Wholesalers*, 236 F.2d 944, 950 (9th Cir.), *cert. denied*, 353 U.S. 930 (1956); *United States v. Schmidt*, 204 F. Supp. 540, 543-44 (E.D. Wis. 1962).

Knowing submission required by: *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 527 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966), *reh'g denied*, 385 U.S. 1032 (1967); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *United States v. Fox Lake State Bank*, 225 F. Supp. 723, 725 (N.D. Ill. 1963); *United States v. Children's Shelter, Inc.*, 604 F. Supp. 865, 866 (W.D. Okla. 1985).

172. 31 U.S.C. § 3729(b) (Supp. IV 1986).

173. *Id.*

174. See, e.g., *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970).

175. 31 U.S.C. § 3731(c) (Supp. IV 1986).

*United States v. JT Construction Co.*¹⁷⁶ aptly illustrates the application of the civil false claims statute elements and the burden of proof in a defective pricing situation.¹⁷⁷ In *JT Construction*, the contractor submitted subcontractor price quotes with its cost or pricing data in a proposal for a negotiated construction contract with the Army.¹⁷⁸ After awarding the contract, the Army began to suspect that some of the submitted subcontractor price quotes had been inflated by the contractor in order to gain a higher contract price.¹⁷⁹ Following an investigation, the government brought criminal and civil false claims actions against the contractor.¹⁸⁰ Subsequently, the contractor was acquitted of the criminal charges and moved for summary judgment in the civil action, arguing that a jury could not reasonably find by a preponderance of the evidence that the contractor had the requisite intent required for recovery under the civil false claims statute.¹⁸¹

The court noted first that the government's false claims action was based on a violation of the Truth in Negotiations Act.¹⁸² Thus, the government had the burden of proving that the subcontractor price quotes were "cost or pricing data" within the meaning of the Truth in Negotiations Act, that the contractor failed to disclose these data as required by the Act, and that the contractor acted "willfully and with guilty intent."¹⁸³ Based upon the verdict in the criminal case and the fruits of discovery in the civil action, the contractor contended that the government would be unable to sustain its burden as a matter of law.¹⁸⁴ The court found this argument unpersuasive. The court noted that in the criminal case the government had the burden of proving its case beyond a reasonable doubt, not by a preponderance of the evidence.¹⁸⁵ The judge in the criminal case found that the government presented sufficient evidence of the contractor's intent to permit the case to go to the jury.¹⁸⁶ Because the civil action required only that the government prove its case by a preponderance of the evidence, and genuine issues of material fact existed, the court denied the contractor's summary judgment

176. 668 F. Supp. 592 (W.D. Tex. 1987).

177. *Id.*

178. *Id.* at 593.

179. *Id.*

180. *Id.*; *United States v. DiBona*, 614 F. Supp. 40 (E.D. Pa. 1984) (criminal case).

181. *JT Constr. Co.*, 668 F. Supp. at 593.

182. *Id.*

183. *Id.* Here the district court improperly defined the intent requirement as "willfully and with guilty intent," citing a pre-amendment case, *United States v. Aerodex*, 469 F.2d 1003, 1007 (5th Cir. 1972) inapplicable to the amended statute, which requires only a showing of a "knowing" submission.

184. *JT Constr. Co.*, 668 F. Supp. at 593.

185. *Id.*

186. *Id.*

motion.¹⁸⁷

The relationship between the civil false claims statute and criminal false claims or false statements in a defective pricing context is well illustrated in *United States v. DiBona*.¹⁸⁸ The defense contractor in *DiBona* certified that the cost or pricing data submitted with its proposal, which included data on historical hours worked, were accurate, complete and current.¹⁸⁹ In fact, the contractor had inflated the actual number of hours worked.¹⁹⁰ The contractor and its two principals were indicted and charged with three counts of violating the criminal false statements statute.¹⁹¹ In a plea agreement, the two principals pleaded guilty and the government charges against the contractor were withdrawn.¹⁹² Subsequently, the government commenced a civil false claims action against the same three defendants.¹⁹³ The government moved for partial summary judgment on the theory that the defendants were collaterally estopped from denying their liability under the civil false claims statute because of the guilty pleas in the antecedent criminal false statements proceeding.¹⁹⁴ The defendants argued that because their convictions were for false statements and the civil action was for false claims, collateral estoppel was improper.¹⁹⁵

The court held that defendants were estopped on the issue of liability for civil false claims on the basis of the principals' criminal convictions because the "false statement and the false claim [were] two sides of the same coin, issues which [arose] out of the same core of operative facts."¹⁹⁶ The court further held that collateral estoppel applied not only to the principals who pled guilty but also to the contractor corporation under the doctrine of respondeat superior.¹⁹⁷ The court stated that although the corporate entity was not convicted on criminal charges, it could not "deny its liability after its top officers, acting through the corporation, admitted to violations of the False Claims Act."¹⁹⁸

The consequence of reducing both the state of mind required to prove a false claim and the government's burden of proof in the context of contract

187. *Id.* at 594.

188. 614 F. Supp. 40 (E.D. Pa. 1984).

189. *Id.* at 41.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 43.

197. *Id.* at 44.

198. *Id.*

pricing, is expanded contractor liability for fraud. Moreover, it has to some extent blurred the distinctions between pricing that is defective under the Truth in Negotiations Act and pricing that is fraudulent under the civil false claims statute.

2. Government Recovery under the Civil False Claims Statute

The 1986 amendments to the civil false claims statute not only expand the scope of contractors' liability for submission of false claims, but also significantly increase the damages and civil penalties the government may recover under the statute. Prior to the statute's amendment, the government could recover double its actual damages, a \$2,000 penalty per false claim, and the costs of the suit.¹⁹⁹ The amended statute permits the government to recover triple its actual damages,²⁰⁰ a \$5,000-\$10,000 penalty for each false claim,²⁰¹ and the costs of the suit.²⁰²

A contractor may, however, reduce its liability to double actual damages plus penalty and costs. To do so, it must prove: (1) that the contractor disclosed to government officials "responsible for investigating false claims violations" all knowledge regarding the violation "within 30 days after the date on which the [contractor] first obtained the information;"²⁰³ (2) the contractor fully cooperated with any government investigation of the violation;²⁰⁴ and (3) that "no criminal prosecution, civil action, or administrative action had commenced . . . with respect to such violation" and that the contractor did not have actual knowledge of an investigation when disclosure was made to the government.²⁰⁵

Damages for violation of the civil false claims statute generally are calculated as the difference between the amount the government actually paid in reliance on the false claims and the amount it would have paid had the con-

199. 31 U.S.C. § 3729 (1982). The Supreme Court held that damages under the pre-amendment statute were intended to "afford the Government complete indemnity for the injuries done it." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943). The Court ruled that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be completely whole." *Id.* at 551-52; *see also* *United States v. Bornstein*, 423 U.S. 303 (1976). It is difficult to justify the steeply increased penalties and damages in the amended statute on the grounds that they are necessary to assure restitution. An award of triple damages plus penalties is obviously punitive in nature.

200. 31 U.S.C. § 3729(a) (Supp. IV 1986).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

tractor been truthful.²⁰⁶ Unlike the Truth in Negotiations Act,²⁰⁷ there is no presumption of entitlement to damages aiding the government under the civil false claims statute.²⁰⁸ The government must carry the burden of proving by a preponderance of the evidence what it would have paid absent the fraud.²⁰⁹ To meet its burden of proof the government must show that the claimed damages are, in the language of the statute, "because of" the commission of the fraudulent act.²¹⁰ The government must establish direct causal connection between the government's losses and the contractor's fraudulent conduct.²¹¹ Accordingly, consequential damages are not recoverable under the statute because they are not directly caused by the submission of false claims.²¹²

In false claims cases founded on misrepresentation of cost estimates or cost data, damages are based on the amount that the contractor actually overcharged the government as a result of the misrepresentation.²¹³ In these cases, as in defective pricing cases under the Truth in Negotiations Act, overstatement of costs eliminated in price negotiations are deducted from the total amount of the overstatement to arrive at actual damages.²¹⁴

In addition to actual damages, the civil false claims statute entitles the government to a forfeiture for each false claim submitted.²¹⁵ The amended statute increases the penalty from \$2,000 to a range of \$5,000 to \$10,000 per false claim.²¹⁶ Since the forfeiture or penalty continues to be primarily punitive in nature, forfeiture liability is imposed on the contractor whether or not

206. *Brown v. United States*, 524 F.2d 693 (Ct. Cl. 1975); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); see also *Shirk & Greenberg*, *supra* note 1, at 335-36.

207. See *supra* note 34 and accompanying text.

208. The government's failure to meet its burden of proof under § 3729 may relieve the contractor from paying anything more than nominal damages, and may even relieve it from paying any damages at all. See *United States v. Collyer Insulated Wire Co.*, 94 F. Supp. 493 (D.R.I. 1950) (court assessed double nominal damages plus allowed the government to recover the \$2,000 forfeiture on each of the 105 false claims the contractor submitted); see also *Little v. United States*, 152 F. Supp. 84 (Ct. Cl. 1957).

209. *Brown v. United States*, 524 F.2d 693 (Ct. Cl. 1975); *United States v. Sawin*, 243 F. Supp. 744 (S.D. Iowa 1965); *United States v. MacMurtrie*, 206 F. Supp. 147 (E.D. Pa. 1962).

210. 31 U.S.C. § 3729(a) (Supp. IV 1986).

211. *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977). The causation requirement "should be liberally construed" to provide the government restitution but should not be disregarded completely. *Id.*

212. *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972).

213. The rule is the same for misrepresentation of actual costs. See *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962).

214. *United States v. Foster Wheeler Corp.*, 316 F. Supp. 963 (S.D.N.Y. 1970), *modified on other grounds*, 447 F.2d 100 (2d Cir. 1971); see also *Shirk & Greenberg*, *supra* note 1, at 336-37.

215. 31 U.S.C. § 3729(a) (Supp. IV 1986).

216. *Id.*

liability for actual damages attaches.²¹⁷

In determining the number of impossible forfeitures for violations of the statute, the Supreme Court has held that the number of forfeitures "has generally been set at the number of individual false payment demands that the contractor has made upon the government."²¹⁸ A contractor may not be assessed forfeitures, however, for false payment demands over which it had no knowledge and control.²¹⁹

*B. The Program Fraud Civil Remedies Act of 1986—
The "Mini False Claims Act"*

A new weapon in the fight against federal procurement fraud was created by congressional passage of the Program Fraud Civil Remedies Act of 1986.²²⁰ This legislation was passed in conjunction with the comprehensive amendments to the civil false claims statute and provides a new administrative remedy for smaller fraud cases that the Department of Justice declines to litigate. The Program Fraud Civil Remedies Act establishes new administrative procedures, including a hearing with due process and discovery rights.²²¹ The jurisdiction of this statute encompasses claims, or statements, or groups of related claims submitted simultaneously, which amount to \$150,000 or less.²²²

The administrative procedures set forth in the Program Fraud Civil Remedies Act are novel in some respects. Each government agency is responsible for setting up its own program and is required to propose rules to implement the statute.²²³ Furthermore, each agency must appoint investigating officials and reviewing officials to implement its program.²²⁴

The investigating official of the relevant federal agency is given authority to investigate contract fraud allegations under the Program Fraud Civil Remedies Act and to report findings and conclusions to the agency's "reviewing official."²²⁵ The reviewing official, after determining that "adequate evidence" of contractor liability exists, must give written notice to the Attorney General of his or her intention to refer the action for prosecution under

217. See Shirk & Greenberg, *supra* note 1, at 337.

218. *United States v. Bornstein*, 423 U.S. 303, at 309 (1976); see also *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964).

219. *Bornstein*, 423 U.S. at 312; see also Shirk & Greenberg, *supra* note 1, at 337-39.

220. Pub. L. No. 99-509, 100 Stat. 1934 (codified at 31 U.S.C. §§ 3801-3812 (Supp. IV 1986)).

221. 31 U.S.C. § 3803(d), (e) (Supp. IV 1986).

222. *Id.* § 3803.

223. *Id.* § 3803(g)(2).

224. *Id.* § 3801(a)(4), (7)-(8).

225. *Id.* § 3803(a)(1).

the statute.²²⁶ Upon written approval of the action by the Attorney General, a presiding officer of the agency must conduct a hearing on the case pursuant to the statute and procedural regulations promulgated by the agency.²²⁷

After completion of the hearing, the presiding officer must issue a written decision, based on the preponderance of the evidence,²²⁸ including findings of fact and conclusions of law.²²⁹ The contractor may appeal the decision to the agency head within thirty days of issuance.²³⁰ Additionally, the contractor may seek judicial review of the agency head's decision in the appropriate United States district court.²³¹ This review is not *de novo*. The agency head's determination will not be overturned unless the court finds it is "unsupported by substantial evidence."²³² The district court's judgment is final and unreviewable.²³³

1. *Prima Facie Case*

The *prima facie* case of liability under the Program Fraud Civil Remedies Act is similar to that under the civil false claims statute. There are two actions available to the government—one for false claims and one for false statements. A *prima facie* case of false claims requires a showing that the contractor submitted a claim,²³⁴ and knew or had reason to know the claim was false, fictitious, or fraudulent.²³⁵ A claim is false, fictitious, or fraudulent if it is supported by a written statement asserting a false or fraudulent material fact, omits a material fact which the contractor had a duty to disclose, or demands payment for items not provided as claimed.²³⁶

A *prima facie* case of a false statement requires a showing that the contractor presented a written statement to the government, the contractor knew or had reason to know the statement was false, fictitious, or fraudulent, and the statement contained or was accompanied by an express certification

226. *Id.* § 3803(a)(2).

227. *Id.* § 3803(a), (d), (g)(1).

228. *Id.* § 3803(f).

229. *Id.* § 3803(h).

230. *Id.*

231. *Id.* § 3805.

232. *Id.* § 3805(c). The statute states in pertinent part that "[i]n concluding whether the . . . determinations are found by the court to be unsupported by substantial evidence, the court shall review the whole record or those parts of it cited by a party, and due accounts shall be taken of the rule of prejudicial error." *Id.*

233. *Id.* § 3805(e). This is a highly unusual provision and it remains to be seen whether it will withstand constitutional scrutiny if challenged.

234. A "claim" is any request, demand, or submission to a federal government authority for property, services, or money. *Id.* § 3801(a)(3).

235. *Id.* § 3802(a)(1).

236. *Id.*

or affirmation of its truthfulness and accuracy.²³⁷ A false, fictitious, or fraudulent statement is one asserting a material fact that is false or fraudulent, or one omitting a material fact that the contractor had a duty to disclose and that renders the statement containing the omission false or fraudulent.²³⁸

The Program Fraud Civil Remedies Act requires proof of precisely the same state of mind on the part of the contractor as does the civil false claims statute—"actual knowledge that the claim or statement is false," or deliberate ignorance or reckless disregard of the truth or falsity of the claim or statement.²³⁹ The Program Fraud Civil Remedies Act does not require the government to prove specific intent to defraud.²⁴⁰ Nor does it require reliance by the government on the false statement or claim, or proof of damages.²⁴¹

Essentially, the Program Fraud Civil Remedies Act fills the role of the civil false claims statute in cases where a small dollar amount is at issue and the Justice Department declines to prosecute. As with the civil false claims statute, a contractor who escapes liability for defective pricing under the Truth in Negotiations Act because the government did not rely on the defective data may nevertheless be liable for false claims or false statements under the Program Fraud Civil Remedies Act, which does not require proof of reliance by the government on the false claims or statements.²⁴²

2. *Government Recovery under the Program Fraud Civil Remedies Act*

Under of the Program Fraud Civil Remedies Act, the government may recover a penalty of "not more than \$5,000" for each false statement.²⁴³ There is no provision for actual damages for false statements under the statute. For each false claim, the government may recover up to a \$5,000 penalty plus, "in lieu of damages," an assessment of up to twice the amount of the claim or portion thereof determined to be in violation of section 3802.²⁴⁴ The "damages" assessment may only be recovered if payment of the claim has been made by the government.²⁴⁵ The presiding officer, however, has no jurisdiction over allegations of liability under the Program Fraud Civil Rem-

237. *Id.* § 3802(a)(2).

238. *Id.*

239. *Id.* § 3801(a)(5).

240. *Id.*

241. *Id.* § 3801.

242. *Id.* § 3802.

243. *Id.* § 3802(a)(2).

244. *Id.* § 3802(a)(1).

245. *Id.* § 3802(a)(3).

edies Act if the value of the claim at issue exceeds \$150,000.²⁴⁶ For purposes of application of the statute's penalties, "each voucher, invoice, claim form, or other individual request or demand" is a separate claim.²⁴⁷ Likewise, "each written representation, certification, or affirmation" constitutes a separate statement.²⁴⁸

Government recovery of penalties and assessments for false claims or false statements under the Program Fraud Civil Remedies Act is "in addition to any other remedy that may be prescribed by law."²⁴⁹ Furthermore, the government is specifically authorized to collect penalties and assessments imposed under the statute by administratively offsetting the amount against any funds owed by the government to the contractor.²⁵⁰ Neither suspension nor debarment will automatically result from an adverse determination under the statute, however, because liability under the statute is not "considered as a conclusive determination of . . . responsibility pursuant to Federal procurement laws and regulations."²⁵¹

III. CRIMINAL FRAUD LIABILITY FOR DEFECTIVE PRICING

The stepped-up war against waste, fraud, and abuse in government procurement has resulted in increased criminal as well as civil fraud investigations. Contract pricing is one of the areas in which the government has concentrated its criminal fraud investigation efforts. The primary vehicles for prosecution of procurement fraud have been the criminal false statements²⁵² and criminal false claims²⁵³ statutes. Although these statutes are not new,²⁵⁴ the criminal penalties for violations of both statutes increased dramatically as a result of passage of the amended Comprehensive Crime

246. *Id.* § 3803(c)(1). The statute appears to leave open the potential for splitting cases involving related claims submitted at different times, e.g., progress payments. *Id.*

247. *Id.* § 3801(b).

248. *Id.* § 3801(c).

249. *Id.* § 3802(a)(1). A determination that a contractor may be liable under § 3802 may provide the government with "grounds for commencing any administrative or contractual action against [the contractor] which is authorized by law and which is in addition to any action . . . under this chapter." *Id.* § 3802(b)(1).

250. *Id.* § 3807.

251. *Id.* § 3802(b)(3). Although neither suspension nor debarment is an automatic result of an adverse determination under this statute, it seems probable that such a determination could stimulate the government agency to institute an inquiry regarding the contractor's present responsibility which could, in turn, lead to suspension or debarment from government contracting.

252. 18 U.S.C § 1001 (Supp. IV 1986).

253. *Id.* § 287.

254. The Criminal False Statements Act was originally enacted in 1948. Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 749.

Control Act of 1984,²⁵⁵ which includes the first comprehensive sentencing law for the federal criminal system.²⁵⁶ The comprehensive sentencing law includes a provision substantially raising, and making uniform, maximum fines for federal crimes including false claims and false statements.²⁵⁷

Although the government has made use of other criminal statutes, such as those governing conspiracy²⁵⁸ and mail and wire fraud,²⁵⁹ in its campaign

255. Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

256. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1995, *amended by* Sentencing Act of 1987, Pub. L. No. 100-185, 101 Stat. 1266 (1987) (current version at 18 U.S.C.A. § 3571 (West Supp. 1988)).

257. 18 U.S.C. §§ 3551, 3571 (as amended).

258. A contractor may be charged with a violation of the conspiracy statute on the grounds that submitted claims or certifications are part of a contractor's scheme to defraud the government by inducing the government to pay an inflated contract price.

Government contractors have been convicted of conspiracy to file false statements, make false claims and defraud the government under the conspiracy statute, 18 U.S.C. § 371 (1982). *See United States v. White*, 765 F.2d 1469 (11th Cir. 1985). Section 371 of the United States Code encompasses two specific crimes, conspiracy to violate a substantive provision of the federal criminal code, and conspiracy to defraud the United States, both of which may be applicable in a defective pricing scenario. 18 U.S.C. § 371. The elements of a conspiracy consist of (1) an agreement by two or more persons; (2) to commit a criminal offense or defraud the United States; (3) with knowledge of the existence of the conspiracy as well as intentional and actual participation in the conspiracy; and (4) one or more of the conspirators performing an overt act in furtherance of the illegal goal. *See United States v. Falcone*, 311 U.S. 205, 210-11 (1940); *United States v. Richmond*, 700 F.2d 1183, 1189 (8th Cir. 1983); *United States v. Pintar*, 630 F.2d 1270, 1275-76 (8th Cir. 1980); *United States v. Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971).

Proof of an overt act in furtherance of the conspiracy by one of the conspirators is generally required under § 371. *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *United States v. Kupper*, 693 F.2d 1129 (5th Cir. 1982); *United States v. Conlon*, 481 F. Supp. 654 (D.D.C. 1979); *see also Fiswick v. United States*, 329 U.S. 211, 216 (1946).

The submission of defective cost or pricing data or subsequent submission of claims for payment may be viewed as overt acts in furtherance of a scheme to make false claims or otherwise defraud the United States into paying an inflated contract price. *See, e.g., White*, 765 F.2d at 1482.

259. A contractor who transmits a false or fraudulent contract claim or certification of cost or pricing data by mail or wire may be criminally liable under the mail fraud or wire fraud statutes. *See* 18 U.S.C. §§ 1341, 1343 (1982 & Supp. IV 1986). The mail fraud statute is a favorite weapon of prosecutors for two reasons; the relative ease with which a violation can be factually established and the ease with which multiple convictions can be obtained for basically the same conduct. Mail fraud requires proof of a higher standard of intent than do false statements.

The elements of mail fraud that the government must prove beyond a reasonable doubt are: (1) the existence of a scheme or artifice intended to defraud another; and (2) use of the United States mails in furtherance of the execution of such a scheme. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Haimowitz*, 725 F.2d 1561, 1568-69 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Pritchard v. United States*, 386 F.2d 760, 764 (8th Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968); *United States v. Computer Sciences Corp.*, 511 F. Supp. 1125,

against procurement fraud, a favored statute for the prosecution of procurement fraud is the false statements statute because its elements are generally the easiest to prove in a contract pricing or other procurement fraud scenario.²⁶⁰

It is important to recognize that the criminal sanctions of the false statements and false claims statutes extend to the corporate entity as well as to corporate employees.²⁶¹ Corporate liability is determined by focusing on the activities of corporate employees. Corporate liability will be imposed if the corporation's employees, while engaged in the unlawful conduct, were acting within the scope of their authority and for the purpose of benefiting the corporation.²⁶² Furthermore, under the collective knowledge doctrine, criminal liability may be imposed on the corporate entity even if no liability attaches to any corporate employees.²⁶³

A. *The Criminal False Statements Statute—The Prima Facie Case*

The criminal false statements statute, section 1001 of Title 18 of the United States Code, penalizes any person who knowingly and willfully submits false, material statements to the government concerning a matter within the jurisdiction of any department or agency of the United States.²⁶⁴

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.²⁶⁵

1134 (E.D. Va. 1981), *rev'd on other grounds*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The elements of a wire fraud violation are virtually identical to those of mail fraud but the wire fraud act applies to use of "wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343 (1982).

260. Overly, *Government Contractors, Beware: Civil and Criminal Penalties Abound for Defective Pricing*, 20 LOY. L.A.L. REV. 597, 612 (1987).

261. *See, e.g.*, *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977); *United States v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976); *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949).

262. *Hanger One*, 563 F.2d at 1158; *Wagner Iron Works v. United States*, 174 F. Supp. 956, 958 (Ct. Cl. 1959); *see also* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATION § 4886, at 393 (rev. perm. ed. 1986) (corporate liability even where agent acted solely for own benefit).

263. *See infra* notes 318-32 and accompanying text.

264. 18 U.S.C. § 1001 (1982).

265. *Id.* There are three distinct criminal offenses in § 1001. The first clause imposes liability for the knowing falsification, concealment or covering up by trick, scheme, or device of a

To sustain a conviction under section 1001, the government must prove five elements beyond a reasonable doubt: (1) the submission of a statement; (2) the submitted statement was intended to bear a relation to some matter within the jurisdiction of a federal agency or department; (3) the statement was material; (4) the statement was false; and (5) the party willfully submitted the statement knowing it to be false.²⁶⁶

The first element the government must prove is the submission of a "statement." This term has been interpreted to include practically any writing.²⁶⁷ Moreover, the term has also been construed to include oral statements.²⁶⁸

Second, the government must establish that the statement relates to some matter within the jurisdiction of a federal department or agency. Significantly, the government need not prove that the party submitting the false statement actually presented it to a federal agency,²⁶⁹ or had actual knowledge of federal agency jurisdiction.²⁷⁰

The third element the government must prove in a section 1001 prosecution is that the submitted false statement was "material."²⁷¹ Although the requirement of materiality explicitly applies only to the "trick, scheme, or device" clause of section 1001, there is a dispute between the United States Court of Appeals for the Second Circuit and other federal circuit courts over whether materiality is an essential element of proof in cases covered by the "false statements" clause of the statute. The United States Court of Appeals for the Second Circuit has steadfastly held that materiality of false state-

material fact; the third imposes liability for making or using any false document or writing. *Id.* We limit our analysis to the second, more commonly applied "false statement" clause, although as will become apparent in Part IV, arguably any of the clauses could apply to a case of defective pricing.

266. Although § 1001 does not specifically proscribe omissions, if an omission resulted in a false representation it would fall within the purview of the criminal false statements statute. *United States v. Irwin*, 654 F.2d 671, 676 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. McCarthy*, 422 F.2d 160, 162 (2d Cir.), *cert. dismissed*, 398 U.S. 946 (1970).

267. *United States v. Godwin*, 566 F.2d 975 (5th Cir. 1978) (government successfully prosecuted individual for submitting false time sheets to a U.S. Marshal); *Ebeling v. United States*, 248 F.2d 429 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957) (contractor's submission of false statement of costs to government satisfied "statement" requirement).

268. *United States v. Adler*, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

269. *United States v. Dick*, 744 F.2d 546, 554 (7th Cir. 1984); *see also Shirk & Greenberg*, *supra* note 1, at 342.

270. *United States v. Yermian*, 468 U.S. 63 (1984).

271. Unlike the criminal false statements statute, *see* 18 U.S.C. § 1001 (1982); *supra* text accompanying note 264, the criminal false claims statute does not explicitly state that materiality is an element of the offense. *Cf.* 18 U.S.C. § 287 (Supp. IV 1986); *infra* text accompanying note 300. Some courts have indicated that because the two statutes have a similar purpose, materiality is also an essential element of the false claims statements. *See, e.g., Adler*, 623 F.2d at 1291 n.5; *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974). *Contra* *United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

ments is not a necessary element for guilt.²⁷² Other federal circuit courts addressing the issue have inferred a judicially created limitation of “materiality”²⁷³ for the purpose of excluding trivial falsehoods from the purview of the statute.²⁷⁴ In these circuits, the test of materiality is whether the statement is capable of affecting or influencing the exercise of a government function, but the government need not actually be influenced by the statement.²⁷⁵ The “materiality” requirement of section 1001 can be satisfied even if the false statement was not relied upon by the government, did not actually deceive the government,²⁷⁶ or did not cause the government any pecuniary loss.²⁷⁷

To establish the intent element of section 1001, the government must prove beyond a reasonable doubt that the defendant willfully submitted the statement with the knowledge that it was false.²⁷⁸ “Willful” means only that the forbidden act was done deliberately and with knowledge.²⁷⁹ A statement is made “knowingly” if it is made with knowledge or awareness of the true facts.²⁸⁰ The government, however, need not prove that the false statement

272. *United States v. Elkin*, 731 F.2d 1005 (2d Cir. 1984); *United States v. Aadal*, 368 F.2d 962 (2d Cir. 1966); *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States v. Silver*, 235 F.2d 375 (2d Cir. 1955), *cert. denied*, 352 U.S. 880 (1956).

273. *United States v. Beer*, 518 F.2d 168, 171 (5th Cir. 1975); *see also United States v. Dick*, 744 F.2d 546 (7th Cir. 1984); *United States v. Lopez*, 728 F.2d 1359 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Johnson*, 530 F.2d 52 (5th Cir. 1976); *United States v. Deep*, 497 F.2d 1316 (9th Cir. 1974); *United States v. Cooper*, 493 F.2d 473 (5th Cir. 1974); *United States v. Cole*, 469 F.2d 640 (9th Cir. 1972); *Brethauer v. United States*, 333 F.2d 302 (8th Cir. 1964); *Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961); *Freidus v. United States*, 223 F.2d 598 (D.C. Cir. 1959).

274. *United States v. White*, 765 F.2d 1469 (11th Cir. 1985).

275. *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *see also Gonzales*, 286 F.2d 118, 122 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961). The test applied is whether the statement “has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. *Id.* (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)).

276. *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963); *United States v. Coastal Contracting & Eng'g Co.*, 174 F. Supp. 474, 479-80 (D. Md. 1959).

277. *United States v. Gilliland*, 312 U.S. 86, 93 (1941); *United States v. Krause*, 507 F.2d 113, 117 (5th Cir. 1975); *United States v. Jones*, 464 F.2d 1118 (8th Cir. 1972).

278. *United States v. Dothard*, 666 F.2d 498 (11th Cir. 1982); *Lichenstein*, 610 F.2d at 1276.

279. *United States v. Carrier*, 654 F.2d 559 (9th Cir. 1981) (willful act does not require an evil intent, only that the it is done deliberately and with knowledge); *United States v. Smith*, 523 F.2d 771 (5th Cir.), *cert. denied*, 429 U.S. 817 (1975). At least one court has held that an indictment for making false claims on a government contract is insufficient if it fails to allege that the contractor acted willfully. *United States v. Cook*, 586 F.2d 572 (5th Cir.), *cert. denied*, 442 U.S. 909 (1978).

280. *United States v. Doshard*, 666 F.2d 498 (11th Cir. 1982); *United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981); *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976); *Elbel v. United States*, 364 F.2d 127, 134 (10th Cir. 1966).

was made with intent to defraud²⁸¹ or with "specific intent" to deceive the federal government.²⁸²

The courts appear to be easing the scienter requirement for a section 1001 conviction. Courts which had established as a required element of a section 1001 violation proof of a knowing, willful submission with intent to deceive have held that intent to deceive may be inferred from a reckless disregard for the truth with a conscious purpose to avoid learning the truth.²⁸³ Eliminating the actual knowledge requirement would appear to be inconsistent with the stated requirement of an intent to deceive.

At least one court apparently has recognized this inconsistency and no longer requires a proof of intent to deceive.²⁸⁴ In *United States v. White*,²⁸⁵ the defendants were convicted of various charges, including filing of false statements with respect to negotiated change orders on a National Air and Space Administration (NASA) contract.²⁸⁶ The defendants had submitted a "cost proposal" for the change orders, attaching supporting documents that included a document entitled *Estimate Summary For Change Orders*.²⁸⁷ That document included a detailed cost breakdown specifying the number of labor hours devoted to each change order and additional charges for equipment expenses.²⁸⁸ The defendants submitted a Certificate of Cost or Pricing Data with its supporting documents.²⁸⁹ At the negotiation, the defendants

281. *United States v. White*, 765 F.2d 1469 (11th Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362 (4th Cir. 1985); *United States v. Godwin*, 566 F.2d at 975 (5th Cir. 1978); see also *United States v. Johnson*, 284 F. Supp. 273 (W.D. Mo.), *aff'd*, 410 F.2d 38 (8th Cir. 1968), *cert. denied*, 396 U.S. 822 (1969) (18 U.S.C. § 1001 does not require that the government prove a specific intent to defraud).

282. *United States v. Yermian*, 468 U.S. 63, 73 (1984).

283. See *White*, 765 F.2d at 1481-82; *United States v. Schaffer*, 600 F.2d 1120, 1121-22 (5th Cir. 1979); *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Jacobs*, 475 F.2d 270, 280-81 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); see also *United States v. Petullo*, 709 F.2d 1178, 1181 (7th Cir. 1983); *United States v. Beck*, 615 F.2d 441, 454 (7th Cir. 1980) (the contractor did not sign or execute a document or know one would be filed, but the court found it foreseeable by the contractor that the principal would deceive the United States Custom Service).

284. *United States v. Vaughn*, 797 F.2d 1485 (9th Cir. 1986). In holding that § 1001 requires no intent to deceive, *Vaughn* relied on the Supreme Court case of *United States v. Yermian*, 468 U.S. 63, 73 (1984), which stated that Congress did not intend § 1001 to require "specific intent to deceive the Federal Government." *Yermian*, 468 U.S. at 73. It is unclear, however, whether *Yermian* still requires an intent to deceive as opposed to the specific intent to deceive the Government.

285. 765 F.2d 1469 (11th Cir. 1985).

286. *Id.* at 1482.

287. *Id.* at 1472.

288. *Id.* at 1473.

289. *Id.*

represented that the itemized expenses were not estimates, but “hard dollar hours” and actual costs.²⁹⁰ The defendants were aware that proposal costs were significantly inflated compared to actual costs.²⁹¹ Moreover, submissions to NASA deleted all formulas and factors used to derive the cost proposals, and although the defendants represented to NASA that the figures had a basis in their records and they would supply those records to NASA, they failed to do so.²⁹²

On appeal, the defendants contended that their submissions to NASA were merely estimates presented to the government as an opening position in the negotiations for the change order work and were represented as such.²⁹³ Consequently, according to the defendants, the key element of section 1001—the knowing submission of a false statement—was not met because the proposals were estimates and judgments rather than facts, and as such could not be knowingly falsified.²⁹⁴

The United States Court of Appeals for the Eleventh Circuit noted that the defendants certified their cost proposal data and had a legal obligation to inform NASA of any formula or factoring methods used to arrive at the proposed figures, which they had failed to do.²⁹⁵ Furthermore, the defendants had made specific representations that their submissions were based on actual hours and that they had specific documentation to back up the figures which was never forthcoming.²⁹⁶ On this evidence, the court noted that it could reasonably be found that the defendants’ submission did not reflect reasonably incurred expenses and constituted false statements that were knowingly submitted as false. The court, in upholding defendant’s convictions, stated:

Even if [defendants’] estimates were truly based on mathematical formula, appellants had a duty to make sure that they reflected reasonably incurred costs. Checking available physical data on change orders was the obvious means to accomplish this end. The appellants’ avowed failure to do so evidenced a reckless disregard of the truth, with a conscious purpose to avoid learning the truth. Such action is sufficient to show that a false statement was made knowingly or willfully.²⁹⁷

Unlike a false claim, a false statement need not be a demand for money or

290. *Id.* at 1474.

291. *Id.*

292. *Id.*

293. *Id.* at 1478.

294. *Id.*

295. *Id.* at 1479.

296. *Id.* at 1481.

297. *Id.* at 1481-82.

property in order to violate the false statements statute. Section 1001 is broad enough to cover all false statements made by a contractor to support a fraudulent claim for payment.²⁹⁸ Moreover, every false statement, even if made pursuant to a single contract or scheme to defraud, is a separate violation of section 1001.²⁹⁹

B. The Criminal False Claims Statute—The Prima Facie Case

The amended criminal false claims statute, section 287 of title 18 of the United States Code, imposes criminal liability on any person who presents a false, fictitious, or fraudulent claim to the federal government.³⁰⁰ Section 287 provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.³⁰¹

The 1986 amendments to the criminal false claims statute did not change the substance of the statute.³⁰² To sustain a conviction under section 287, the government must prove beyond a reasonable doubt that: (1) a claim was presented to a federal agency or department; (2) the claim was false, fictitious or fraudulent; and (3) the defendant submitted the claim knowing it to be false, fictitious or fraudulent.³⁰³

Apparently, the broad definition of "claim" as set forth in section 3729 of the civil false claims statute³⁰⁴ applies to prosecutions under section 287 of the criminal false claims statute,³⁰⁵ inasmuch as both sections evolved from the same statutory scheme under the original False Claims Act. Thus, any attempt to cause the government to part with its money constitutes a

298. *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972).

299. *See United States v. Grossman*, 154 F. Supp. 813 (D.N.J. 1957).

300. 18 U.S.C. § 287 (Supp. IV 1986).

301. *Id.*

302. Pub. L. No. 99-562, 100 Stat. 3169 (1986) (codified at 18 U.S.C. § 287 (Supp. IV 1986)), merely deleted the pre-amendment fine amount for violation of the statute.

303. *United States v. Computer Science Corp.*, 511 F. Supp. 1125 (E.D. Va. 1981), *rev'd on other grounds*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

304. 31 U.S.C. § 3729(c) (Supp. IV 1986).

305. *See United States v. Winchester*, 407 F. Supp. 261, 272 (D. Del. 1975) (cases construing the civil branch of the False Claims Act are relevant to the interpretation of the criminal branches of the False Claims Act); *see also White Collar Crime: A Survey of the Law*, 18 AM. CRIM. L. REV. 169, 281 (1980).

"claim" for purposes of section 287.³⁰⁶ Each false demand for payment constitutes a separate violation of section 287, even if multiple claims are made pursuant to a single contract or are part of a single scheme to defraud.³⁰⁷

The government must establish the intent element of section 287 by proving beyond a reasonable doubt that the defendant acted with knowledge that its claim was false, fictitious, or fraudulent.³⁰⁸ There is confusion among the courts as to the requisite intent that is needed to sustain a conviction under section 287, and whether a higher standard of criminal culpability is required for a "fraudulent" claim as opposed to a "false" claim.³⁰⁹ Although at least one court has required a specific intent to deceive,³¹⁰ the consensus suggests that a less specific state of mind is sufficient. Thus, knowledge of falsity, intent to violate the law, or consciousness of wrongdoing have sufficed to establish guilt under section 287.³¹¹ Furthermore, several courts have held that knowledge can be inferred from a reckless disregard for the truth of the claim combined with a conscious effort to avoid learning the truth.³¹²

Unlike the false statements statute, however, section 287 omits willfulness as an element of the offense.³¹³ The government is not required to prove a

306. 31 U.S.C. § 3729 (Supp. IV 1986) defines "claim" as including:

any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id.

307. *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981); *United States v. Brown*, 524 F.2d 693 (Ct. Cl. 1975); *AlSCO-Harvard Fraud Litigation*, 523 F. Supp. 790 (D.D.C. 1981).

308. Some courts define the requisite state of mind as "knowledge of falsity." *See, e.g., United States v. Precision Medical Laboratories*, 593 F.2d 434 (2d Cir. 1978). Other courts require a specific intent to deceive which may be inferred from a finding that defendant knew his claim was false. *See, e.g., United States v. Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978).

309. *See generally White Collar Crime: A Survey of the Law*, 18 AM. CRIM. L. REV. 169, 285 (1980).

310. *United States v. Martin*, 772 F.2d 1442 (8th Cir. 1985).

311. *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *accord United States v. White*, 765 F.2d 1469 (11th Cir. 1985); *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982) (intent to defraud not required for conviction under § 287, government showing that defendant submitted invoices with knowledge of their falsity is sufficient); *United States v. Milton*, 602 F.2d 231 (9th Cir. 1979).

312. *See White*, 765 F.2d at 1469; *United States v. Gold*, 743 F.2d 800, 821-22 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Holloway*, 731 F.2d 378, 380-81 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984); *United States v. Cook*, 586 F.2d 572, 578-80 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).

313. *See White*, 765 F.2d at 1472; *United States v. Cook*, 586 F.2d 572, 574-75 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979). *But see United States v. Milton*, 602 F.2d 231, 233

specific intent to defraud.³¹⁴ Nor does section 287 specifically require that the false claim be material. Some courts have held that proof of materiality is not required,³¹⁵ while others have concluded that materiality is a necessary element of the false claim offense.³¹⁶ Although section 287 requires proof that a false claim was submitted to the government, there is no requirement that the claim actually be honored by the government.³¹⁷

C. Corporate Criminal Liability for False Statements and False Claims under the Collective Knowledge Theory

Recent developments in the law of corporate criminal liability may potentially expand contractor criminal liability for defective pricing fraud.³¹⁸ Corporate criminal liability has always been derivative liability. As such, "the acts and intent of corporate officers and agents are imputable to the corporate entity."³¹⁹ Traditionally, in prosecutions for crimes requiring knowledge or willfulness, such as false claims or false statements, corporations could be convicted only if at least one agent or employee acted with the requisite knowledge or intent.³²⁰

Currently, however, there is growing momentum toward the establishment of a doctrine of "collective knowledge" in corporate criminal law.³²¹ Under the collective knowledge doctrine, "a corporation may be held liable

n.6 (9th Cir. 1979) (approving a jury instruction on knowing and willful element in indictment); Maher, 582 F.2d at 846-47 (approving a jury instruction on willfulness).

314. See *supra* notes 278-82 and accompanying text.

315. See *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); *United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

316. See *United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980); *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974); *Johnson v. United States*, 410 F.2d 38, 46 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969). Courts generally construe the term "materiality" broadly because it is a matter of law rather than fact. *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983); see also *White*, 765 F.2d at 1473. The conflict between the courts seems more apparent than real.

317. *United States v. Coachman*, 727 F.2d 1293, 1302 (D.D.C. 1984).

318. See generally 1 CORP. CRIM. LIABILITY (1984).

319. *Id.* § 1.04, at 8. Where corporate employees or agents commit unlawful acts during the course of employment and within the scope of their authority the liability for those culpable acts may be imputed to the corporation. *Id.* at 8-9. Furthermore, liability generally attaches to the corporation regardless of the agent's status in the corporate hierarchy and regardless of whether the agent's conduct contravenes established or express corporate policy, so long as the agent has been authorized to act on behalf of the corporation in the matter that gave rise to the misconduct. *Id.* at 9. Finally, although corporate criminal liability is derivative of agent and employee misconduct, it is not contingent on the conviction of the wrongdoing agent. *Id.* at 10.

320. *Id.*

321. See *id.* § 4.05, at 93-97.

for knowing violations of the law notwithstanding the absence of proof that any single agent intended to commit the offense or even knew of the existence of the operative facts that led to the violation."³²² Thus, even in the absence of such proof, a corporation may be held liable for crimes requiring a culpable mental state by imputing to the corporation the collective knowledge of its employees and agents as a group.³²³

Prior to 1987, the collective knowledge doctrine was applied almost exclusively within the context of criminal prosecutions for knowingly and willfully violating a false records prohibition in the Interstate Commerce Act.³²⁴ *United States v. Bank of New England, N.A.*³²⁵ however, created a foothold for the collective knowledge doctrine outside of this specialized regulatory area. Accordingly, the doctrine is now on the threshold of becoming a recognized corporate criminal law doctrine.³²⁶

In *Bank of New England*, the bank was found guilty under the Currency Transactions Reporting Act,³²⁷ of knowingly and willfully failing to file the required Currency Transaction Reports (CTR) on cash withdrawals of more than \$10,000 by a single customer,³²⁸ even though two former head tellers of the bank and the customer were acquitted of similar charges.³²⁹ On appeal, one of the issues was whether the application of the collective knowledge theory was proper in determining whether or not the bank knowingly and willfully violated the CTR filing requirement.³³⁰ In upholding the jury instructions on collective knowledge and intent, the court of appeals noted that a collective knowledge instruction is "entirely appropriate" in the context of corporate criminal liability.³³¹ According to the court:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation³³²

322. *Id.* at 93-94.

323. *Id.* at 94.

324. *Id.* at 94 n.38.

325. 821 F.2d 844 (1st Cir. 1987).

326. 1 CORP. CRIM. LIABILITY § 4.01 (1984).

327. *Bank of New Eng.*, 821 F.2d at 848. The Currency Transaction Reporting Act is codified at 31 U.S.C. §§ 5311-5322 (1982).

328. *Bank of New Eng.*, 821 F.2d at 847.

329. *Id.*

330. *Id.* at 856.

331. *Id.*

332. *Id.*

The court concluded that even though it was unclear whether any one bank employee had acquired the requisite knowledge of the transactions, or the applicable reporting requirements, the aggregate knowledge of the bank tellers and managers could be imputed to the bank.³³³

The implications of the collective knowledge doctrine for government contractors are significant. Although the collective knowledge doctrine has not yet been adopted in the context of a criminal false statement or false claim suit encompassing defective pricing, the knowledge requirements of section 1001 of the criminal false statements statute³³⁴ and section 287 of the criminal false claims statute³³⁵ are practically identical to the standard in the *Bank of New England* case was decided. Thus, there is no logical reason for a court that has adopted the collective knowledge doctrine not to apply it in the context of criminal false statements and false claims.

If the collective knowledge doctrine were applied in a criminal false statements case encompassing defective pricing, it might result in a corporate contractor being held criminally liable for false statements if its certified cost or pricing data are found to be noncurrent or incomplete, even though no single employee knew that the data was defective, that it was submitted to the government, and that it was required to be accurate, current, and complete as of the date of agreement on price. In such a case, the facts would not support the criminal conviction of any individual involved because no one had the requisite knowledge of all the operative facts. Under the collective knowledge doctrine, however, the aggregate knowledge of all the employees could be sufficient to convict the corporate contractor of "knowingly" submitting a false statement to the government. Thus, a corporate contractor must establish a single vigilant control point for clearing all cost or pricing data submissions in order to reduce the potential for criminal liability under the collective knowledge doctrine.

D. Criminal Penalties for Violation Of the Criminal False Statements and False Claims Statutes

Penalties for criminal false statements and false claims have risen dramatically in recent years, even as the requirements of intent necessary to sustain conviction under these statutes appear to be eroding. Prior to late 1984, the penalty for each conviction of a false claim or false statement was a fine of

333. *Id.*

334. *See supra* notes 278-83 and accompanying text.

335. *See supra* notes 308-12 and accompanying text.

not more than \$10,000 and/or imprisonment for up to five years.³³⁶ As part of the current wave of criminal law reform, and in conjunction with the war against procurement fraud, Congress has passed new legislation dramatically increasing fines for the violation of criminal fraud and similar "white collar" criminal statutes. One rationale for the huge increase in fines was the belief that existing penalties were insubstantial and therefore lacked any deterrent effect, especially since a corporation can not be sent to jail.³³⁷

Accordingly, as part of the first comprehensive federal sentencing law,³³⁸ fines for the violation of the criminal false statement and false claims statutes were increased to a maximum of \$250,000 for a violation by individuals and \$500,000 for a violation by corporations.³³⁹ Defense contractors are subject to fines of up to \$1,000,000 per violation.³⁴⁰ There is a limit, however, on multiple fines to be imposed on a defendant for multiple offenses arising out of a common scheme or plan that "do not cause separable or distinguishable kinds of harm or damage."³⁴¹ In such cases, the maximum monetary fine is twice the amount imposed for the most serious offense.³⁴² Furthermore, under the new federal sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984,³⁴³ imposition of these fines will be mandatory and may be commensurate with any loss or damage to the government caused by the criminal violations.³⁴⁴

336. 18 U.S.C. § 1001 (1982); *see also* 18 U.S.C. § 287 (1982).

337. *See* H.R. REP. No. 1030, 98th Cong., 2d Sess. 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

The need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners.

Id. at 3289.

338. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1995, *amended by* Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 and Criminal Fine Improvements Act of 1987, Pub. L. No. 100-85, 101 Stat. 1279 (currently codified at 18 U.S.C.A. § 3571-3581 (West Supp. 1988)).

339. 18 U.S.C.A. § 3571 (West Supp. 1988). In 1985, Congress extended the penalty limit provided under tit. 18, § 287 to \$1,000,000 if the false statement or claim was made to the Department of Defense. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 931, 99 Stat. 699 (currently set out as a note to 18 U.S.C. § 287 (Supp. IV 1986)).

340. 18 U.S.C. § 287 note (Supp. IV 1986).

341. *Id.*

342. Thus, if a defense contractor is convicted of two or more counts of false claims and false statements "that arise from a common scheme or plan" the maximum fine imposable for the aggregate violations is \$2,000,000. *Id.*

343. *See supra* note 338.

344. *See* 18 U.S.C.A. § 3571(d) (West Supp. 1988). In lieu of, or in addition to the criminal fines, individuals convicted under criminal fraud statutes may be sentenced to prison for up to five years. *See* 18 U.S.C.A. §§ 3551, 3559 (West Supp. 1988).

IV. APPLICATION OF ANALYSIS TO A HYPOTHETICAL PROBLEM

In this section, we explore the government contractors' increased liability for defective pricing under the Truth in Negotiations Act, the civil false claims statute, and the criminal false statement and false claims statutes in the context of a hypothetical example. At the same time, we explore the interrelationship among these statutes. A chart illustrating the relationship among the statutes is found in the Appendix to this article.

A. Hypothetical

Megga Corporation, a conglomerate that includes a number of defense related divisions and affiliates, was awarded a defense contract by the United States Navy for fifty XYZ airborne antisubmarine warfare radar systems and certain spare parts. The Navy had previously awarded Megga a contract for development models of the precursor to the XYZ radar system. Subsequently, the Navy awarded two production contracts for the radar system to Megga. The current award is the third production contract. The contract called for delivery of fifteen radar systems six months after the contract award, another twenty radar systems nine months after the award, and the remaining fifteen radar systems one year after the award. Once the radar systems were delivered, Megga was to supply a certain amount of spare parts to the Navy. The contract was a negotiated defense contract subject to the requirements of the Truth in Negotiations Act.

The XYZ radar system was composed of four boxes, identified as a black box, a red box, a green box, and a white box. The black and white boxes were manufactured by the Fuzzbuster Division of Megga Corporation. The green and red boxes were supplied to Megga by an outside vendor. The boxes were integrated by Megga and the completed radar systems delivered to the Navy for installation.

As part of Megga's pricing proposal for the supply of the radar systems, Megga submitted its cost figures, which consisted of estimated and historical labor hours, material costs, and vendor quotations, on Standard Form 1411 (SF 1411). With respect to the spare parts, the government negotiators informed Megga that the price for the parts would be based solely on the historical costs of spare parts delivered in the previous two production contracts. As part of Megga's pricing proposal for the spare parts, Megga submitted on its SF 1411 computer generated cost runs representing the historical costs of spare parts from the previous two production contracts. Megga and the government negotiators reached agreement on price. Megga then executed a Cost or Pricing Certificate certifying the accuracy, com-

pleteness, and currency of its cost or pricing data as of the date the agreement was reached.

Megga delivered the fifty radar systems according to schedule. Each of the three deliveries was accompanied by Form DD-250 invoicing the government at prices based on previously submitted cost or pricing data. Megga also successfully completed its spare parts delivery obligations and submitted one invoice to the government on Form DD-250 for the spare parts.

Six months after Megga delivered the last of the spare parts, the DCAA conducted a routine defective pricing audit. The audit revealed that Megga realized on its Navy contract a profit of twenty-five percent on cost as compared to an estimated profit shown on its SF 1411 of ten percent on cost. The auditors discovered that Megga's Vice-President for Contract Negotiations had knowingly overstated Megga's vendor quotations on the red and green boxes by approximately twenty percent before submitting those quotations to the government. It was also discovered that Megga's accounting department had knowingly failed to disclose the latest historical labor hour data available for certain components of the black and white boxes and that the estimated labor hours contained on Megga's SF 1411 and supporting schedules for those components were twenty-five percent higher than the historical labor hours. The audit further concluded that Megga overstated its price for the spare parts by failing to submit its latest computer run cost report revealing the decreasing costs of manufacturing the spare parts during the latter part of the second production contract. Apparently responsible Megga personnel neglected to obtain the latest computer run cost from Megga's accounting department during the contract negotiations. The investigation concluded that, as a result of Megga's activities, the federal government was overcharged for costs in the amount of \$1 million.

B. Analysis of the Hypothetical

1. Truth in Negotiations Act

The facts of the hypothetical case reveal that Megga Corporation manipulated and withheld cost or pricing data from the government, the effect of which was to enable Megga to realize a significant profit on its Navy contract. These facts appear to make out a prima facie case of defective pricing under the Truth in Negotiations Act.

First, in connection with the negotiation of its nonexempt government contract, Megga Corporation executed a Certificate of Cost or Pricing Data when it reached agreement on price with the government.³⁴⁵ Under the

345. See *supra* note 109 and accompanying text.

amended Truth in Negotiations Act, however, even if a certificate had not been submitted to the government, Megga would still be liable for inaccurate, incomplete, or noncurrent data submitted under the Navy contract.³⁴⁶

Second, the latest historical labor hour data available for components of the black and white boxes was clearly cost or pricing data as defined by the amended Act.³⁴⁷ Accordingly, they should have been disclosed to the government during price negotiations. The data consisted of verifiable historical labor costs, facts "which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiation."³⁴⁸ Even if government auditors had obtained this information while auditing the previous radar system production contract, unless the government negotiators had actual knowledge of the data, or Megga Corporation alerted the government negotiators to the significance of the data for this procurement, Megga failed to meet its submission requirements under the Act.³⁴⁹ Moreover, as a result of Megga's overstated vendor quotations, failure to submit historical labor hour data on black and white box components, and failure to submit its latest computer run cost report for spare parts, the information submitted on SF 1411 was inaccurate and noncurrent. Thus, the information did not satisfy the requirement under the Truth in Negotiations Act that cost or pricing data be accurate, complete and current.³⁵⁰ In short, Megga Corporation's cost or pricing data were defective.

Third, in price negotiations, the government relied on Megga's defective data.³⁵¹ Fourth, the government's reliance thereupon resulted in the government paying higher prices for the radar systems and spare parts.³⁵²

Turning to the question of damages under the amended Truth in Negotiations Act, the government is entitled to a price reduction equal to \$1 million, the amount of Megga's cost overstatement, plus the appropriate overhead and profit.³⁵³ To the extent that Megga can show that even if it had disclosed correct data, the parties would not have negotiated a price reduced by the total amount of overstatement,³⁵⁴ or that it understated certain of its contractual costs, the government's recovery will be reduced accordingly.³⁵⁵ On the other hand, if the government can show that Megga intentionally

346. See *supra* notes 111-12 and accompanying text.

347. See *supra* note 8 and accompanying text.

348. See *supra* note 84 and accompanying text.

349. See *supra* notes 95-103 and accompanying text.

350. See *supra* note 34 and accompanying text.

351. See *supra* note 112 and accompanying text.

352. See *supra* notes 122-24 and accompanying text.

353. See *supra* note 125 and accompanying text.

354. See *supra* note 129 and accompanying text.

355. See *supra* notes 137-43 and accompanying text.

misrepresented its cost or pricing data Megga would be liable for double damages or in excess of \$2 million.³⁵⁶

2. *The Civil False Claims Statute*

Megga's submission of defective cost or pricing data on the Navy contract, and its certification of the data in conjunction with its subsequent submission of invoices to the government on Form DD-250, also appear to establish a prima facie violation of the newly amended civil false claims statute, 31 U.S.C. § 3729.³⁵⁷ First, the combination of these actions falls within the expanded definition of "claims" under section 3729, as it constitutes an attempt by Megga to cause the government to pay out sums of money.³⁵⁸

Second, Megga's claims were false: the Forms DD-250 invoiced the government for inflated prices based on inaccurate cost data.³⁵⁹

Third, Megga acted with the apparent requisite "state of mind." Our hypothetical facts suggest that Megga knowingly submitted the false claims, or at the very least, that Megga submitted the claims with deliberate ignorance of their truth or falsity. Prior to the amendment of section 3729 of the civil false claims statute, this would not have been sufficient to make out a prima facie case in those jurisdictions that required a showing of specific intent to defraud.³⁶⁰ Furthermore, some courts previously required that the government prove its case by clear and convincing evidence.³⁶¹ Under the amended section 3729, however, the government need only prove by a preponderance of the evidence that Megga knowingly submitted the false claims, or submitted the claims with deliberate ignorance of their truth or falsity.³⁶²

As a result of Megga's actions, the government may recover under amended section 3729 triple its actual damages, a \$5,000-\$10,000 forfeiture for each false claim, and its costs of suit.³⁶³ Megga's damages payment will be reduced to double actual damages if it proves that it disclosed the violation to the government thirty days after first learning of it, and that it fully cooperated with the government's investigation.³⁶⁴ Like the computation of damages under the Truth in Negotiations Act, actual damages under section 3729 of the civil false claims statute are computed by determining the

356. *See supra* note 149 and accompanying text.

357. *See supra* note 162-66 and accompanying text.

358. *See supra* notes 167-68 and accompanying text.

359. *See supra* note 162 and accompanying text.

360. *See supra* note 170 and accompanying text.

361. *See supra* note 174 and accompanying text.

362. *See supra* notes 172, 175, and accompanying text.

363. *See supra* notes 200-02 and accompanying text.

364. *See supra* notes 203-05 and accompanying text.

amount of the cost overstatement due to the false data, subtracting amounts eliminated during negotiations, and then adding appropriate burden and profit.³⁶⁵ Thus, assuming Megga's cost overstatement was not reduced in any amount during price negotiations, it appears that Megga would be liable for a sum exceeding \$3 million in actual damages, that is, a sum treble \$1 million in costs plus appropriate overhead and profit. Prior to the amendment of section 3729, Megga would have been liable for a sum exceeding \$2 million, i.e., a sum double the \$1 million in costs, plus appropriate overhead and profit.

With respect to Megga's liability for penalties, the number of impossible penalties is generally set at the number of individual false payment demands over which the contractor had knowledge and control.³⁶⁶ Moreover, the government cannot recover more than one penalty for the *same* false claim. The application of these rules to our hypothetical case requires an assessment of four forfeitures or \$20,000-\$40,000, on the basis of the four Forms DD-250 Megga used in invoicing the government. Prior to the amendment of section 3729, Megga would have been liable for only \$8,000 in penalties, or \$2,000 for each invoice.³⁶⁷ If Megga Corporation's false claims amounted to \$150,000 or less, the government would have the option of seeking recovery under the administrative procedures of the Program Fraud Civil Remedies Act with virtually the same proof requirements as under the civil false claims statute.³⁶⁸

3. *The Criminal False Statement and False Claims Statutes*

The hypothetical facts also appear to make out a prima facie violation of the criminal false statements statute, 18 U.S.C. § 1001. First, the SF 1411, the Certificate, and the Forms DD-250 are all "statements" under section 1001, inasmuch as each document is a written representation to the government of Megga's cost or pricing data, the accuracy of that data, or the prices ultimately based on that data.³⁶⁹ Second, the statements relate to matters within the jurisdiction of a government agency as all were made to the Navy as part of that agency's procedure for the pricing and payment of govern-

365. See *supra* note 206 and accompanying text.

366. See *supra* note 218 and accompanying text.

367. See *supra* note 199 and accompanying text.

368. See *supra* notes 234-51 and accompanying text.

369. See *supra* notes 267-68 and accompanying text. Arguably the Forms DD-250 themselves are not false statements because they merely reflect the prices in the actual contract. Nevertheless, in conjunction with the SF 1411 and certificate, the forms probably violate the first clause of § 1001, which imposes liability for the knowing falsification, concealment or covering up by trick, scheme or device of a material fact. See *supra* note 265.

ment contracts.³⁷⁰ Third, for the reasons noted above, all of the statements were false.³⁷¹

Fourth, the statements were "material" within the meaning of section 1001 of the criminal false statements statute.³⁷² The submission of defective cost or pricing data and its subsequent certification resulted in a higher contract price. Even if Megga's false statements did not cause an increase in the contract price, they arguably were material because they had "a natural tendency to influence, or [were] capable of influencing" the government's decisionmaking process.³⁷³ Moreover, Megga's invoices to the government on the Forms DD-250 were material because they sought payment of sums that Megga had no right to collect.

Fifth, the intent element of section 1001 appears to be satisfied. The inflated cost figures and nondisclosure of material data suggest that Megga willfully or deliberately made the statements knowing they were false.³⁷⁴ Even if Megga did not have actual knowledge of the statements' falsity, the intent requirement is met if Megga made the statements with reckless disregard for their truthfulness.³⁷⁵

Likewise, the hypothetical facts appear to make out a prima facie violation of the criminal false claims statute, 18 U.S.C. § 287. First, the invoices to the government on Forms DD-250 demanding payment based on a defectively priced contract are claims within the meaning of the statute.³⁷⁶ Second, for the reasons already set forth in our discussion of section 3729 liability under the civil false claims statute, the Forms DD-250 were all false.³⁷⁷

Finally, the intent element of section 287 of the criminal false claims statute appears to be satisfied. Megga's awareness of inflated cost figures and nondisclosure of material data suggest that Megga acted with knowledge of the falsity of its claims when it submitted the Forms DD-250.³⁷⁸ The chances of a conviction of Megga for criminal false statements or false claims in some jurisdictions are perhaps increased by the apparent elimination of the requirement that the government prove actual knowledge of a false submission in such cases.³⁷⁹

370. See *supra* notes 269-70 and accompanying text.

371. See *supra* text accompanying note 259.

372. See *supra* notes 272-77 and accompanying text.

373. See *supra* note 275 and accompanying text.

374. See *supra* notes 278-80 and accompanying text.

375. See *supra* note 283 and accompanying text.

376. See *supra* notes 304-07 and accompanying text.

377. See *supra* text accompanying note 359.

378. See *supra* note 308 and accompanying text.

379. See *supra* notes 283-84, 311, and accompanying text.

A fine would almost certainly be imposed on Megga if it were convicted of violating the false statements or false claims statutes. Because the violations involved a defense contract, the maximum fine imposable on the corporation for each false statement or claim would be \$1 million.³⁸⁰ However, since the false statements and claims arise out of a common scheme or plan, Megga's maximum criminal liability for conviction of two or more counts of false statements or claims would be double the maximum fine for a single violation, or \$2 million.³⁸¹

Thus, in the hypothetical example, the same acts that establish defective pricing under the amended Truth in Negotiations Act also help establish liability under the amended civil false claims statute and criminal false statements and false claims statutes. However, not all violations of the Truth in Negotiations Act constitute violations of the false claims and false statements statutes. The government may successfully pursue a government contractor for defective pricing under the Truth in Negotiations Act, but be unsuccessful in prosecuting the contractor for the same actions under the civil and criminal false claims and false statements statutes and vice versa.

For example, suppose that the government's price negotiations memoranda reveal that the government never relied on Megga's inflated cost or pricing data because Megga's offered price was lower than the low end of the Navy's projected reasonable contract price range. In other words, the Navy enthusiastically accepted the offer without relying on the cost information in Megga's proposal. Under these circumstances, the government's defective pricing action under the Truth in Negotiations Act would be defeated because the government would be unable to show that it relied on Megga's defective cost or pricing data in negotiating the contract price, and that such reliance resulted in a higher contract price.³⁸² However, the government's actions under the false claims and false statements statutes would not be defeated because these statutes do not require either government reliance on the false claims or statements or a showing of damages sustained as a result of reliance.³⁸³ Thus, under the civil false claims statutes, even if the government suffered no damages, it could recover the \$20,000-\$40,000 penalty from Megga.³⁸⁴ Furthermore, Megga could be criminally liable for fines up to \$2 million under section 1001 of the criminal false statements statute and

380. See *supra* note 340 and accompanying text.

381. See *supra* notes 341-42 and accompanying text.

382. See *supra* notes 113-24 and accompanying text. It should be noted here that, as a general rule, government price negotiation memoranda specifically state at the outset that the government negotiator relied on the contractor's cost or pricing data submission.

383. See *supra* notes 164, 266, 303, and accompanying text.

384. See *supra* notes 216-17 and accompanying text.

section 287 of the criminal false claims statute.³⁸⁵

Now, let us modify the intent element of our hypothetical example. Suppose that Megga's inflated cost data resulted from a failure to disclose certain vendor quotations for the green and red boxes because of Megga's belief that the quotations were inaccurate, unreasonably low, and, therefore, unreliable for pricing purposes, combined with an inadvertent error in the transposing of figures from its work sheets to its pricing proposal, resulting in an overstatement of its cost or pricing data.

Under these circumstances, Megga Corporation would still be held liable under the Truth in Negotiations Act for any overstatement in contract price caused by the submission of defective cost or pricing data. The fact that Megga had honorable intentions and did not intentionally withhold cost or pricing data from the government is irrelevant. The Truth in Negotiations Act and the implementing regulations address the question of defects in the data and not individual or corporate intent.³⁸⁶ Any culpability or lack of it on the part of Megga does not affect its obligation to refund the money.

Megga, however, may escape liability under the false claims and false statements statutes. Before liability under the civil false claims statute could be found, the government would have to prove that Megga knowingly presented a false claim or statement to the government.³⁸⁷ Likewise, under section 287 of the criminal false claims statute, the government would have to establish that Megga submitted its claims knowing them to be false, fictitious or fraudulent.³⁸⁸ Under the criminal false statements statute, the government would have to establish that a false statement was willfully or deliberately submitted by Megga with the knowledge that it was false.³⁸⁹ The facts suggest that Megga believed the data was accurate and reliable, that Megga inadvertently submitted defective data, and that Megga did not submit the data with reckless disregard for, or in deliberate ignorance of, its truth or falsity and, therefore, Megga did not have the requisite intent to violate the false claims or false statements statutes.³⁹⁰

Let us modify our hypothetical example once more to present a disturbing possibility with regard to corporate liability for defective pricing. Suppose Megga's Vice President for Contract Negotiations requested an historical

385. See *supra* notes 338-41 and accompanying text.

386. However, under the amended Act, a defense contractor may be liable for an additional civil penalty if it is found that the contractor knowingly submitted defective data. See *supra* note 149 and accompanying text.

387. See *supra* note 172 and accompanying text.

388. See *supra* note 308 and accompanying text.

389. See *supra* note 278 and accompanying text.

390. See *supra* notes 278-312 and accompanying text.

cost analysis for the black and white boxes from the Fuzzbuster Division's accounting department while neglecting to inform Fuzzbuster that the analysis would be submitted to the government as cost or pricing data in Megga's latest proposal. The Fuzzbuster accounting department is very busy and decides to give the Megga Vice President an analysis that was done a few months before and that the accounting department knows is neither up to date nor completely accurate but is generally representative of historic costs for the boxes. The Megga Vice President subsequently submits the cost analysis to the government without the knowledge that it is inaccurate and noncurrent. Subsequently, the Navy relies on the defective data which results in a higher contract price.

Under this scenario, Megga is liable for defective pricing under the Truth in Negotiations Act. At first glance, however, it would appear that Megga should not be liable for criminal false claims or statements because no single agent or employee of Megga had the requisite knowledge or intent to submit the false claims. Under the collective knowledge doctrine,³⁹¹ however, Megga may be held liable for a knowing violation of the false claims or false statements statutes notwithstanding the absence of proof that any single employee intended to submit false claims or even knew of the operative facts leading to the violation. Thus, the separate knowledge of both the Fuzzbuster accounting department (that the black and white box cost analysis was inaccurate and noncurrent) and the contract negotiator (that the cost analysis was being submitted to the government and certified as accurate, current, and complete) could be imputed collectively to Megga. Megga would then be found to have knowingly submitted a false claim or statement to the Navy, which could lead to Megga's conviction for criminal false claims or statements.

V. CONCLUSION

The same acts establishing liability under the Truth in Negotiations Act are increasingly giving rise to civil and criminal liability under the various federal false claims and false statements statutes. Not all violations of the Truth in Negotiations Act constitute violations of the false claims or false statements statutes. A scienter requirement, establishing the intent of the contractor to submit defective cost or pricing data to the government, must be shown to establish liability for false claims or false statements but the same element is not required to establish liability under the Truth in Negotiations Act. Nevertheless, the line between Truth in Negotiations Act violations requiring no element of intent, and false claims or false statements

391. *See supra* notes 318-31 and accompanying text.

violations requiring an element of intent has been blurred significantly. False claims and false statements statutes which formerly required proof of specific intent to defraud or actual knowledge of false submissions now merely require proof of reckless disregard for or deliberate ignorance of the truth or falsity of a claim or statement.

Furthermore, the potential application of the collective knowledge doctrine to criminal false claims and statements cases could, in effect, render corporate contractors who submit defective data to the government, strictly liable for criminal false claims or statements. Moreover, a contractor may escape liability under the Truth in Negotiations Act, but still be found liable under the false claims or false statements statutes. Thus, if the government does not rely on defective cost or pricing data, or no price increase results from submission of such data, the government is not entitled to a price reduction under the Truth in Negotiations Act. Nevertheless, neither reliance nor actual damages are necessary to sustain civil liability or criminal conviction under the false claims and false statements statutes.

**APPENDIX
FEDERAL STATUTES RELATING TO DEFECTIVE PRICING OF GOVERNMENT CONTRACTS**

		Elements		
Truth in Negotiations Act	Civil False Claims Statute 31 U.S.C. § 3729	Program Fraud Civil Remedies Act 31 U.S.C. § 3801	Criminal False Statement Statute 18 U.S.C. § 1001	Criminal False Claims Statute 18 U.S.C. § 287
Statutory requirement for submission of data	Claim	Statement or claim	Statement	Claim
1. Statutory requirement not required	Made or presented to government agency	Statement accompanied by express certification or affirmation	Statement within government agency's jurisdiction	Made or presented to government agency
3. Data defective; inaccurate, incomplete, noncurrent	Claim was false	Statement or claim was false	Statement was material and false	Claim was false
4. Data relied on by Government	Claim need not have been relied on	Statement or claim need not have been relied on	Statement need not have been relied on	Claim need not have been relied on
5. Contract price is higher as a result	Damages need not be proven	Damages need not be proven	Statement was material but damages need not be proven	Damages need not be proven
6. No knowledge or intent required	Knowing submission of false claim, deliberate ignorance, or reckless disregard of truth or falsity	Knowing submission of false statement or claim, deliberate ignorance or reckless disregard of truth or falsity	Knowing and willful submission of false statement with intent to deceive (some infer from reckless disregard of truth with conscious effort to avoid truth)	Knowing submission of false claim with intent to violate the law (majority infer from reckless disregard of truth with conscious effort to avoid truth)
Penalties To Contractor				
Refund for any overstated portion of contract price, reduced by amount "negotiated out" or allowable offset (if defective data knowingly submitted separate penalty in amount of contract overpayment)	Triple damages plus a \$5,000-10,000 penalty for each false claim (actual damages need not be proven to impose penalties)	Maximum \$5,000 penalty per false statement; maximum \$5,000 penalty per false claim plus assessment up to twice amount of claim in lieu of damages if payment of claim has been made by the government	Maximum \$1 million penalty (maximum \$250,000 penalty and/or up to 5 years imprisonment for individuals)	Maximum \$1 million penalty (maximum \$250,000 penalty and/or up to 5 years imprisonment for individuals)

