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GOVERNMENT'S OBLIGATION TO DISCLOSE UNDER THE TRUTH IN NEGOTIATIONS ACT

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Since its enactment in September 1962, Public Law 87-653, the Truth in Negotiations Act, has been the subject of continuous and extensive discourse. The focus of all discussion and literature to date has been on the obligations which the Act imposes upon a contractor. Particular emphasis has been placed upon the manner in which Government agencies have, by regulation and implementation, attempted to carry out the statute’s requirements. Little notice has been given to the possibility that the Truth in Negotiations Act itself, and the atmosphere which it has created, may impose upon the Government certain duties of disclosure that it did not have previously.

Wholly apart from the requirements of Public Law 87-653, the Government is obliged, under the general law, to refrain from hindering a contractor’s attempted performance and also to do whatever is necessary to enable him to perform. This obligation, labeled “constructive condition of cooperation,” imposes on both parties a duty to disclose to the other any information which is deemed essential to the transaction. In fact, this obligation has particular application to Government contracts. It has even been suggested that the Government has a greater duty to disclose such information to contractors than does one commercial contractor to another. However, this con-

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3. Patterson, Constructive Conditions in Contracts, 42 Colum. L. Rev. 903 (1942).
5. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 863-64 (1964). Patterson ascribes this to a principle of “noblesse oblige” adopted by the Government in taking care of contractors. This point is particularly important.
clusion more likely results from the limited availability of remedies against the Government than from a difference in substantive law. In any event, it is clear that the Government does have a duty to disclose certain information under general legal principles.

It cannot be denied that the primary purpose of Public Law 87-653 was to provide the Government with sufficient cost information to prevent contractors from overreaching in the pricing of noncompetitive procurements, particularly in incentive contracts. No direct attempt was made during congressional hearings, nor in the drafting of the statute, to enlarge the Government's "constructive condition of cooperation," nor to define the Government's obligation of disclosure. Thus, the contractor, as the party rendering performance, was given the primary obligation to present a price proposal and support that proposal with accurate, complete and current cost or pricing data. Nevertheless, the Government's increasing and knowledgeable participation in price analysis in recent years and the degree of sophistication of that analysis, may well have affected (if not changed) the contractor's primary obligation and the relationship of the parties in price negotiations. In these circumstances, there may be a greater duty of disclosure on the part of the Government than hitherto suspected.

The two-fold purpose of this article, therefore, is:

to the duty of disclosure of a prime contractor to its subcontractors. It might be argued by the prime contractor that his duty to disclose to subcontractors is less than the duty of the government to disclose to its primes. However, an argument of this kind should not be successful, since Patterson's statement relates to contractors in the commercial world of trade. Subcontracts under Government prime contracts bear many of the characteristics of Government contracts and are likely to be interpreted according to the law applicable to Government contracts. American Pipe and Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961); United States v. Taylor, 333 F.2d 637 (5th Cir. 1964).

6. Litigation among nongovernmental contracting parties involving failure to disclose is often brought on a tort allegation of fraud or misrepresentation. See, e.g., Strand v. Librascope Inc., 197 F. Supp. 743 (E.D. Mich. 1961), and authorities cited therein. However, the federal government has not waived its sovereign immunity for suits based upon fraud or misrepresentation. 28 U.S.C. § 2680 (h) (1946); United States v. Gibbs, 156 F. Supp. 955 (W.D. Pa. 1957). Thus an action against the Government must base liability upon the violation of a contract provision; in this instance, the implied condition of cooperation.


1. To examine the Government's duty of disclosure under the general law, absent considerations of 87-653; and
2. To determine whether the scope of that duty has been enlarged, or otherwise changed, by the passage of the Truth in Negotiations Act.

This will be accomplished by reviewing, both under the general law and under Public Law 87-653, the objectives of disclosure, the necessity of knowledge on the part of the party charged with disclosure, the nature of the data to be disclosed, the method of disclosure, and the remedies for non-disclosure.

Objective of the Disclosure

The basic objective of Government disclosure under general contract principles was discussed by the Court of Claims in Helene Curtis Industries, Inc. v. United States. In that case, Helene Curtis was the low bidder on a contract for the supply of a disinfectant chlorine powder, to be compounded of chlormelamine and other chemical ingredients. Although Helene Curtis based its bid upon a simple mixing process, it found it could not produce production quantities which met the specification solubility requirements without first grinding the chlormelamine to reduce particle sizes. This grinding process substantially increased its cost, for which it sought compensation from the Government. The Court of Claims found that the contracting agency knew, or should have known, that grinding would likely be required, and that Helene Curtis expected to perform the contract without grinding. The court, in awarding Helene Curtis damages for breach of contract, concluded:

In this situation the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own. Although it is not a fiduciary toward its contractors, the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.\(^\text{10}\)

The purpose of disclosure as enunciated in Helene Curtis is thus to

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9. 312 F.2d 774 (Cr. Cl. 1963).
10. Id. at 778.
prevent the Government from standing by while a contractor unknowingly enters into a most disadvantageous situation. In another case, the Armed Services Board of Contract Appeals granted the contractor recovery, when the silence of the Government “misled the appellant into making a disastrous bargain.”

Later cases have stated the standard of disclosure in less strict terms. However, all cases in which relief has been granted have included the element that the failure to disclose actively misled the contractor, and, in each case, the purpose of requiring disclosure was to relieve the contractor from the effect of such action by the Government. Consequently, there has been in these cases, almost a requirement of mens rea on the part of the Government.

The objective of disclosure under Public Law 87-653, on the other hand, is to assist the parties in reaching a fair and reasonable price. Disclosure is not restricted therefore, as it is under the general law, to those unusual situations where failure to disclose misled the other party or led him into a “disastrous bargain.” This difference in objective is significant and bears directly on the nature of the data which must be disclosed by the Government. This will be discussed in more detail below.

**Necessity of Knowledge on Part of the Party Charged with Disclosure**

It is axiomatic that, in order to obtain relief for withholding of information under general contract law, a contractor must prove the Government possessed pertinent information and had knowledge of its significance. Notwithstanding the apparent simplicity of this statement, complicated questions arise as to what knowledge may be attributed to the contracting agency.

A major problem for the contractor is that significant knowledge may exist in a department of the Government divorced from the procuring activity. The courts and boards are reluctant to impose the

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12. See, e.g., Ambrose-Augusterfer Corp. v. United States, 394 F.2d 536 (Ct. Cl. 1968): This was not a situation where the defendant alone had superior knowledge of a material fact which it withheld from the plaintiff, and which it knew plaintiff required to intelligently appraise contract expenditures. Id. at 18 (slip opinion).
knowledge of one department or agency upon another. Thus, the rule has developed that the agency dealing with the contractor must have had actual knowledge of the information which the contractor claims was withheld.\textsuperscript{14} \textit{J. A. Jones Construction Co. v. United States}\textsuperscript{15} provides an interesting application of this principle. Jones was awarded a construction contract by the Corps of Engineers to build facilities for the Air Force at Cape Kennedy, Florida. During performance of this contract, the Air Force initiated a vast, high priority ICBM construction program in the same area, authorizing the payment of premium wages. This new program created a labor shortage, and Jones was required to pay large amounts of premium wages itself to obtain sufficient workmen to complete the project. Jones then made a claim for the additive labor cost. The Court of Claims found that the Air Force knew, at the time Jones was awarded its contract, of the impending ICBM program, and also knew of the premium pay authorization. Although Jones' contract was with the Corps of Engineers, that organization, the court said, was acting primarily as an agent of the Air Force, particularly as concerned the timing and conflict of other work.\textsuperscript{16} Consequently, the Air Force, as the Corps of Engineers' principal, had a duty to disclose to Jones the impendency of the ICBM project.

The \textit{Jones} case represents a very limited departure from the basic rule that the knowledge must be possessed by the procuring organization. While a definite agency relationship between the procuring and

\textsuperscript{14} In a business so vast as that engaged in by the United States Government, with its multitudinous departments, bureaus, and independent agencies, with various and sundry projects scattered all over the world, it is impossible for one department to know what another department is going to do. In such case, it seems unreasonable to charge one agency with knowledge of what another one is going to do. It would seem that defendant should be held liable only if the agency that dealt with plaintiff had knowledge of the impending employment of this huge labor force. Bateson-Stolte, Inc. v. United States, 172 F. Supp. 454, 457 (Cr. Cl. 1959), 305 F.2d 386 (Cr. Cl. 1962).


\textsuperscript{15} 390 F.2d 886 (Cr. Cl. 1968).

\textsuperscript{16} In this way, the court distinguished the two Bateson-Stolte cases, where the Corps of Engineers was the contracting and the using agency, and the knowledge was possessed by the Atomic Energy Commission. The court in those cases did not find an agency relationship, but rather found that the two organizations were independent.
knowledgeable organization may not be required, Jones states that there must be a "significant bond between the two organizations." 17

A bond of this kind was found by the Armed Services Board of Contract Appeals in the case of Cryo-Sonics, Inc. 18 In that case, a bidder on an Air Force procurement made reference to a report developed by another Air Force Command. This report, upon which the contractor relied, was incomplete. The Board found a sufficient bond between the two Air Force Commands by means of the reference by the contractor to the incomplete report:

We agree with the government that the knowledge of one organizational element of the Air Force would not automatically be imputed to every other organizational element of the Air Force, no matter how remote. In this particular instance, any gap between the organizational elements of the Air Force was bridged by the reference in appellant's proposal to the WADD report. 19

While knowledge will not be imputed from one Government agency to another, constructive knowledge may be imposed where the information was available in the procuring agency itself. The Court of Claims has ruled in Travis Womack v. United States 20 that a Government contracting agency is liable not only for actual knowledge in its possession, but also for what it would have learned through reasonable investigation. In Womack, the Government furnished bidders with an estimate of data to be processed under the contract. This estimate was grossly understated, and did not reflect the information which was reasonably available to the Government agents. The court held that a negligent misrepresentation is as actionable as an intentional one, and where the Government furnishes an estimate for assistance to bidders, the estimate must be based on all relevant information that is reasonably available to the Government.

Notwithstanding the apparent broad reach of the Womack case, the extent to which constructive knowledge will be imposed upon the Government is limited. The Court of Claims has indicated that the Government need not go to extreme measures to obtain the data. In

17. 390 F.2d at 892.
19. Id. at 27,331-27,332.
Evans Reamer & Machine Co. v. United States, the contractor contended that the Government should have disclosed problems experienced by another contractor on a similar procurement. The Court denied relief on that ground, stating:

From the foregoing it is clear that as of the end of February 1955, when Evans' contract was fully executed, the contracting officer had only surmises, not verified facts, as to the nature of Aircraftsmen's problems. Obviously, he cannot be charged with fraud, either actual or constructive, in failing to disclose "facts" which he did not actually know to be facts.22

Consequently, the current state of the general law of disclosure, based upon the Womack and Evans Reamer cases, is that the Government must disclose only that knowledge which is factual, and is not required to verify and then disclose that which is mere conjecture.

As stated earlier, neither Public Law 87-653, nor the regulations under it, define the Government's duties of disclosure. Thus, it is necessary to refer to the contractor's obligations under the statute and regulations, in order to determine by analogy the degree to which knowledge might be imputed to the Government under 87-653. Such reference by analogy is consistent with decisions of the Comptroller General, in which it is indicated that the statute imposes duties on the Government, similar to those imposed on the Contractor.23

The relevance of the contractor's knowledge that the data is defective has been an important issue since the statute was first considered. The Act was originally conceived as a type of fraud provision, to prevent over-reaching by contractors in stating their costs. Consequently, good arguments can be made that the purpose of the statute would be satisfied if the Government's right to a deductive price change were to be limited to situations where the contractor knew its data was defective. This position appears to be supported by that portion of the statute which requires the contractor "to certify that, to the best of his knowledge and belief, the cost or pricing data be submitted was accurate, complete and current."24 (Emphasis added.)

21. 386 F.2d 873 (Ct. Cl. 1967).
22. Id. at 882.
However, the statutory language which requires the inclusion in the contract of a clause allowing price adjustment where there was inaccurate, incomplete or noncurrent data, does not limit the Government's remedy to situations where the contractor had knowledge that the data was defective. The Armed Services Board of Contract Appeals has ruled that the price adjustment can be obtained under the contract clause by itself, without resort to the certificate. Further, most commentators, based on the total legislative history, have expressed the view that it is immaterial whether the defective data resulted from advertence or inadvertence. It is, therefore, the prevailing view that the knowledge or motivation of the contractor with respect to accuracy, currency, or completeness is not pertinent to the question of defective pricing.

Consequently, the current DOD regulations have included within the definition of cost or pricing data to be disclosed "all facts existing up to the time of agreement on price which prudent buyers and sellers would reasonably expect to have a significant effect on the price negotiations." The regulations go on to provide guidance as to what data might be regarded as reasonably available on the date that agreement is reached on price, stating that closing or cut-off dates should be included as part of the data submitted. This is consistent with decisions arising under the pre-statute contract clause requiring disclosure of all "reasonably available" data. In these cases, the Board, considering all the circumstances of the contractor's organization, established a cutoff date, and determined that data acquired by the contractor's organization after this date was not reasonably available to the contractor's negotiators.

Further elaboration of the degree to which a party is charged with disclosure under 87-653 is provided by Lockheed Aircraft Corp. In this case, the Government claimed that a subcontractor had failed to disclose material purchases made prior to agreement on price. The subcontractor contended that because of the complexity of its accounting

27. ASPR 3-807.3(e). As amended by defense procurement circular no. 57, dated Nov. 30, 1967.
system, and because of numerous changes in the product, this data was not reasonably available. The Board held that the subcontractor should have developed this information, stating that "[i]t would not be unreasonable to expect the subcontractor to have reviewed all of the available purchase orders, even though it may have taken a week or two or even three to complete that survey." 31

Should these principles under Public Law 87-653 be applied to the Government, the Government would incur new areas of liability for non-disclosure. While under general legal principles the contractor must show possession of the knowledge on the part of the procuring agency, under 87-653 the contractor would merely have to show that the data was reasonably available to the contracting agency.

NATURE OF THE DATA TO BE DISCLOSED

Once a duty has been established, there remains the question of how much, and what kind of, data must be disclosed. Obviously, a categorical answer, responsive to every situation which might arise, is not possible. Instead, the issue must be analyzed in light of the objective to be accomplished by disclosure. Thus, under general contract principles the Government need not disclose all knowledge in its possession, since this would impose an unreasonable burden on the Government. 32 Rather, the Government must disclose that knowledge which will achieve the objective of preventing the contractor from being misled into an unfair bargain. By comparison, the nature of data to be disclosed under Public Law 87-653 is determined by a different objective—that of enabling the parties to reach a fair and reasonable price.

Nature of Data Under General Law

In the Helene Curtis case, the Court of Claims stated that the Government must disclose to bidders "vital information," which it knows the bidders need. 33 The term "vital information" would have been a convenient one to use in describing the Government's obligation to disclose. However, this term has not been carried forward in later cases. In some instances a much less restrictive test has been utilized in assessing liability against the Government. In the appeal of S. Patti Construc-

31. Id. at 29,447.
33. 312 F.2d at 778 (Ct. Cl. 1963).
tion Co., the Armed Services Board of Contract Appeals stated the test as follows:

Where the contracting agency has exclusive knowledge that will materially affect the cost of performing the work, it has the duty to disclose such knowledge to its contractors.34 (Emphasis added.)

Consequently, the "label" attached to the data is not particularly helpful in defining the Government's obligations. A more significant measure of that obligation is the extent to which the Government is aware of the consequences of non-disclosure. The greater the awareness, the more likely that the Government will be charged with a duty to disclose. This of course is consistent with the objective of requiring disclosure; namely, to prevent the contractor from being misled into an unfair bargain. The application of this principle can best be illustrated by taking a number of situations which have been litigated, and analyzing the results obtained in those cases.

1. Item furnished by the Government. When the Government furnishes one of the items required for performance, its failure to disclose information about that item will likely subject it to liability.35 Thus, in the S. Patti Construction Co. case, the contractor was to build a structure to receive certain equipment supplied by the Government. The Government knew at the time of bidding, but failed to disclose, that the design of this equipment was not finalized. Therefore, the Government delayed the contractor's performance while completing the equipment design. The Board held that this failure to disclose rendered the delay unreasonable under the contract suspension of work clause, thereby entitling the contractor to compensation.36

34. ASBCA 8423, 1964 BCA ¶ 4225, 20,505 (1964). See also Big 4 Paving Inc., AEC CA-176 (1964):

[When] the government has or reasonably should have superior knowledge of matters material to an understanding of the work involved, it has a positive duty to reveal [such knowledge] before the submission and acceptance of a bid.

35. Kaiser Industries Corp. v. United States, 340 F.2d 322 (Ct. Cl. 1965) (suitability of rock in Government owned quarry); Sidran Sportswear Co., ASBCA 9557, 65-1 BCA ¶ 4632 (1965) (defective pattern for uniform jackets). In this situation, it may not be necessary for the contractor to argue that the Government withheld information, if he can obtain an equitable adjustment under the Government-furnished property clause of the contract.

36. S. Patti Constr. Co., ASBCA 8423, 1964 BCA ¶ 4225 (1964). See also Consolidated Electrodynamics Corp., ASBCA 6732, 1963 BCA ¶ 3806 (1963), where the Government did not discourage the contractor from continuing work on a cost re-
Similarly, where the Government furnishes information to bidders to assist in the preparation of bids, the failure to furnish complete information will render the Government liable. One case, *Synder-Lynch Motors, Inc. v. United States*, is particularly pertinent to the subject of this article. In that case, the Government approached Synder-Lynch to bid on a contract for rebuilding engines. The Government had considerable experience with respect to another contractor who had done this work. Synder based part of its bid on the Government's advice that the parts cost per unit was about $800. In fact, as the Government knew from its experience, that amount was inadequate. The actual parts cost to Synder was nearly two and one-half times the estimate. The court found that the Government's withholding of this cost information constituted a breach of contract, entitling Synder-Lynch to recover damages.

2. Actions by the Government hindering performance. Of course, the Government is subject to the implied contractual condition that it will not take action which hinders or delays the contractor's performance. A breach of this condition entitles the contractor to recover damages. However, if the hindering action is done in its sovereign (as opposed to its contracting) capacity, the Government is not answerable in damages to the contractor for such sovereign acts. Notwithstanding reimbursable contract past the cost limitation, while failing to advise contractor that no effort was being made to obtain additional funding.


38. 292 F.2d 907 (Ct. Cl. 1961).

39. The court used the phrase "145.5 percent over and above the estimated requirements." *Id.* (emphasis added). The court apparently was stating 245.5 percent of the estimate.

40. The measure of damages was Synder-Lynch's "unrecovered indirect costs of procuring the tank engine parts" of $87,587.06. *Id.* at 910. This apparently represented the difference between Synder-Lynch's actual cost of procurement of the parts and the $800 estimate per unit. There is no indication in the opinion as to whether the Government knew, at the time of bidding, the extent to which the estimate was low.


42. Speidel, *supra* note 4. Such sovereign acts are acts of the Government beyond the control and without the fault of the contractor, and as such do provide a basis for excusable delay. Acme Missiles & Constr. Corp., ASBCA 11794, 68-1 BCA ¶ 6734 (1968).
ing, if the procuring agency knew at the time of contract execution of the likelihood of such acts, sovereign or not, it has a duty to advise the contractor. Failure to do so renders the Government liable.\footnote{43}

3. Problems encountered by other contractors on similar work. Frequently, similar problems have been experienced by other contractors on earlier procurements. In some cases, the precise nature of these problems has not been transmitted to the Government, and there is therefore no duty to disclose to a later contractor.\footnote{44} On the other hand, where the Government's information is fairly well defined, the duty to disclose is present, particularly where the information was developed as a result of research sponsored by the Government.\footnote{45}

A particular difficulty arises where the Government has acquired proprietary knowledge from a previous contractor. In this situation, the Government has conflicting obligations. On one hand, the Government may be prohibited from disclosing a contractor's proprietary data to its competitors.\footnote{46} On the other hand, there is a duty to disclose important information to bidders. The Court of Claims has hinted, in dictum, that the Government may be excused from disclosure in this situation.\footnote{47} However, with respect to technical data, it might well be argued that liability for nondisclosure is a risk that must be borne by


\footnote{44} Robertson Elec. Co. v. United States, 176 Ct. Cl. 1287, 1295-6 (1966); Evans Reamer & Machine Co. v. United States, 386 F.2d 873 (Ct. Cl. 1967).

\footnote{45} Cryo-Sonics, Inc., ASBCA 11483, 66-2 BCA \& 5890 (1966); Sidran Sportswear Co., ASBCA 9557-65-1 BCA \& 4632 (1965). \textit{But cf.} Speciality Assembly Packing Co. v. United States, 355 F.2d 554 (Ct. Cl. 1966) where relief was denied, although at the time the contract was awarded, the procuring agency was aware that another contractor was experiencing difficulties with the test procedures. Recovery was denied on the basis that the procuring agency was not aware of any suitable alternate procedures. The result in this case is questionable, since the contractor's claim was probably that it would have increased its price if it had known of the problem with the test procedure.


\footnote{47} Evans Reamer & Machine Co. v. United States, 386 F.2d 873, 882 n. 12, (Ct. Cl. 1967):

There may be merit in the government's alternative contention that, even assuming the contracting officer was possessed of relevant facts regarding Aircraftsmen's troubles, he was not at liberty legally to disclose those facts to a competitor such as Evans.
the Government for placing the procurement involving such proprietary data on a competitive basis. The Government does have the alternative of purchasing the rights in the information from the data owner.\footnote{48} The bidder being unaware of the existence of the information has no such opportunity.

4. **Extensive research & development required.** In certain circumstances, the Government, knowing that the contract involves a substantial amount of research and development work, has a duty to disclose that fact to the contractor. This is particularly true where the circumstances of the contract indicate that primarily a production effort is involved.\footnote{49} Such circumstances would include a short delivery schedule, precluding extensive research and development,\footnote{50} or the fact that the contract was formally advertised, on a fixed price, and set aside for small businesses.\footnote{51} However, unless it is aware of development problems, the Government is not required to advise prospective contractors that the article being procured has never before been produced.\footnote{52}

5. **Capability of contractor.** In a few cases the contractor has claimed that the Government should have advised him that he did not have the capability to perform the work. This claim has not been successful, since the premise is that the contractor, and not the Government, is the best judge of his own capability. As stated by the Armed Services Board of Contract Appeals:

> Basically, the responsibility is on the bidder to ascertain what is called for by an invitation for bids and whether he has the technical and financial facilities to produce the item sought. To vary this rule takes a showing so strong that it goes almost to the point of being able to find that the bidder COULD not know that he was incapable of performing and, further, that the Government knew that he could not know.\footnote{53}
Nature of Data Under P.L. 87-653

As stated above, the objective of disclosure under Public Law 87-653 is to make available sufficient information to enable the parties to reach a fair and reasonable price. The nature of the data to be disclosed under the statute must be guided by this objective.

There is some published indication of the nature of the data which the Government must disclose under Public Law 87-653. The most limited description of this obligation is stated in ASPR 3.807.5 (b):

If at any time prior to agreement on price the contracting officer learns through audit or otherwise that any cost or pricing date submitted is inaccurate, incomplete or non-current, he shall immediately call it to the attention of the contractor whether that defective data tends to increase or decrease the contract price.

The obligation, as expressed in this regulation, standing alone would not greatly increase the Government’s duty to disclose. It appears to be similar to the contractor’s duty to call apparent ambiguities in specifications to the attention of the contracting officer, if the contractor wishes the specification to be interpreted in his favor.\(^5\) It also bears resemblance to the duty of the contracting officer to call an obvious bidding error to the attention of a bidder.\(^5\)\(^5\) The basic principle is that the Government may not snap up an offer too good to be true.\(^5\)\(^6\) The apparent purpose of ASPR 3.807.5 (b) quoted above is similar. The Government may not let an obvious error in cost or pricing data pass, without notifying the contractor of the error.

But, does the Government’s duty go beyond the apparent limitations of ASPR 3.807.5 (b)\(^5\)? The Comptroller General has indicated that it may. Although the decision dealt only with a contractor’s alleged failure to disclose pertinent data, the Comptroller has stated:

We believe, however, that Public Law 87-653, the Truth in Negotiations Act, requires that all significant cost or pricing data

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56. Wender Presses, Inc. v. United States, 343 F.2d 961 (Ct. Cl. 1965).
available to one party to contract price negotiations be com-
pletely disclosed to the other party so that they may negotiate
on equal terms and establish a price that will be fair and reason-
able to both.57

In a later case, the Comptroller General was faced with a failure to
disclose by the Government.58 The Government had issued an RFQ
for aircraft maintenance services, the contract to be awarded upon
a cost-plus-incentive-fee basis.59 The procurement agency, in analyzing
the three bids received, determined that all bidders had greatly under-
estimated the cost of performing the work. Therefore, the target cost
of each bidder was grossly understated, in effect precluding any
bidder to whom an award might be made from receiving other than
the minimum fee. As a result, award of the contract was made solely
upon the basis of the lowest minimum fee. A bidder, who did not
receive the award, protested to the Comptroller General. The Comp-
troller found that the procuring agency improperly based its total
evaluation upon the minimum fee, and should have disclosed to all bid-
ders its opinion that their target costs were too low:

We strongly feel that the circumstances required, under the
mandate of Public Law 87-653, full and meaningful cost negoti-
ations with the competitive offerors as a prerequisite to award
to that offeror who had submitted the lowest profit proposal
which was related to a higher estimated contract price deter-
mined to be "unrealistic". The legislative history of Public Law
87-653 discloses that one of its primary purposes was to require
full, complete and accurate data and disclosure by both parties
in pricing discussions of incentive contracts in particular and to
require the contractor to certify to the cost figures in hand at
the time of negotiations for target price.60

Consequently, insofar as the nature of the data to be disclosed is con-
cerned, the Comptroller General seems to be imposing on the Govern-
ment a duty similar to that imposed on contractors. Thus, the Gov-

59. Under this type of contract, the parties establish a target cost, target fee and
minimum and maximum fee. The contractor's target fee is increased (up to the maxi-
imum fee) by a pre-established portion of the cost below the target cost. Similarly,
if the contractor's cost is greater than the target cost, his fee is decreased by sub-
tracting from the target fee (down to the minimum fee) a portion of that overrun.
Government might be expected to disclose all data in its possession "which prudent buyers and sellers would reasonably expect to have a significant effect on the price negotiations." The scope of such data may be much broader than the scope of the data which the Government must disclose under general legal principles. Thus, such data might include information which accounts for a relatively small portion of the contract price. It may also include information, the value of which is somewhat in doubt at the time of contract execution.

As to particular items to be disclosed, the one most frequently arising is likely to be the Government's audit of the contractor's proposed price. By means of this audit, and its other pre-contract analysis, the Government frequently has a better understanding of the accuracy, completeness, and currency of the contractor's costs than does the contractor. In light of the objective of 87-653, it would seem that the audit, and the Government's accompanying analysis, ought to be revealed to the contractor.

Another specific item which frequently occurs is knowledge on the part of the Government of another contractor's experiences in performing a similar contract, particularly with respect to the costs of performance. Even assuming the propriety of disclosing such information to another contractor, there is a real question of efficacy since the method of accounting for costs may vary so widely from contractor to contractor that disclosure might be meaningless.

The two specific items listed above are not intended to encompass all areas in which the Government might be required to disclose under Public Law 87-653. Rather, disclosure might be held to be the rule as to any data in the Government's possession which is needed by the contractor to assist in the negotiation of a fair price.

Assuming Disclosure Is Required, What Is the Method and Extent of Disclosure

Since the purpose of disclosure under the general law is to prevent the contractor from being misled by the Government, the contractor

61. ASPR 3-807.3e. As amended by defense procurement circular no. 57, dated Nov. 30, 1967.
64. The auditor's procedures are described in ASPR 3-809. See also Vick, Role of Defense Contract Audit Agency under P.L. 87-653, 1 PUB. CONTRACT L. J. 58 (1968).
65. See note 48, supra.
must show that he was in fact misled by the failure to disclose, and that disclosure would have benefitted him. 66 Similarly, the contractor must prove that the information possessed by the Government was relevant to the difficulties experienced by him. For example, in Natus Corporation v. United States, 67 the contractor was unable to mass produce the article required in the manner indicated in a contract drawing. He claimed that the Government withheld information as to the difficulty in mass producing under this method. However, the Court of Claims denied recovery, finding that the Government's knowledge was obtained solely through experimentation in prototypes, and as such, did not relate to mass production problems.

Under general legal principles, the Government has no duty to disclose information which the contractor knew or should have known. Where the contractor had actual knowledge, the case is clear. 68 The only problem will be one of proof. However, the situation is more difficult when the Government asserts that the contractor should have known—in other words, that the contractor had "constructive knowledge." The major determinative is the relative ease or difficulty by which the contractor could have obtained the information. Thus, where the data is readily available as a matter known in the trade, 69 or from an equipment supplier, 70 or upon a reasonable site investigation, 71 the contractor is likely to be charged with constructive knowledge. At the other extreme, if the data is classified, or otherwise retained under Government control, the contractor would obviously not be expected to have obtained it. 72

The cases do make clear that the Government's obligation to disclose is an affirmative duty, and is not dependent upon a request for disclosure by the contractor. 73 In this respect the Government's duty

67. 371 F.2d 450 (Ct. Cl. 1967).
68. Air Terminal Services, Inc. v. United States, 330 F.2d 974 (Ct. Cl. 1964).
73. Helene Curtis v. United States, 312 F.2d 774 (Ct. Cl. 1963). The contractor may be required to ask for the information where it should have known that data was available. See Ray D. Bolander Co., IBCA 331, 65-2 BCA ¶ 5224 (1965).
to disclose can be distinguished from its obligations under the Freedom of Information Act, where disclosure is dependent upon specific request for identifiable records.\textsuperscript{74}

A somewhat difficult situation exists where the Government discloses the basic data, but withholds its own conclusions from that data. While the point might be made that the Government ought to disclose the entire package, the reported cases appear to release the Government from liability in this situation. The contractor is charged with the knowledge he would have obtained by developing the conclusion from the data submitted.\textsuperscript{75} Presumably, however, the more esoteric the data, and the more expertise required to reach the conclusion, the greater the Government's duty to disclose that conclusion.

As to form, the general law prescribes no particular method of disclosure. Since actual or constructive knowledge by the contractor excuses disclosure by the Government, any means of communication by the Government to the contractor should be sufficient.

Neither Public Law 87-653 nor its implementing regulations indicate the method, extent or form of disclosure required of the government. Consequently, attention must be focused once again upon the requirements imposed upon contractors under the Act. In all respects it would appear that the requirement of disclosure under 87-653 is more stringent than under general legal principles.

The current thinking of the Armed Services Board of Contract Appeals is that constructive knowledge on the part of the Government does not discharge the contractor's affirmative obligations under the statute. Therefore, it is not sufficient for the contractor merely to make available to the Government the records containing the relevant data. Rather, the data itself must be prepared and presented to the government.\textsuperscript{76}

The second area of difference between disclosure under the contract condition of cooperation and disclosure under 87-653 is that of causation, or burden of proof. As described above, under general legal principles, the contractor must prove he was misled by the Government's failure to disclose. The Truth in Negotiations Act itself contains similar language. It states that the price to the Government shall

\textsuperscript{74} 5 U.S.C. § 552 (a) (3) (1946).


\textsuperscript{76} Lockheed Aircraft Corp., ASBCA 10453, 67-1 BCA ¶ 6356 (1967).
be reduced to exclude "any significant sums by which it may be determined . . . that such price was increased because the contractor . . . furnished cost or pricing data which . . . was inaccurate, incomplete or noncurrent. . . ." Consequently, the statute does appear to impose upon the Government the burden of showing that the furnishing of defective data caused the price to increase by significant sums, and to prove the extent of that increase.\textsuperscript{77} However, this burden has been so shaped by the decisions of the Armed Services Board of Contract Appeals and the implementing regulations as to make it significantly less than that demanded under general legal principles. As stated by the Board in the \textit{Cutler-Hammer, Inc.} case:

In \textit{Defense Electronics, Inc.}, . . . we held that the Government had the burden of proving the causal relationship between significant, non-disclosed, pricing data and the resulting contract price reduction. However, we did not then, nor do we here, intend that that burden be an unreasonably heavy one. Accordingly, under the circumstances of this appeal and on the entire record, we are of the opinion that the Government has established the reasonable probability that with a disclosure of the Transco quotation [the data in question], the parties would have agreed that the cost of the Luneberg Lens would be excluded from the contract price.\textsuperscript{78}

The Armed Services Procurement Regulations go even farther, stating:

In the absence of evidence to the contrary, the natural and probable consequences of defective data is an increase in the contract price in the amount of the defect plus related burden and profit or fee; therefore, unless there is a clear indication that the defective data was not used, or was not relied upon, the contract price was reduced in that amount.\textsuperscript{79}

This regulation appears to have almost shifted the burden of proof to the contractor to show non-reliance on the part of the Government.\textsuperscript{80}

\begin{itemize}
  \item \textsuperscript{77} Defense Elec. Inc., ASBCA 11127, 66-1 BCA ¶ 5604, recon. den., 66-1 BCA ¶ 5668 (1966).
  \item \textsuperscript{78} Cutler Hammer, Inc., ASBCA 10900, 67-2 BCA ¶ 6432, at 28,829 (1967). \textit{See also} Bell & Howell Co., ASBCA 11999, 68-1 BCA ¶ 6993 (1968).
  \item \textsuperscript{79} ASPR 3-807.5(a) (2). As amended by defense procurement circular no. 57, dated Nov. 30, 1967.
  \item \textsuperscript{80} It has been suggested that the causation requirement was an unworkable limi-
\end{itemize}
Finally, as to the form of disclosure, a more defined structure is required under 87-653 than under general contract law. This is primarily due to the statutory obligation of the contractor to certify the data he has submitted. Applying an analogous requirement of certification on the Government, as to data submitted to the contractor, would not be supportable under the statute or regulations. However, it can certainly be contended that disclosure by the Government under 87-653 must be made in a more substantial and concrete form, than disclosure in compliance with the constructive condition of cooperation.81

**Remedies for Non-Disclosure**

The Government's failure to fulfill its obligation of disclosure under general provisions of the contract provides the contractor with a number of avenues of relief. The failure to disclose is a breach of the contractual constructive condition of cooperation, and the contractor may bring an action in damages for that breach of contract.82 Non-disclosure may also provide the contractor with an excuse for the Government's termination of the contract for default.83 Finally, the contractor may secure relief under the contract changes clause by obtaining an equitable adjustment, on the theory of a constructive change.84

Public Law 87-653 makes no provision for a price increase based upon Government non-disclosure. Therefore, the remedies for non-disclosure, with one exception, would be similar to the remedies under the general law. That exception might occur in a situation where the Government claims that there was non-disclosure by the contractor, and demands a price reduction on the premise that had the contractor made disclosure, there would have been a reasonable basis for negotiating a lower price. If the Government also failed to disclose information on the item in question, the contractor might defend the Government's demand for

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82. J. A. Jones Constr. Co. v. United States, 390 F.2d 886 (Cr. Cl. 1968); Helene Curtis v. United States, 312 F.2d 774 (Cr. Cl. 1963); Bateson-Stolte Inc. v. United States, 172 F. Supp. 454, 457 (Cr. Cl. 1959).
a price reduction by the assertion that if the Government had made full disclosure during negotiations, the contractor would have had a reasonable basis for increasing the price.

**Summary**

Whether the Government’s duty to disclose information to a contractor has been enlarged by the passage of the Truth in Negotiations Act is speculative at this time. A definitive position may not be taken until these issues have been subjected to litigation.

However, this much can be said: if there is a duty imposed upon the Government to disclose under Public Law 87-653, then the Government’s obligation is significantly broader than it is under general legal principles. This is caused primarily by the difference in objectives between the general law and the Truth in Negotiations Act. Under general legal principles, the objective is to prevent a contractor from being misled into an unfair bargain by the Government’s silence or otherwise. Therefore, only data that would be necessary to avoid such a situation need be disclosed. On the other hand, under Public Law 87-653 the purpose of disclosure is to attain fair and reasonable prices.

Consequently, as the cases are brought before administrative boards and courts, and decided, the Government may find that, as a part of its dealings with contractors, it has an affirmative obligation to disclose all cost and pricing data which might reasonably be expected to significantly affect the price negotiations.