

# “Certified Estimates” and Mandatory Disclosure: A Bad Decision Makes for a Worse Regulation

By **STEPHEN D. KNIGHT**



In *United States v. United Technologies Corp.*, 2008 U.S. Dist. LEXIS 61199 (S.D. Ohio 2008), *appeal filed* No. 08-4257 (6th Cir. Sept. 29, 2008),<sup>1</sup> the United States District Court for the Southern District of Ohio found that the Pratt & Whitney Division (Pratt) of United Technologies had violated the civil False Claims Act, 31 U.S.C. §§ 3729 *et*

*seq.* (civil FCA), by making certain fraudulent statements in its Best and Final Offer (BAFO) for competitively awarded fighter aircraft engines. The court’s decision is troublesome for government contractors because its questionable analysis provides the government with a powerful tool to allege fraud in proposals and estimates that has not been previously available. Moreover, the recent promulgation of Federal Acquisition Regulation (FAR) 52.203-13, “Contractor Code of Business Ethics and Conduct” (Dec. 2008), when combined with the court’s ruling, creates a nearly impossible compliance problem for contractors.

## The Government’s “Failure to Use” Legal Theory at the ASBCA

The case arose from the Fighter Engine Competition, a source selection the Air Force conducted for fighter engines for F-15 and F-16 airplanes from 1983 to 1990. The government decided that industrial mobilization considerations warranted split awards to Pratt and General Electric Company. The competition coincided with the upgrade of the engines from the “-200” to the “-220” model. Notwithstanding the competition for the split awards, the government required cost or pricing data from the offerors.<sup>2</sup> At the same time that the government pursued its civil FCA case against Pratt, it also pursued a defective pricing case against Pratt at the Armed Services Board of Contract Appeals (ASBCA, or the board).<sup>3</sup> The government claimed civil FCA damages of \$227,980,977 before trebling, and a defective pricing price reduction at the ASBCA of \$299,000,000.

The defective pricing case at the ASBCA provides some insight into the basis for the civil FCA action, namely Pratt’s alleged failure to use certain cost or pricing data in its BAFO. In its findings of fact, the ASBCA (Judge Delman) stated:

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*Stephen D. Knight is a partner in Smith Pachter McWhorter PLC, Vienna, Virginia.*

54. Appellant’s BAFO stated at pages 3-56 that it had used its “most current quotes” and “most current data available” to price engineering changes. . . . Upon audit, the DCAA found that appellant did not use its most current quotes for certain parts related to engineering changes. According to the DCAA, this BAFO statement was inaccurate and constituted defective cost or pricing data. . . . DCAA recommended contract price reductions on a per part basis reflecting the more current data that should have been used per appellant’s representations. . . . For a number of parts, the more current data would have resulted in a *higher* BAFO price, and the DCAA recommended offsets against the price reductions. . . .

55. The AF [Air Force] does not assert that the most current data were not disclosed to the Government. It contends that the data were not *used by* Pratt to develop its BAFO price. For reasons stated in the Decision section of this opinion, we find that appellant’s cost or pricing data were not defective in this respect and that no contract price reductions or offsets can be recognized. . . .

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60. Appellant’s BAFO stated at 3-59 that “labor standards from 1985 forward were reduced by increased factors from the initial proposals . . .” to reflect historical standard labor reductions. . . . Upon audit, the DCAA determined that the BAFO did not use these “factors,” also known as out-year reductions or taskings, to reduce DEEC & ILC labor . . . . According to the DCAA, appellant’s failure to use these factors per its purported BAFO representation constituted defective pricing, caused an overstatement in the contract price and was a basis for contract price adjustment. For reasons stated in the Decision section of this opinion, we find that appellant’s cost or pricing data were not defective in this respect.

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65. The DCAA determined that appellant priced DEEC add parts in the BAFO using estimated 1983 standard material costs escalated by a material escalation factor of -.9815 (also stated in the record as -1.85%) for 1984, but elsewhere in the BAFO used a more current escalation factor of .9600. . . . According to the DCAA, appellant’s failure to use the more current rate consistently in the BAFO constituted defective cost or pricing data, for which a contract price adjustment was recommended. . . . The AF does not assert that appellant failed to disclose these rates to the Government, but only that it failed to use the more recent rate consistently in the BAFO.<sup>4</sup>

The board flatly rejected the government’s “failure to use” position:

[T]he government contends that appellant violated its obligations under TINA by *failing to use certain cost or pricing data in its BAFO*. We reject this contention for a number of reasons.

The plain language of the Act *does not obligate a contractor to use any particular cost or pricing data to put together its proposal. Indeed, TINA does not instruct a contractor in any manner regarding the manner or method of proposal preparation.*

TINA is a disclosure statute. It requires a contractor under certain circumstances to disclose and to furnish cost or pricing data to the government and to *certify that the data are accurate, current and complete. This disclosure and certification obligation is not limited to that data actually used or relied upon by the contractor to prepare its proposal.* Under the regulatory definition, the data to be provided consists of “all facts existing up to the time of agreement on price which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations. . . .” . . . *On the other hand, once a contractor has furnished accurate, current and complete data, it has fulfilled its TINA obligations. The statute does not require that all or any of that data be used to prepare the proposal.* One would think that any contractor with the desire to obtain a contract award would use credible, historical cost data so as to demonstrate to the government that its proposed price is consistent therewith. However this is a matter for the contractor to decide, and for the Government to evaluate as part of the proposal review process, and is not a mandate under TINA.<sup>5</sup>

### The Government’s “Failure to Use” Legal Theory in Federal Court

Having been unsuccessful at the ASBCA, the government next pursued its “failure to use” theory in its civil FCA action in the Southern District of Ohio.<sup>6</sup> The district court’s ruling on several pretrial motions demonstrated its lack of understanding of the requirements of the Truth in Negotiations Act, along with a misinterpretation of the duty owed by a party providing an “estimate” to another.

In *United States v. United Technologies Corp.*, 255 F. Supp. 2d 779 (S.D. Ohio 2003), the court denied several of United Technologies’ pretrial motions that essentially argued that estimates did not meet the falsity requirement of the civil False Claims Act, holding:

While United Technologies asserts that *its certified price estimates cannot be fraudulent because estimates are inherently subjective, “an opinion or estimate carries with it ‘an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which would justify it.’”* *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999) (quoting *W. Page Keeton et al., Prosser & Keeton on the Law of Torts* § 109, at 706 [sic 760] (5th ed. 1984).

. . . In the instant case, *the Government has charged that United Technologies has certified that its estimates were based upon complete and current data and, moreover, were based upon past experience in achieving certain predictions. . . .* United Technologies has not put

forward facts that would support the veracity of its certification, but has simply asserted the metaphysical possibility that United Technologies, or some United Technologies’ representative, had estimated the amount certified. Not only does United Technologies not have the factual foundation . . . it ignores that *it has certified a basis for its estimates, namely, its past experience—a basis that the Government asserts was not, in fact, utilized. . . .*

Defendant similarly asserts that it is impossible for the Government to prove that Pratt’s certified “Best Estimates” were false, given the “vague” and “ambiguous” nature of the terms. This claim has already been considered and rejected by other courts. In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999), the Fourth Circuit held that “*an opinion or estimate carries with it ‘an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it.’*” *Id.* (quoting *W. Page Keeton et al., Prosser & Keeton on the Law of Torts* § 109, at 706 [sic 760] (5th ed. 1984)). The Government in this case asserts both that Pratt knew of no facts to substantiate its “best estimate” and that it actually knew of facts that would preclude such an opinion.<sup>7</sup>

Two significant points emerge from the above-quoted passage. First, the district court erroneously concluded that a contractor’s Certificate of Current Cost or Pricing Data somehow acts to certify a contractor’s price estimates, and mandates a direct connection between a contractor’s estimates and current data.<sup>8</sup> This is precisely the position that the ASBCA rejected, rightly, in the related government contract litigation.<sup>9</sup> The district court fundamentally misunderstood and misstated the significance of the Certificate of Current Cost or Pricing Data, erroneously concluding that the certificate was a representation that the price estimates were based on “complete and current” data.

Second, the district court compounded its mistake by utilizing the “implied assertion” test relied upon in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999). Both *Harrison* and *United Technologies* misinterpret language quoted from Professors Keeton’s and Prosser’s treatise on torts, which actually states the general rule as being: “In the absence, then of special circumstances affording some reason to the contrary, a representation which purports to be one of opinion only is not a sufficient foundation for the action of deceit.”<sup>10</sup> Discussing these “special circumstances,” the treatise states in relevant part:

The courts have developed *numerous exceptions* to the rule that misrepresentations of opinion are not a basis for relief. Apparently all of these may be summed up by saying that *they involve situations where special circumstances make it very reasonable or probable that the plaintiff should accept the defendant’s opinion and act upon it*, and so justify a relaxation of the distrust which is considered admirable between bargaining opponents. Thus where the parties stand in a relation of trust and confidence, as in the case of members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, insurer

and insured, close friendship, and the like, it is held that reliance upon an opinion, whether it be as to a fact or a matter of law is justifiable, and relief is granted.

Further than this, it has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it. There is quite general agreement that such an assertion is to be implied where the *defendant holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff*, so that his opinion becomes in effect an assertion summarizing his knowledge. Thus the ordinary man is free to deal in reliance upon the opinion of an expert jeweler as to the value of a diamond, of an attorney upon a point of law, of a physician upon a matter of health, of a banker upon the validity of a signature, or the owner of land at a distance as to its worth, even though the opinion is that of his antagonist in a bargaining transaction. On the same basis it has been held that statements by a seller as to the capacity of the thing sold, or the condition of land, or other matters, *which on the part of one without special knowledge would be regarded as mere opinion*, may be relied on as statements of fact.<sup>11</sup>

Thus, the implied assertion—"that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it"—applies only in "special circumstances" of "special knowledge." Only if a party has "special knowledge," does the implied assertion apply. Because the entire basis for the Truth in Negotiations Act and disclosure of certified cost or pricing data is to eliminate special knowledge possessed only by the contractor, and to place the government in a position equal to the contractor with regard to factual information (i.e., cost or pricing data), there are no "special circumstances" present.<sup>12</sup> Accordingly, in the absence of "special circumstances" under the general rule propounded by Professors Keeton and Prosser, the "estimates" contained in Pratt's BAFO did not form the basis for an "action of deceit" sufficient to support a claim of "falsity" under the civil False Claims Act.

### The Court Determines UT's BAFO to Be False

With the "special knowledge" standard in mind, on the merits the district court discussed the government's three assertions of falsity: (1) decrements for vendor ceiling price quotes; (2) escalation applied to base price quotes; and (3) engineering changes.

The first assertion concerns Pratt's decision not to rely solely on the recommendations of its Procurement Contract Accounting Group (PCAG) pertaining to vendor decrements for the proposal. The court highlighted, and misinterpreted, Pratt's statements in its BAFO, construing those statements with a more narrow meaning than warranted by the circumstances:

The BAFO contains an "Explanation Exhibits" section, 3.8, that "present[ed] additional explanations/rationale for

our BAFO Proposal. Also included are some comments related to DCAA comments." This section explained that Pratt did not apply the PCAG recommendations purportedly because Pratt historically did not achieve these recommendations in actual negotiations:

Ceiling price quotes were decremented in the BAFO for consideration of final settlement on all sole-sourced vendors. The decrement factor applied by calendar year was developed *based upon our review of the PCAG recommendations for each supplier and the cognizant buyer's past experience with the individual vendors involved. The decrement factor reflects our past experience in not being able to achieve PCAG recommendations at final settlement time.* The DCAA audit reports as discussed during fact-finding recommended decrementing all ceiling vendor quotes to a level consistent with the PCAG recommendation. While we have incorporate[d] a decremented position, we do not agree that the appropriate estimate should be based solely upon PCAG, *but rather also should consider past experience by supplier as indicated above.*

Finally, Pratt provided a document purporting to show "purchasing buyer assessments" of what 3.8.1 had described as "past experience in not being able to achieve PCAG recommendations at final settlement time." This "Item #8" purportedly:

display[ed] a summary by vendor for PCAG recommendations and purchasing buyer assessments of decrement factors for ceiling type quotes contained in the Fighter Engine Competition proposal.

This data was considered in estimating stand[ard] material for the Fighter Engine Competition BAFO and is being submitted in support thereof."

The list contained the PCAG recommended decrement for materials from twenty firms, reduced to a "purchasing Decrement." The changes ranged from Howmet-Misco's reduction from a PCAG decrement of 22.0 to a purchasing buyer assessment decrement of 0, to Whitaker Control's reduction from 5.6 to 5.0. (Three firms, NEAP, Windsor and AlloyTek were recommended at 0 and remained 0.)

These numbers, however, did not reflect Pratt's "past experience by supplier," as asserted in 3.8/1.A.1, but instead were numbers that, at least one purchaser, Henry Boratis, derived merely by speculating as to what he thought was achievable. Moreover, Boratis does not remember having recommended any other particular number.

Had Pratt desired to apply a decrement based upon its actual past performance in achieving PCAG-recommended decrements, however, it had a corporate database that could have readily provided it with accurate numbers reflecting this historical fact. Comparing those numbers to those utilized reveals that the numbers utilized in the BAFO were not based upon "past experience by supplier. . . ."<sup>13</sup>

The district court found Pratt's statements to be false because the court narrowly interpreted words such as "based upon," "consider," and "reflect" to mean "directly traceable to" and "applied directly." Thus, the court misinterpreted "consider past experience by supplier" to mean "should apply actual past experience directly to the BAFO." This is evident by the above quotation, and the last paragraph quoted above. The court equated "a decrement based upon its actual performance" with "a decrement utilizing only its actual past performance." The court misinterpreted Pratt's BAFO in such a way as to leave no room for Pratt's business judgment in deriving its estimates:

In the instant case, Pratt knowingly made a false record or statement to get a false or fraudulent claim paid or approved by the Government. Pratt asserted that it had applied decrement factors that "reflect[ed Pratt's] past experience in not being able to achieve PCAG recommendations at final settlement time," when in fact they did not.

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Because the only fair reading of Pratt's assertion in Exhibit 3.8.1 is that ceiling prices quotes were decremented in the BAFO on all sole-sourced vendors in an amount somewhere within the range established by the PCAG recommendations for each supplier and Pratt's past experience in achieving PCAG recommended decrements, and *because Pratt certified that the prices it submitted were substantiated by the most recent data*, Pratt has violated the False Claims Act.<sup>14</sup>

The court's interpretation of the BAFO essentially requires direct application of historical experience to determine an estimate. To say, as Pratt did, that the decrement factors "reflect past experience" and "considered" PCAG recommendations says no more than past experience and PCAG recommendations were part of the information Pratt examined and used in the estimating process. The district court's assertion that the "only fair reading" of Pratt's BAFO exhibit was a decrement "within the range established by the PCAG recommendations . . . and Pratt's experience in achieving PCAG recommended decrements" is not supported by any facts mentioned by the court. The idea of a "range" was an inference drawn by the court, by definition *not* the only fair reading of Pratt's BAFO. The single factual instance cited by the court—that the numbers came from what purchaser Henry Boratis merely "thought was achievable"—is hardly a sufficient factual basis for the sweeping conclusions drawn by the court. Moreover, the district court was clearly incorrect in concluding the Certificate of Current Cost or Pricing Data is a certification relating to offered prices, or to the substantiation of such prices by "the most recent data."

The same difficulty appears in the court's treatment of the second ground of falsity: escalation applied to base price quotes. The court again quoted and discussed Pratt's BAFO: BAFO exhibit 3.8.1 paragraph A.3. further asserted:

Escalation applied to base price quotes was revised to reflect

## Section Fetes Director

The Public Contract Law Section surprised Section Director Marilyn Neforas with a birthday party at the reception following the 15th Annual Federal Procurement Institute on Friday, March 6, 2009, in Annapolis, Maryland. The bash—beautifully organized and executed by Pat Wittie and her hard-working band of coconspirators—celebrated Marilyn's 65th birthday and her many years of exceptional and dedicated service to the Section.



Marilyn was genuinely surprised when the atrium doors opened and Section Chair Michael Mutek escorted her to the stage where Lynda O'Sullivan crowned her with a tiara and Ruth Burg presented her with a crystal cake platter from Tiffany's. Apart from the birthday girl herself, highlights of the party included a disc jockey who played old favorites, dancing, champagne and, of course, a chocolate birthday cake. Always one to know exactly what is taking place during every moment of every Section meeting, Marilyn was heard to exclaim that she could not believe the Section had pulled the party off right under her nose!



Pictured (l. to r.) Ruth Burg, Carol Park-Conroy, Marilyn Neforas, Mary Ellen Coster Williams.

consideration for the most recent [Domestic Rate of Inflation] forecast of the appropriate indices. Although not specifically addressed by the DCAA, we feel this was only prudent as the new forecast reflected generally lower inflation estimates.

While the Best And Final Offer proclaims to have been “revised to reflect consideration for the most recent [Domestic Rate of Inflation] forecast of the appropriate indices,” it did not reflect the entire reduction in the forecast of inflation, but instead just 75% of that amount. Pratt did not utilize some alternative inflation forecast, but simply guessed that the reduction in the forecast would not be met. This reduction would have reduced Pratt’s estimation of costs by millions.

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Pratt asserted that it had applied “the most recent DRI forecast of the appropriate indices,” when in fact, it had not.

*Id.* at \*16-\*17, \*27.

The court misinterpreted “escalation . . . was revised to reflect the most recent [DRI] forecast” to have only one meaning—that Pratt applied the most recent forecast without any adjustment, as if Pratt were required to follow a particular mechanical formula in its pricing. If Pratt had stated that it used the most recent DRI forecast without change, the court would have been correct. But Pratt pointedly stated that escalation applied “*was revised to reflect consideration for the most recent [DRI] forecast. . .*” Consequently, the district court’s conclusion that the statement in Pratt’s BAFO regarding escalation was false was clearly overreaching.

The court’s third ground of falsity related to engineering changes:

Finally, BAFO exhibit 3.8.1 paragraph C.3, entitled “F100-PW-200 Engineering Changes” asserted:

All remaining engineering change deltas were adjusted to reflect latest data available. This includes most current quotes, most current engineering change configurations and sourcing, and adjusted cancel parts to reflect 1984\$ as the basis instead of 1983\$ escalated. These areas were identified by the DCAA. While agreeing in concept, we have incorporated the most current data available.

In fact, however, Pratt had not incorporated “the most current data available.” Pratt’s Purchasing Department had developed a Value and Financial Analysis that estimated expected costs for material quoted from vendors and was based on the -220 Quoted Bill of Material. Pratt’s New Engine Pricing Group received the Value and Financial Analysis, but did not utilize these dollar estimates. Rather, it utilized a “Reduction Percentage” formula for determining how cost would change for carrying amounts of engines actually ordered at percentages in between a full 100 percent award and a 30 percent award of the contract. The New Engine Pricing Group applied this formula instead to the -200 Quoted Bill of Material. Thus, while the Purchas-

ing Group’s Value and Financial Analysis subgroup had decremented the latest Digital Electronic Engine Control quotes with its estimate, the New Engine Pricing Group decremented the Unified Control System that the Digital Electronic Engine Control was going to replace. Had Pratt used the Value and Financial Analysis and decremented the -220 Quoted Bill of Material, its material estimate would have been hundreds of million dollars lower, because the -220 Quoted Bill of Material was considerably lower in value than the -200 Quoted Bill of Material. This was done contrary to Pratt’s assertion in the Best And Final Offer that it was using the -220 quotes. . . .

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Pratt asserted it had utilized “most current quotes, most current engineering change configurations and sourcing, and adjusted cancel parts to reflect 1984\$ as the basis instead of 1983 escalated[,]” when in fact, it had not.

*Id.* at \*17-\*18, \*27.

Here, the court misinterprets “reflects” and “data” generally. As with the two other bases of falsity asserted by the government, the district court treated the use of the word “reflects” as though it meant “utilized” or “directly traceable to.” That is not what the BAFO stated, as quoted by the court. The BAFO stated that engineering change deltas “were adjusted to reflect latest data available” and “incorporated the most current data available.” The district court supposed a contradiction in Pratt’s use of the New Engine Pricing Group’s “Reduction Percentage” formula over the purchasing department’s value and financial analysis that estimated expected costs. Yet Pratt used the word “data” which, in the context of this BAFO, could very well have meant “cost or pricing data.” Neither the formula nor the analysis was “data” in that sense; they both were estimates, and outside the definition of “cost or pricing data.”

Summing up, the court stated:

While Pratt was not obliged to utilize any particular means of predicting of decrements, inflation, or part prices, once it proclaimed to the Government that it had used some particular method, it was obliged to have done so.

*Id.* at \*27.

While this position is a correct statement, the court was incorrect in concluding that Pratt had “proclaimed . . . that it had used some *particular method*.” At best, Pratt provided a general description of how it had arrived at its estimates.

Equally disturbing is the court’s failure to understand that government contract estimating is as much art as it is science, and that the contractor has significant discretion in determining the prices it will offer to sell goods and services to the government:

Pratt’s upper management had decided upon a proposal strategy that would make it financially difficult for the Air Force to split the award of engines between Pratt and GE. . . . Pratt wanted to make the prices it offered for any quantity of engines less than

a 100% award much higher than the prices if the award was not split between GE and Pratt. . . .

The strategy to make the price for an award of less than 100% of the engines to be delivered, however, was complicated by the fact that Pratt's price had to be the sum of its expected cost, plus a reasonable profit. . . . One way around this, however, was in the estimation of inflation and the prediction of Pratt's ability to negotiate lower prices in later years of the contract, referred to as "decrements." Pratt decided to overstate its engine price by means of these factors, but offered an exceedingly attractive price for the warranty on the engines if 100% of the contract was awarded to it. *Id.* at \*5-6 (all emphasis added).<sup>15</sup>

Neither TINA nor any other law or regulation required Pratt's price to be the sum of its expected cost, plus a reasonable profit. The ASBCA put the matter succinctly in its rejection of the government's defective pricing allegations:

*One would think that any contractor with the desire to obtain a contract award would use credible, historical cost data so as to demonstrate to the government that its proposed price is consistent therewith. However this is a matter for the contractor to decide, and for the Government to evaluate as part of the proposal review process, and is not a mandate under TINA.* 04-1 BCA at 161,024 (all emphasis added).

While a contractor cannot lie to the government in its proposal, and in appropriate cases must provide current, complete, and accurate cost or pricing data, the contractor generally has complete discretion to determine the prices at which it is willing to sell goods and services to the government.

### Implications of *United Technologies* after FAR 52.203-13

The recent changes to FAR 52.203-13 and FAR Subpart 9.4 complicate a contractor's position after *United Technologies*. The court's decision, standing alone, means that the government can use the civil FCA to scrutinize a contractor's proposals and estimates for "falsity" much like the government now uses the Truth in Negotiations Act to scrutinize a contractor's cost or pricing data for "disclosure." Accordingly, contractors would be well advised to make certain that their proposals clearly state the particular methods by which they arrive at particular estimates, or clearly state that the proposals only contain general descriptions of the methods used or the information on which the estimates and prices are predicated.

The newly amended FAR 52.203-13<sup>16</sup> may compel such explanations in proposals. FAR 52.203-13(c)(2)(i) states:

- (c) Business ethics awareness and compliance program and internal control system . . . *The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:*
  - (2) *An internal control system.*
    - (i) *The Contractor's internal control system shall—*
      - (A) *Establish standards and procedures to facilitate timely dis-*

*covery of improper conduct* in connection with Government contracts; and

- (B) *Ensure corrective measures are promptly instituted and carried out.* (all emphasis added).

This provision requires the contractor to establish an internal control system with "procedures to facilitate timely discovery of improper conduct in connection with Government contracts." Although the court's factual and legal analysis in *United Technologies* is erroneous, the decision highlights a risk area about which contractors must be concerned—estimates and statements in proposals. Contractors must establish procedures to ascertain that no "improper conduct"<sup>17</sup>—such as arguably inaccurate assertions—occurs with regard to proposals and estimates.<sup>18</sup> Taken together, *United Technologies* and FAR 52.203-13 mean that contractors should have procedures to guarantee that statements in proposals are indisputable.

The more interesting question raised by FAR 52.203-13 in the context of the *United Technologies* case, however, relates to the mandatory disclosure requirement. FAR 52.203-13(c)(2)(ii)(F) states:

- (ii) At a minimum, the Contractor's internal control system shall provide for the following:

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- (F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).


Taking the facts of the *United Technologies* case and the court's decision that Pratt had violated the civil FCA, at what point did Pratt have "credible evidence" that an employee had violated the civil FCA such as to require "timely disclosure"? Did Pratt have "credible evidence" when it exercised its judgment in arriving at decrement, escalation, and engineering change positions that differed from the government's chosen methods? After *United Technologies*, will "credible evidence" requiring mandatory disclosure include a contractor's decision not to use *only* the "most current" data to substantiate its proposal? One can surmise that, in the future, the government may argue a violation of FAR 52.203-13 whenever a civil FCA case is decided against a contractor, or perhaps whenever a civil FCA complaint is filed, without a contractor's "timely disclosure."<sup>19</sup>

The problem created by overlaying FAR 52.203-13 onto *United Technologies* is that contractors will be required to make a mandatory disclosure whenever they have "credible evidence" of a violation of the court-imposed "implied assertion." The erroneous legal standard underlying the court's decision is "that the expression of an opinion [*i.e.*,

an estimate or a description in a proposal of the estimating process] may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it.” With each estimate in a proposal, therefore, a contractor would impliedly assert that it knows no facts that would preclude the estimate, and knows facts that justify the estimate. Such a requirement is highly problematic because two estimates for the same work, by their nature, can vary depending on the factual basis selected by the estimators, as well as underlying assumptions. In short, for any estimate, some facts contained in the cost or pricing data will be supportive while other facts will not.

If a contractor states in a proposal that it “used” or “considered” the most current cost or pricing data, or that the proposal “reflects” the most current data, the implied assertion turns those general statements into absolutes—the contractor *only* used or considered the most current data, and the proposal *only* reflects the most current data. This is so because the contractor, using the district court’s erroneous logic in *United Technologies*, impliedly asserts that it knows no facts to preclude and does know facts to justify that current cost or pricing data were used, considered, or reflected. Such an interpretation clearly results in an unworkable standard for both the contractor and the government.

## Conclusion

The purpose of the Truth in Negotiations Act is to set the negotiating parties on a level field with respect to factual information, and permit each party to perform its own analysis to arrive at judgments respecting price. The ASBCA correctly rejected the government’s “failure to use” theory. The district court’s interpretation of the requirements of the Truth in Negotiations Act, especially the function of the Certificate of Current Cost or Pricing Data, was legal error, as was the court’s finding of an “implied assertion.” FAR 52.203-13 should require a contractor to have internal controls for gathering and providing to the government current, complete, and accurate cost or pricing data so that the government can effectively analyze a contractor’s proposal and estimates. It should not require a contractor to implement an internal control system guaranteeing that each estimate in a proposal conforms to some government notion of accuracy. 

## Endnotes

1. The government, as the appellant, filed its initial brief with the Sixth Circuit on February 25, 2009. At the time this article was written, *United Technologies’* initial brief was due on April 27, 2009; the government’s reply brief was due on May 27, 2009, and *United Technologies’* reply brief was due on June 10, 2009.

2. The source selection was conducted under Air Force Regulation 70-15, which meant that adequate price competition was considered not to exist, permitting the government to require certified cost or pricing data.

3. The government filed its first complaint in the civil FCA action on March 3, 1999; the contracting officer’s final decisions that led to the ASBCA litigation were dated January 16, 1998; August 23, 2000; and March 20, 2001. Compare 2008 U.S. Dist. LEXIS

61199 at \*24 with *United Technologies Corp.*, ASBCA Nos. 51410 *et al.*, 04-1 BCA ¶ 32,556 (Fact Finding 70), *recon. granted*, 05-1 BCA ¶ 32,860, *aff’d sub nom. Wynne v. United Technologies Corp.*, 463 F.2d 1261 (Fed. Cir. 2006). Originally, the ASBCA decided that Pratt had engaged in defective pricing, but that the government’s damages were offset by cost understatements. On reconsideration, the ASBCA agreed with Pratt that the government had not relied on the defective cost or pricing data, affording a defense to the government’s claim; the Federal Circuit affirmed the ASBCA.

4. *United Technologies*, 04-1 BCA at 161,017-19.

5. *Id.* at 161,024 (emphasis added).

6. The original ASBCA decision is dated February 27, 2004. The government filed its Third Amended Complaint in the civil FCA case by December 18, 2004, and the court’s opinion states, “This matter came before the Court from October 12, 2004 until April 15, 2005, for a bench trial.” 2008 U.S. Dist. LEXIS 61199 at \*1, \*24.

7. *United Technologies*, 255 F. Supp. 2d at 782-83 (emphasis added).

8. The court made the same mistake in a later pretrial decision on *United Technologies’* motion in limine. See *United Technologies*, 255 F. Supp. 2d at 788-89 (court describes *United Technologies’* proposals as “their certified initial proposals,” “its certified best and final offer,” “Pratt certified that its bid ‘reflects our best estimate . . .’”).

9. “The plain language of the [Truth in Negotiations] Act does not obligate a contractor to use any particular cost or pricing data to put together its proposal. Indeed, TINA does not instruct a contractor in any manner regarding the manner or method of proposal preparation.” The only effect of the certificate is “to certify that the [cost or pricing] data are accurate, current and complete.” 04-1 BCA at 161,024.

10. W. KEETON, PROSSER & KEETON ON TORTS, at § 109, p. 755 (5th ed. 1984). The quotation comes from Chapter 18, “Misrepresentation and Nondisclosure,” and a section entitled “Justifiable Reliance—Opinion and Intention.”

11. W. KEETON, at 760-61.

12. See, e.g., J. CIBINIC, R. NASH, J. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS at 125 (4th ed. 2006) (“The Truth in Negotiations Act (TINA) was added to the Armed Services Procurement Act in 1962 to improve the government’s ability to negotiate contracts and contract modifications by ensuring that the government has the same factual data as the contractor at the time of price negotiations.”); *Lockheed Martin Corp.*, ASBCA Nos. 50464, 51350, 02-1 BCA ¶ 31,784 at 156,942 (“The purpose of TINA is to establish a level field for price negotiations by requiring a prospective contractor to furnish factual cost or pricing data significant to the price negotiations known to it so that the contracting officer will have the same knowledge during negotiations”).

13. 2008 U.S. Dist. LEXIS 61199 at \*14-16.

14. *Id.* at \*27, \*36 (emphasis added).

15. The court also spoke of Pratt’s “artificially inflated price,” and Pratt’s “scheme to fudge their numbers . . . by making the individual engine prices artificially high.” *Id.* at \*28, \*32. The court also implied that Pratt had “certified” its prices, a misconstruction of TINA requirements. *Id.* at \*33.

16. See similar provisions in the newly amended FAR Subpart 9.4 concerning grounds for suspension and debarment.

17. Note that FAR 52.203-13 does not define “improper conduct,” although it would appear to differ from, and extend beyond, “violation” as used in other provisions of that regulation.

18. The government might allege the lack of such procedures as evidence of proposal submission with reckless disregard or deliberate ignorance of the truth or falsity of the proposal. 31 U.S.C. § 3729(b).

19. The more significant risk is in FAR 9.406-2 and 9.407-2. Those provisions state that a cause for debarment and suspension, respectively, is “knowing failure by a principal . . . to timely disclose to the Government . . . credible evidence of” the same violations listed in FAR 52.203-13(c)(2)(ii)(F) and “significant overpayment(s) on the contract. . . .”