PROOF OF DETRIMENTAL RELIANCE ON DEFECTIVE DATA: AN UNDUE BURDEN UNDER THE TRUTHFUL COST OR PRICING DATA (TRUTH IN NEGOTIATIONS) ACT PERPETUATING WASTEFUL SPENDING ON DEPARTMENT OF WAR SOLE-SOURCE ACQUISITIONS

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I. The Need to Strengthen Defective Pricing Enforcement to Prevent Wasteful Spending

In fiscal year 2022, the Department of War (DoW) [1] awarded a staggering 175 billion dollars to contractors without competition.[2] This figure represents over 40 percent of the DoW's total contracting dollars expended in fiscal year 2022, [3] making sole-source contracting big business for the DoW. Absent competition, the government relies on the Truthful Cost or Pricing Data (Truth in Negotiations) Act (the "Act") to

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[1] On September 5, 2025, President Donald J. Trump signed Executive Order 14347 changing the name of the Department of Defense to the Department of War as a secondary title. Restoring the United States Department of War, 90 Fed. Reg. 43893 (Sept. 10, 2025).

[2] The Competition Standard Report in the SAM.gov Data Bank for the period from October 1, 2021, through September 30, 2022, reflects $175,804,583,417.25 in Department of War (DoW) "not competed dollars" out of $414,375,789,421.42 total dollars awarded (42.4264% "not competed dollars"). Competition Standard Report, SAM.GOV, https://sam.gov/reports/awards/standard/6602777D47E8D7A60F47429224E50CA5/view [https://perma.cc/3PVC-3WMM] (search date range from "10/1/2021" to "9/30/2022"; then search organization "9700 – DEPT OF DEFENSE") (last visited Jan. 16, 2026). The report includes all contract actions (i.e., new awards and modifications to existing awards) but does not include actions where the "Other Than Full and Open Competition" value is under the "Micro Purchase Threshold." *Id*. The Competition Standard Report appendix provides additional limitations and explanations on the data. *Id.*

[3] The DoW did not compete 42.4264% of total obligations in fiscal year 2022. *Id.*

establish a fair and reasonable price.[4] The Act requires contractors under certain sole-source acquisitions to provide certified cost or pricing data during negotiations to allow the government to determine price reasonableness.[5]

By enacting this legislation, Congress sought to "avoid excessive contract costs" resulting from contractors possessing accurate, complete, and current data not available to the government by requiring contractors to disclose this information during negotiations.[6] The intent is to give the government "information parity or equal footing with contractors"[7] and to provide the government with recourse against contractors when they fail to comply. When a contractor submits defective cost or pricing data, the government may adjust applicable contracts "to exclude any significant amount by which it may be determined by the head of the agency that such price was increased" because of the defective pricing.[8] The Act serves a necessary, two-fold purpose—to promote fair negotiations and to recover excessive, unearned profits. As currently written, however, the Act is ineffectual in meeting that purpose.

Throughout the Act's history, government representatives and scholars have recognized the importance of the statute but criticized its effectiveness in recovering excessive profits.[9] In his 1986 testimony to the Acquisition and Procurement Policy Panel of the House Committee on Armed Services, then-acting Department of Defense Deputy Inspector General Derek J. Vander Schaaf supported proposed legislation to

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[4] Truthful Cost or Pricing Data (Truth in Negotiations), 10 U.S.C. §§ 3701–3708. The civilian counterpart, Truthful Cost or Pricing Data, is codified at 41 U.S.C. §§ 3501–3509.
[5] 10 U.S.C. § 3702; FAR 15.403-4(b)(1) (2025).
[6] M-R-S Mfg. Co. v. United States, 492 F.2d 835, 842 (Ct. Cl. 1974).
[7] *Acquisition Reform–1986: Hearings Before the Acquisition and Procurement Pol'y Panel of the H. Comm. on Armed Services*, 99th Cong. 520 (1986) [hereinafter *Acquisition Reform–1986*] (statement of Donald J. Kinlin, Chief Trial Attorney, Air Force Contract Law Center, Wright-Patterson Air Force Base, OH).
[8] 10 U.S.C. § 3706(a)(1). The government may also reduce the contract price if a subcontractor "required to make available such certificate" submits defective pricing that causes an increase to the price. *Id.*
[9] As early as 1968, critics identified shortcomings with the statute. *See, e.g.*, Michael J. Graetz, *The Truth-in-Negotiations Act–An Examination of Defective Pricing in Government Contracts,* 54 VA. L. REV. 505 (1968) (discussing the legislative history of the Truth-in-Negotiations Act, Pub. L. No. 87-653, originally codified at 10 U.S.C. § 2306(f) (1964), and suggesting, among other things, that Congress remove the causation requirement from the statute).

strengthen the law.[10] Mr. Vander Schaaf stressed that the "Truth in Negotiations Act is the best means the Government has to prevent contractors from reaping unearned or excessive profits."[11] He noted, however, that defective pricing audits must be performed "within the framework of an effective law" and urged Congress to amend the statute to make the law more effective in preventing and recovering excessive profits in sole-source acquisitions.[12]

Despite many government-favorable statutory changes in 1986, Congress buckled on this issue of detrimental reliance and would not agree to a strict liability standard for a contractor's defective pricing.[13] Rather, Congress provided contractors with a statutory defense. Contractors can defend a defective pricing claim by showing that the government did not rely on the defective data.[14] Although the government benefits from a presumption of reliance,[15] contractors easily rebut the presumption. The statutory defense decimates the law's effectiveness in preventing and recouping contractors' "unearned or excessive profits."[16] Absent specific documentation and government negotiating party testimony, the government generally cannot prove it relied upon defective data even

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[10] *Acquisition Reform–1986*, *supra* note 7, at 429. Congressman John M. Spratt, with Congressman Nicholas Mavroules, introduced legislation in 1986 to amend the Truth in Negotiations Act "to improve control of the cost of Department of Defense contracts" to strengthen the "[p]revention of [u]nearned and [e]xcessive [c]ontractor [p]rofits." Truth in Negotiations Amendments of 1986, H.R. 4548, 99th Cong. (1986). The bill proposed a conclusive presumption of government reliance on the contractor's defective cost or pricing data. *Id.* Senator William V. Roth, Jr. introduced similar legislation of a conclusive presumption of reliance in the Senate. Defense Procurement Program Integrity Act of 1985, S. 940, 99th Cong. (1985).

[11] *Acquisition Reform–1986, supra* note 7, at 442 (statement of Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense).

[12] *Id.* at 430.

[13] The statute, as amended in 1986, provided no conclusive presumption of government reliance. Truth-in-Negotiations Act Amendments, Pub. L. No. 99-661, 100 Stat. 3945 (1986) (codified as amended at 10 U.S.C. § 2306a). Also, the current version of the Act provides no conclusive presumption of government reliance. 10 U.S.C. §§ 3701–3708.

[14] The statute, as amended in 1986, added the contractor's defense that the government did not rely on the defective data. Truth-in-Negotiations Act Amendments, Pub. L. No. 99-661, 100 Stat. 3945 (1986) (codified as amended at 10 U.S.C. § 2306a(d)(2) (1986)). This statutory defense remains in the current version of the Act. 10 U.S.C. § 3706(b).

[15] Alloy Surfaces Co., Inc., ASBCA No. 59625, 20-1 BCA ¶ 37,574, 182,446 (citing Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342, 1349 (Ct. Cl. 1973)).

[16] *Acquisition Reform–1986, supra* note 7, at 442 (statement of Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense).

when an audit report clearly shows the contractor defectively priced its proposal.[17] Thus, the contractor retains its excessive profits despite noncompliance with the Act's disclosure requirements.

The overly burdensome element of detrimental reliance jeopardizes the single recourse available to the government to counter contractor windfalls.[18] Because no other statute currently exists to recoup excessive costs,[19] the Act remains critical legislation to prevent wasteful spending. Congress should, however, amend the Act to make it more effective by eliminating the government's burden to prove detrimental reliance and holding contractors strictly liable for defective pricing.

This article discusses the problem of including detrimental reliance in the Act as it affects the DoW. It does not address fraudulent disclosures or other aspects of the Act that Congress could improve to encourage

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[17] *See, e.g.*, Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,700 (sustaining contractor's appeal where the government failed to provide affidavits from principal negotiators to prove reliance); Boeing Co., ASBCA No. 20875, 85-3 BCA ¶ 18,351 (sustaining appeal and finding no defective pricing concerning certain labor costs where the government did not provide testimony or a post-hearing brief addressing inconsistency); Wynne v. United Techs. Corp., 463 F.3d 1261 (Fed. Cir. 2006) (affirming Armed Services Board of Contract Appeals decision to sustain appeals where the government failed to offer evidence of reliance when the burden shifted back to the government).

[18] For example, in a recent defective pricing decision from the Armed Services Board of Contract Appeals, the Army claimed $15,920,212 plus interest for defective pricing but recovered nothing when the Board sustained the contractor's appeal in part because the government could not demonstrate reliance. Alloy Surfaces Co., Inc., ASBCA No. 59625, 20-1 BCA ¶ 37,574, 182,446. The Army alleged that when negotiating delivery order 14, the contractor failed to disclose delivery order 13 job cost data, which included newly automated manufacturing processes for M211 infrared countermeasure decoy flares. *Id.* at 182,434. The Board held that the delivery order 13 job sheets did not constitute certified cost or pricing data because the job sheets lacked the "requisite degree of certainty." *Id.* The Board further held "that the Army fully was aware of the effect of automation on the pricing for the flares, but chose instead to rely on manufacturing data from earlier, non-automated jobs." *Id.*

[19] Mr. Vander Schaaf stressed to the House Committee on Armed Services' Acquisition and Procurement Policy Panel that "defective pricing is the government's last recourse for recouping profits for which contractors are not entitled, since we no longer use the renegotiation process," which process he found ineffective. *Acquisition Reform–1986*, *supra* note 7, at 430 (statement of Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense). This remains true today; there is currently no renegotiation statute or other means to recover excess costs or profits from contractors except through the Act. *See* DAVID Z. BODENHEIMER, DEFECTIVE PRICING HANDBOOK 28 (2019-2020 ed. 2019) (recognizing the limitation of recovery for defective pricing to matters occurring during negotiation rather than after price agreement and award).

compliance and reduce government costs. Part II of this article begins with an overview of the process to achieve a level playing field in sole-source negotiations and to recover losses from defective pricing, followed by a discussion in Part III on how requiring proof of detrimental reliance undermines the government's ability to recover excessive profits. Part IV recommends that Congress amend the Act to align with its original purpose to promote fair negotiations and "to avoid excessive contract costs"[20] by imposing a strict liability standard. Part V provides DoW interim solutions to improve the government's position in demonstrating reliance until Congress amends the Act to capture its purpose more fully.

II. The Process to Achieve a Level Playing Field and Recover Excessive Profits

A. The Act's Application and Scope

In a sole-source contracting environment, the contractor holds a sizeable bargaining position during contract negotiations, for which the government often pays the (high) price. In 1962, following General Accounting Office[21] reports evidencing overpriced contracts and excessive contractor profits, Congress enacted the Truth-in-Negotiations Act to promote fairness in negotiations.[22] The statute provides the government with greater access to contractor information used in developing contractor cost or price proposals. Following several amendments throughout its history,[23] the Act currently requires, unless an exception applies, heads of agencies to obtain cost or pricing data from contractors when a contract will likely exceed $2,500,000.[24] Cost or

[20] M-R-S Mfg. Co. v. United States, 492 F.2d 835, 842 (Ct. Cl. 1974).

[21] In 2004, the General Accounting Office changed its name to the Government Accountability Office. *History*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, https://www.gao.gov/about/what-gao-does/history [https://perma.cc/LFA8-XMR7] (last visited Nov. 12, 2025).

[22] Graetz, *supra* note 9, at 509.

[23] *See* BODENHEIMER, *supra* note 19, at 17–25 (providing a history of the Act and its amendments).

[24] While 10 U.S.C. § 3702(a)(1)(A) reflects $2,000,000, inflation adjustments in 2025 pursuant to 41 U.S.C. § 1908 increased the threshold to $2,500,000. Federal Acquisition Regulation: Inflation Adjustment of Acquisition-Related Thresholds, 90 Fed. Reg. 41872 (Aug. 27, 2025). The requirement to obtain certified cost or pricing data unless an

pricing data are "facts" that prudent parties "would reasonably expect to affect negotiations significantly," including facts relied upon in making judgments as to cost or price.[25]

The Act's application extends beyond prime contracts and initial awards to include subcontracts and modifications to prime contracts and subcontracts. The Act requires subcontractors to disclose cost or pricing data when the expected subcontract value may exceed $2,500,000, and the government requires the prime contractor and higher-tier subcontractors to make cost or pricing data available.[26] The disclosure requirement further extends to contract modifications with expected price adjustments over $2,500,000.[27]

Although the Act applies to contracts, subcontracts, and modifications, its numerous exceptions narrow its application significantly. Among these exceptions are contracts, subcontracts, and modifications where the price is based on adequate price competition[28] or prices prescribed by law or regulation; where the acquisition is for commercial products or services; where the head of the agency provides a waiver for an exceptional case; and when the data relate to an offset agreement in connection with foreign military sales.[29]

The Act's restricted scope further limits its application. As the Act's title indicates, defective pricing only concerns truth, or fairness, during

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exception applies for contracts exceeding $2,500,000 applies to contracts executed on or after July 1, 2018. FAR 15.403-4 (2025). For contracts executed before July 1, 2018, the threshold is $950,000. *Id.* Unless an exception applies, contracting officers must obtain cost or pricing data and include a clause permitting an adjustment to the contract price to remove "any significant amount" that the head of the agency determines increased the contract price because the contractor or subcontractor submitted defective cost or pricing data. 10 U.S.C. § 3706(a)(1). Such price reduction includes any profit or fee. *Id.* In accordance with this requirement, FAR 15.408 prescribes several clauses that the contracting officer must include in solicitations and contracts to facilitate price reductions for defective pricing. FAR 15.408(b)–(e) (2025).

[25] 10 U.S.C. § 3701(1). Cost or pricing data "does not include information that is judgmental, but does include the factual information from which a judgment was derived." *Id*.

[26] *Id.* § 3702(a)(3) (as amended by 41 U.S.C. § 1908).

[27] *Id.* §§ 3702(a)(2), (a)(4) (as amended by 41 U.S.C. § 1908).

[28] Recognizing the overly broad exceptions to the Act, Representative John Garamendi and Senator Elizabeth Warren proposed bicameral legislation in June 2022 to expand the Act's application to require the submission of cost or pricing data for all cost-reimbursement type contracts, "regardless of the number of offers received." Stop Price Gouging the Military Act, H.R. 8007, 117th Cong. (2022); S. 4374, 117th Cong. (2022).

[29] 10 U.S.C. § 3703(a).

negotiations,[30] and only concerns cost or pricing data. The Act does not provide a means for adjusting the contract price simply because a contractor receives greater profits than the government anticipated when negotiating the contract. The Armed Services Board of Contract Appeals (ASBCA) has outlined the Act's limitations, holding that the "defective pricing clause is not a vehicle for repricing a contract which is deemed unreasonably high-priced." [31] In addition, the Federal Acquisition Regulation (FAR) specifically prohibits the contracting officer from repricing a contract "*solely* because the profit was greater than forecast or because a contingency specified in the submission failed to materialize."[32]

The Act, then, limits contract price reductions to those situations where the parties were not on "equal footing" [33] during negotiations because the contractor submitted inaccurate, incomplete, or noncurrent cost or pricing data, and such defective data caused "any significant" increase in the cost of the contract. [34] In such circumstances, the government can modify the contract to reflect a reduction in the contract price. [35] Because of the Act's limited purview and because no other statutory basis exists to recover contractors' excessive profits resulting from negotiations or otherwise, contracting officers and their supporting legal advisors must possess a strong understanding of defective pricing law to ensure the government recoups excess costs resulting from contractor noncompliance with the Act.

B. The Contractor's Duty to Disclose Cost or Pricing Data

For procurements subject to the Act, contractors must submit cost or pricing data with their cost or price proposals and certify to its accuracy,

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[30] BODENHEIMER, *supra* note 19, at 28.
[31] Alloy Surfaces Co., Inc., ASBCA No. 59625, 2020-1 BCA ¶ 37,574, 182,448 (citing Luzon Stevedoring Corp., ASBCA No. 14851, 71-1 BCA ¶ 8745, 40,604).
[32] FAR 15.407-1(c) (emphasis added).
[33] *Acquisition Reform–1986, supra* note 7, at 520 (statement of Donald J. Kinlin, Chief Trial Attorney, Air Force Contract Law Center, Wright-Patterson Air Force Base, OH).
[34] 10 U.S.C. § 3706(a)(1). Defective pricing takes many forms. Perhaps the most basic example of defective pricing occurs when a contractor fails to disclose the most current vendor quotation for material it intends to buy. If, during a post award audit, auditors discover a vendor quotation that the contractor possessed but did not disclose to the government during negotiations, this nondisclosure may constitute defective pricing provided the government can prove all elements of its prima facie case.
[35] *See, e.g.*, FAR 52.215-10(a).

completeness, and currency. While contracting officers retain discretion in determining proposal format when contractors submit proposals requiring cost or pricing data, contractors generally must follow the instructions at FAR 15.403-5(b)(1) and FAR 15.408, Table 15-2.[36] Regardless of format, the "responsibility for providing adequate supporting data lies solely with the contractor."[37] Contractors must establish the basis for their pricing and identify the source of the item, the quantity, and the price.[38] The contractor's "basis and rationale for all proposed costs should be provided as part of the proposal so that the government can place reliance on the information as current, complete, and accurate."[39] FAR 15.408, Table 15-2 requires contractors to provide general information, a breakdown of basic cost elements, and line item summaries[40] to facilitate government proposal evaluation and ensure contractor compliance with the Act. In addition to these requirements, DoW contractors must also complete a proposal adequacy checklist in accordance with Defense Federal Acquisition Regulation Supplement (DFARS) 252.215-7009 when submitting cost or pricing data "to facilitate submission of a thorough, accurate, and complete proposal."[41] Shortly after agreement on price but before contract award, the contractor must submit to the government a Certificate of Current Cost or Pricing Data, certifying to the best of the contractor's knowledge the accuracy, completeness, and currency of its cost or pricing data disclosure.[42]

C. The Government's Duty to Determine Defective Pricing

Generally, the government discovers defective pricing during a post-award audit, long after the parties completed negotiations and even after

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[36] FAR 15.403-5(b)(1), 15.408 tbl. 15-2.
[37] DEF. CONT. AUDIT AGENCY, U.S. DEP'T OF DEF., DCAA MANUAL NO. 7641.90 encl. 4, 25 (2023) [hereinafter DCAAM No. 7641.90]; *see also* DEF. CONT. AUDIT AGENCY, U.S. DEP'T OF DEF., ELEMENTS OF AN ADEQUATE PROPOSAL, https://www.dcaa.mil/Portals/88/ElementsOfAnAdequateProposal.pdf [https://perma.cc/4L5A-B3YR] (last visited Jan. 22, 2026) (providing high-level guidance and examples of adequate and inadequate proposal elements).
[38] FAR 15.408 tbl.15-2.
[39] DCAAM No. 7641.90, *supra* note 37.
[40] FAR 15.408 tbl.15-2. Specifically, contractors must provide the basis for materials and services, direct labor, indirect costs, royalties, and facilities capital cost of money. *Id.*
[41] DFARS 215.408(4).
[42] FAR 15.406-2(a); DFARS PGI 215.406-2(c)(i)(A).

completion of contract performance.[43] The Defense Contract Audit Agency (DCAA) conducts defective pricing audits for the DoW, and DCAA's Contract Audit Manual outlines audit guidance and procedures for conducting these audits.[44] The guidance requires auditors to address and satisfy "five points" in a defective pricing audit before recommending a price adjustment to the contracting officer.[45] Auditors must demonstrate in the defective pricing audit that: (1) the questioned information is cost or pricing data, as defined in the FAR; (2) accurate, complete, and current data were both in existence and reasonably available before the parties' price agreement; (3) the contractor did not submit or disclose accurate, complete, and current data to the contracting officer or an authorized representative, and the contracting officer or authorized representative had no actual knowledge of the data or its significance; (4) the government relied on that defective data during negotiations; and (5) the government's reliance resulted in an increase in the price.[46]

Per FAR 15.407-1(d), upon receipt of a defective pricing audit, the contracting officer must independently determine whether the contractor submitted defective data and whether the government relied upon it.[47] The contracting officer must consider "the time by which the certified cost or pricing data became reasonably available to the contractor and the extent to which the Government *relied* upon the defective data" in deciding whether to adjust the contract price.[48] To make this determination, the contracting officer must independently review the audit to ensure accurate facts substantiate the audit recommendations. The contracting officer should thoroughly review the original negotiation documents and audit working papers. The contracting officer should discuss aspects of the negotiation with the original government negotiators, consult with the

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[43] *But see* FAR 15.407-1(a) ("If, before agreement on price, the contracting officer learns that any certified cost or pricing data submitted are inaccurate, incomplete, or noncurrent, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price.").

[44] DEF. CONT. AUDIT AGENCY, U.S. DEP'T OF DEF., DCAA CONTRACT AUDIT MANUAL NO. 7640.1 para. 14-100 (2025) [hereinafter DCAAM NO. 7640.1]. DCAA refers to defective pricing audits as "Truth in Negotiation compliance audits," or "TIN" audits, based on the original statute title, Truth in Negotiations. *Id.* para. 14-103.

[45] *Id.* para. 14-102(b).

[46] *Id.*

[47] FAR 15.407-1(d).

[48] *Id.* 15.407-1(b)(2) (emphasis added).

contractor,[49] and collaborate with the DCAA auditor(s), the Defense Contract Management Agency (DCMA) financial liaison(s), and the field-level legal advisor before making a determination of defective pricing.[50]

For the Army, field attorney involvement typically commences late in the process when the contracting officer receives the finalized audit. The contracting officer's legal advisor usually reviews the final audit concurrently with the contracting officer. Upon receiving the audit, the field attorney should request and review the audit working papers, review the underlying negotiation documents, assist the contracting officer in identifying other relevant documentation and witnesses not identified in the audit working papers, and discuss the prior negotiations and audit findings with available government negotiating parties and auditors. The field attorney ultimately provides the contracting officer with a determination of whether any alleged defective pricing claim would likely withstand judicial or administrative scrutiny if appealed by reviewing the facts against the elements of proof.[51] The field attorney usually provides the written legal review in response to the contracting officer's written audit disposition determination. Because Army policy restricts a contracting officer from issuing a defective pricing Contracting Officer's Final Decision (COFD) if the advising attorney determines that the government would not likely prevail in litigation,[52] the legal review serves an integral part of the defective pricing disposition.

When the government finds defective pricing exists, and the contractor will not settle or enter into a tolling agreement to allow sufficient time to

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[49] Before the contracting officer makes the determination required under FAR subsection 15.407-1(d), the FAR provides that the contracting officer should allow the contractor an opportunity to demonstrate that the data in question is accurate, complete, and current. *Id.* 15.407-1(d). This opportunity for the contractor to show compliance with the Act promotes resolution of audit findings and should occur early in the process so that the contracting officer can discharge nonviable claims or begin settlement discussions on claims with merit.

[50] OFF. OF DEPUTY ASSISTANT SEC'Y OF ARMY (PROCUREMENT), U.S. DEP'T OF ARMY, DEFECTIVE PRICING GUIDE para. 3.0(B) (14 May 2020). Pre-coordination with the auditor, DCMA, and the legal advisor during the evaluation of the claim and prior to submitting a memorandum finding no defective pricing and/or reliance may prevent dismissing an otherwise meritorious claim.

[51] The advising attorney must determine whether the government possesses sufficient evidence to prove all elements of defective pricing for each recommended price adjustment in the audit. OFF. OF DEPUTY ASSISTANT SEC'Y OF ARMY (PROCUREMENT), U.S. DEP'T OF ARMY, DEFECTIVE PRICING GUIDE para. 3.0(B) (14 May 2020).

[52] *Id.*

settle before the Contract Disputes Act (CDA)[53] six-year statute of limitations expires,[54] the contracting officer will issue a COFD, formalizing the government's defective pricing claim.[55] In preparation for issuing the COFD and to ensure the preservation of evidence in the event of an appeal, the contracting officer should collect all relevant documents from government negotiating parties and auditors and retain those documents in the contracting file. Once issued, the COFD is final and conclusive, and the contractor cannot challenge the COFD unless the contractor timely appeals that decision.[56]

D. The Contractor's Right to Appeal the Contracting Officer's Final Decision

When the contractor disputes its liability under the Act, the contractor will appeal the COFD. Contractors have two avenues of recourse under the CDA. DoW contractors may appeal defective pricing COFDs to the ASBCA within 90 days of the COFD issuance, or they may commence an action directly on the claim in the Court of Federal Claims (COFC) within one year of the COFD issuance.[57]

If appealed, the government must prove three elements by a preponderance of the evidence:

> First, the government must establish that the information at issue is "cost or pricing data" within the meaning of [Truth in Negotiations Act]. Second, the government must show that the cost or pricing data was either not disclosed or not meaningfully disclosed to a proper government representative. Third, it must demonstrate

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[53] Contract Disputes Act, 41 U.S.C. §§ 7101–7109.
[54] *Id.* § 7103(a)(4)(A).
[55] *Id.* § 7103(a)(3) ("Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.").
[56] *Id.* § 7103(g) ("The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter.").
[57] *Id*. § 7104. The Armed Services Board of Contract Appeals serves as the applicable administrative board for DoW claims and appeals. *Id.* at § 7105.

detrimental reliance on the defective data.[58]

The government's prima facie case appears simple, but complex facts complicate the government's proof of each of these elements. The third element regarding detrimental reliance has proven especially difficult for the government to establish once rebutted.

Recognizing the government's difficulty in recovering for defective pricing, Congress amended the statute in 1986 to improve the government's ability to recoup defective pricing losses and to encourage contractor compliance.[59] The Act now specifically identifies certain invalid defenses. Contractors cannot defend a defective pricing claim by arguing that the price would not have been altered even if the contractor had provided accurate, complete, and current cost or pricing data because the contractor was the sole-source provider or was in a superior bargaining position.[60] Further, claiming that the contracting officer "should have known" the defective nature of the cost or pricing data when the contractor or its subcontractor failed to take affirmative action to alert the contracting officer to the data's character is not a defense.[61] Contractors also cannot defend a defective pricing claim on the basis that the contract was based on total cost (i.e., bottom-line negotiations) rather than based on the cost of each item (i.e., element-by-element negotiations).[62] Finally, contractors may not assert as a defense their failure to submit a certificate of cost or pricing data.[63] In explicitly prohibiting these defenses, Congress attempted to address prior judicial and administrative interpretations of the statute that obstructed government success upon contractor appeal. Despite these government-friendly amendments to the Act, many contractors still defend against these claims easily. Congress can and should change this to enhance government recovery of excessive costs by removing detrimental reliance from the government's burden of proof.

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[58] Alloy Surfaces, *supra* note 15, at 182,443 (citing United States v. United Techs. Corp., 51 F. Supp. 2d 167 (D. Conn. 1999) and Wynne v. United Techs. Corp., 463 F.3d 1261, 1264 (Fed. Cir. 2006)).

[59] Truth-in-Negotiations Act Amendments, Pub. L. No. 99-661, 100 Stat. 3945 (1986) (codified as amended at 10 U.S.C. § 2306a).

[60] 10 U.S.C. §§ 3706(c)(1)(A)–(B).

[61] *Id.* § 3706(c)(2).

[62] *Id.* § 3706(c)(3).

[63] *Id.* § 3706(c)(4).

III. Proof of Detrimental Reliance Undermining the Government's Ability to Recover

A. The Statutory Defense that the Government Did Not Rely on the Defective Data

In attempting to strengthen the Act by eliminating certain contractor defenses, Congress simultaneously undermined the force of the Act by including the statutory defense. The Act provides that "it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor."[64] Although the government "is aided by a presumption that the non-disclosure of data resulted in an overstatement of the price of the contract,"[65] this rebuttable presumption does little to assist the government in recovering excessive profits. The government retains the ultimate burden of proving "it relied upon the defective data to its detriment in agreeing to the contract price" when the contractor rebuts the presumption.[66]

As was noted a few years after Congress enacted the original statute, proving causation, or that the government relied to its detriment upon defective data that ultimately caused a price increase, "has been one of the more troublesome requirements of the Act."[67] Sixty years after the original statute's enactment, proof of detrimental reliance remains problematic. The Act requires disclosure. Yet, if a contractor fails to disclose accurate, complete, and current cost or pricing data, that contractor can avoid liability for its noncompliance by rebutting government reliance and, by implication, the cause of an increased contract price. The government recovers nothing in these instances. Rather, the government loses those excessive contractor profits resulting from the contractor's failure to

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[64] *Id.* § 3706(b).

[65] Alloy Surfaces Co., Inc., ASBCA No. 59625, 2020-1 BCA ¶ 37,574, at 182,443 (citing Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342, 1349 (Ct. Cl. 1973)); *see also* Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342, 1349 (Ct. Cl. 1973) ("[I]t is reasonable to assume that the government negotiators relied upon the data supplied by the contractor and that this data affected the negotiations.").

[66] Alloy Surfaces Co., 2020-1 BCA ¶ 37,574, at 182,443 (quoting Wynne v. United Techs. Corp., 463 F.3d 1261, 1263 (Fed. Cir. 2006)).

[67] Graetz, *supra* note 9, at 517. Graetz argues that the "total-price method," or bottom-line negotiations, and the time between negotiations and actual pursuit of price adjustments for defective pricing make it "virtually impossible to prove a causal connection between defective pricing data and the negotiated contract price." *Id.* at 521. Eliminating the causation requirement, Graetz argues, would "rid the Act of these impediments." *Id.*

disclose accurate, complete, and current cost or pricing data, as well as the time and cost to audit the contract and pursue the audit findings.[68]

B. The Government's Difficulties in Proving Detrimental Reliance

Although Congress premised the 1986 amendment on strengthening the prevention of unearned and excessive profits,[69] the inclusion of the statutory defense actually weakens the government's ability to recover those unearned and excessive profits. The government often cannot prove detrimental reliance despite an audit clearly showing defective pricing. Many factors impact proving detrimental reliance, but the DoW's primary problems can be categorized into three broad categories: delayed action in pursuing defective pricing claims, inadequate contemporaneous documentation evidencing reliance, and lack of field-level defective pricing expertise.

1. Delayed Action in Pursuing Defective Pricing Claims

Conducting audits toward the end or after the contract's period of performance, or not diligently pursuing audit findings when DCAA performs the audit earlier in the contract's period of performance, jeopardizes the government's chances for recovery.[70] The CDA provides that an action must be commenced within six years after the claim accrues.[71] A claim accrues on "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of

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[68] In its fiscal year 2021 report to Congress, the Defense Contract Audit Agency (DCAA) reported that its systems, Cost Accounting Standards (CAS), and Truth in Negotiations audits, together, netted a $0.13 return on investment (net savings per aggregate cost). DEF. CONT. AUDIT AGENCY, U.S. DEP'T OF DEF., DCAA REPORT TO CONGRESS ON FY 2021 ACTIVITIES 6 (Mar. 31, 2022) [hereinafter DCAA REPORT FY 2021]. DCAA noted, however, that these audits provide "long term value to the government without providing direct significant dollar savings." *Id.*

[69] Truth in Negotiations Amendments of 1986, H.R. 4548, 99th Cong. (1986).

[70] The "longer a case remains unsettled, the weaker the Government's position tends to become for a favorable settlement through either negotiation or litigation." *Defective Pricing Under the Truth-in-Negotiations Act: Hearing Before the S. Comm. on Governmental Affairs,* 98th Cong. 10 (1983) [hereinafter *Defective Pricing Under the Truth-in-Negotiations Act*] (testimony of James P. Viola, auditor, General Accounting Office staff).

[71] 41 U.S.C. § 7103(a)(4)(A).

the claim, were known or should have been known."[72] If the government discovers defective pricing during an audit conducted after or near the end of the contract's period of performance, the government could potentially pursue a defective pricing claim a decade or more after contract award.[73] By this time, government negotiating parties may no longer be available or may not remember specific negotiation aspects to support the government's theory of reliance on appeal.[74]

Because government negotiating party testimony is key to proving reliance, the sooner the government pursues these claims, the better its position in presenting this evidence. In most cases that found government reliance, a government negotiating party testified to support the claim.[75] Likewise, in many cases where the government failed to meet its burden of proving reliance, the government did not offer testimony.[76] The result of a key negotiating party witness's unavailability is clear. The

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[72] FAR 33.201.

[73] For example, in *Alloy Surfaces Co.,* the Army awarded a delivery order in August 2006. Alloy Surfaces Co., Inc., ASBCA No. 59625, 2020-1 BCA ¶ 37,574. The contracting officer determined the delivery order was defectively priced and issued a contracting officer's final decision in July 2014. *Id.* The Board ultimately determined in the contractor's favor in April 2020. *Id.*

[74] *See* Graetz, *supra* note 9, at 517 n.60 (acknowledging "hazy memories are inevitable" when substantial delays exist between negotiation and appeal).

[75] *See, e.g.,* Lockheed Martin Corp. d/b/a Sanders, ASBCA Nos. 50566, 51351, 51784, 02-2 BCA ¶ 31,907 (finding government reliance where government engineer and contracting officer testified that the contract price would have been reduced had the information been available during negotiations); McDonnell Douglas Helicopter Sys., ASBCA No. 50341, 99-2 BCA ¶ 30,546 (finding government relied to its detriment when government evaluator testified that information would have been considered had the contractor provided it during negotiations); Motorola, Inc., ASBCA No. 48841, 96-2 BCA ¶ 28,465 (finding reliance where credible testimony established facilities capital charge information would have affected negotiations if known); Singer Co., Librascope Div. v. United States, 576 F.2d 905 (Ct. Cl. 1978) (finding government reliance on noncurrent direct labor factors where procuring contracting officer testified that the contract price would have been lower and administrative contracting officer testified that the information would have been analyzed if provided).

[76] *See, e.g.,* Wynne v. United Techs. Corp., 463 F.3d 1261 (Fed. Cir. 2006) (finding no government reliance where government failed to offer evidence when the burden shifted back to government); Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770 (finding no government reliance where government failed to provide an affidavit from the key government negotiator, his supervisor, or the contracting officer to demonstrate how that data would have affected negotiations); Boeing Co., ASBCA No. 20875, 85-3 BCA ¶ 18,351 (finding no government reliance where government did not provide testimony or a post-hearing brief to clarify contradiction and ambiguity in government's position).

government will not likely prevail without that testimony. The likelihood of losing witnesses naturally increases the longer the government takes to proceed with investigating defective pricing and proceeding with those claims. Consequently, pursuing defective pricing claims a decade after negotiations wastes government resources unless the government has secured a (favorable) witness from the original negotiating party to testify as to the government's reliance on the defective data. The negative effects associated with the delayed pursuit of claims necessitate policy changes to ensure earlier action to position the government for success.

2. Inadequate Contemporaneous Documentation Showing Reliance

The government faces additional problems in meeting its burden of proof absent detailed, contemporaneous documentation showing reliance. In *United Technologies Corporation*, the ASBCA found on reconsideration that the government failed to prove reliance when the government provided no evidence showing it reviewed the appellant's best and final offer upon which it based its defective pricing claim.[77] Although other factors contributed to the ASBCA's decision, including the ASBCA discounting government testimony provided seventeen years after negotiations, the ASBCA found the contemporaneous documentation lacked detail on government reliance.[78] The agency's office instruction required that the Record of Acquisition Action discuss the cost and price information relied upon, but the document "did not discuss any specific [best and final offer] cost or pricing data relied upon by the [agency] price analyst and the cost panel."[79] Without adequate contemporaneous documentation, the government could not prove reliance.

Although contracting officers must establish prenegotiation objectives before negotiation, and, when using cost analysis, must document "pertinent issues to be negotiated, the cost objectives, and a profit or fee objective,"[80] the reliance documentation often lacks substance. The Army requires contracting officers to prepare a price negotiation memorandum "in sufficient detail to clearly establish all significant aspects of the

[77] United Techs. Corp., ASBCA Nos. 51410, 53089, 53349, 05-1 BCA ¶ 32,860, *aff'd* 463 F.3d 1261 (Fed. Cir. 2006).
[78] *Id.* at 162,812-13.
[79] *Id.*
[80] FAR 15.406-1(b).

contract action." [81] The Army's sample prenegotiation objective memorandum and sample price negotiation memorandum recommend including within these documents the degree or extent to which the government relied upon the contractor's certified cost or pricing data in negotiations.[82] Despite these requirements, the prenegotiation objectives memorandum and price negotiation memorandum typically lack specificity concerning reliance on cost or pricing data.[83]

A generic statement of government reliance, however, will not suffice to prove actual reliance. Contracting officers usually do not focus on future defective pricing claims when negotiating contracts and documenting those negotiations, as they concentrate primarily on closing the deal. This lack of emphasis on future defective pricing claims likely factors into the inadequate reliance documentation, and contracting officers should consider the possible impact that generic reliance statements without analysis may have down the road.

While this issue may seem easily rectifiable by simply adding more detail to these documents, the manner of negotiations affects the degree of detail available. For instance, large sole-source contract negotiations often end in bottom-line negotiations. In these situations, the government does not typically possess or retain details regarding each element making up that final bottom-line cost.[84] If negotiations move to the bottom line, the contracting officer may never have sufficient documentation to support reliance for a particular element of cost later found to be defectively priced.

Although the Act states that it is not a defense to a defective pricing

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[81] AFARS 5115.406-3(a).

[82] The Army's knowledge management portal, Procurement.Army.Mil (PAM), contains a sample prenegotiation objective memorandum and a sample price negotiation memorandum that include recommendations for addressing reliance on the contractor's certified cost or pricing data.

[83] During a 1983 Senate hearing discussing defective pricing, James P. Viola, the General Accounting Office staffer assigned to the Senate's Committee on Governmental Affairs, emphasized the problem with inadequate negotiation documentation, which remains a problem forty years later despite efforts to remedy the issue. Viola suggested that contracting officers provide "more detailed and supporting documentation organized to allow DCAA or other Government personnel to determine the amount negotiated and the basis for this amount." *Defective Pricing Under the Truth-in-Negotiations Act*, *supra* note 70, at 21–22 (testimony of James P. Viola, auditor, General Accounting Office staff).

[84] Graetz, *supra* note 9, at 517 (recognizing in 1968 the difficulty in determining the effect accurate data has on price because negotiations take place in a "give-and-take" environment).

claim that the parties reached an agreement based on the "total cost of the contract" rather than an agreement on "the cost of each item procured under such contract,"[85] this "invalid defense"[86] does little to remedy the government's difficulty in recovering for defective pricing. Reverting to this type of negotiation likely endangers the government's future defective pricing claim because the documentation will not include specificity on an element-by-element basis. The government must retain the option to use bottom-line negotiations to reach an agreement on needed supplies and services, but by simplifying the negotiation, the government unfortunately complicates a future defective pricing claim. The DoW should address this gap to give contracting officers the continued ability to negotiate at the bottom line while also safeguarding future defective pricing claims.

3. Lack of Field-Level Defective Pricing Expertise

In addition to the delayed pursuit of claims and inadequate contemporaneous documentation, the lack of field-level defective pricing expertise adversely affects the government's ability to recover excessive costs. Many contracting officers and their field-level legal advisors have no prior experience with defective pricing claims. Inexperience, particularly with such a complicated area of the law, leaves the government poorly positioned for success. Lack of experience, together with discomfort with an unfamiliar subject matter, may cause contracting officers to dismiss audit findings more quickly, particularly if the assigned contracting officer did not negotiate the contract personally. For those audit findings the contracting officer decides to pursue, inexperience with defective pricing may impair a successful negotiation or limit the quantum of that settlement.

As with negotiations, contractors retain a sizeable advantage in defective pricing claims. Armed with teams of experienced contracting personnel and in-house and external legal counsel, contractors often possess a greater depth of expertise in defective pricing than their government field-level counterparts. The government can expect contractors to reach out to outside counsel for this expertise, and many of

[85] 10 U.S.C. § 3706(c)(3).
[86] *Id.*

these attorneys have built entire practices around this area of law.[87] Because most contracting officers and their legal advisors address defective pricing cases so infrequently, the government will never gain the requisite expertise at the field level where contracting negotiations take place. Understanding the difficulty with proving government reliance, at all stages of the process, better positions the government for success.

Recognizing this shortfall, at the close of fiscal year 2020, the Assistant Secretary of Defense (Acquisition), Defense Pricing and Contracting Acting Principal Director issued a memorandum delegating DCMA to lead defective pricing for the DoW.[88] As part of that leadership, DCMA created a defective pricing pilot team to support contracting officers in "resolving and dispositioning" defective pricing audits.[89] The pilot team offers a great first step in ensuring the government possesses and presents the requisite expertise in tackling these claims. The program, however, does not go far enough in guaranteeing expert disposition of these cases. First, DoW developed this effort as a pilot program, meaning it may not be a long-term solution. Second, DCMA, in coordination with the Assistant Secretary of Defense (Acquisition), Defense Pricing and Contracting and the buying activity, reserved the right to reject contracting officers' requests to delegate to DCMA.[90] Thus, some contracting officers may not benefit from DCMA's assistance, as DCMA could deny their request for case delegation. Third, the program does not address providing defective pricing expertise at the contract negotiation stage, a place where greater knowledge may help stop defective pricing in its tracks or at least position the government for greater success if a defective pricing claim later arises.

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[87] Take, for example, a recent defective pricing case, *Alloy Surfaces Company, Inc.,* where the ASBCA found no government reliance. Alloy Surfaces Co., ASBCA No. 59625, 2020-1 BCA ¶ 35,574. Represented by David Bodenheimer, the author of the definitive defective pricing guide, *The Defective Pricing Handbook*, used as an authoritative reference by contractor and government personnel alike, the contractor successfully appealed the Contracting Officer's Final Decision. *Id.*

[88] Memorandum from Kim Herrington, Acting Principal Dir., Def. Pricing & Contracting, Off. of Under Sec'y of Def. (Acquisition) to Commander, U.S. Cyber Command et al., subject: Delegation of Defective Pricing Authority to the Defense Contract Management Agency 1 (Sep. 30, 2020) [hereinafter DCMA Delegation Memo].

[89] *Id.*

[90] *Id.*

IV. A Legislative Solution to Enhance Government Recovery

To solve the above-identified problems hindering government recovery for defective pricing, Congress should remove detrimental reliance as an element of proof. First, strict liability for contractor disclosure of inaccurate, incomplete, or noncurrent cost or pricing data would alleviate the government's burden of producing witnesses to prove government reliance years after contract negotiation, when employees may no longer remain in government service. Second, while contracting officers must still provide adequate negotiation documentation, removing reliance as an element of proof eliminates the need to include detailed reliance analysis for each element of cost when negotiations move to the bottom line. Third, strict liability solves a government resourcing issue. By eliminating the most complex element of proof, the government requires less field-level expertise in defective pricing. Removing this legally and factually complex element from the statute should also reduce DCAA's time to perform and complete a defective pricing audit[91] and reduce the contracting officer's time to review and make a formal determination on the audit findings. Finally, strict liability encourages contractors to disclose information during negotiations to prevent contract reductions in the future.

In 1968, legal scholar Michael J. Graetz recognized causation as a significant obstacle to recovering under the statute.[92] In arguing for legislative changes, Graetz suggested that the government receive a reduction in contract price without showing causation "whenever it can demonstrate that the contractor has submitted overstated cost or pricing data."[93] To "promote equitable application" of the statute, Graetz recommended that the statute permit contractors to offset these costs.[94] Congress ultimately amended the Act to allow contractors to offset defective pricing price adjustments,[95] but Congress did not provide

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[91] Defective pricing audits, together with systems audits and Contract Accounting Standards (CAS) audits, accounted for the lengthiest timelines in performing audits in fiscal year 2021 due to the complexity of issues. DCAA REPORT FY 2021, *supra* note 68, at 12–13.

[92] Graetz, *supra* note 9, at 517.

[93] *Id.* at 526.

[94] *Id.*

[95] The Act currently provides contractors the ability to "offset" overstatements to reduce defective pricing liability when:

reciprocal relief to the government by easing its burden of proof. Under the Act, the government must prove that it relied to its detriment on the defective data that caused an increase in the total contract price.[96] To ensure an "equitable application" of the Act, as Graetz suggested decades ago,[97] and which now permits contractor offsets, Congress should remove proof of detrimental reliance.

Congress previously considered, but ultimately rejected, a conclusive presumption of government reliance during the 1986 acquisition reform efforts. Recognizing numerous limitations with the statute as originally enacted, Representative John M. Spratt, Jr., with Representative Nicholas Mavroules, introduced legislation to amend the original statute "in order to improve control of the cost of Department of Defense contracts" and strengthen "[p]revention of [u]nearned and [e]xcessive [c]ontractor [p]rofits." [98] Among the suggested legislative changes, House of Representatives Bill 4548 (H.R. 4548) included a significant change to reliance. The bill proposed removing the rebuttable presumption of government reliance and replacing it with a conclusive presumption. Specifically, H.R. 4548 states: "It shall be conclusively presumed that the Government relied on all cost and pricing data furnished by the contractor or subcontractor."[99] The proposed change offered a simple and effective solution to encourage contractor compliance and promote government recovery for defective pricing.

Congress shelved this proposed change when negotiating reforms to the statute, however. Industry balked, arguing that a conclusive

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> (A) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and (B) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with subsection [10 U.S.C. § 3706(a)(2)], another date agreed upon between the parties, and that the data were not submitted as specified in [10 U.S.C. § 3702(c)] before such date.

10 U.S.C. § 3706(d).

[96] 10 U.S.C. § 3706(b); Alloy Surfaces Co., Inc., ASBCA No. 59625, 2020-1 BCA ¶ 37,574 at 182,443.

[97] Graetz, *supra* note 9, at 526.

[98] Truth in Negotiations Amendments of 1986, H.R. 4548, 99th Cong. (1986).

[99] *Id.*

presumption of reliance was unreasonable.[100] Representative Herbert H. Bateman's reservations ultimately rang the death knell for strict liability during the 1986 reform efforts. His remarks, that "[c]onclusive presumptions frighten the heck out of [him] as a former lawyer,"[101] appear to have steered questions and legislative reforms away from this critical improvement in the statute. Decades later, however, the government remains disadvantaged by this flaw in the Act.

The DoW continues to spend hundreds of billions of dollars on sole-source contracts each year,[102] for which contractors have no motivation to reduce costs.[103] Additionally, the government struggles to recover the full value of defective pricing audit exceptions.[104] The government remains in a clearly subordinate position during negotiations despite the Act's attempt to put the government on "equal footing with contractors during

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[100] *Acquisition Reform–1986, supra* note 7, at 544–46 (statement of Clarence T. Kipps, Jr., Aerospace Industries Association). While not discussed during the hearings, the Federal Circuit later stated in dicta that an "irrebuttable presumption of fact violates due process." Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 (Fed. Cir. 1986). Rather than a conclusive presumption of detrimental reliance, this proposal seeks to narrow the Act to strict disclosure compliance. Any failure to disclose in accordance with the requirement would then subject contractors to liability for the difference in value when the disclosed defective data exceeds the value of accurate, complete, and current cost or pricing data.

[101] *Acquisition Reform–1986, supra* note 7, at 572.

[102] *See, e.g.,* DoW fiscal year 2024 non-competitive expenditures in the Competition Standard Report of the SAM.gov Data Bank for the period from October 1, 2023, through September 30, 2024, reflecting $194,363,159,320.52 in DoW "not competed dollars" out of $445,811,445,753.78 total dollars awarded (43.5976% "not competed dollars"). Competition Standard Report, SAM.GOV, https://sam.gov/reports/awards/standard/6602777D47E8D7A60F47429224E50CA5/view [https://perma.cc/7DVZ-XGEV] (search date range from "10/1/2023" to "9/30/2024;" then search organization "9700 – DEPT OF DEFENSE") (last visited Jan. 16, 2026). The report includes all contract actions (i.e., new awards and modifications to existing awards) but does not include actions where the "Other Than Full and Open Competition" value is under the "Micro Purchase Threshold." *Id*. The Competition Standard Report appendix provides additional limitations and explanations on the data. *Id.*

[103] *Acquisition Reform–1986, supra* note 7, at 520 (statement of Donald J. Kinlin, Chief Trial Attorney, Air Force Contract Law Center, Wright-Patterson Air Force Base, OH) (arguing that "lack of competition eliminates incentive to cut costs and can lead to inflated prices").

[104] In fiscal year 2021, only 55.3% of audit exceptions for systems, Cost Accounting Standards (CAS), and defective pricing audits resulted in exceptions sustained. DCAA REPORT FY 2021, *supra* note 68, at 7.

price negotiations."[105] Contractors continue to retain a "distinct advantage" over the government because contractors understand and control what information they disclose to the contracting officer.[106] For these reasons, Congress must reconsider legislation that promotes a reduction in or elimination of inflated sole-source pricing. The primary focus of the Act's two-fold purpose should shift from establishing a "level playing field,"[107] a feat that can never be achieved as demonstrated throughout the Act's sixty-year history, to bolstering the recovery of all excessive profits from contractors who fail to strictly comply with the Act. Such a refocus would enable the government to recoup losses more effectively and encourage contractors to disclose all accurate, complete, and current cost or pricing data during negotiations to avoid price reductions later.

If the contractor fails to disclose accurate, complete, and current cost or pricing data during negotiations, the contractor should bear that risk. As the controller of the data, the contractor also controls its fate, and any failure on its part to comply with the Act should result in liability when the value of defective data exceeds that of accurate, complete, or current cost or pricing data. The law should presume, if any presumption were to remain in the Act, that the contractor intended to inflate the contract price by submitting defective cost or pricing data.

Without a renegotiation statute[108] to allow the government to recover excessive contractor profits post-award, the Act, though limited to negotiations, serves as the only means of protecting the government from paying an unreasonably high price for its sole-source supplies and services. The importance of the Act cannot be overstated. Without it, the government has no recourse whatsoever against contractors charging unreasonable prices in sole-source acquisitions and no means to motivate them to reduce costs. Congress should strengthen the Act to reach its full potential by eliminating detrimental reliance and focusing on recovering costs resulting from defective pricing.

To achieve this end, Congress should amend the Act to reflect a strict

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[105] *Acquisition Reform–1986, supra* note 7, at 520 (statement of Donald J. Kinlin, Chief Trial Attorney, Air Force Contract Law Center, Wright-Patterson Air Force Base, OH).
[106] *See id.*
[107] Gen. Dynamics Corp., ASBCA No. 39866, 94-1 BCA ¶ 26,339 at 131,010.
[108] The government previously had recourse against excessive contractor profits through the now repealed Renegotiation Act, which, unlike the Act, did not limit recovery to certified cost or pricing data disclosure. Renegotiation Act of 1951, Pub. L. No. 82-9, 65 Stat. 7 (1951) (amended 1968).

liability standard if contractors provide inaccurate, incomplete, or noncurrent cost or pricing data and the value of such defective data is greater than the value of the accurate, complete, or current data. The Act must continue but with greater force. This change would not only reinforce prevention[109] but would also increase the government's ability to recover those excessive contractor profits on behalf of the American taxpayer to ensure responsible spending.

V. Department of War Interim Solutions to Enhance Government Recovery

Until Congress amends the Act to ensure it fully captures its dual purpose of establishing fair negotiations and recovering excessive contractor profits, the DoW should take measures to better position defective pricing claims for full recovery of DCAA-recommended price adjustments. The DoW has already made strides in this effort through the establishment of the DCMA defective pricing pilot team.[110] In addition to this initiative, the DoW should develop policies requiring prompt pursuit of claims, tailored negotiation documentation to better reflect the documents upon which the government relied, and comprehensive field-level training, all of which would reinforce the government's position on reliance and defective pricing in general.

A. Pursue Defective Pricing Claims Promptly

Pursuing claims during contract performance would increase the likelihood that government witnesses remain in government employment and could provide testimony to support government reliance during an appeal. Because defective pricing audits "are generally more complex taking more time to complete,"[111] DCAA requires sufficient time and resources to perform these audits. The DoW should establish a policy requiring DCAA to initiate defective pricing audits during contract performance to ensure DCAA has adequate time to complete these audits

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[109] *See* Truth in Negotiations Amendments of 1986, H.R. 4548, 99th Cong. (1986).
[110] DCMA Delegation Memo, *supra* note 88.
[111] DCAA REPORT FY 2021, *supra* note 68, at 13 (showing, for fiscal year 2021, an average 269 days from audit inception to audit issuance for system, Cost Accounting Standards (CAS), and defective pricing audits).

before contract expiration.[112] The DoW should also require contracting officers to make final determinations on defective pricing audits within shorter, specified time periods to eliminate problems with potentially time-barred claims and to increase the likelihood of presenting witnesses to support the government's reliance on the defective data.

B. Document Reliance Adequately and Contemporaneously

The government must improve the substance of reliance documentation in the prenegotiation objectives memorandum and the price negotiation memorandum. Contracting officers must add analysis at the element level on reliance within these negotiation documents to withstand administrative and judicial scrutiny when the government later asserts a defective pricing claim. The negotiation documentation should cross-reference contractor-disclosed cost or pricing data to the data the government used in establishing prenegotiation objectives and the final price and include a thorough explanation of the basis of reliance. By including some additional information on the front end, the government creates a contemporaneous snapshot to justify reliance years later during an audit or appeal. If the government used something other than the contractor-disclosed cost or pricing data to establish objectives for negotiations, DCAA can then shelve those claims, because the law currently does not permit recovery in those instances, and pursue others for which the contracting officer clearly established reliance during negotiations. The additional documentation would protect the government in situations where government negotiators are no longer available to testify and would reduce audit and contracting officer final determination timelines by clearly establishing a contemporaneous record of the government's position on reliance.

C. Provide Comprehensive Defective Pricing Training to the Field

Providing comprehensive defective pricing instruction to contracting and legal personnel will enhance government recovery of excessive costs

[112] Any such policy should not, however, preclude the DoW from performing a defective pricing audit after contract performance or inhibit the DoW from asserting a defective pricing claim against the contractor after contract performance if it is in the government's best interest.

resulting from defective pricing. Even if DCMA assumes control over all defective pricing matters, the DoW must train the field sufficiently so that contracting personnel and other government negotiating parties and advisors consider defective pricing when negotiating contracts and modifications. With a better understanding of this area of law, contracting and legal professionals will consider defective pricing throughout negotiations and with an eye toward possible future litigation. Further, when properly trained, contracting personnel will shape contemporaneous negotiation documentation to protect the government's interest in those future claims.

Both informal training by legal advisors to introduce contracting personnel to defective pricing[113] and more formalized training for those contracting officers regularly negotiating noncompetitive contracts to which the Act applies will yield long-term benefits to the DoW. When DCAA planned to double its defective pricing efforts, DCAA and the Office of the Assistant Secretary of Defense (Acquisition), Defense Pricing and Contracting began a collaborative effort in fiscal year 2019 to "increase the knowledge of [Truth in Negotiations Act] audits across the acquisition team."[114] The Defense Acquisition University now offers online defective pricing training.[115] Targeting contracting officers, contract attorneys, and DCAA auditors, the training includes a defective pricing credential comprised of several one-hour defective pricing classes on "how to process defective pricing findings from . . . audit through settlement/litigation."[116] Of particular importance, to receive the defective pricing credential, the student must complete a course on novel negotiation strategies.[117]

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[113] Vernon J. Edwards, *Improving Training for the Contracting Workforce*, 22 NASH & CIBINIC REP. ¶ 6 (Jan. 2008) (providing numerous suggestions to train the acquisition workforce more thoroughly and suggesting contract attorneys provide informal training to contracting personnel to discuss topics such as defective pricing).

[114] DEF. CONT. AUDIT AGENCY, U.S. DEP'T OF DEF., DCAA REPORT TO CONGRESS OF FY 2019 ACTIVITIES 20–21 (Mar. 31, 2020).

[115] CCON 007A: Defective Pricing Credential, DEF. ACQUISITION UNIV., https://www.dau.edu/credentials/ccon-007a [https://perma.cc/9K2Y-ZD8V] (last visited Nov. 14, 2025).

[116] Renee Butler, *New Defective Pricing Credential Deployed!!!!*, DEF. ACQUISITION UNIV. (Mar. 22, 2022), https://www.dau.edu/blogs/new-credential-deployed-special-topics-contract-pricing [https://perma.cc/LW9X-HBLP].

[117] CCON 007A: Defective Pricing Credential, DEF. ACQUISITION UNIV., https://www.dau.edu/credentials/ccon-007a [https://perma.cc/9K2Y-ZD8V] (last visited Nov. 14, 2025). DAU's most current *Contract Pricing Reference Guide* also provides guidance on

While all necessary and beneficial, the DoW should not stop there. The DoW should require contracting and field-level legal personnel to complete these trainings and should expand training on the review, use, and proper documentation of cost or pricing data during negotiations.

VI. Conclusion: Easing the Government's Burden of Proof to Encourage Responsible Spending

For sixty years, Congress has attempted to shape the Truthful Cost or Pricing Data (Truth in Negotiations) Act into a workable mechanism to recover contractor unearned and excessive profits. Although Congress has made some progress over the decades and continues in this effort,[118] the Act will never have the force it requires to achieve its original purpose while detrimental reliance remains an element of government proof. Congress must bolster the Act's enforcement capabilities by removing proof of detrimental reliance and holding contractors strictly liable for the disclosure requirements. Only then will the Act transform from a hollow aspiration to an effective tool for recovering excessive contract costs, and only then will the Act serve its true purpose "in insuring that the American taxpayer is not paying outrageous profits and excessive prices for necessary defense items."[119]

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recognizing and adjusting defective pricing. 4 DEF. ACQUISITION UNIV., CONTRACT PRICING REFERENCE GUIDE, Ch. 5 (2021), https://www.dau.edu/sites/default/files/tools/CPRG-Volume-4.pdf [https://perma.cc/PC43-YKJU].

[118] In June 2022, Representative John Garamendi and Senator Elizabeth Warren introduced a bicameral bill to expand the Act's scope to require the submission of cost or pricing data for all cost-reimbursement type contracts, "regardless of the numbers of offers received", thereby limiting the exception to the Act's application for contracts for which adequate competition exists. Stop Price Gouging the Military Act, H.R. 8007, 117th Cong. (2022); S. 4374, 117th Cong. (2022). While this author agrees with the proposal because the Act should be more broadly construed, this bill, if enacted, may adversely impact already thinly stretched DoW resources. This further emphasizes the need to make the Act's enforcement aspects less burdensome on the government to promote compliance and enhance recovery of unearned profits.

[119] *See Acquisition Reform–1986, supra* note 7, at 534 (statement of Donald J. Kinlin, Chief Trial Attorney, Air Force Contract Law Center, Wright-Patterson Air Force Base, OH).

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