

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

United States of America,

Plaintiff,

v.

**Case No. 3:99-cv-093
Judge Thomas M. Rose**

United Technologies Corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This matter came before the Court from October 12, 2004 until April 15, 2005, for a bench trial. After giving careful consideration to the testimony of the witnesses, the exhibits introduced at trial, the transcripts of the proceedings, the proposed findings of fact and conclusions of law, as amended, and the applicable law, the Court makes the following findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

II. FINDINGS OF FACT

The instant case stems from the United States Government's award of a contract through a source selection known as the Fighter Engine Competition. Throughout the 1970's and early 1980's, Pratt & Whitney Aircraft Engines ("Pratt"), an operating division of Defendant United Technologies Corporation, was the sole source of jet fighter engines for F-15 and F-16 airplanes. In 1982,

however, the Government decided to change this beginning with its order of engines for fiscal year 1985. Incidentally, this coincided with the upgrade of the fighters' engines from what the parties describe as the F100 PW-200, or "-200" model, to the F100 PW-220 model, or "-220" model. The two most important changes between these models was the replacement of the Unified Fuel Control by a Digital Electronic Engine Control, or "DEEC," and the addition of what is called an Improved Life Core, or "ILC." The Government decided, pursuant to 10 U.S.C. § 2304, that industrial mobilization warranted awarding a negotiated contract in a manner split between the General Electric Company and Pratt. Regulations generally require the submission to the Government of cost or pricing data when awarding large negotiated contracts. 32 C.F.R. § 3-807.3 (1982). One exception to this requirement is when the Government determines "from the outset that there will be adequate price competition." 32 C.F.R. § 3-807.3(e)(1982).

In December 1982, the United States Air Force provided Pratt and General Electric with a draft Request For Proposal for the procurement of high performance jet fighter engines for Fiscal Years 1985 through 1990. The parties to this litigation refer to fiscal year 1985 as FEC I, fiscal year 1986 as FEC II, continuing through fiscal year 1990, which is referred to as FEC VI. The draft Request For Proposal stipulated that the procurement would be conducted under the Source Selection procedures outlined in Air Force Regulation 70-15, which does not apply to awards based "primarily on the basis of price competition." AFR 70-15(1-1)(a)(2). This means that the process would be considered "negotiated," not based upon "adequate price competition." Rather, contractors would be required to support their proposals with certified cost and pricing data, and that the proposals would be evaluated on the basis of four criteria, listed in descending order of importance as 1) "overall capacity," 2) "readiness (logistics) and support," 3) "engine life-cycle cost (acquisition

costs plus operations and support costs for 20 years),” and 4) “program adequacy and competition, *i.e.*, manufacturing and support capability, competition in sourcing spare parts, and co-production.” The draft Request For Proposal further stated that the Air Force would assess the effect of selecting either single source or two sources based on the acquisitions and ownership costs, system readiness and availability, and industrial mobilization base. Finally, the Air Force reserved the right to award contracts on other than the lowest proposed acquisition price.

On May 18, 1983, the Air Force issued its official Fighter Engine Competition Request for Proposal RFP F33657-83-R-0105. The Request for Proposal was similar to the draft Request for Proposal, identifying four evaluation factors in descending order of importance: 1) Overall Capability, 2) Readiness and Support, 3) Life Cycle Cost and 4) Program Adequacy and Competition. While the “fundamental drive” for the Fighter Engine Competition was to acquire improved engines, there was an increased emphasis on Operation and Support costs, defined to include the “total cost of ownership” including warranties.

Thus, by June 1983, Pratt’s upper management had reviewed the draft Request for Proposal and Request for Proposal and considered the possibility of a dual source award on an engine that Pratt had historically supplied on a sole-sourced basis. 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. The strategy developed among several senior Pratt managers. 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. Pratt’s pricing strategy was to achieve price quotes so that, in the event that Pratt’s share of the production dropped from 100% to 70% there would be a resulting price increase of 10 to 15%. In the event that Pratt’s share of

production was reduced to 50%, there would be a resulting price increase of 20 to 25%. In the event Pratt's share of production was reduced to 30% there was to be an increase in the price of 30 to 35% per engine.

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. As early as June of 1983, Pratt was concerned that the data it had from vendors did not support their pricing strategy. When discussing the "Price Change for Quantity Change" from a 100% award to a split award between Pratt and General Electric, Pratt executives fretted the fact that "[q]uotations from suppliers...do not support the price-quantity" "[p]rior statements...that a 50% reduction in volume could result in a 20% price increase." 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. As early as May 13, 1983, Pratt had carried on internal discussions concerning what decrements should be applied to the ceiling quotes in the Fighter Engine Contract.

On August 17, 1983, Pratt submitted its initial proposal in response to the Fighter Engine Competition Request for Proposal. Pratt's Manager of Pricing and Negotiations signed and submitted to the Government several copies of Defense Department Form 633. Pratt did not decrement its "ceiling price quotes" in this initial proposal, which is to say: Pratt did not estimate the amount by which they expected the ceiling price quotes would be reduced when the contracts for the parts were finally negotiated. Moreover, rather than create a proposal from a list of the parts

required to create the -220 engine, Pratt began with a list of parts needed to create the -200 engine at 1983 part prices.

From that Bill of Materials, the values that were associated with the parts Pratt quoted for the FEC were removed, leaving only the unquoted values. In place of these removed quoted values, Pratt substituted the values from its -200 Quoted Bill of Materials plus values for 29 additional parts the Air Force asked Pratt to quote. The -200 Quoted Bill of Materials contained quotes for (1) parts common to the -220 configuration and the -200 configuration, and (2) parts that *were not* going to be used in the -220 engine. A decrement factor (reduction percentage) was then applied to this -200 Quoted Bill of Materials. Pratt understood at the time of the BAFO that this reduction percentage was taken from an estimate prepared by Pratt's Purchasing Department, called the Value and Financial Analysis, that was derived from the -220 Quoted Bill of Materials. Then escalation was applied based upon the year to year movement of the quoted values. The total was an amount before the Engineering Change Proposals deltas, or changes, were added to take the engine to the -220 configuration. At trial, Pratt officials testified that, for an Engineering Change Proposal to be correct, it was necessary that the values at which cancelled parts are taken out of an Engineering Change Proposal be the same values as they were in the baseline.

The Defense Contract Audit Agency, or DCAA, reviewed Pratt's submission in detail, finding multiple shortcomings. The DCAA concluded that Pratt's supporting data was not generally adequate, current or complete, that there were indications of potential defective pricing on subcontracts, that deficiencies relating to subcontractors over one million dollars had not been corrected and could lead to defective pricing, and that Pratt had not complied with the requirement of DAR 3.807.4(a) to submit a "Certificate of Current Cost or Pricing Data" for more than one

hundred subcontractors over one million dollars. The DCAA specifically questioned Pratt's decision not to decrement as recommended by its Procurement Contract Accounting Group (or "PCAG") the ceiling price quotes on cost estimates for standard material obtained from sole source vendors.

With respect to specific engine parts, such as the Digital Electronic Engine Control and with respect to what the parties refer to as the "Engineering Change Proposal" for the "Improved Life Core" or "ILC ECPs", which entailed eliminating various parts from the prior engine configuration, the Defense Contract Auditing Agency questioned costs being cancelled from the -200 engine configuration in 1983-dollars-escalated-to-1984 dollars, rather than cancelling those parts based upon actual 1984 estimates, as 1984 was the base year for those parts in the proposal. With respect to the parts the Digital Electronic Engine Control and "ILC ECPs" parts that had to be added to complete the -220 model engine, the DCAA questioned costs based upon later quotes for some parts and Pratt's failure to apply its historical decrement of about 9% to the values of certain added parts.

The Air Force went to considerable lengths to explain to Pratt the exceptions it took to the initial proposal in "fact-finding discussions." In October 1983, the Air Force provided to Pratt portions of the Defense Contract Auditing Agency pre-award audit, including portions that questioned the failure to apply Pratt's Procurement Contract Accounting Group's decrement recommendations to the ceiling price quotes. The portions of the DCAA pre-award audit that the Air Force provided to Pratt also discussed the -220 and not the -200 Bill of Materials. Pratt's review of this DCAA audit informed Pratt that the DCAA understood the Air Force to have requested quotes based upon the -220 Quoted Bill of Materials not the older -200 engine Bill of Materials, updated, which Pratt had used as its basis for estimating its cost for producing the -220 engine. The

Air Force's only problem with the ceiling quotes was that Pratt needed to assume a reasonable decrement factor for the ceiling quotes in its Best And Final Offer.

On November 11, 1983, the fact-finding discussions were followed up with a "Contractor Inquiry," a written communication that asked Pratt to "[a]ssure that latest quotes are reflected in BAFO," as well as to "[a]ddress disposition of all PCAG recommendations in BAFO."

On November 19, 1983, the Air Force sent Pratt the instructions for the BAFO, directing Pratt to specifically address the issues discussed during the fact-finding session and summarized in the November 11, 1983 letter, including: 1) whether and to what extent each government exception to the Pratt proposal was incorporated into the BAFO, 2) the price impact and the cost element impacted by each such incorporation, and 3) a written rationale for how Pratt treated each Air Force exception.

Pratt submitted its Best And Final Offer to the Air Force on December 5, 1983. Pratt's BAFO included five proposals based on differing award criteria. Option one was a 3-year annual buy with an additional 2 years of not-to-exceed prices; option 2 was a 5-year multi-year buy; and option 3 was a series of 1-year annual buys. Each proposal included prices based upon 100% awards to Pratt, and 30% awards to Pratt. The BAFO also contained a "Variation in Quantity" formula that was to be used to price contract awards for each option at quantities other than 100% or 30%.

Pratt accompanied the BAFO with a letter asserting that Pratt was "compliant with all requirements" of the November 19, 1983 BAFO Instructions including a DD Form 633. The instructions of DD Form 633 stipulate:

1. The purpose of this form (DAR 16-206) is to provide a vehicle whereby the offeror submits to the Government a

pricing proposal of estimated and/or incurred costs by contract line item with supporting information, adequately cross-referenced, suitable for detailed analysis. A cost element breakdown, using the applicable format prescribed in 7A, B, or C below, shall be attached for each proposed line item, and must reflect any specific requirements established by the Contracting Officer. Supporting breakdown must be furnished for each cost element, consistent with the offeror's cost accounting system. Where agreement has been reached with Government representatives on use of forward pricing rates/factors, identify the agreement and describe the nature thereof. Depending on the offeror's system, breakdowns shall be provided for the following basic elements of cost, as applicable:

[Materials, Direct Labor, Indirect Costs, Other Costs, Royalties, and Facilities Capital Cost of Money]

2. As part of the specific information required by this form, the offeror must submit with this form, and clearly identify as such, cost or pricing data (that is, data which is verifiable and factual and otherwise as defined in DAR 3-807.1(a)(1)). In addition, submit with this form any information reasonably required to explain the offeror's estimating process, including:
 - a. The judgmental factors applied and the mathematical or other methods used in the estimate including those used in projecting from known data, and
 - b. The contingencies used by the offeror in the proposed price.

The DD Form 633 itself states "This proposal is submitted in response to [Request for Proposal F33657-83-R-0105] and reflects our best estimate and/or actual costs as of this date, in accordance with the instructions of this form."

As required by the Government Form 633 on which it was submitted, Pratt's Best And Final Offer was supported by certified cost and pricing data. Part of this submission was United Technologies' Best And Final Offer Disclosure Item #8, which listed "decrement factors" based

upon Pratt's Procurement Contract Accounting Group estimates. Pratt certified that its bid "reflects our best estimate and/or actual costs as of the date in accordance with the instructions of this form."

On January 3, 1984, Pratt ostensibly complied with another government regulation by "certify[ing] that, to the best of [its] knowledge and belief, cost or pricing data as defined in ASPR 3.807.1(a)(1) submitted, either actually or by specific identification in writing (see ASPR 3-807.3(a)), to the Contracting Officer or his representative in support of [the bid] are accurate, complete and current as of 5 December 1983." Doc. 172 attach. This certification would tend to make the question of what components of the BAFO were certified as accurate, complete and current a question answered by the definition in ASPR 3.807.1(a)(1). However, UTC made further assertions in its BAFO.

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....”

BAFO exhibit 3.8.1 paragraph A.3. further asserted:

Escalation applied to base price quotes was revised to reflect 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.

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 varying amounts of engines actually ordered at percentages in between a full 100% award and a 30% award of the contract. The New Engine Pricing Group applied this formula instead to the -200 Quoted Bill of Material. Thus, while the Purchasing Group’s Value and Financial Analysis sub-group 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 millions 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. This further resulted in quotes for parts added to the DEEC -220 part quotes not being decremented.

On December 21, 1983, the Air Force requested that Pratt deliver any PCAG recommendations that the Air Force did not already have. Pratt, in fact, had information that contradicted its claimed past performance in achieving PCAG recommendations. Pratt had a computer database from which it could have retrieved and provided to the Air Force its actual "past experience" with suppliers, and that doing so would have revealed that the Procurement Cost Accounting Group-recommended price reductions were accurate. This, however, was not provided.

Pratt was awarded 25% of the engines in FEC I. But the Air Force's goal was to maintain the competition between Pratt and GE throughout the Fighter Engine Competition. Already in February 1984, after the first award, Air Force Secretary Verne Orr told Congress the Air Force would "continu[e] the competition for the out years." The Air Force maintained competition between Pratt and GE by annual "Calls for Improvements." Thus, in the subsequent annual competitions, Pratt and the Air Force agreed to new deals superseding the BAFO prices and terms.

Even in FEC I, Pratt responded to the Air Force Call for Improvement by reducing the engine warranty price from more than \$1,000,000 to about \$140,000 per engine. By the second year, FEC II, Pratt had secured 46% of the engine contract. As the Armed Services Board of Contract Appeals,

or ASBCA, later found, the Air Force “sought different and more advantageous offers each year from [Pratt] and GE – described by the AF as the annual call for improvement process – prior to the exercise of each option.” In FEC III, Pratt won 175 engines, representing 44% of the contract. In FEC IV, Pratt’s offers of even lower engine and warranty prices won it 221 engines or 45% of the engines to be produced. Similarly, Pratt secured 191 engines, or 55% of FEC V; and 135 engines or 64% of FEC VI.

Pratt had improved the warranty price by \$50.1 million in FEC I; \$101 million in FEC II; \$93 million in FEC III; \$103 million in FEC IV; \$103.4 million in FEC V; and \$52.5 million in FEC VI.

Under the terms of the February 1984 agreement, the price for 175 engines for FEC III would have been \$3,292,514 per engine. The Air Force eventually paid \$3,249,712 per engine, representing savings of \$42,802 for each of 175 engines, in addition to the aforementioned \$93,000,000 savings on the warranty. Under the February 1984 agreement, 221 engines for FEC IV would have cost \$2,882,850 each. By the time FEC IV was implemented, they only cost \$2,866,162. Pratt’s actual FEC V engine unit price was \$3,003,314 for 191 engines, instead of the \$3,061,409 it would have paid under the original proposal. Similarly, while the FEC VI engine price for each of 135 engines would have been \$3,103,220, the Air Force actually only paid \$3,022,680 per engine.

From March 3, 1989 on, the Air Force paid Pratt for 709 invoices (DD Forms 250) that Pratt submitted after February 24, 1989.

Later, the Air Force pursued a contract price reduction before the Armed Services Board of Contract Appeals, contending that Pratt’s actions in concealing materials relevant to their estimation

of the cost of performing the FEC constitutes furnishing defective cost or pricing data in violation of the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306(f), in the amount of roughly \$299,000,000. A TINA violation requires that the Government prove three elements:

First, it must establish that the information at issue is ‘cost or pricing data’ within the meaning of the Truth In Negotiations Act, 10 U.S.C. § 2306(f). 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 detrimental reliance on the defective data and show by some reasonable method the amount by which the final negotiated price was overstated.... Upon proof of nondisclosure or the use of inaccurate or noncurrent cost or pricing data, the government is aided in meeting its burden of establishing that there was a significant overstatement in the contract price by a rebuttable presumption that the ‘natural and probable consequence’ of the nondisclosure or the use of noncurrent or inaccurate cost or pricing data is an increase in the contract price. The [defendant] must then show that the defective data was not relied upon or that the undisclosed data would not have been relied upon even if there had been complete disclosure.

United States v. United Technologies Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167, 189 (D. Conn. 1999).

The Armed Services Board of Contract Appeals originally decided on February 27, 2004 that materials described as disclosure items 1 through 18 were cost or pricing data that TINA requires be disclosed, and that they were not disclosed to the Air Force. It also found that the Air Force relied upon the cost and pricing information, but concluded that there was no detriment to the Air Force, due to certain offsets available to a defendant under TINA. Both parties appear to have moved for reconsideration of this decision, and on January 26, 2005, after evidence had been presented in this case, but prior to closing arguments, the Armed Services Board of Contract Appeals released a decision on the motions for reconsideration.

In affirming the eventual decision of the ASBCA, the United States Court of Appeals for the Federal Circuit noted:

[T]he Board's [original decision's] reliance analysis improperly focused on the Air Force's audit of the data submitted with the initial price proposal.... [T]he Air Force accepted UTech's BAFO, dated December 5, 1983, for the base year of the contract, Fiscal Year 1985 (FY 85), and accepted revised versions of that offer for the subsequent years of the contract, Fiscal Years 1986–1990 (FYs 86-90). ...

The Board found that the Air Force was entitled to a presumption that "the natural and probable consequence of defective cost or pricing data is to cause an overstated price." *Id.* slip op. at 3. However, the Board found that UTech had rebutted this presumption by demonstrating that the Air Force did not rely upon the allegedly defective cost or pricing data in agreeing to any contract price and that the Air Force had failed to meet its burden of proof, as the claimant, of showing that the defective cost or pricing data caused an increase in the contract price.

Wynne v. United Technologies Corp., 463 F.3d 1261, 1263–64 (Fed. Cir. 2006).

On March 3, 1999, the United States filed a complaint in this Court. By December 18, 2004, the Government had filed its Third Amended Complaint. Doc. 335. Therein, the Government asserted two claims that Pratt had violated the False Claims Act, 31 U.S.C. §§ 3729(a)(1)&(2), and additional claims under common law for breach of contract, payment by mistake, and unjust enrichment. The Government asserts a right to False Claims Act violations for claims submitted to the Government on or after March 3, 1989, which, in effect, disclaims FCA damages for FEC I and FEC II. The Government asserts common law damages for all claims submitted in Pratt's performance of the contract.

III. CONCLUSIONS OF LAW

Under the False Claims Act:

“[a]ny person who-(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Government ... is liable to the United States Government for a civil penalty....”

31 U.S.C. § 3729(a). In addition to the statutory elements, some circuits, including the Sixth Circuit, impose a requirement that the false or fraudulent claim be material. *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 442 (6th Cir. 2005). Moreover, the Sixth Circuit has determined that the “natural tendency” test is the appropriate standard by which materiality in the FCA civil context should be measured. *Id.*, at 445. This standard “focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered.” *Id.* (quoting *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916-17 (4th Cir. 2003)). By way of example, in *A+ Homecare*, the Sixth Circuit concluded that a pension accrual was material even though it was later disallowed. It, thus, “may not have resulted in an actual decrease in the obligation owed” to the Government, but nevertheless, “had the ‘natural tendency to influence or [was] capable of influencing the government's funding decision.’” *Id.* (quoting *Harrison*, 352 F.3d at 917). Courts that have followed the Sixth Circuit’s test for materiality have recognized that:

Evidence of the government's actual conduct is less useful for FCA purposes than evidence of the government's legal rights.... Materiality must turn on how [the government] was authorized to respond to such failures, or else violation of identical provisions in separate cases could have different materiality results based on the predilections of particular program or accounting staff.

United States ex rel. Oliver v. The Parsons Corp., 498 F.Supp.2d 1260, 1289-90 (C.D. Cal. 2006) (quoting *United States v. President and Fellows of Harvard College*, 323 F. Supp. 2d 151, 186 (D. Mass. 2004)).

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. Pratt asserted that it had applied “the most recent DRI forecast of the appropriate indices,” when in fact, it had not. 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. 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. Pratt made these false assertions, calculating that, in combination with a variable priced warranty, it would render a less than 100% award to Pratt unattractive to the Government, winning it a 100% award contract. What came to pass, however, was that Pratt was awarded a smaller portion of the contract at artificially inflated prices.

While Pratt argues that the Government did not rely upon the false assertions, and claims that the Federal Circuit has already ruled that the Government did not rely, citing *Wynne v. United Technologies Corp.*, 463 F.3d 1261, 1263–64 (Fed. Cir. 2006), reliance is not an element of a cause of action under the False Claims Act in the Sixth Circuit. Pratt also asserts that the Calls-for-Improvement superceded the False Claims in Pratt’s BAFO.

In the Sixth Circuit, materiality is presumed if the “natural tendency” of the false statement has the potential effect of causing a false claim to be paid. As noted by the United States Court of Appeals for the Federal Circuit and the ASBCA, “the natural and probable consequence of defective pricing data is to cause an overstated price.” *Wynne*, at 5 (quoting ASBCA decision at 3). While the Government had already determined to rebid the contract each year by means of “Calls for Improvements,” the Government had the legal right to award the entire multi-year contract to Pratt and to have the contract performed based upon Pratt’s BAFO. Thus, the Court concludes that each invoice submitted to the Government in performance of the contract constituted a violation of the False Claims Act. *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429, 435 (Fed. Cl. 1994) (“each separate submission seeking payment from the Government is a claim for purposes of the False Claims Act, even when such submissions are made pursuant to one overall contract.”) (citing *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988); and *United States v. Ehrlich*, 643 F.2d 634, 637 (9th Cir. 1981)); see also *United States ex rel Marcus v. Hess*, 317 U.S. 537, 543-44 (1943).

The Court will thus turn its attention to False Claims Act damages:

Under the FCA, a person who knowingly presents a false claim for payment or approval or to decrease an obligation owed to the Government “is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act.” 31 U.S.C. § 3729(a).

United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc., 400 F.3d 428, 455 (6th Cir. 2005). Courts that follow the Sixth Circuit’s “natural tendency” test for materiality recognize that what the Government actually did “is an argument for reducing damages.” *United States v. President and Fellows of Harvard College*, 323 F. Supp. 2d 151, 186 (D. Mass. 2004).

The chief purpose of the False Claims Act's original civil penalties was to provide for restitution to the government of money taken from it by fraud. *United States v. Bornstein*, 423 U.S. 303, 314-315 (1976) (citing *United States ex rel. Marcus v. Hess*, 317 U.S., at 551-552). Even the “device of [what used to be] double damages plus a specific sum was chosen to make sure that the government would be made completely whole.” *Id.* With the increase from double damages to treble damages in 1986, an aspect of punishment was entered into the Act, but a finder of fact’s primary order of business has not changed: “if it finds liability, its instruction is to return a verdict for actual damages,” *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 131-32 (2003), which a court may then multiply. This approach also seems consistent with the decision of Congress to include in statutory structure a provision for fines, as fines seem most appropriate when potential damages are large, but actual damages small. The Court, then turns its attention to a determination of actual damages.

The Court is convinced that Pratt’s false statements had the natural tendency to cause a false claim to be paid during the first year of the contract, FEC I. FEC I, however, is not part of the Government’s False Claims Act charge. Only Years FEC III - FEC VI are at issue for False Claim Act purposes.

Pratt asserts that what the Government actually paid during FEC III through FEC VI is less than the Government would have paid under a BAFO that was calculated as Pratt had certified its submission was calculated. The Government reasons differently.

The Government presented Dannie Zacheretti as an expert witness on damages. Zacheretti calculated damages in a defensible manner, arguing that Pratt’s reduction of warranty prices do not relate to the engine part prices and that Pratt’s reduction of total engine price should be applied on

a pro-rata basis to all of the engine parts. This approach would leave the Government with substantial damages, \$227,980,977, to be precise.

While Zacheretti's approach is facially reasonable and entirely defensible, it ignores the nature of what the Government has proven Pratt did: Pratt devised a scheme to fudge their numbers so that the Government would be forced to award it 100% of the contract. This was done by making the individual engine prices artificially high, but making the warranty price artificially low for an 100% award and progressively more disadvantageous for partial awards of the contract. When this approach backfired, yielding Pratt 25% of the first-year contract, it continued to play with its numbers.

The Government Calls for Improvement did not request new certifications of engine prices broken down part-by-part. Instead, engine prices and warranty prices were rebid on the overall price. The new Government approach of avoiding sole-source vendors on major acquisitions and creating an atmosphere of continual competition succeeded in its goal. Had the Government requested a new BAFO, the Court has no doubt that Pratt, chastened by its experience of winning just 25% of FEC I, would have certified the lowest possible engine prices it could manage. Reducing the Government's damages on a pro-rata basis over the entire parts list in this instance does not fairly estimate the Government's damages. There is no evidence that, had Pratt reduced the parts affected by its originally fraudulent statements, that commensurate price reductions could have been won for all engine parts.

Pratt reduced engine prices by more than \$87,000,000 over the course of FEC III through FEC VI from what was originally certified to the Government. There were savings in the warranty

price of approximately \$351,900,000. While the Government may have suffered substantial damage over the course of FEC I, in the years under review, the Government's actual damages were none.

The Air Force paid on or after March 3, 1989 each of these 709 invoices (DD Forms 250) submitted by Pratt to the Air Force after February 24, 1989. In sum, under the FCA Counts I and II, as noted above, the Plaintiff is awarded \$7,090,000 in civil penalties.

IV. DEFENSES

The Government's common law claims fail for want of damages and are barred under the doctrine of claim preclusion. The Government has fully litigated its contract remedy claim to a final decision before the ASBCA. The Government could have raised its quasi-contractual claims in the ASBCA case. Because the Government litigated Count III and could have litigated Counts IV and V in the ASBCA case, the doctrine of claim preclusion bars those claims here. Moreover, the damages analysis above eliminates the possibility of damages under these theories.

Pratt pursues only two other defenses in its proposed findings of fact and conclusions of law: that the ASBCA Decisions Preclude or Bar All of the Government's Claims and that the Government's claims are barred by the statute of limitations. Pratt asserts that the ASBCA decision affects an array of issues that include: 1) the Air Force relied on competition and its own independent estimate in determining that Pratt's prices for FEC I were reasonable; 2) the Air Force relied exclusively on competition in determining that Pratt's prices for FEC II through FEC VI were reasonable; 3) the Air Force did not accept the BAFO prices for any of the FEC awards; 4) Pratt did not certify its BAFO; 5) Pratt's estimate of material escalation for DEEC add parts was not cost or pricing data; 6) Pratt's BAFO included \$153.7 million in cost underestimates.

None of these issues bear on the instant case, either because the Court has already agreed with the ASBCA decision, or because the particular fact is not relevant to the instant case. As to the first contention, reliance is not an element of a False Claims Act claim, and neither is reasonableness of the false claim. While “adequate price competition” is relevant to aspects of a Truth in Negotiations Act action, whether the monopsonistic duopoly under review in this case constitutes “adequate price competition,” is not relevant. The Court agrees that the Air Force relied upon renewed competitions between Pratt and General Electric in improving the prices of FEC II - IV, but, again, reasonableness is not a defense to a False Claims Act allegation. The Court agrees that the Air Force did not pay the BAFO prices for any FEC year. It is not relevant whether Pratt certified its BAFO; the False Claims Act applies not only to false certified claims, but to all false claims. Whether any of the pricing material was “cost or pricing data” under TINA is not relevant to a False Claims Act. Finally, given the Court’s damages finding, any of Pratt’s cost underestimates are not relevant, either.

Pratt’s statute of limitations defense is denied for the reasons stated in *United States v. United Technologies Corp.*, 255 F. Supp. 2d 779 (S.D. Ohio 2003).

V. CONCLUSION

Because the only fair reading of Pratt’s assertion in Exhibit 3.8.1 is that ceiling price 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, and because Pratt did not apply the domestic rate of inflation prediction as it asserted, Pratt has violated the False Claims Act. Because the Government

suffered no actual damages in the years under review, and because the Government is precluded from pursuing common law claims, **the Clerk shall enter Judgment in favor of the Government and against Defendant for the statutory maximum fine of \$10,000 per invoice submitted, for a total of \$7,090,000.**

DONE and ORDERED in Dayton, Ohio, this Friday, August 1, 2008.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE