MILITARY LAW REVIEW

Volume 164 **June 2000**

WHERE THERE'S SMOKE . . . WHO SHOULD BEAR THE BURDEN WHEN A COMPETING CONTRACTOR HIRES FORMER GOVERNMENT EMPLOYEES?

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The federal government's procurement system should be protected from both the corrupting influence of actual impropriety, and the corrosive effects of procurements tainted by the appearance of impropriety.

The current rules governing the hiring of a former government employee who, while he was in government service, had official duties involving a requirement satisfied by procurement through a contract, by a firm competing for award of such contract, do not adequately protect the integrity of the government procurement system, or the interests of other contractors.

The rules should recognize the full scope of government duties relating to a requirement that could confer an unfair competitive advantage upon the contractor employing a former government

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employee, and they should impose the burden of establishing the propriety of the hiring decision and duty assignment with regard to the former government employee primarily upon the contractor who hired him. Such a regime would best harmonize the government's interests in integrity, mission accomplishment, and competition.

I. Statement of the Problem

"Few men have virtue to withstand the highest bidder."

— George Washington[2]

Federal Acquisition Regulation (FAR) 3.101-1 General. Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. *The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government - contractor relationships*. While many Federal laws and regulations place restrictions on the actions of Government personnel, *their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.*[3]

A. An Illustration of the Problem: Timely as Today's Headlines

Energy Official Followed Line to Contractor, Insists He Didn't Cross It

When Thomas P. Grumbly was named an assistant secretary of energy in early 1993, he wanted quick results in the cleanup of the Cold War nuclear weapons facility at Rocky Flats, Colo. He presided over the award of the $3.5 billion contract.

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2. George Washington *quoted in* JOHN F. SCHROEDER, MAXIMS OF WASHINGTON: POLITICAL, SOCIAL, MORAL, AND RELIGIOUS 312 (1855).

3. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 3.101-1 (June 1997) [hereinafter FAR] (emphasis added).

> Today, Grumbly wears a different hat. Two years after the Rocky Flats contract was awarded, Grumbly announced that he would join ICF Kaiser International Inc., a partner in the joint venture that won the job. Federal ethics laws prohibit him from dealing directly with the Energy Department. But nothing in the rules restricts Grumbly in his current role: attending quarterly meetings of the joint venture and advising it on how to deal with his former employer on the Rocky Flats project.
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> The hiring of Grumbly, a high-level political appointee, by ICF Kaiser, a company headed by a major Democratic fund-raiser, illustrates how a handful of huge engineering firms used every means at their disposal after 1993 to cultivate closer ties to the Clinton administration as they fought for a share of a huge new pot of federal dollars: $6 billion a year in contracts to clean up the nation's bomb-making facilities.[4]

B. What's the Problem?

Why does the circumstance of a former senior government official accepting employment by the awardee of a contract with which he was involved while in public service have the power to raise doubt regarding the former public servant's propriety, and generate sensational headlines?[5] Are the rules enacted to avoid impropriety and the appearance of impropriety unfair to persons leaving government service, and corrosive of the government's position in the market for the most highly qualified personnel?[6]

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4. Dan Morgan & David B. Ottoway, *Energy Official Followed Line to Contractor, Insists He Didn't Cross It*, WASH. POST, Dec. 12, 1997, at A12.

5. The "revolving door" is a pervasive and invidious metaphor applied to a wide variety of situations in American society and culture. For example, a 19 February 1998 LEXIS-NEXIS search of the *New York Times* database (NY;NYT, no date restriction) using the search request "revolving door," yielded 1108 stories employing the term. Searching the *Washington Post* (NEWS;WPOST) and *Wall Street Journal* (NEWS;WSJ) databases under the same circumstances yielded 1147 and 24 stories, respectively. A random survey of the results (every 75th story) disclosed an overwhelmingly sinister connotation associated with the term (e.g., referring to the suspicious or corrupt activities of lawyers, lobbyists, politicians, career criminals, health maintenance organizations, etc.). The most benign circumstances associated with the revolving door were contained in articles critical of the stability of professional sports teams' rosters or coaching tenure.

6. Concerns regarding the adverse effect of revolving door rules comes both from within and from outside of the government. *See* H.R. REP. NO. 115, 96th Cong. 1st Sess. 1979, *reprinted in* 1979 U.S.C.C.A.N. 328 (discussing the purportedly over-broad scope of

6. (continued) the principal revolving door statute: 18 U.S.C. § 207). Deputy Secretary of Defense Charles W. Duncan testified,

> The problems in the act have created an atmosphere in which senior government officials believe they must reevaluate whether they want to remain in government employment. The bill, in its present form, sweeps so broadly that it creates a basic uncertainty as to a senior government employee's capability to earn a living after leaving the government. The ability to earn a living and optimism about the future are so basic to job satisfaction that we simply cannot deal with the turmoil created when these fundamental factors are undermined. The Department of Defense relies heavily on a large group of talented scientists, engineers, and technical managers to carry out its mission.We cannot maintain the technological advantage that this nation now enjoys in its national defense without these people. We believe strongly that movement back and forth from private industry to government service is valuable to people in systems management and scientific and technical fields and that it is valuable to the department of defense. If this opportunity did not exist, we would quickly *see* the best minds move out of the government permanently and we would also find that promising young talent would move into nondefense fields where there were no such restrictions on their future professional development. We would also find ourselves stagnating as a permanent cadre of civil servants faced no fresh competition or infusion of energy from outsiders.

Id.

Evidently Deputy Secretary Duncan's concerns were not adequately addressed by the changes to 18 U.S.C. § 207 under consideration in 1979, at least in the opinion of some in the defense industry. *See* American Institute of Aeronautics and Astronautics (AIAA), *Procurement Integrity and the Revolving Door, November 1989* (visited Apr. 6, 2000) <http://www.aiaa.org/policy/papers/revolving-door.html>. Commenting on efforts then underway by Congress to control revolving door problems through the Procurement Integrity Act, 41 U.S.C. § 423, the AIAA paper intoned,

> There are myriad post-employment ("revolving door") statutes whose cumulative impact is also deadly. The latest is Public Law 100-679, which took effect in July of 1989. Adding restriction upon restriction has resulted in overwhelming, ambiguous, and vague guidelines and has merely served to confuse those most affected. The appearance of conflict of interest, rather than the fact, has now become the target of such measures. Senior government acquisition officials are unsure of how the new restrictions will affect them after they depart. The fear that their official actions may be misinterpreted later can inhibit their decision-making and slow the acquisition process. For those talented people asked to contribute in crucial government roles, the drawbacks of serving outweigh the incentives. The net result is that Congress has unnecessarily narrowed the field of good candidates.

Id.

Are the rules adequate to protect the integrity of the federal procurement system? Is there enforcement of FAR 3.101, which states that "[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships"?[7] Before examining these issues, consider the following hypothetical scenario.

1. The Setting

ABC Corporation, an experienced government contractor in the field of environmental remediation, just lost the competition for a $35,000,000 Army contract to perform the cleanup of the now defunct Toxic Gulch Ammunition Depot, in Badwater, Nevada. Two days following the announcement of contract award, ABC learns that the winner of the contract, Green Services, Inc., had employed a former Army employee who, while employed for the government, had been the contracting officer's representative for the predecessor remediation contractor. At ABC's debriefing, its general counsel (GC) asked the procuring contracting officer (PCO) about the former employee. The PCO assured the GC that the PCO had been fully aware that the former employee was hired by Green Services; that the former employee, an environmental engineer, had retired from government service, the Army, over fourteen months ago, and had taken only a limited role in the procurement while in the government's employ; that he would personally vouch for the honesty and integrity of the former employee (the PCO had worked with him for nearly ten years); and, that Green Services had reportedly not detailed the former employee to assist in preparing its proposal.

Upon returning to his office, the GC and the chief of the proposal preparation team discussed the matter. ABC's proposal, the GC was told, was very competitive in price with that of Green Services, but had been downgraded by government evaluators for a perceived lack of understanding of the requirement and other supposed technical deficiencies. The proposal team chief, however, stated that they could not evaluate whether the former employee had somehow given Green Services an unfair competitive advantage, without obtaining a great deal of additional information, including access to the Green Services proposal preparation team members.

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7. *See* FAR, *supra* note 3, at 3.101.

The GC researched bid protest cases in which a former government employee went to work for a successful offeror on a government contract with which he had been officially involved in some way while employed by the government. The results of his research were discouraging. Of the several dozen GAO cases fitting into this broad fact situation over the past decade, the GC found that the rate at which protests were sustained on procurement integrity or conflict of interest grounds was far beneath the overall sustain rate. The GAO employed a variety of ways to uphold contracting officers' decisions to award contracts to firms that had hired former government employees with official duties relating to contracts or procurements in which they had a competitive interest.

Researching bid protests in the courts yielded a smaller number of cases, but an apparently more sympathetic forum, based upon the rates at which revolving door protests were sustained. Nevertheless, the sample was too small, the decisions often confusing or difficult to reconcile, and the costs of federal court litigation too high, for the GC to recommend a judicial bid protest, especially when ABC did not have the kind of "hard facts" evidence of a violation of the procurement integrity and "revolving door" laws and regulations.

Further, those laws and regulations lacked clarity and precision, and covered a limited spectrum of post-government employment conduct. Moreover, even if a violation may have occurred, ABC, in order to prevail in a protest, would have to demonstrate that Green Services gained an "unfair competitive advantage" through its hiring of the former government employee—a nearly impossible burden in view of the limited discovery available before the GAO. In addition, the PCO had become increasingly reluctant to discuss the issue during the GC's conversation with him, and finally terminated the call by indicating that he wanted to consult with his lawyer before discussing the matter further. The GC's attempts to learn more by talking to other friends in the contracting activity were completely unavailing, as people either claimed poor memories, or simply refused to discuss the issue.

It appeared to the GC that it would be impracticable to get the specific facts from which a valid assessment of the competitive effects of Green Services' hiring of the former government employee could be made, especially given the short period during which an automatic stay could be obtained. In view of this circumstance and the protester's burden in such cases, the GC concluded that a protest should not be undertaken.

The GC met with the proposal team chief and the company CEO to discuss the matter, and presented the results of his research and analysis, recommending that they not protest the award to Green Services. The CEO was upset that there was no means of addressing what he believed was an injustice. In the end, the CEO saw the wisdom of just moving on to the next project. He did, however, resolve that, before the next important competition, they would hire their own government employee, and maybe things would be different.

The essence of the above scenario is a fair depiction of events in a significant number of cases.[8] The specific situation, which is the subject of this article, is one in which a non-clerical federal employee leaves government service and accepts employment of some type with a contractor. The contractor is competing for a contract to be awarded to fulfill a requirement with which the former government employee had substantial involvement while in public service, either in the instant procurement or in the administration of a predecessor contract (the "FGE case" scenario).[9]

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8. The author's views are informed by study of the nearly 80 revolving door bid protest cases extant, and five years' experience with and substantial participation in government procurement, as an attorney-advisor, at two Department of Defense contracting activities, including two years as a Deputy Ethics Counselor appointed pursuant to the Department of Defense Joint Ethics Regulation. *See* DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993) [hereinafter JER].

9. Although beyond the scope of this article, other related revolving door and conflict of interest scenarios, such as when a former contractor employee enters government service, or when a current government employee is related in some way to a competing contractor, may assist in understanding the way in which protest fora have decided these cases. Agencies and the General Accounting Office, however, appear to be more sensitive to improprieties in such situations. *See, e.g.*, Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272 (sustaining a protest where awardee's president was married to the contracting officer's supervisor); Childers Serv. Ctr., B-246210.3, June 17, 1992, 92-1 CPD ¶ 524 (upholding termination for convenience in a case where the husband of alternate contracting officer's representative for a predecessor contract was hired by the awardee); Huynh Serv. Co., B-242297.2, June 12, 1991, 91-1 CPD ¶ 562 (upholding termination for convenience where the husband of awardee/protester's president was a former employee of a competitor; the husband, while employed by the competitor, had assisted in the preparation of the competitor's bid; awardee's bid was just barely lower than that of the competitor).

2. So What?

(a) A Statistical Disparity

The FGE case scenario has been the subject of at least sixty-six protests litigated before the GAO since 1976.[10] The rate at which such protests (against awards to contractors that have employed such former government employees) have been sustained is more than seventy-five percent below the overall sustain rate.[11] This circumstance is ground for concern and closer scrutiny. Admittedly, it would be unreasonable to demand perfect congruity among the sustain rates for all protest grounds

10. *See infra* Appendix A. In addition, these cases decided by the courts and by the General Services Board of Contract Appeals (GSBCA), though far fewer in number, will be considered and analyzed as appropriate.

11. Revolving door protests are sustained by the General Accounting Office at a rate of about 3% (2/66), whereas the annual rate for all General Accounting Office protests has fluctuated between 9% and 16% from 1987 through November 1999. The ten-year average is 14%. Sustain rates were calculated based upon searches conducted in the WESTLAW WESTMATE 6.3 (Law School Edition), CG database, using the search requests: "WE SUSTAIN THE PROTEST" & DA(AFT 1/1/19XX & BEF 12/31/19XX), and "WE DENY THE PROTEST" & DA(AFT 1/1/19XX & BEF 12/31/19XX), for the years 1987 through 1996. The results reflected below appear to track with a longstanding trend in sustain rates in the middle to upper teens percentages. *Competition In Contracting Act of 1984: Hearings Before A Subcomm. of the Comm. on Government Operations*, 98th Cong. 42 (1984) (testimony of Hon. Charles A. Bowsher Comptroller General of the United States) (noting a 15% sustain rate for years 1981-1984).

General Accounting Office Bid Protest Results 1987-1999

Year	Sustained	Denied	Total	%Sustained
1987	106	544	Total	0.16
1988	78	541	650	0.13
1989	75	597	619	0.13
1990	109	581	672	0.16
1991	95	504	690	0.16
1992	98	573	599	0.15
1993	77	521	671	0.15
1994	50	477	598	0.09
1995	55	451	527	0.11
1996	56	357	506	0.14
1997	6	200	413	0.03
1998	31	176	206	0.18
1999	17	89	207	0.19
Total	**853**	**5611**	**6464**	**0.15**

on pain of condemning such inequality as evidence of sinister motives. Nevertheless, the General Accounting Office's sustain rate has remained remarkably consistent over 6000 randomly reviewed cases throughout a thirteen-year period, and the number of FGE cases is substantial and apparently significant.[12] What legitimate reason could explain this difference?

(b) Possible Explanations

There appear to be two primary alternative explanations for this disparity.

Explanation Number One: The rules are sufficiently responsive to the reasonable expectations of the public regarding the conduct of former government employees, and they are properly interpreted and applied by the protest fora. Protesters who challenge the award of contracts to such businesses are irrationally willing to squander substantial resources in obviously futile litigation. The protest fora cannot do otherwise than to repeatedly dash such quixotic protests.

Explanation Number Two: Perhaps, however, the rules do *not* address the range of conduct that should be proscribed to avoid impropriety and the appearance of impropriety. Further, perhaps bid protest proce-

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12. Economist and mathematician Mary M. O'Keeffe analyzed a portion of these outcomes and found the results very significant indeed. She wrote:

> As a general rule of thumb, statisticians consider a discrepancy to be "statistically significant" if there is a less than 5% chance that such a discrepancy could have arisen by chance. The "revolving door" sample easily meets this criterion.
>
> Given the population probability of 13.34% derived from your overall dataset, there is less than a 1% chance that you would observe as few as two cases sustained in a sample of 66. Thus statisticians consider the "revolving door" subsample to be significantly different from the overall population of protests. To be precise, the chances that no more than 2 out of 66 cases would be sustained in a random sample drawn from the overall population is 0.00900617 [.9%].
>
> Thus it is very unlikely that the 66 case "revolving door" subsample is different from the overall sample as a mere artifact of chance.

Electronic Correspondence from Mary O'Keeffe, Ph.D., to LTC Richard B. O'Keeffe, subject: It is Indeed a Highly Significant Difference (May 31, 1998) (on file with author).

dural rules do not place the burden of explaining such impropriety or appearance of impropriety on the parties in the best position to do so, namely, the agency, the former government employee, and the contractor that hired him. Finally, perhaps the shortcomings of these procedural and substantive rules have encouraged the protest fora to adjudicate revolving door protests in a significantly less rigorous manner, legally and intellectually, than they decide and explain protests in general.

This article argues that the latter explanation better describes the reasons for the disparate treatment of revolving door protests, and that this circumstance is a problem. It is reasonable to observe that, when confronted with a disparity in results of the magnitude that presents itself in this case, the burden for identifying a benign reason for the disparity should fall upon those advocating the status quo. A more compelling and substantive argument, however, is that successful enterprises do not remain in business by wasting money on vain efforts to seek redress for wrongs that the law clearly does not recognize. Yet why do disappointed bidders continue to protest even in the face of such odds? There may well be other classes of protest grounds that suffer results as discouraging as the revolving door.[13] There is, however, probably no other protest ground subject to such a unique collection of obstacles to full and fair adjudication and vindication. To begin the inquiry into the reasons and character for the marked relative lack of success of revolving door protests, potential sources of disparity must be sought.

(c) Sources of Disparity

Several factors depress sustain rates in FGE cases. First, the rules governing post-government service employment, although greatly simplified by the Federal Acquisition Reform Act of 1996 (FARA),[14] have in the

13. Protests of best value procurements likewise have very low sustain rates. Carl J. Peckinpaugh & Joseph M. Goldstein, *Best Value Source Selection—Contracting For Value, Or Unfettered Agency Discretion?*, 22 PUB. CONT. L.J. 275, 277 (1993) ("GSBCA and the GAO have deferred to the virtually complete discretion of an agency to pay immense cost premiums for higher technical ratings, or to award to a lower rated, lower priced offeror notwithstanding the solicitation's emphasis on technical considerations over cost.") However, as will be discussed, *infra*, Section I.B.2.(d), revolving door protests are different.

14. Pub. L. No. 104-106 §§ 4000-4402, 110 Stat. 186, 642-679 [hereinafter FARA]. *See* Frederick M. Levy et al., *A Contractor's Guide to Hiring Government Employees*, FEDERAL PUBLICATIONS BRIEFING PAPERS (Second Series), No. 96-8, (July 1996). "Among other

past been viewed as inconsistent and confusing.[15] This lack of clarity could in turn lead to faulty analysis and resolution of revolving door protests. The FARA reforms, moreover, were not directed at the problem central to this article, but rather were focused on freeing the government from burdensome rules, rather than on addressing the apparent anomaly of results in revolving door bid protest cases.[16] There are still issues regarding coverage, (arguably a common defect in any rule that attempts to balance and harmonize vigorously competing interests). The most significant limitation, however, is the lack of a prescribed civil or administrative remedy for violations of the rules, and a standard to guide agencies and the protest fora regarding the circumstances under which violations should result in remedial action.

Into this vacuum has flowed, from the closely related field of organizational conflicts of interest,[17] the concept of unfair competitive advan-

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14. (continued) reform measures, FARA significantly revised the OFPP Act § 27 procurement integrity provisions, eliminates most certification requirements, and imposes uniform restrictions on post-government employment. Some of the FARA changes became effective immediately when the law was signed on February 10, 1996." *Id.*

15. *See* Kathryn Stone, *The Twilight Zone: Post-Government Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 MIL. L. REV. 67, 68 (1993) (noting that the conflict of interest laws are "obscure, confusing, overlapping, often unnecessary, and difficult to explain"); *see also* United States v. Nofziger, 878 F.2d 442, 445 (D.C. Cir. 1989) ("[W]e are dealing with a statute [the Ethics in Government Act, 18 U.S.C. § 207] that is hardly a model of clarity.").

16. President Clinton, upon signing the FARA, stated:

> And this legislation makes important strides in the area of procurement reform, which will help produce a better-equipped military for less money. The legislation gives agencies enhanced authority and flexibility in their use of computers and telecommunications, while insisting on accountability. Consistent with the Administration's efforts under the National Performance Review to create a Government that works better and costs less, the Act encourages the purchase of commercially available goods and services, *to streamline and clarify procurement integrity laws*, and to substantially improve the process for resolving bid protests for information technology.

William J. Clinton, Statement by President William J. Clinton upon Signing S.1124, *reprinted in* 1996 U.S.C.C.A.N. 468-1 (emphasis added).

17. *See* 48 C.F.R. subpt. 9.5 (2000). Organizational conflict of interest rules (seeking to mitigate the unfair competitive effects of contractor incumbency or participation by a contractor in the development of a requirement, 48 C.F.R. § 9.502(c) (2000)), though closely related to the revolving door scenario, present distinct issues that are beyond the scope of this article. *See* Aetna Gov't Health Plans, Inc., B-254397.16, B-254397.17,

tage.[18] When conflicts of interest or procurement integrity rule violations have been found or suspected, the protest fora have typically required, in order to sustain the protest, that the procurement violations have *prejudiced* the protester by affording the proposed awardee an unfair competitive advantage.[19]

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17. (continued) B-254397.18, B-254397.19, July 27, 1995, 95-2 CPD ¶ 129 (describing the three types of situations in which organizational conflicts arise).

18. 48 C.F.R. § 9.505(b) (2000). The term, "unfair competitive advantage" has been defined by the Office of Federal Procurement Policy, as follows:

> An "unfair competitive advantage" exists, in addition to the situations addressed in FAR Subpart 9.5, where a contractor competing for award of any federal contract possesses
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> (1) proprietary information that was obtained from a Government official without proper authorization, or
>
> (2) source selection information that is relevant to the contract but is not available to all competitors, and
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> (3) such information would assist that contractor in obtaining the contract.

Office of Federal Procurement Policy, Policy Letter on Consultants and Conflicts of Interest: Invitation for Public Comment, 54 Fed. Reg. 51,805, 51,808 (1989). This definition applies to proprietary and source selection information. The decisions employing the unfair competitive advantage concept, however, as will be discussed in greater detail in Section III, tend to focus too heavily on source selection information (i.e., rankings of competing bids/offers, competing costs, etc.) to the prejudice of full and fair consideration of the competitive advantage afforded by proprietary information, learned during the course of performing contract administration functions, regarding other competitors.

19. Keco Indust., Inc. v. United States, 492 F.2d 1200 (1974); *see also* Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("Our general interest, within the confines of a bid protest, is to determine whether any action of the former Government employees may have resulted in prejudice for, or on behalf of the awardee during the award selection process."). *See also* Physician Corp. of America, B-270698.5, B-270698.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

Prejudice is required for relief on any other type of protest ground before the General Accounting Office. The prejudice requirement, however, is itself subject to criticism. *See* Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636 (1993) ("The notion of allowing a federal agency to proceed with a procurement that fails to comply with applicable statutes and regulations on the grounds that no prejudice to other bidders occurred violates the express language of CICA."). *Id.* at 637.

Although imposing a heavy burden on protesters to demonstrate prejudice is the norm, there are reasons to believe that doing so in revolving door cases may suppress the discovery of all the facts necessary to fair, open, and just resolution of the issues in such cases. As in most protests, however, the government or the awardee in a revolving door protest enjoy superior knowledge of the material facts. Further, it is understandable in any case that obtaining evidence from competitors and adverse parties may be very difficult.[20]

Why should protesters in revolving door cases need special treatment? As recognized by the U.S. Supreme Court, in its 1961 decision in *Mississippi Valley Generating Co. v. United States*, to justify remedial action regarding a contract tainted by corrupt practices, there need not be any "actual loss" to the government.[21] Such precedent alone does not justify abolishing the prejudice requirement in revolving door bid protest

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20. *See* Centel Bus. Sys., VABCA No. 2079, 86-3 BCA ¶ 19,120 ("While it certainly would have been helpful to the Board to have had such additional evidence presented, we recognize the realities in the business world and the potential difficulties involved in obtaining favorable testimony from one's competitors."). In *Pinkerton Computer Consultants, Inc*., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694, the Comptroller General acknowledged the difficulty a revolving door protester may face, but asked us to take it on faith that all is well:

> We understand that Pinkerton was somewhat hindered in its attempt to show a conflict of interest, because some of the materials concerning the evaluation of proposals were withheld from it by NHTSA under Freedom of Information Act exemptions. However, we have examined the record of proposal evaluations and discussions, and we have discerned no evidence of bias in the award of this contract.

21. Mississippi Valley Generating Co. v. United States, 364 U.S. 520 (1961). In ruling that a federal employee had illegally acted in his official capacity while under a conflict of interest in violation of 18 U.S.C. § 434 (a precursor to the present 18 U.S.C. § 208) Chief Justice Warren, writing for the Supreme Court, stated:

> It is also significant, we think, that *the statute does not specify* as elements of the crime that there be actual corruption or *that there be any actual loss* suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, *regardless of whether there is positive corruption*. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor.

Mississippi Valley Generating Co., 364 U.S. at 549 (emphasis added).

cases. It does, however, acknowledge that ethical rules violations raise unique issues demanding different remedies.

(d) The Revolving Door is Different

A salient distinction in revolving door cases is that, unlike in "garden-variety" protests,[22] the specter of actual, intentional wrongdoing, the scent of scandal and dishonor, and ultimately, the threat of criminal prosecution, are ever-present just beneath the surface in revolving door cases. No one ever went to jail because he mistakenly evaluated a technical proposal, erroneously determined contractor responsibility, or incorrectly added up a cost proposal. For violations of revolving door statutes, however, people can and have been convicted and sentenced to substantial fines and to confinement.[23] Garden-variety protest grounds do not merit law enforcement investigation, yet criminal investigation is a common and sometimes a required response to revolving door allegations.[24]

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22. By the term "garden-variety," it is intended to refer to protests on grounds not implicating any party's honesty, integrity, or ethics. For example, challenges to the adequacy of discussions, to the makeup of the competitive range, or to the efficacy of the specifications, would be garden-variety protest grounds.

23. *See, e.g.*, United States v. Baird, 29 F.3d 647 (D.C. Cir. 1994); United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991); United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990); United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989); United States v. Gleason, 39 M.J. 776 (A.C.M.R. 1994), *reversed* 43 M.J. 69 (1994); *see generally* James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343 (1992).

24. A random sampling of 565 General Accounting Office bid protest decisions over a twelve-year period disclosed no referrals to criminal law enforcement agencies for garden-variety procurement irregularities. Sampling was conducted WESTLAW WESTMATE 6.3 (Law School ed.) using the CG database and the search request "MATTER OF" (to isolate bid protests from other actions) & "DA(AFT 1/1/19XX & BEF 2/1/19XX)" for the years 1997, 1995, 1993, 1991, 1989, 1987, and 1985.

By contrast, of the approximately 80 revolving door/conflict of interest cases analyzed for this article, six protest decisions reported that criminal investigations were conducted into revolving door issues. IGIT, Inc., B-271823, Aug. 1, 1996, 96-2 CPD ¶ 51; General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; Childers Serv. Ctr., B-246210.3, June 17, 1992, 92-1 CPD ¶ 524; Compliance Corp., B-239252, B-239252.3, Aug 15, 1990, 90-2 CPD ¶ 126; Holmes & Narver Servs., Inc./Morrison-Knudsen Servs., Inc. (JV); Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379; Chemonics Int'l Consulting Div., B-210426, Oct. 7, 1983, 83-2 CPD ¶ 426.

(e) How Does the "Difference Make a Difference"?

The stigma attached to revolving door violations manifests itself at several levels. It is likely that source selection officials, procuring contracting officers, and their counsel are more timid in addressing actual or apparent revolving door improprieties early on, when remedial action would be most effective and least disruptive to the parties and the process. This timidity may stem from a natural desire to avoid action that implies criminality, dishonesty, or, at a minimum, grossly bad judgment, on the part of former colleagues or contractors with whom the government decision-makers may have dealt for a long period of time. Further, such action, involving misconduct, rather than mere error or negligence, would tend to reflect especially adversely on the leadership and management abilities of the government decision-makers. In addition, unlike cases involving only garden-variety allegations, in conflict of interest cases, the agency is required to air its "dirty laundry" outside of agency and bid protest channels.[25] Finally, taking remedial action that explicitly or implicitly accuses others of criminal, or at least morally and legally ambiguous conduct, invites retaliation in kind by persons whose prior association puts them in an excellent position to do so.[26] The ancient Romans had an apposite saying: *"quid de quoque viro, et cui dicas, saepe caveto."*[27]

There are other factors, unrelated to the "seamy" side of the law implicated by the revolving door, which influence government decision-makers to draw unjustifiably benign conclusions with regard to the actions

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24. (continued) Further, under the Department of Defense Joint Ethics Regulation, ethics counselors who suspect that a violation of the Ethics in Government Act, *see infra* Section II.C.1., must report the matter to his component's criminal investigative commend. 32 C.F.R. § 84.38(B)(3)(i) (2000); *see* JER, *supra* note 8.

25. 5 C.F.R. § 2637.212(a)(2)(i) (2000) (noting that an agency is required to report substantiated information of violations of Ethics in Government Act, 18 U.S.C. § 207 (1994), to the Criminal Division, Department of Justice).

26. The adage, "when accused admit nothing, deny everything, and make counter-accusations," is ingrained in American culture and society, and it is very pertinent to this situation. *See, e.g.*, Graham v. Wyeth Lab., 760 F. Supp. 1410, 1420 (D. Kan. 1991). Tod Linberg, *Guilty is as Guilty Does*, WASH. TIMES, Mar. 11, 1998, at A19; Georgina Wroe, *Blake's Heaven on Golden Pond*, SCOTSMAN PUB. LTD, Mar. 8, 1998, at 18; Joe Giuliotti, *Sox All Wet on Coach's Demotion*, BOSTON HERALD, May 1, 1996, at 88.

27. "Take special care what you say of any man, and to whom it is said." Horace *quoted in* GEORGE MACDONALD FRASER, FLASHMAN AND THE ANGEL OF THE LORD 55 (1995)).

of former government employees and the contractors who employ them.[28] Nevertheless, the cloud of criminality that hangs over the revolving door applies powerful pressure in its own right upon government decision-makers. The results are that timely, effective remedial actions are not taken; and dubious decisions are made to overlook, justify, or minimize revolving door improprieties.

When such decisions are challenged in bid protests, it appears as if the protest fora are likewise influenced by revolving door stigma. The reluctance of the General Accounting Office[29] to deal with conflict of interests allegations is demonstrated by its repetition of the mantra: "conflict of interests allegations (primarily those involving the applicable criminal provisions) are not for us to deal with, they are a matter for the procuring agency and the Department of Justice."[30] As will be discussed in Section III of this article, this distaste for allegations involving possible criminal

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28. For example, as discussed in Section III, decisions by the protest fora requiring "hard facts" to support remedial measures such as disqualification also exert a powerful influence, depressing the likelihood that government decision makers will take strong action against firms employing former government employees. In addition, government decision-makers may also believe, quite sincerely *and correctly,* that the contractor that hired the former government employee offers the government the best value.

29. As the General Accounting Office has written the vast majority of the decisions in this field, its protest decisions are the main focus of this article. The decisions of the courts, especially the Federal Circuit, and the GSBCA, will be considered as they advance the understanding of the issues bearing on the problem.

30. *See, e.g.*, PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115; Physician Corp. of America, B-270698.5, B-270698.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Cleveland Telecomm. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366; Central Texas College, B-245233.4, Jan. 29, 1992, 92-1 CPD ¶ 121; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132; MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81; Joseph L. De Clerk & Assoc., Inc.—Request for Reconsideration, B-233166.3, Apr. 6, 1989, 89-1 CPD ¶ 357; Mariah Assoc., Inc., B-231710, Oct. 17, 1988, 88-2 CPD ¶ 357; The Earth Tech. Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113; Regional Envtl. Consultants—Reconsideration, B-223555.2, Apr. 21, 1987, 87-1 CPD ¶ 42; Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254; Space Sys. Tech., Inc., B-220935, Nov. 6, 1985; Wall Colmonoy Corp., B-217631, Jan. 8, 1985, 85-1 CPD ¶ 27; D. J. Findley, Inc., B-213310.2, Nov. 30, 1984, 84-2 CPD ¶ 588; Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422; Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290; Sterling Medical Assoc., B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60; Bray Studios, Inc., B-207723, Oct. 27, 1982, 82-2 CPD ¶ 373; Polite Maintenance, Inc., B-194669, May 10, 1979, 79-1 CPD ¶ 335.

conduct appears to have several results: (1) unduly cursory review and analysis of the facts (and omission of essential facts from decisions), (2) uncritical acceptance of uncorroborated or lightly corroborated testimony by parties with obvious interests in the outcome, and (3) inability to discern relationships among the facts and the various protest grounds that

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30. (continued) It is also noteworthy that the General Accounting Office's robotic repetition of its policy against applying and interpreting the criminal conflict of interest laws has no statutory basis. To the contrary, the House Conference Report on legislation amending 31 U.S.C. § 35 (to strengthen General Accounting Office bid protest procedures), while acknowledging that the General Accounting Office's jurisdiction was not exclusive on all protest matters, did not designate conflicts of interest based upon violations of revolving door criminal statutes as matters outside its protest purview. "The Comptroller General is not given exclusive authority to hear protests. The conferees do not intend, for example, that the GAO decide matters dealing with the Small Business Administration's responsibilities under the Small Business Act to establish industry size standards or to issue certificates of competency to small businesses." H.R. CONF. REP. 98-861.

Further, the General Accounting Office's prudent policy against enforcing criminal conflict of interest statutes over-emphasizes the punitive nature of such laws at the expense of the protective. Such prudence is thus inconsistent with the opinion of the U.S. Supreme Court in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), in which the court, in construing 18 U.S.C. § 434 (a precursor to the present 18 U.S.C. § 208), stated:

> Although nonenforcement frequently has the effect of *punishing* one who has broken the law, *its primary purpose is to guarantee the integrity of the Federal contracting process* and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction.

Mississippi Valley Generating Co., 364 U.S. at 564-65 (emphasis added).

This policy also overlooks the reality that, in conflict of interest cases, non-criminal action based upon actual *or apparent* ethical violations, may be the government's sole effective remedy. As the Supreme Court, in *Mississippi Valley Generating Co.*, stated:

> [T]he primary purpose of the statute is to protect the public from the corrupting influences that *might* be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. *If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution* against its agent, as the respondent suggests, *then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent*.

Id. at 316 (emphasis added).

bear on the existence of actual impropriety or the appearance of impropriety.[31]

Admittedly, the General Accounting Office is also influenced by valid prudential considerations favoring the decisions of the agency.[32] There is reason, however, to question the need for deference to the agency in revolving door cases. Such deference is clearly warranted when applied to issues over which an agency's expertise can be fairly deemed to extend (that is, the statutes it is specifically charged with administering, or technical or scientific issues relating to agency requirements).

There is, however, no reason to believe that any agency has special expertise worthy of deference from the General Accounting Office on the matters of ethics and conflicts of interest.[33] Although the typical agency does not possess unique ethical expertise, there will always be issues, related to the existence of impropriety, or its effects, which are within the agency's area of technical expertise.[34]

Nevertheless, in view of the potentially explosive nature of ethical issues, standard deference to the agency's technical expertise should be tempered when ethical and technical issues are intertwined.[35] There is,

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31. *See infra* Section III.B.3.(e).

32. *See, e.g.*, Acton Rubber Ltd.—Reconsideration, B-253776, Sept. 27, 1993, 93-2 CPD ¶ 186 ("Where an agency's interpretation of a statute it is charged with administering is reasonable and has been consistently held, we will defer to the agency's interpretation unless it is clearly erroneous."); Sellers Eng'g Co., B-218062.2, Apr. 29, 1985, 85-1 CPD ¶ 483 (holding that the agency has the expertise to determine its needs and to that expertise, the General Accounting Office will defer). *See also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that courts should respect an agency's reasonable interpretation of the laws that the agency is charged with administering); *see generally* 2 AM. JUR. *Administrative Law* § 528.

33. An obvious exception is the Office of Government Ethics. 5 U.S.C. app. 4 §§ 401-402 (1994). Admittedly, responsibility for administration of issues of government ethics is committed, not only to OGE, but also to Congressional bodies, to the Office of Personnel Management, to the Department of Justice, and to individual agencies, *see, e.g.*, 5 U.S.C. app. 4, §§ 111, 402. There are, however, no agencies other than the Office of Government Ethics that have such a singular focus on ethics that normal agency deference from the protest fora is warranted.

34. For example, the magnitude of the competitive advantage afforded by a former government employee's access to the agency's technical approach to the requirement that is the subject of the contract. *See* 5 C.F.R. § 2637.201(e) (2000) (detailing deference to agency expertise in certain complex cases).

35. *See* Express One Int'l, Inc. v. United States Postal Serv., 814 F. Supp. 93 (D.C. 1993). In this case, the District Court for the District of Columbia rejected a deferential

moreover, even less reason to defer to the agency regarding a decision in which the government decision makers have personal relationships or at least substantial acquaintance with the persons over whose apparently improper actions they must rule.[36] Regardless of the degree to which such deference is warranted, however, deference is an undoubtedly powerful influence on the protest fora.

In addition, the protest fora have also been heavily influenced in their adjudication of revolving door protests by the Federal Circuit's seminal decision in *CACI, Inc.–Federal v. United States*.[37] Nevertheless, the evidence suggests that the criminal undertones always present in revolving door cases are powerful factors leading to unusual decision-making and skewed results as compared to bid protests in general.

The third level on which the criminal stigma attached to the revolving door distinguishes such cases, and explains the marked difference in protest sustain rates, is the unique difficulty facing the protester in his attempt to obtain the material facts necessary to support his allegations of impropriety. Admittedly, the streamlined discovery and hearing procedures available to the parties in a garden-variety protest represent a judicious bal-

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35. (continued) approach to agency discretion in regard to ethical issues, stating:

> The court finds that special deference to the Postal Service's determination on the issues reached by the court is inappropriate. In this case, the composition of the evaluation team was within the personal discretion of Mr. Maytan, the contracting officer. The primary issue is whether Mr. Maytan rationally applied the simple ethical principles proscribed [sic] by the Postal Service (through the persons of Mr. Vandamm and Mr. Maytan himself); interpretations of technical regulations and complicated evaluation procedures are not implicated.

Id. at 97.

36. Such rulings are inherently suspect. In the case of *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988), the U.S. Supreme Court, when analyzing the appearance to the public of one judge ruling of the propriety of a brother judge's conduct, stated, "A finding by another judge–faced with the difficult task of passing upon the integrity of a fellow member of the bench–that his or her colleague merely possessed constructive knowledge, and not actual knowledge, is unlikely to significantly quell the concerns of the skeptic." *Id.* at 865.

37. 719 F.2d 1567 (Fed. Cir. 1983) (ruling that disqualification of an offeror based upon an apparent impropriety must be based upon "hard facts" rather than "mere suspicion and innuendo"). *CACI, Inc.–Federal* will be analyzed in detail *infra* Section III.B.

ancing of the protester's due process rights against the government's interest in timely accomplishment of its missions.[38]

There is, however, reason to believe that such procedures uniquely and unduly disadvantage the protester in its effort to fully investigate the appearances of impropriety resulting from the employment of a former government employee by a successful competing contractor. The burden of establishing an actionable appearance of impropriety entails a showing that a reasonable person, with knowledge of all of the relevant facts, would doubt the actual propriety of the official action being challenged.[39] The revolving door protester thus has an even more compelling need to gather all of the relevant facts. Yet its task is extremely difficult.

Extracting evidence from a competitor or opposing party is always difficult.[40] When questions of ethical misconduct arise, however, the courts have long recognized the inherent difficulty of bringing the facts to light.

In *Hazelton v. Shackels*,[41] a 1906 case, the U.S. Supreme Court declined to enforce a contract for the sale of land. The contract was tainted, the Court opined, by an illegal contingency requiring the plaintiff to obtain passage of legislation by Congress, Justice Holmes wrote for the Court:

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38. *See generally* 4 C.F.R. ch. I, subch. B, pt. 21 (2000); Roger J. McAvoy, *Bid Protests–Balancing Public and Private Interests*, 34 A.F. L. REV. 227 (1991) (discussing that protest regulations are to aid the General Accounting Office in its investigation, not to afford the protester due process).

Consistent with the need for speed in resolving protests, the process is streamlined. Protesters have a right: to the contracting agency's report to the General Accounting Office, and all supporting documents, 4 C.F.R. § 21.3(c-e) (2000); to request additional relevant documents, 4 C.F.R. § 21.3(g); to make comments on the agency report and request that a decision be made on the written record 4 C.F.R. § 21.3(i); to request orders protecting its proprietary information, 4 C.F.R. § 21.4; to request a hearing, 4 C.F.R. § 21.7(a); to request the non-compulsory appearance of witnesses whose attendance is on pain of an adverse inference regarding the factual issues to which the witness would testify, 4 C.F.R. § 21.7(f); to file post-hearing comments, 4 C.F.R. § 21.7(g).

39. *See Liljeberg*, 486 U.S. at 860-61 (holding that a U.S. District Court judge who unwittingly had a personal fiduciary interest in a matter pending before him should have recused himself). In *Liljeberg*, however, the Supreme Court applied the judicial disqualification provisions of 28 U.S.C. § 455, a similar but not identical ethical issue to that posed in revolving door contracting cases.

40. *See supra* note 20.

41. 202 U.S. 71 (1906).

> The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. *The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear.*[42]

Fifty-five years after *Hazelton*, in *United States v. Mississippi Valley Generating Co.*, the U.S. Supreme Court again had occasion to comment on the unique challenge of unearthing evidence of ethical misconduct.[43] The Court, through Chief Justice Warren, wrote: "*It is this inherent difficulty in detecting corruption* which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent."[44] The court further noted that an ethical issue pertaining to a federal contract "might lie *undetectable* beneath the surface of a contract conceived in a tainted transaction."[45]

In 1966, the U.S. Supreme Court again remarked on the inherent difficulty of detecting corruption. In *United States v. Acme Process Equipment Co.*,[46] in ruling on the validity of a government contract tainted by a kickback, the Court stated:

> Kickbacks being made criminal means that they must be made—if at all—in secrecy. Though they necessarily inflate the price to the Government, this inflation is *rarely detectable*. This is particularly true as regards defense contracts where the products involved are not usually found on the commercial market and where there may not be effective competition. . . . Kickbacks will usually not be discovered, if at all, until after the prime contract is let.[47]

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42. *Id.* at 79 (emphasis added).

43. 364 U.S. 520 (1961).

44. *Id.* at 565 (emphasis added).

45. *Id.* (emphasis added).

46. 385 U.S. 138 (1966).

47. *Id.* at 144 (citation omitted, emphasis added); *see* United States v. Medico Indus., 784 F.2d 840, 843 (7th Cir. 1986) (holding that it was irrelevant that the former government employee did not actually use any inside information in obtaining a contract). Further, 18 U.S.C. § 207(a) "avoids any reference to *such difficult to prove events.*"

It is just such undetectability that explains why General Accounting Office revolving door bid protest decisions so frequently cite a dearth of evidence supporting the protester's allegations of impropriety, thereby enabling it to denigrate the protester's case as being built upon "suspicion and innuendo."[48]

(f) The Result?

In revolving door cases, factors such as under-inclusive rules, deference to the agency, and obstacles to discovery of the facts, lead to protest decisions that neither address all ethical issues arising in such cases, nor adequately disclose the material facts necessary for the public to evaluate the correctness of the decision. This, coupled with the marked disparity of outcomes between revolving door cases and bid protests overall, could result in increased cynicism regarding the integrity of the government procurement system, and the scandalizing of contractors believing themselves to have been wronged by competitors clever and unscrupulous enough to hire the right former government employee. The message is: if you really want to win an important contract, hire someone who has inside information; not necessarily source selection information on the current procurement, but information relating to the predecessor contract or the incumbent contractor. In a close competition, it may prove critical to success, and the risk of adverse action if anyone protests is minimal.

But what really promotes such a view? Former government employees, at least those in the learned professions and technical fields, especially those with ancillary contract administration responsibilities, bring something valuable with them when they retire. When they go to work for competitors for contracts with which they have had official involvement—they

48. *See, e.g.*, Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (finding *no evidence* that the former government employee influenced the decision of the technical evaluators or participated in awardee's proposal preparation); Stanford Telecomm., Inc., B-258622, Feb. 7, 1995, 95-1 CPD ¶ 50 (finding *no evidence* that the former government employee provided any proprietary information to awardee); Cleveland Telecomm. Corp., B-25794, Sept. 19, 1994, 94-2 CPD ¶ 105 (finding *no evidence* that government employees who had signed letters of intent to work for awardee if it received the contract participated in the preparation of awardee's proposal); Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694 (finding *no evidence* that the former government employees prepared the statement of work; finding *no evidence* that the awardee's best and final offer price proposal was only $260 (.007%) below that of protester's price proposal, after having been initially higher than protester's price proposal, was other than "coincidence").

bring something beyond mere expertise and know-how[49]—something that gives their new employers an edge, especially in a close, hotly contested competition.

A recent General Accounting Office bid protest decision, *PRC, Inc.*, is an apt example of this phenomenon.[50] TESCO, the proposed awardee of a test support services contract, had hired retired Major General Rosenkranz, the former commander of the requiring activity for the procurement under protest, to assist in the preparation of its proposal. In denying PRC's protest, the General Accounting Office accepted General Rosenkranz's word that he did not concern himself with matters, such as the test support services acquisition plan, among other items of information relevant to the procurement, if they did not directly relate to his command responsibili-

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49. *See* Thomas D. Morgan, *Appropriate Limits On Participation By Former Agency Official In Matters Before An Agency*, 1980 DUKE L.J. 1, 35-6 (Feb. 1980) (noting that former government employees bring expertise, knowledge of the way the agency works and, in a few cases, celebrity status and clout).

During 1981 hearings on the defense acquisition process, Senator Eagleton engaged in the following apposite colloquy with a witness before the Senate Governmental Affairs Committee:

> Senator Eagleton. I think it is generally known, and I think there have been some studies–I don't have one handy–that career military officers, especially in the procurement and R. & D. area, when they retire from the military, are absorbed by the major contractors throughout the United States. Doesn't the fact that a number of career military men retire into big defense businesses give those big companies unique access to the entire defense procurement process while a small company, such as yourself, without such access is disadvantaged?
>
> Mr. Julie. I'm afraid it does, Senator Eagleton, and I think that is an important part of the problem. Maybe that is what the Army refers to as a nonaggressive demeanor. Perhaps with that kind of interface you are nonaggressive.
>
> Senator Eagleton. You don't have to be very aggressive if Colonel *X* comes to defense contractor *A* and his previous deputy then gets promoted in a procurement position, and he is just a telephone call away. You don't have to shout or scream or in any way intimidate.

Acquisition Process in the Department of Defense: Hearings Before The Comm. on Governmental Affairs, United States Senate, 97th Cong. 1st Sess. 540 (1981) (colloquy between Senator Eagleton and Mr. Julie).

50. B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115.

ties.[51] Thus, for the purpose of upholding the award to TESCO, the General Accounting Office was willing to find that the General was too remote from the procurement, and too unfamiliar with the requirement, for his employment by TESCO to have given them an unfair competitive advantage. If this were the case, why then did TESCO hire General Rosenkranz, soon after his retirement, and immediately assign him to prepare its proposal? Obviously, the General had "a certain something."[52] Such a "certain something" may or may not meet the current definitions of source selection information[53] or bid and proposal information,[54] and thereby run the former government employee and his new employer afoul of procurement integrity or conflict of interest laws. In either case, it will be very difficult to prove, as the decision in the *PRC* case illustrates.

Current statutes in this area of law, are extremely narrow in the scope of the post-government employment conduct prohibited, and the nature of the "expertise" and information, acquired while discharging their official duties, that former government employees are permitted to peddle to the highest bidder.

In Section II, this article discusses procurement integrity rules[55] that focus primarily on information pertaining to a particular procurement, and do not clearly indicate the extent to which proprietary information obtained while administering a predecessor contract can be, or can become, bid and proposal information. Further, the revolving door conflict of interest statute covers and prohibits a very narrow band of conduct by former government employees.[56]

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51. The General Accounting Office was inexplicably uninterested in knowing how General Rosenkranz could consider the award of a $67,000,000 contract, by an activity under his command, as not in some meaningful way being within his command responsibility. It is understandable that the word of a retired general officer should carry great weight; however, no human witness should be beyond common-sense scrutiny of his testimony's plausibility.

52. It is possible that TESCO merely sought General Rosenkranz's views on the ways in which the command likes to see a project proposed, what the current buzz words were, or some other non-sensitive information that would assist in preparing the proposal. However, in view of the general's purported detachment from the procurement process, such a rationale for hiring him seems dubious. Further, if this was TESCO's rationale, why then did it not say so?

53. 41 U.S.C. § 423(f)(2) (2000).

54. *Id.* § 423(f)(1).

55. Primarily the Procurement Integrity Act, 41 U.S.C. § 423.

56. 18 U.S.C. § 207(a)(1-2) (2000). The statute prohibits former government employees from "knowingly mak[ing], with the intent to influence, any communication to

In Section III, this article discusses that the bid protest fora, primarily the General Accounting Office, are thus compelled to cull all protests not meeting the restrictive definitions of impropriety set forth in the statutes. After winnowing the field in this manner, those allegations arguably meeting the statutory requirements of impropriety are then subjected to an extremely demanding review for prejudice (that is, unfair competitive advantage)—a process in which the significance and competitive impact of the information available to the awardee through the former government employee may be overlooked or minimized.

Lack of evidence is invariably highlighted and held decisively against the protester. Remedial action based upon the appearance of impropriety, almost regardless of how egregious, is denied, paradoxically, because the protester has been unable to come up with "hard facts" to substantiate its presence.[57] The result of this process is the dramatically lower sustain rates for revolving door bid protests.

This article examines the root of the problem leading to such low sustain rates. The problem is the idea that the ability of the government to attract and to retain in public service the most qualified employees, and to acquire goods and services from the most qualified contractors, would be significantly diminished, if public procurements had to avoid even the

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56. (continued) or appearance before" a particular matter with which they were involved as a government employee. It does not, by its terms, prohibit them from assisting the contractor in developing its bid or proposal.

57. This myopic practice can lead to laughable results. The General Services Board of Contract Appeals may have missed the irony of its disqualification of a protester's law firm "on the ground that a partner in the firm had previously represented MTS and *might have acquired* confidential and privileged information relevant to the instant protest-in which Caelum's position is adverse to that of [the awardee]." Caelum Research Corp., GSBCA No. 13139-P, GSBCA No. 13155-P, GSBCA No. 13156-P, 95-2 BCA 27,733 (emphasis added).

The Board's scruples with regard to the ethics of the protester's counsel, however, did not profit the protester. The Board managed to overlook that the awardee hired, as its program manager, a former government employee (GM-15) who had substantial involvement in the predecessor contract, and was the head of the agency's requiring activity for the instant procurement, which position entailed access to the independent government estimate. *Id.* The fact that the former government employee *might* have used his inside information to the benefit of his new employer was insufficient to persuade the Board to overturn the award, because there was "no evidence of record that [the former government employee] remembered the PWS or the government estimate or any [of the predecessor contractor's] proprietary information or that he transmitted it to any member of the [awardee] team." *Id.*

appearance of impropriety.[58] The rigorous and definitive analysis of the validity of this notion is beyond the scope of this article. It is, however, subject to doubt, and this article, in Section IV, discusses several reservations in regard to it.

More importantly, the article takes issue with the idea that these underlying interests (that is, obtaining only the very best employees and contractors) should play such a predominant role in evaluating the eligibility of competing contractors who have hired former government employees under circumstances creating an appearance of impropriety. The undue importance of these concerns is manifested in the decisions of the various fora that consider the bid protests of competitors disappointed by the failure of the government: to recognize the threat posed by awardees who have hired former government employees under circumstances giving rise to appearances of impropriety; and, to protect the integrity of federal procurement system. Section III analyzes these decisions.

Among the obstacles to achieving the proper balance between the competing interests in this area are: the granting of *undue* deference to contracting officers' decisions, the employment of unwarranted intellectual gymnastics and strained logic to uphold such decisions, the inordinate difficulties of proof facing bid protesters, and agency officials' reluctance to make the tough calls when it comes to cases involving integrity and conflicts of interest.

It would be inaccurate, however, to lay the blame for this problem on contracting officers and the protest fora. They operate, after all, under the existing laws and regulations that permit them to proceed as they have. Errors in legal or factual analysis and misguided balancing of interests are merely the manifestations of a system that has imperfectly expressed its paramount desire for integrity in public procurement.

That's the problem.

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58. In his pocket veto message to Congress regarding amendments to the Ethics In Government Act, President Reagan stated: "This provision says: Warning, government service may be hazardous to your career. It's a warning that can only lead to a government that never feels the invigorating influence of new blood. The incentive is to leave government, not to join it. And that defies the principle of government of, by, and for the people." 24 Weekly Comp. Pres. Doc. 1563.

C. What's the Solution?

1. What's Really Important?

Zeal for actual and apparent propriety should dominate the thinking of all who participate in public procurement. Careful analysis of the ways in which contracting officers and protest fora have subordinated integrity to other interests is merely evidence of the deficiencies of the current system. It imposes a heavy burden on the innocent party: the disappointed bidder who did *not* (or, cynically, was unable to) hire a former government employee whose prior government service may have created an appearance of impropriety.

2. A Political Solution is Required

The problem is the result of the way in which the laws and regulations are currently written and the manner in which they have been applied for over twenty years. Balancing interests and adopting a solution to this problem cannot be accomplished by persuasion and argument before agencies and the protest fora. Significant changes will be required in the rules governing competition in government contracting, and in the assignment of the burden of proof in revolving door bid protests. The task must therefore be performed by the legislative and executive branches; then implemented through regulation; and, ultimately applied by agencies and protest fora.

3. The Solution

In arriving at a solution, this article, in Section II, first reviews the scope of the current laws and regulations addressing such situations. Section III analyzes the case law that has applied these rules over the past twenty years. Analysis focuses on whether the rules result in protest decisions that not only reach just results, but also set forth sufficient facts for the public to understand and believe in the justness of the result. Section IV balances four primary interests bearing on the problem: efficiency, the integrity and fairness of the procurement system, competition, and mission accomplishment. The solution to the problem is to adopt a regime that places the burden of proving the propriety of an award in a revolving door case on the parties in the best position to protect the integrity of the procurement system. The contractors who have chosen to employ former

government employees know the material facts bearing on propriety of their hiring decisions, and have the ability to avoid actual impropriety or the appearance of impropriety.[59]

Proper placement of the burden could be accomplished by enacting a law permitting or requiring agencies, when awarding high dollar value contracts, to disqualify a contractor from a competition, even without evidence of unfair competitive advantage, when the contractor has engaged the services of a former government employee who participated in the procurement, or in the administration of a predecessor contract for the same requirement. In addition, unfair competitive advantage could be presumed in such cases, and disqualification of the contractor required, unless the agency finds, by clear and convincing evidence, that the proposed awardee did not gain an unfair competitive advantage by virtue of its employment of the former government employee.

Section IV describes this regime in detail, and argues that it places the burden where it belongs (mainly on the proposed awardee, and to a lesser degree, the former government employee and the agency). In Section IV, this article argues that the proposed rule creates an incentive for the former government employee and the competing contractor that hires him, to be more aware of the ethical implications of their actions, and to contemporaneously document their efforts to act properly, avoid gaining an unfair competitive advantage over competitors. If this is accomplished, the agency in most cases should easily be able to make the required finding

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59. The U.S. Supreme Court, in *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988), the burden of demonstrating the propriety of apparently improper actions was effectively placed on the judge and the party whose interests depended upon the propriety of the judge's actions; the party challenging the propriety of the judge's actions was not forced to prove facts that were provable only through evidence within the exclusive control of the judge. In rejecting the notion that shifting the burden in this manner would work an injustice, the court found that, instead, the ruling would actually prevent injustice by encouraging greater circumspection and sensitivity to ethical concerns. The Court wrote:

> Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by *encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered*.

Id. at 868 (emphasis added).

that no unfair competitive advantage was obtained by its proposed awardee, thereby permitting award to the contractor the agency believes provides it the best value.

Where such a finding does not satisfy a disappointed offeror, and a protest results, the agency's finding of no unfair competitive advantage, along with its supporting documentation, will provide a ready-made basis for the protest forum to uphold the award. The essence of Section IV, ultimately, is that the regime proposed by this article will not impose undue burdens on either the agency or the proposed awardee, and will not sacrifice the government's interests in mission accomplishment and competition in the name of integrity.

4. Transparency and Accountability

Readers are cautioned that this article does not assume that former government employees who accept offers of employment from competing contractors are cheats or hustlers looking to sell their souls. To the contrary, the vast majority have labored long and hard for the good of the country, and have acquired valuable skills that they should be permitted to market.

The principal flaw with the current rules, however, is that they make it too easy for agencies and protest fora to condone post-government service employment, even where it creates an appearance of impropriety, and without the discovery and rigorous analysis of all material facts that would demonstrate the propriety of their actions. At the same time, the rules permit the few true cheats and wrongdoers to get away with their misdeeds, thereby tarring all former government employees who accept positions with contractors that have done business with their agencies.

In either case, the public cannot, from study of such protest decisions, decide for itself whether justice was done. This may be the most pernicious result of the current rules. Chief Justice Taft said, "Nothing tends to render judges more careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."[60]

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60. DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED 144 (1990) (quoting Chief Justice Taft as *quoted in* Bruce Fein, 75 APR ABA J. (Apr. 1989) 56, at 59).

Taking Chief Justice Taft's remarks a step further, Donald Lively coupled judicial transparency and democratic values when he noted, "Because history evidences that even serious perversions tend to be self-correcting, any interest in optimizing accountability and enhancing democratic linkage should focus upon maximizing the potential for intelligent scrutiny of judicial performance."[61] The perversion of the few corrupt revolving door cases cannot be corrected unless the decisions of the protest fora are open to our "intelligent scrutiny." The current rules, as they have been applied, mask the facts from such scrutiny. For this reason, above all, the rules must change.

II. The Rules

Some things are easier to legalize than to legitimate.[62]

A. Introduction

Do the current revolving door rules adequately protect the integrity of the federal procurement system? The rules are, after all, the product, ultimately, of decades of evolution, debate, compromise, and the will of the people as expressed by their elected representatives. Moreover, there currently does not appear to be any widespread demand for reform. Should we assume that silence means that all is well?

On the contrary, the lack of call for change probably means that government decision-makers and contractors are happy with the status quo. Agencies appreciate it when their decisions are less subject to critical review and second-guessing. They quite naturally do not like rules that limit their discretion in selecting contractors, or that compel them to publicly disclose or litigate the ethical propriety of past employees, and the leadership and management abilities of current chiefs. Contractors have a similar stake in the way things are. Today's disappointed bidder, after all, may well be tomorrow's winner. Having accounted for the preferences of the key players, is our inquiry at an end? Or, on the other hand, perhaps the rules still have serious shortcomings that remain hidden below the surface, about which the public should be concerned.

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61. *Id.* at 144.

62. SÉBASTIEN-ROCH NICOLAS DE CHAMFORT, 1 MAXIMS AND CONSIDERATIONS 134 (1796).

In contrast to Section III, in which the article examines the application of the rules to the facts in specific bid protest cases, in Section II the concern is the sufficiency of the rules themselves to protect the integrity of the procurement system. There is, however, a significant connection between the two areas of inquiry, because the limitations of the current rules, primarily their narrow focus and vague stance against the appearance of impropriety, lead directly to poor analysis and unsatisfying resolution of revolving door protests. Section II examines the provisions of the Ethics in Government Act, and the Procurement Integrity Act that relate to revolving door cases, discussing the restrictions imposed by these statutes, as currently written,[63] on the conduct of former government employees.

The rules, written to protect the system from misconduct by former government employees, and the contractors who employ them, suffer from two major substantive deficiencies:[64] (1) the failure to squarely address the problem of the appearance of impropriety, and (2) the extremely narrow set of circumstances under which an actual impropriety may be found for purposes of obtaining relief in a bid protest. These failings make it easier to avoid taking a close, hard look at practices that should be more closely scrutinized, and they thereby make it harder to protect the system. There is a contrary argument to the effect that increased ethical regulation of public servants, by denigrating the "public service vision" is actually counter-productive to achieving greater integrity in public service.[65] The efficacy of further refining the rules, however, is a topic for discussion in Section IV. For the purposes of discussion in this section, however, the premise is that some post-government employment practices are truly easier to legalize than to legitimate.

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63. The focus is on the current rules. The evolution of revolving door law is beyond the scope of and not essential to this article. For general information regarding the development of conflict of interest rules in federal procurements, *see* Kathryn Stone, *The Twilight Zone: Post Government Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 MIL. L. REV. 67 (1993); James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343 (1992).

64. The rules suffer from a major procedural defect as well, namely, as was mentioned in Section I, and as will be discussed further in Section IV *infra*, the counterproductive imposition of the burden in revolving door cases upon the protester, rather than upon the competitor that hired the former government employee.

65. *See* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417 (Feb. 1990).

B. Spectrum of Legal Theories

Former government employee-based protests are grounded on allegations of actual impropriety or the appearance of impropriety,[66] or a combination of the two. Actual impropriety and the appearance of impropriety are at opposite ends of the revolving door protest rule spectrum that classifies protest theories according to their level of legal development. Actual impropriety protest grounds rely upon well-developed, highly detailed, narrowly focused statutes; appearance of impropriety protests must rely upon vague, admonitory language contained in regulatory provisions. Neither theory, however, is well suited to protecting the integrity of the procurement system from improprieties in the hiring of former government employees.

1. Actual Impropriety

To prosecute a bid protest based upon an actual revolving door impropriety, the protester typically attempts to prove that a violation of the Ethics in Government Act,[67] or the Procurement Integrity Act occurred.[68] However, these are criminal statutes that were not necessarily intended to serve as bid protest grounds. They entail heavy penalties for violations,[69] and require proof beyond a reasonable doubt.[70] As a result, these statutes have quite properly been drafted with great precision, requiring proof of numer-

66. The terms "apparent impropriety" and "appearance of impropriety" are occasionally employed synonymously. *See* RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213. However, apparent impropriety, in bid protests, is more often employed to describe challenges to defects in solicitations and other protest grounds not related to the revolving door. *See* Paging Network of Washington, Inc., B-274052, Aug. 13, 1996, 96-2 CPD ¶ 63; ACR Elects, Inc., B-266201, Jan. 24, 1996, 96-1 CPD ¶ 19; Vertin Valuation Servs. Corp., B-260304, June 13, 1995, 95-1 CPD ¶ 271. The term "appearance of impropriety" will therefore be used exclusively in this article.

67. 18 U.S.C. § 207 (2000).

68. 41 U.S.C. § 423 (2000).

69. Violation of either statute is a felony. Persons found guilty of willfully violating 18 U.S.C. § 207(a) are subject to fine and/or imprisonment for up to five years under the provisions of 18 U.S.C. § 216(a)(2). Persons found guilty of violating 41 U.S.C. § 423(a) or (b) are subject to the same maximum punishment under the provisions of 41 U.S.C. 423(e).

70. *See* United States v. Baird, 29 F.3d 647, 652 (D.C. Cir. 1994); United States v. Schaltenbrand, 930 F.2d 1554, 1560 (11th Cir. 1991). However, administrative and civil penalties may be imposed based upon lesser standards of proof. 41 U.S.C. § 423(e)(2) (Procurement Integrity Act civil penalties upon proof of violation by preponderance of the evidence); 41 U.S.C. § 423(e)(3) (administrative actions, preponderance of the evidence);

ous elements, thereby requiring difficult-to-achieve legal syzygy[71] to establish a violation. This article does not advocate a reduction in either the burden of proof, or in the elements of offenses the conviction of which could lead to ruinous obloquy and substantial confinement. These statutes are designed to serve a distinct purpose that is alien to the world of bid protests: publicly punishing serious criminal behavior when evidence of felonious conduct is very strong. An effective alternative to these criminal statutes is needed to afford relief to aggrieved competitors and to promote public confidence in the integrity of the federal procurement system.

2. Appearance of Impropriety

At the other end of the theoretical spectrum in revolving door protests is the appearance of impropriety.[72] With regard to actual impropriety, the standards for finding a violation are set out in a minutely detailed statute, further elaborated by comprehensive regulations.[73] No such well-developed legal infrastructure supports the appearance of impropriety. The theory of appearance of impropriety has been criticized as a "vapid concept" and "virtually empty of intellectual content."[74] Indeed, in *NKF Engineer-*

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70. (continued) 5 C.F.R. § 2637.212(a)(7) (2000) (administrative enforcement of 18 U.S.C. § 207 through sanctions based upon substantial evidence).

71. "The conjunction or opposition of three heavenly bodies; a point in the orbit of a body, as the moon, at which it is in conjunction with or in opposition to the sun." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1444 (1969).

72. Although recognized as a revolving door protest basis (*see, e.g.*, ITT Fed. Servs. Corp., B–253740.2, May 27, 1994, 94-2 CPD ¶ 30), appearance of impropriety is recognized as a protest ground in other types of cases. *See, e.g.*, KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272 (industrial espionage); P & C Constr., B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361 (propriety of invitation for bids cancellation); Moniaros Contracting Corp., B-244682.3, Dec. 12, 1991, 91-2 CPD ¶ 537 (propriety of permitting a bidder to lower his price following bid opening). It can also be seen in other legal settings. *See, e.g.*, 28 U.S.C. § 455 (federal judge must recuse "in any proceeding in which [her] impartiality might reasonably be questioned"); Busby v. Worthen Bank & Trust Co., N.A., 484 F. Supp. 647 (E.D. Ark. 1979) (Arkansas bank trustee loan decisions); Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualification of law firm in securities fraud case).

73. *See* 5 C.F.R. §§ 2637.201-.216 (2000) (implementing 18 U.S.C. § 207); 48 C.F.R. §§ 3.104-1 – 3.111 (2000) (implementing 41 U.S.C. § 423).

74. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 460-61 (1986). Professor Wolfram's critique addressed its purported methodological weakness, its irrelevancy or redundancy, and its amenability to misuse. *Id.* at 320-21. However, Professor Wolfram's analysis focused primarily on the use of the theory to support *disciplinary* action against *lawyers*, rather than as a basis for *disqualification* of *contractors*. *Id.* at 321-22.

ing Inc. v. United States,[75] the Claims Court grounded its approval of an agency disqualification based upon the appearance of impropriety on Federal Acquisition Regulation Section 1.602-2,[76] a provision setting forth the contracting officer's responsibilities for safeguarding the interests of the United States. This provision, however, does not even mention the term, "appearance of impropriety."[77]

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75. 9 Cl. Ct. 585 (1986), *rev' on other grounds*, 805 F.2d 372 (Fed. Cir. 1986). The Claims Court rejected the contractor's argument that the government was not authorized to disqualify an offeror in the absence of proof of an actual impropriety, as follows:

> Despite the seeming absence of any authority expressly authorizing the actions that were taken in this case, the court is of the view that the contracting officer's responsibility of "safeguarding the interests of the United States in its contractual relationships," is sufficient to support the exercise of authority that was asserted. What persuades us to this view is the latitude the courts have historically shown with respect to the contracting officer's basic authority to enter into, administer, or terminate contracts, and the overriding importance of the government's need to insure full and fair competition in the conduct of its procurements.

9 Cl. Ct. at 592 (citations omitted). A more detailed discussion of the decisions in *NKF* appears *infra* at Section III.B.3.(d).

76. 48 C.F.R. § 1.602-2 (1985).

77. *Id.* Section 1.602-2 provides:

> Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—
>
> (a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;
>
> (b) Ensure that contractors receive impartial, fair, and equitable treatment; and
>
> (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

Id.

Rather, in terms of explicit authority for the theory, the appearance of impropriety relies upon the nebulous and hortatory language in the FAR, Section 3.101-1,[78] as follows:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. *The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest* in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.[79]

Section 3.101-1, however, has several drawbacks as an instrument by which to promote public confidence in the procurement system. First, the theory is embodied in a regulation, rather than a statute, thus conveying less authority. Second, the section in which it is contained is a general provision, rather than one dedicated to the appearance of impropriety problem. Such provisions do not create "specific and precise standards justifying" decisive actions such as disqualification of a competitor from a procurement.[80] Third, the regulation is, at least superficially, directed at current, rather than former government employees.[81]

Fourth, the language of Section 3.101-1 itself saps authority from the warning against the appearance of conflicts of interest. Although government employees are "strictly" enjoined to "avoid" the appearance of con-

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78. *See, e.g.*, PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115; Guardian Tech. Int'l., B-270213.2, B-270213.3, Feb. 20, 1996, 96-1 CPD ¶ 104; Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52; Holsman Servs. Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484

79. 48 C.F.R. § 3.101-1 (2000) (emphasis added).

80. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983).

81. An argument could be made that Section 3.101-1 would prohibit a current government employee from conducting a procurement tainted by apparent impropriety by a former government employee. However, any need to "bootstrap" coverage in such a fashion must detract from the ability to employ the section in addressing revolving door appearances of impropriety affecting government contracts.

flicts of interest, they need only do so as a "general rule."[82] Further, although they must not favor any person with preferential treatment, or show impartiality, government employees are advised, at least implicitly, that such actions may be "authorized by statute or regulation."[83] Thus, Section 3.101-1 is meager protection from the problem of appearance of impropriety in government contracting. At best, the section sends a mixed message, oscillating between "an impeccable standard of conduct" and a suggestion that partiality might be condoned by statute or regulation.

C. What the Laws Say and Don't Say

1. *Ethics in Government Act*[84]

(a) General

Originally enacted in 1962 as the replacement for 18 U.S.C. § 284,[85] the Ethics in Government Act is the principal conflict of interest statute

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82. 48 C.F.R. § 3.101-1 (2000). These terms do not connote as strict a standard of scrupulousness as could have been demanded by, for example stating that "government personnel will not create an appearance of a conflict of interest." Use of the term "general rule" implies that there are instances in which it would be permissible to create an appearance of impropriety. However, there does not appear to be any statutory or regulatory authority for such an exception.

83. *Id.* Although preferential treatment is sanctioned in some cases (*see, e.g.*, 41 U.S.C. § 10a (2000) (Buy American Act of 1988)), there does not appear to be authority to conduct government business without impartiality, which is defined as "Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just." BLACK'S LAW DICTIONARY 752 (6th. ed. 1990).

84. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code); *see generally* Debasish Chakrabanti et al., *Federal Criminal Conflict of Interest*, 34 A. CRIM. L. REV. 587, 608 (1997); Office of Government Ethics Memorandum, subject: Revised Materials Relating to 18 U.S.C. § 207 (Nov. 5, 1992).

As currently written, the Ethics In Government Act covers several situations and classes of former employees that will not be discussed herein. Although Section 207(a)(1) is the primary focus of this portion of Section II, the statute also places restrictions upon former government employees whose connection to a matter is vicariously created through subordinates. *See* 18 U.S.C. § 207(a)(2) (2000); *id.* § 207(c) (former senior employees); *id.* § 207(d) (former very senior employees); *id.* § 207(e) (members of Congress). It also imposes restrictions upon former government employees' representation of foreign entities. *Id.* 207(f).

85. S. REP. 87-2213 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852.

applicable to *former* government employees.[86] Section 207(a)(1) permanently prohibits all former executive branch officers and employees from:

- knowingly making
- with the intent to influence
- any communication to or appearance before[87]
- any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia
- on behalf of any other person, other than the United States or the District of Columbia
- in connection with a particular matter
- in which the United States or the District of Columbia is a party or has a direct and substantial interest
- in which the person participated personally and substantially as such officer or employee; and
- which involved a specific party or specific parties at the time of such participation.[88]

The law sweeps broadly in one sense. It includes all executive branch employees, and it applies to actions before all personnel and entities of the federal and District of Columbia governments. On the other hand, the listing of offense elements demonstrates the statute's narrow, surgical focus. There are several features, beyond the statute's fundamental limitations based upon its criminal nature (as discussed in Section I.B.2) that limit the reach of the law in the revolving door context.

(b) Communications and Appearances

The law prohibits communications or appearances before an agency.[89] Thus, a former government employee is not prohibited, by the

86. 18 U.S.C. § 208 is the analogous provision applicable to *current* government employees. In addition, there are other criminal provisions that may bear on revolving door cases. *See* 18 U.S.C. § 201 (1994) (bribery); 18 U.S.C. § 203 (compensation of Members of Congress and others); 18 U.S.C. § 209 (salary of government employees payable only by the United States).

87. The scienter element applies to both communications and appearances. United States v. Nofziger, 878 F.2d 442, 446 (D.C. Cir. 1989) (applying Section 207(c), containing pertinent language identical to that of § 207(a)(1)).

88. 18 U.S.C. § 207(a)(1).

89. The communication and appearance clauses state separate offenses. *Nofziger*, 878 F.2d at 446 (applying Section 207(c), containing identical language to that of Section 207(a)(1)).

terms of the Ethics in Government Act, from assisting a contractor in the preparation of a bid or proposal, or the execution of a contract, so long as he does not communicate with or appear before the agency.[90] The term "appearance," moreover, has been strictly construed in bid protest decisions.[91] Whatever the merits of such construction, the result is that the opportunities for the transfer of competitively useful information, obtained while in federal service, are increased.

(c) Particular Matters

Further, the law requires that the communication or appearance must relate to a "particular matter" in which the former government employee "participated personally and substantially" while in federal service.[92] Again, the law appears to encompass a broad range of actions.[93] The "particular matter" element includes a contract and any modifications;[94] how-

90. Other laws, particularly the Procurement Integrity Act, 41 U.S.C. § 423, limit the assistance that a former government employee may provide. However, as will be discussed, these limitations are themselves inadequate.

91. Robert E. Direcktor of Rhode Island, Inc. v. United States, 762 F. Supp. 1019 (D. R.I. 1991) (holding that personal delivery of proposal by former high level procurement official not an appearance where former government employee was "a mere messenger"). *See also* Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 88-2 CPD ¶ 314 (General Accounting Office would not speculate, for purposes of its 18 U.S.C. § 207 analysis, that former government employee, who supervised proposal evaluation team for predecessor contract, and accepted employment as successful offeror's program manager, would be required to communicate with the government regarding the contract); Computer Sciences Corp. B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422 (holding that a former government employee with contract administration responsibilities for predecessor contract did not violate 18 U.S.C. § 207 because he did not participate on behalf of the contractor in the proposal conference, site visit, discussions, or negotiations).

92. 18 U.S.C. § 207(a)(1)(B) (2000). The requirement that participation be "personal and substantial" is valid in both the criminal law and bid protest contexts. In a revolving door case, we should be less concerned regarding the appearance or actuality of impropriety when the former government employee did not participate personally or substantially as a government employee in the procurement under protest. Further, unlike the regulatory definition of the term in the Procurement Integrity Act context, *see* 48 C.F.R. § 3.104-3 (2000) and as discussed *infra*, the regulatory definition of "participate personally and substantially" in the Ethics in Government Act context is reasonably straightforward and not rendered confusing and ambiguous by exceptions. The problem with this element, rather, is the manner in which it has been *applied* in bid protests. *See* Section IV *infra*.

93. "Particular matter" includes "any investigation, application, request for ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." 18 U.S.C. § 207(i)(3).

94. United States v. Medico Indus., 784 F.2d 840 (7th Cir. 1986).

ever, it has been held not to include predecessor contracts for the same or substantially similar requirements.[95] This is a significant gap in protection. For the purposes of avoiding impropriety, there is no logical reason for distinguishing the award of contract modifications from the administration of predecessor contracts. Both situations involve the same core of competitively useful information, primarily inside information regarding the government's procurement strategy and cost estimates, and contractor proprietary data pertaining to the action.

Moreover, if a choice *has* to be made as to which type of transaction should be protected, there are more compelling reasons to protect a competitive procurement from the disclosure of inside or proprietary information relating to a predecessor contract than there are reasons to protect a contract modification from the disclosure of procurement sensitive information. This is because, in the modification setting, although protection of the government's bargaining position is a concern, competition and fairness to other competitors are not at issue. This is not so in a competitive procurement, in which fairness to competitors and protection of the government's interests are both at stake.

In addition, the knowledge gained while administering a predecessor contract is likely to be at least of equal value to that obtainable while assisting in the conduct of a procurement. Contract administration typically takes place over a much longer period of time (that is, the life of the contract, potentially a period of years). Exposure to the proprietary information of the predecessor contractor and the government's cost experience, month in and month out, over a period of years would inevitably yield valuable insights that would be of great benefit to a competitor seeking to

95. The issue remains unresolved, although there are cases in which it is implied that a true predecessor contract might be deemed to be the same particular matter. The court in *Medico* wrote, that it was "'plausible' to read 'contract . . . or other particular' matter more broadly than the four corners of a single document, to treat the language as covering a 'nucleus of operative facts' . . . ." *Id.* at 843. However, the court was not specifically addressing a predecessor contract. Further, the court, in *Medico* also stated that the statute required that "[t]he parties, facts, and subject matter must coincide to trigger the prohibition of § 207(a)." *Id.* The requirement for identical parties would thus exclude from Section 207(a) coverage a predecessor contract involving a different contractor than the one that has hired the former government employee. *But see* CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (holding that a follow on contract that, although involving fundamentally the same services, is "broader in scope, different in concept, and incorporates different features," is not the same "particular matter").

unseat an incumbent.[96] The unfair competitive value of such experience was recognized by the Claims Court in its opinion in *CACI, Inc.–Federal v. United States*.[97]

Finally, the term "particular matter," as construed to exclude activities related to administration of predecessor contracts, artificially restricts the ambit of the Ethics in Government Act.[98] It discounts the fact that procurement activities requiring protection from improper revolving door influences commence when a requirement is first identified, continue through the initial procurement in satisfaction of the requirement, and end only when the requirement ceases to exist.

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96. Indeed, a substantial number of case protesters are incumbents who lost competitions for successor contracts after a government contract administrator went to work for a competitor. *See, e.g.*, Stanford Telecomm., Inc., B-258622, Feb. 7, 1995, 95-1 CPD ¶ 50; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213; Sequoia Group, B-252016, May 24, 1993, 93-1 CPD ¶ 405; Person-System Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546; Holmes and Narver Servs./Morrison-Knudson Servs., Pan Am World Servs., B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379; Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123; Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422.

97. 1 Cl. Ct. 352 (1983). In *CACI, Inc.–Federal*, the former head of the requiring activity for the protested procurement was vice president for a competitor in the procurement. In his former job "he became familiar with the pricing strategies of plaintiff and other incumbent contractors and with the people whose resumes could be used to support a technical proposal." *Id.* at 363. Although later reversed by the Federal Circuit, the higher court did not directly dispute the validity of the Claims Court's opinion on this issue. It found, instead, that the prior contract was not the same "particular matter," for the purposes of 18 U.S.C. § 207. *See* CACI, Inc.–Federal, 719 F.2d 1567, 1576 (Fed. Cir. 1983). Further, the Claims Court's opinion was very fact-specific, and not necessarily intended as a general pronouncement.

98. For examples of cases in which prior participation by former government employees in the administration of predecessor contracts was at least implicitly deemed inconsequential to the propriety of awards in subsequent procurements. *See* Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (contracting officer's technical representative); Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 (contract administration of predecessor contract); RAMCOR Servs. Group, B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213 (program manager); General Elec. Gov't Servs., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196 (administrative contracting officer); Blue Tee Corp., B-246623, Mar. 18, 1992 (program manager); Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132 (program manager); Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422 (contracting officer's representative).

Acquisition planning is the driving force behind this circumstance. Federal agencies must conduct acquisition planning.[99] Although acquisition planning may appear superficially to be focused on discrete procurements,[100] under the Federal Acquisition Regulation System, it is in reality a continual process of fulfilling requirements as long as they exist.[101] "Acquisition planning is an expansive term that includes actions aimed at stating the government's needs, identifying potential sources, and determining the techniques to be used to satisfy those needs. It is the first step in the procurement process,"[102] and should "begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award is necessary."[103] For systems acquisitions, acquisition planning is "an iterative process that becomes increasingly more definitive

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99. 48 C.F.R. § 7.103 (2000) (general); 48 C.F.R. § 207.103 (military departments).

100. *See* 48 C.F.R. § 7.105(b)(18) (listing milestones from acquisition plan approval to contract award).

101. For acquisition of major systems, the approach taken by the Defense Department demonstrates the continuous nature of acquisition planning without regard to arbitrary demarcations between contracts. *See* DOD DIRECTIVE 5000.1, DEFENSE ACQUISITION (15 Mar. 1996) ¶ 4.1.1 which states:

> *All three systems* [requirements generation, acquisition management, and planning, programming and budgeting] *operate continuously and concurrently* to assist the Secretary of Defense and other senior officials in making critical decisions. The information derived from these systems permit senior DOD officials to plan for the future, allocate resources . . . and execute the current budget.

Id. (emphasis added). Paragraph 4.1.2 of DOD Directive 5000.1 further states:

> Integrated Product and Process Development (IPPD). PMs and other acquisition managers shall apply the concept of IPPD throughout the acquisition process to the maximum extent practicable. IPPD is *a management technique that integrates all acquisition activities starting with requirements definition through production, fielding/deployment and operational support* in order to optimize the design, manufacturing, business, and supportability processes.

Id. ¶ 4.1.2 (emphasis added). *See also* Federal Aviation Administration, Section 2: *Lifecycle Acquisition Management Policy*, § 2.1 Guiding Principles, *available at* <http://fast.faa.gov/v997/ams497/ams2-1.htm> (acquisition management "starts with the determination of agency needs and continues through the entire lifecycle of a product or service").

102. RALPH C. NASH JR. & JOHN CIBINIC JR., FORMATION OF GOVERNMENT CONTRACTS 261 (3d ed. 1998).

103. 48 C.F.R. § 7.104(a) (2000).

as the system progresses from the initial stages of advanced research to production."[104]

Planners are required to "[e]nsure that *knowledge gained from prior acquisitions* is used to further refine requirements and acquisition strategies."[105] The acquisition planning team should include contracting, fiscal, legal, and technical personnel.[106] These employees, especially, technical personnel, are likely to be drawn from the ranks of those already employed in various contract administration functions. It makes common sense to draw personnel already working on a contract to acquire the follow-on goods or services. Who, for example, is in a better position to estimate the costs for successor contracts, to discern flaws or gaps in prior statements of work or unique contract clauses, and to learn the ways in which evaluation criteria employed in predecessor procurements failed to result in selecting contractors who offer the best value to the government? Thus the personnel involved in the day-to-day tasks of administering a contract are necessarily intimately involved also in planning for successor contracts.[107]

Because the contract administration and procurement functions are so inextricably intertwined, there is no valid means of compartmentalizing

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104. NASH & CIBINIC, *supra* note 102, at 266.

105. 48 C.F.R. § 7.103(q) (emphasis added); *see also* DOD Directive 5000.1, DEFENSE ACQUISITION (15 Mar. 1996), ¶ 4.2.9 ("Continuous Improvement. The Department shall continuously focus on implementing major improvements necessary to streamline the acquisition process, reduce infrastructure, and enhance customer service through process reengineering and technological breakthrough.").

106. *Id.*

107. The program manager in particular has his feet planted in both worlds (administration and procurement). In the Defense Department, for example, the program manager is explicitly assigned overall responsibility for acquisition planning for requirements within his bailiwick. 48 C.F.R. § 207.103. The program manager is also responsible for developing the acquisition strategy and other important procurement tasks, such as acquisition risk management and development of acquisition strategy. 48 C.F.R. § 34.004; DOD DIRECTIVE 5000.1, *supra* note 101, paras. 4.1.4, 4.3.1, 5.1.13; DOD 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS, para. 3.3 (23 Mar. 1998) ("Each PM shall develop and document an acquisition strategy that shall serve as the roadmap for program execution from program initiation through post-production support."). *See also* 48 C.F.R. § 434.003(e) (Department of Agriculture program managers responsible for planning and executing major systems acquisitions); 48 C.F.R. § 3507.103(f) (Panama Canal Commission program managers responsible for acquisition planning for their requirements); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., § 6.303-91 (Dec. 1, 1984) (program manager must review and sign justifications and approvals for Other Than Full and Open Competition).

them in the context of revolving door rules. Nevertheless, to the extent that the scope of the particular matter element of 18 U.S.C. § 207 does not include contract administration with regard to predecessor contracts, a great body of competitively useful information is allowed onto the market when former government employees seek new jobs.

(d) Specific Parties

Finally, Section 207(a)(1) requires that the particular matter have involved a "specific party or specific parties at the time of such participation." This is a significant limitation on the coverage of the statute.[108]

(e) Summary

As a means of administratively policing the integrity of the procurement system through the bid protest process, the Ethics in Government Act suffers from several deficiencies, including the criminal nature of the statute, and its concomitantly narrow focus as reflected in its numerous and highly specific offense elements. An additional handicap under which the statute labors is its failure to explicitly encompass the administration of predecessor contracts as being part of a "particular matter" that is an ongoing procurement of follow-on goods or services. This failure makes it far more difficult, when using an Ethics in Government Act violation as the fulcrum of a revolving door bid protest, to prove that predecessor contract administration activities can confer upon government employees inside information that could result in unfair competitive advantage if such government employees go to work for a contractor competing for a follow-on contract. The Ethics in Government Act, by design or inadvertence, is thus a tool ill-suited to the task of protecting the integrity of the procurement system through revolving door bid protests.

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108. Regarding the then-new ethics law, 18 U.S.C. § 207, Dean Manning wrote in 1964:

> [T]he significance of the phrase "involving a specific party or parties" must not be dismissed lightly or underestimated. Law 87-849 (18 U.S.C. § 207) discriminates with great care in its use of this phrase. Wherever the phrase does appear in the new statute it will be found to reflect a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate.

BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

2. Procurement Integrity Act

(a) General

Originally enacted as Section 6 of the Office of Federal Procurement Policy Act Amendments of 1988,[109] the Procurement Integrity Act shares several of the same drawbacks as the Ethics In Government Act with regard to its ability to protect the integrity of the procurement system from the threat of revolving door impropriety. The Procurement Integrity Act was enacted primarily in response to the broad range of abuses highlighted by the "Ill Wind" investigations of the 1980s, and was not focused on the revolving door problem.[110] It therefore is not surprising that the law does not perfectly address revolving door concerns.

Providing criminal penalties for violations under certain circumstances,[111] the Procurement Integrity Act was drafted with precision and narrow focus appropriate for proceedings that could result in imprisonment and requiring proof beyond a reasonable doubt, but ill-suited for use in bid protests resulting at most only in remedial administrative action. In addition, like Ethics in Government Act Section 207(a)(1), the Procurement Integrity Act does not cast its net widely enough to prevent disclosure of all information that could confer unfair competitive advantage upon a contractor.

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109. Codified at 41 U.S.C. § 423. *See generally* Jamie S. Gorelick & Paul F. Enzinna, *Restrictions on the Release of Government Information*, 20 PUB. CONT. L.J. 427 (Summer 1991); *Guidelines And Observations On The Procurement Integrity Rules Affecting The Hiring Of Government Employees*, 39 GOV'T CONTRACTOR No. 2, 3.

110. Hon. Jeff Bingaman, *The Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, 145 MIL. L. REV. 149, 153 (1994). *See also* 134 CONG. REC. S17,071-01 (remarks of Sen. Glenn). For an overview and discussion of the legislative history of the Procurement Integrity Act, *see* Sharon A. Donaldson, *Section Six of the Office of Federal Policy and Procurement Act Amendments of 1988: A New Ethical Standard in Government Contracts?*, 20 CUMB. L. REV. 421 (1989/1990).

111. Although to date there have apparently been no reported prosecutions under the Procurement Integrity Act (negative search result in WESTLAW DCT database), improper disclosure of or obtaining of procurement information, when done in exchange for a thing of value or in order to confer a competitive advantage in competing for a federal agency procurement contract, are felonies punishable by fines and or imprisonment for up to five years. *See* 41 U.S.C. § 423(e)(1) (2000).

(b) Disclosure of Procurement Information, Section 423(a)

The Procurement Integrity Act provision bearing most directly on the revolving door problem is Section 423(a), Prohibition on Disclosing Procurement Information,[112] which states, in pertinent part:[113]

- no former official of the United States[114] who by virtue of that office had access to
- contractor bid or proposal information or
- source selection information,
- may knowingly disclose such information before the award of the federal agency procurement contract to which the information relates,
- other than as provided by law.[115]

Though superficially less narrowly—drawn than 18 U.S.C. § 207(a)(1), Section 423 suffers from an identical limitation—it focuses exclusively on one procurement at a time by defining the terms "contractor bid or proposal information" and "source selection information" with reference only to the procurement under consideration.

Contractor Bid or Proposal Information—Section 423(f)(1)(A-D) lists, as "contractor bid or proposal information," cost and pricing data, indirect costs and direct labor rates, duly-marked proprietary information about manufacturing processes, and information identified by the contractor as bid and proposal information.[116] However, these items are classified as "contractor bid and proposal information" only when they are "submitted to a federal agency *as part of or in connection with a bid or proposal* to enter into a federal agency procurement contract."[117] Thus, the Procurement Integrity Act does not protect from disclosure information obtained

112. 41 U.S.C. § 423(a). This and each of the other principal substantive provisions of the Procurement Integrity Act, 41 U.S.C. § 423(a-d), are repeated essentially verbatim at 48 C.F.R. § 3.104-4(a-d).

113. 41 U.S.C. § 423(a) also applies on the same terms to current federal officials. 41 U.S.C. § 423(b) contains an analogous provision prohibiting persons from obtaining contractor bid or proposal or source selection information.

114. Including persons who have acted for on behalf of, or who has advised the United States with regard to a federal agency procurement. 41 U.S.C. § 423(b).

115. *Id.* § 423(a).

116. 41 U.S.C. § 423(f)(1)(a-d).

117. *Id.* § 423(f)(1).

by a government employee while engaged in contract administration duties.[118]

Source Selection Information—Likewise, the term "source selection information" is defined comprehensively to include bid prices, proposed costs, source selection plans, technical evaluation plans, technical, cost, and price evaluations of proposals, competitive range determinations, rankings of bids, proposals, or competitors, source evaluation board reports, and information duly marked as source selection information.[119] Again, however, such information only qualifies as "source selection information" if it has been "prepared for use by a federal agency *for the purpose of evaluating a bid or proposal* to enter into a federal agency contract."[120] The statute thus appears to focus on discrete procurements.

A protester could argue that, as discussed above, administration of predecessor contracts is part of a seamless acquisition planning process to fulfill a continuing requirement, and that most knowledge acquired by government personnel so engaged should be protected by the Procurement Integrity Act as being the root of "source selection information" specifi-

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118. Government employees are explicitly prohibited from disclosing such information under the provisions of the Trade Secrets Act, 18 U.S.C. § 1905. The Trade Secrets Act, however, does not appear, in the context of bid protests, to have been effective in preventing such disclosures. *See* ARO, Inc., B-197436, May 19, 1980, 80-1 CPD ¶ 344 (judicial determination of Trade Secrets Act violation required in order to sustain protester's demand for cancellation of ongoing procurement and award to it). *See also* NSI Tech. Servs., B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344 (protester with apparent Trade Secrets Act claim referred to Department of Justice). *But see* Hex Indus., Avel Corp., and Cosmodyne, Inc., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223 (where it is clear that the government's use of proprietary data or trade secrets violates a firm's proprietary rights, General Accounting Office may grant relief).

The regulatory prohibition against use of nonpublic information to further a government employee's private interests, however, may provide some theoretical protection. *See* 5 C.F.R. § 2635.703 (2000). This provision has the advantage, unlike the Procurement Integrity Act, of recognizing the importance of protecting information gained on one procurement from disclosure with regard to another procurement. 5 C.F.R. § 2635.703, example 3. However, this provision has never been employed by a protester in any bid protest (based on negative search results in the WESTLAW CG, BCA, and ALLFEDS databases using the query "2635.703").

119. 41 U.S.C. § 423(f)(2)(A-J) (2000).

120. *Id.* § 423(f)(2) (emphasis added). Unlike with "contractor bid or proposal information," however, the defense against the improper release of "source selection information" is not backstopped by the Trade Secrets Act, but would at least theoretically be supported by 5 C.F.R. § 2635.703 (restrictions on use of nonpublic information).

cally prepared for a particular procurement. However, such an argument, although meritorious in the abstract, would likely fail because such knowledge does not correspond with any precision to the items of source selection information listed in Section 423(f)(2)(A-J).[121] The careful, precise drafting of the statute would appear to militate against such adventuring.

(c) Post-Government Service Employment Contacts, Section 423(c)

Although it is often impossible to discern from bid protest decisions[122] precisely when a former government employee was first contacted by the non-federal employer, in a number of cases, it is clear that such contacts were made while the former government employee was still working for the government.[123] Under such circumstances, a violation of Section 423(c) of the Procurement Integrity Act is possible.[124] Section 423(c), however, added to the Procurement Integrity Act in 1989,[125] has an even more explicit focus on discrete procurements. Requiring positive preventive actions rather than positing proscriptions, Section 423(c) requires that,

- an agency official who
- participates personally and substantially[126]
- in a federal agency procurement[127]

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121. The listing appears to be exclusive. In addition to the doctrine of *inclusio unius est exclusio alterius*, the language of the statute uses words denoting exclusivity. Instead of saying that "source selection information" "includes" the items listed (thus suggesting that the list is not exclusive), it states that the term "means" any of the items listed. *See* United States v. Terence, 132 F.3d 1291 (9th Cir. 1997); Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

122. The absence of such essential details in bid protest decisions is itself a significant failing that is permitted to occur because of the way revolving door bid protests are currently handled. *See infra* Section III.C.3.(e).

123. *See, e.g.*, Caelum Research Corp. v. Department of Transp., GSBCA No. 13139-P, GSBCA No. 13155-P, GSBCA No. 13156-P, 95-2 BCA 27,733; Central Tex. College, B-245233.4, Jan. 29, 1992, 92-1 CPD ¶ 121; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105.

124. 41 U.S.C. § 423(c).

125. Pub. L. No. 101-189, § 814(a)(1)(C).

126. The term is defined in 48 C.F.R. § 3.104-3. *See* discussion *infra.*

127. Section 423(f)(4) states that "'federal agency procurement' mean the acquisition (by using competitive procedures and awarding *a contract*) of goods or services . . . ." 41 U.S.C. § 423(f)(4). The procurement must be in excess of the simplified acquisition threshold. 41 U.S.C. § 423(c)(1).

- who contacts or is contacted regarding possible non-Federal employment for that official
- by a person who *is* a bidder or offeror *in that procurement*
- the official shall
- promptly report the contact, in writing to the official's supervisor and to the designated agency ethics official
- and either
- reject the possibility of non-Federal employment,
  or
- disqualify himself from further personal and substantial participation in that procurement until permitted to resume such participation in accordance with the requirements of 18 U.S.C. Section 208.[128]

Several elements of Section 423(c) limit its protection of the integrity of the procurement system. First, it only applies to "personal and substantial participation," a term not defined in the statute. The Federal Acquisition Regulation Section 3.104-3 employs 294 words to define the term, spending sixty-one percent of them (179) in describing what is *not* "personal and substantial participation."[129] The regulatory definition reflects careful, thoughtful, consideration, and an attempt to balance all pertinent interests. However, as a means of drawing a clear line between participation that does and does not trigger the protection of the Procurement Integrity Act with regard to job offers and negotiations, Section 3.104-3 is a failure. This failure may simply reflect the impossible nature of such a task. Nevertheless, by focusing more attention on what is *not* covered participation, Section 3.104-3 conveys restrictive connotations that may thereby erode the protection against revolving door impropriety that it might otherwise have provided.

In addition, several of the specific exclusions of Section 3.104-3 from the definition of "personal and substantial participation" arguably degrade rather than promote procurement integrity. Service on agency-level

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128. 41 U.S.C. § 423(c) (emphasis added). The Federal Acquisition Regulation prescribes disqualification procedures at 48 C.F.R. § 3.104-6 (2000).

129. 48 C.F.R. § 3.104-3(2-4). The regulation defines the terms as follows (negative definition portions in italics):

> (2) Participating "personally" means participating directly, and includes the direct and active supervision of a subordinate's participation in the matter.

boards,[130] performance of general, technical, or scientific effort having broad, indirect application with a procurement,[131] preparation of in-house cost estimates in OMB Circular A-76 actions,[132] and discharge of clerical

129. (continued)

> (3) Participating "substantially" means that the employee's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. *However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.*
>
> (4) Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:
>
> (i) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;
>
> (ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;
>
> (iii) Clerical functions supporting the conduct of a particular procurement; and
>
> (iv) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

Id.

130. 48 C.F.R. § 3.104-3(4)(i).
131. *Id.* § 3.104-3(4)(ii).
132. *Id.* § 3.104-3(4)(iv).

functions supporting a procurement[133] may entail exposure to important proprietary or source selection information. Yet, under Section 3.104-3 (4)(i-iv), persons performing such activities are under no duty to take prophylactic action in the event they are contacted regarding possible employment by a bidder or offeror. These exclusions also create opportunities for misunderstanding, misuse, and abuse, as well as post hoc rationalization by persons accused of violations of Section 423(c), and by agencies seeking to justify their actions. The balancing prescribed in Section 3.104-3(3) should furnish sufficient guidance without the need for specific regulatory exclusions from Section 423(c) coverage.

Further, Section 423(c) limits, by its terms, its coverage, not only to particular procurements (to the exclusion of predecessor procurements or administration of predecessor contracts),[134] but also to firms that are bidders or offerors at the time of the employment contact.[135] Thus, employment contacts occurring prior to the actual submission of a bid or offer would not subject the government employee to the requirements of Section 23(c).

The final characteristic of Section 423(c) that significantly weakens the protection afforded to the integrity of the procurement system is Subsection 423(c)(4).[136] At first reading, this provision may appear to strengthen the protection promised by Section 423(c), by extending the civil, administrative, and criminal penalties for violations of the section to bidders and offerors who discuss employment with government employees. However, instead of imposing on bidders and offerors an affirmative duty to ensure that the government employees they hire have complied with Section 423(c), the subsection imposes liability only if the employer "know[s] that the official has not complied with" the section's reporting and rejection or disqualification requirements.[137] Thus a bidder or offeror

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133. *Id.* § 3.104-3(4)(iii).

134. 41 U.S.C. § 423(c)(1) (2000) ("in *that* federal agency procurement") (emphasis added).

135. *Id.* ("by a person who *is* a bidder or offeror") (emphasis added).

136. *Id.* § 423(c)(4). The subsection provides:

> A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

Id.

137. *Id.*

is free to remain blissfully ignorant regarding the official activities of the government employees it pursues during the course of a procurement.[138] The language of Subsection 423(c)(4) provides that actual rather than constructive knowledge of violations would be required for liability exposure to exist.[139] Instead of encouraging the offeror to ensure the propriety of its hiring of a government employee whose official duties place him close to a procurement in which it is interested, Subsection 423(c)(4) perversely creates an incentive for the offeror to unreasonably keep its "head in the sand."[140] This aspect of Section 423(c) does not advance the government's interest in procurement integrity. The restrictive characteristics of Section 423(c) greatly diminish its protective effect against revolving door improprieties, and perhaps explain the dearth of reported bid protest cases in which a violation of the section was used as a protest ground.[141]

(d) Decision Makers and Senior Procurement Officials, Section 423(d)

Section 423(d) of the Procurement Integrity Act[142] attacks the problem presented in the Grumbly situation, detailed in the Introduction of the article.[143] It is addressed: under Subsection 423(d)(1)(C), to decision-

138. Government employees are likewise only liable if they knowingly fail to comply with the requirements of Section 423(c). However, actual knowledge should be more easily proven in the case of government employees versus bidders and offerors.

139. The subsection's diction ("knowing") is crystal clear. Further, when Congress wishes to indicate that a statute's coverage extends to constructive knowledge, or to preclude "deliberate ignorance," it knows how to do so. *See* 31 U.S.C. § 3729(b) (2000) (false claims statute, "knowing" and "knowingly" defined to include actual knowledge, deliberate ignorance, and reckless disregard for the truth); 12 U.S.C. § 1701q-1 (2000) (civil money penalties against mortgagors). While the theory of "deliberate ignorance" is applicable, in rare cases, in which the scienter requirement is only willfulness, *United States v. Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994), when the scienter requirement is actual or positive knowledge, there must be conscious avoidance of knowledge of illegality. *See* United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976); EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 17.09.

140. Indifference to concerns regarding the qualifications of prospective employees is an ever less tenable business practice. *See* Jim Stavros, *Employee Screening Can Prevent Fraud; Right Information About Applicants Reduces Risk to Company*, THE LEGAL INTELLIGENCER, June 1, 1995, at 7.

141. A search of the WESTLAW CG, BCA, and DCT databases yielded no cases in which Section 423(c) was advanced as a protest ground.

142. 41 U.S.C. § 423(d).

143. *See supra* note 4 and accompanying text.

makers in procurement actions valued in excess of $10,000,000;[144] under Subsection 423(d)(1)(A), to senior procurement officials serving as such at the time of the selection of the contractor or the award of a contract to the contractor in excess of $10,000,000;[145] and, under Subsection 423(d)(1)(B), to program managers, deputy program managers, and administrative contracting officers for contracts in excess of $10,000,000.[146] Covered former government employees may not accept compensation for services rendered as an employee, officer, director, or consultant, from a contractor, within one year after the service or decision pertaining to a contract involving the contractor.[147]

Section 423(d) has the virtue of recognizing, through Subsection 423(d)(1)(B), that serving in certain key contract administration positions (program manager, deputy program manager, and administrative contracting officer) creates procurement integrity concerns without reference to involvement in a particular procurement. However, the subsection's meager coverage does not address contract administration support personnel, who would likewise have access to (and arguably in some cases a more detailed knowledge of) inside information that could impart an unfair competitive advantage. Further, Subsection 423(d)(1)(B) only prohibits acceptance of compensation from the contractor in place at the time of service in the contract administration position. For example, if the program manager for a $20,000,000 contract, K_1, with *XYZ* Corp., wants to retire and go to work for *ABC* Inc., to compete for and execute K_2, a follow-on contract for the same requirement, Section 423(d)(1)(B) does not prevent him from doing so.[148]

Section 423(d) shares with Section 423(c) the limitation that it exposes the contractor to liability only if it compensates the former government employee knowing that such compensation violates Section

144. Included are persons who personally decide to award contracts, establish overhead rates, approve issuance of contract payments, or pay/settle contract claims. 41 U.S.C. § 423 (d)(1)(C).

145. Covered officials are: the procuring contracting officer, the source selection authority, members of the source selection evaluation board, or the chief of a financial or technical evaluation team. 41 U.S.C. § 423(d)(1)(A).

146. *Id.* § 423(d)(1)(B).

147. *Id.* § 423(d)(1).

148. Section 423(d)(1)(B) covers only contracts "awarded *to that contractor.*" *Id.* § 423(d)(1)(B).

423(d),[149] thereby encouraging "head in the sand" hiring decisions.[150] In addition, the one-year compensation ban fails to take into account the substantial number of procurements that take longer than a year to complete.[151] Thus, Section 423(d) would not prevent the program manager in the above example from going to work for *XYZ* Corp., and assist it in its proposal preparation for the K_2 procurement, a fifteen-month process, as long as he waited one year to do so.

(e) Protest Limitations

Section 423(g) distinguishes procurement integrity as a unique protest ground, by requiring a person who discovers violations of the Act to report the discovery to the agency responsible for the affected procurement within fourteen days after discovery, on pain of precluding resort to the Comptroller General's bid protest process.[152] This is a significantly stricter deadline than is the case under the Comptroller General's bid protest regulations for procurements conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.[153] There are valid reasons to require such unusual haste in bring-

149. 41 U.S.C. § 423(d)(4). Actual, versus constructive knowledge, is required. Congress has shown that where it wishes to include both concepts in a statute, it knows how to do so ("knew or should have known"). *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)(I) (IV) (2000); 15 U.S.C. § 16(g) (2000); 15 U.S.C. § 78u-3(a); 21 U.S.C. § 335a(d)(4)(B)(ii) (2000).

150. Section 423(d) suffers from an additional major shortcoming. Subsection 423(d)(2) permits acceptance of employment with a firm to which, for example, a former government employee had personally awarded a $1,000,000,000 contract, as long as the former employee worked for an affiliate of the firm that does not produce the same or similar product or service as the entity to which the contract was awarded. 41 U.S.C. § 423(d)(2). This shortcoming appears to relate primarily to the *quid pro quo* corruption concerns addressed by the Procurement Integrity Act, rather than to concerns arising out of the thesis case scenario. However, the provision exemplifies the ambivalence, timidity, and compromise that must have figured in the enactment of the law, and perhaps explains how Congress, attempting to design a horse, referred the task of design to a committee, thereby producing a camel.

151. *See, e.g.*, Holmes and Narver Servs./Morrison-Knudson Servs.; Pan Am World Servs., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, *aff'd on reconsideration*, B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (at least 13 months); Bendix Field Eng'g Corp., B-232501, Dec. 30, 1988, 88-2 CPD ¶ 642 (at least 20 months from initiation of solicitation package to award).

152. 41 U.S.C. § 423(g); *see also* 4 C.F.R. § 21.5(d) (2000) (General Accounting Office implementation).

153. Such protests must be filed not later than 10 days following the conduct of the debriefing. 4 C.F.R § 21.2(a)(2).

ing matters affecting a procurement's integrity to the attention of the responsible government officials.[154] For instance, Section 423(g) may be intended to recognize the special enormity of procurement integrity violations, as compared to "garden-variety" procurement irregularities, and therefore attempt to give the government the greatest opportunity to avoid problems of this nature. Although laudable in theory,[155] this provision may serve only to stigmatize procurement integrity protests, leading to a belief that they are disfavored actions, and thus contribute to the lower sustain rate for revolving door bid protests. A recent General Accounting Office protest case that strictly interpreted this provision, to the detriment of a protester that had initially reported an alleged violation in a timely manner to the agency, only serves to aggravate such a perception.[156]

(f) Summary

The Procurement Integrity Act overall does not adequately meet the challenges to the integrity of the procurement system that arise when former government employees go to work for firms competing for contracts awarded to satisfy the requirements for which the former employees had official responsibility when in government service. By defining key terms in a restrictive fashion, the reach of the Act has been effectively limited to cases involving information prepared specifically for a discrete procurement, discounting the competitive value of information learned during contract administration activities. When combined with the Act's fundamentally criminal character, and a uniquely restrictive protest time limitation, these restrictive definitions render the Procurement Integrity Act a poor means for a bid protester to vindicate his claim to fair treatment of his bid or offer when competing for award with a contractor who has hired a key former government employee.

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154. SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42 ("The 14-day reporting requirement affords the agency an opportunity to investigate alleged improper action during the conduct of an acquisition and, in appropriate circumstances, to take remedial action before completing the tainted procurement.").

155. In addition, this provision supports the article's argument that revolving door/conflict of interest protest grounds are different in ways that require special protection.

156. *See* SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42 (noting that the protester notified the agency in a timely fashion and promptly received the agency position in reply that a violation had not occurred; the protester waited for over 100 days to protest; the protest was dismissed as untimely; the agency response implicitly deemed the equivalent of a debriefing to trigger the start of the 10-day clock for filing of protests under 4 C.F.R. § 21.2(a)(2)).

D. Conclusion

Is it presumptuous to challenge the current revolving door rules as inadequately solicitous of the integrity of the federal procurement system? This article does not challenge them. It simply notes that they apparently were not designed to comprehensively address revolving door issues in bid protests.

The Ethics in Government Act and the Procurement Integrity Act, at one end of the spectrum, focus like a laser beam on criminal conduct. Accordingly, they have been written to put everyone on notice of the acts they must avoid on pain of prosecution, fines, or imprisonment. It is too much to ask such criminal statutes to do double-duty as administrative protest grounds. All we can hope is that their existence will deter as many former government employees and competing contractors as possible from the most blatant and egregious unethical practices.

At the other end of the spectrum is the theory of the appearance of impropriety, a true legal stepchild. Though recognized in a wide variety of legal settings, "appearance of impropriety" in government contracting exists in a tenuous status at best, relying on scraps of ambiguous and equivocal regulatory guidance and authority that give protest fora little by which to navigate.

Unfortunately, there is currently no middle path between the extremes; no tool to address improprieties associated with former government employees who go to work for contractors under circumstances in which it is difficult to determine whether actual or apparent impropriety exists. The procedural rules exacerbate this difficulty by failing to impose upon the parties who are in an exclusive position to illuminate the facts bearing on these issues (namely, the agency, the former government employee, and the contractor who hired him) the duty to do so. Instead the rules impose and never shift the burden from the protester, and effectively hold that "ties goes to the [agency]."[157]

In view of the shortcomings of the rules, it is not surprising that revolving door bid protests are denied at such an unusually high rate, and that the protest fora experience such difficulty in arriving at decisions that comprehensively and critically evaluate all relevant evidence.

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157. Riggins Co., B-214460, July 31, 1984, 84-2 CPD ¶ 137 (holding that the protester has the burden of proof, which is not carried when the evidence consists of conflicting statements between the protester and the agency).

III. Applying the Rules: Hard Facts Are Good to Find

> When it comes to ethical issues . . . "close enough for government work" is not sufficient. In a democratic state, the government must be held to a higher standard than "close enough." Public confidence in the integrity of the public procurement system . . . requires that those who work for the government refrain from the appearance of impropriety to the greatest extent possible. "Close enough for government work" does not meet this standard. In short, the evil that must be avoided is the appearance of favorable treatment by an agent of government towards a private entity.[158]

A. Introduction

There is tension among the various compelling and sometimes conflicting interests: integrity, mission accomplishment, and competition, as filtered, reconciled, and stewed by the political branches, and as embodied in applicable law and regulation. This has resulted in the creation of tools that are not properly calibrated to accomplish the task of protecting the procurement system from the actual and apparent evils stemming from post-government service employment by government contractors. Further, the Federal Circuit's decision in *CACI, Inc.–Federal v. United States*,[159] which itself stemmed from the inadequacies of the revolving door rules, cast a pall of doubt over the appearance of impropriety as a basis for protecting the integrity of the procurement system.

This article is premised on a belief that the overwhelming majority of former government employees who accept positions with firms doing business with their former agencies do so in a completely ethical manner. However, when such virtuous behavior is not "bedecked with the outward ornaments of decency and decorum,"[160] the procurement system and its stewards, past and present, suffer damage to their image. The premise that

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158. Express One Int'l, Inc. v. United States Postal Serv., 814 F. Supp. 93, 99 (D.C.D.C. 1993).

159. 719 F.2d 1567 (Fed. Cir. 1983).

160. The full text of Fielding's advice regarding the importance of appearances is as follows: "Let this, my young readers, be your constant maxim, that no man can be good enough to enable him to neglect the rules of Prudence; nor will Virtue herself look beautiful, unless she be bedecked with the outward ornaments of decency and decorum." HENRY FIELDING, THE HISTORY OF TOM JONES, A FOUNDLING 92 (1909).

most former government employees conduct themselves with integrity in their post-government service employment suggests that the bid protest fora reach the "correct" result in a high percentage of its revolving door cases. In other words, based upon the prevalence of virtue among former government employees, when a protest forum denies a protest because no impropriety has affected the integrity of a procurement, we can be fairly confident that this is correct. However, when protest decisions do not satisfy the need to learn what happened, to discern who is telling the truth, and to understand the legal basis of the decisions, there is no reliable means of distinguishing the sheep from the goats. Under these circumstances, the temptation to generalize pejoratively regarding the ethics of government contractors and the former government employees who work for them is unfair yet difficult to resist, especially for the vast majority of the citizenry that is unfamiliar with the niceties of public contracting.

Section III begins with an examination of the 1983 case of *CACI, Inc.–Federal v. United States.* The primary effect of the Federal Circuit decision in this case was the confusion it spawned concerning the appearance of impropriety theory, by means of its requirement that disqualification based upon such an appearance must be supported by "hard facts."[161] Presumably, however, if "hard facts" were known regarding impropriety in the hiring or employment of a former government employee in the context of a protested procurement, there would be no need to rely on the appearance of impropriety, because actual impropriety would be proven (or disproven). The court further attenuated the appearance of impropriety theory with its seeming disparagement of other evidence suggestive of impropriety, but less compelling than "hard facts," as mere "suspicion and innuendo."[162] In addition, one portion of the opinion even appears to denounce the legitimacy of using the appearance of impropriety as a basis for injunctive relief in conflict of interest cases at all.[163] However, in view of the conflict of interest bid protest record since *CACI, Inc.–Federal*, the "hard facts" requirement appears to have had the same impact.

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161. *CACI, Inc.–Federal*, 719 F.2d at 1582. *See infra* Section III.B.2.

162. *CACI, Inc.–Federal*, 719 F.2d at 1582.

163. This, however, turned out not to have been the intent of the Federal Circuit. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (Fed. Cir. 1986) (overruling a Claims Court decision that had enjoined the government from disqualifying a competitor based upon an appearance of impropriety). The Federal Circuit wrote: "Though the Claims Court erroneously limited that power to cases involving actual, but not the appearance of, impropriety, we do not repeat that mistake here." *Id. See infra* Section III.B.3.(d).

The *CACI, Inc.–Federal* decision thus set the stage for fifteen years of timidity by the protest fora,[164] forcing them to search for "hard facts" evidence of criminal conduct under rules that encouraged former government employees and their new employers to admit nothing and deny everything. Under these circumstances, it would be remarkable if subsequent revolving door protest decisions were able, on a consistent basis, adequately to examine the facts, apply the law, and reach results capable of withstanding "intelligent scrutiny."[165] However, as one would expect, revolving door protest decisions since *CACI, Inc.–Federal* have mirrored the muddled and imprecise state of the law. Section III concludes with an examination of the ways in which this unfortunate circumstance has been embodied in the post-1983 bid protest decisions.

B. *CACI, Inc.–Federal Legacy*

1. Background[166]

Formally commencing in September 1982, the Department of Justice (DOJ), Antitrust Division Information Systems Support Group (ISSG) conducted the procurement that was the subject of the *CACI, Inc.–Federal* protest to acquire data processing and litigation support services.[167] Eight firms responded to the Request for Proposals, including CACI, Inc.–Federal (CACI) and Sterling Systems (Sterling).[168]

Sterling's proposal was prepared under the direction of Mr. Robert E. Stevens, the former ISSG Chief (from 1978 to 1980).[169] Four of the five members of the Government Technical Evaluation Committee (TEC): Messrs. Anderson, Sweeney, and Smith, and Ms. Shelton, had some prior

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164. The Federal Circuit decision in *CACI, Inc.–Federal* overruled the Claims Court's decision disqualifying the awardee because of the appearance of impropriety resulting from its actions during the procurement. CACI, Inc.–Federal v. United States, 1 Cl. Ct. at 352 (1983). The Federal Circuit opinion reads as a severe rebuke. *See infra* Section III.B.2.-3.

165. *See* LIVELY, *supra* note 60.

166. To set forth all material facts, it will be necessary to recite particulars gleaned from both the Claims Court and the Federal Circuit opinions. Unless otherwise noted, there is no apparent conflict between the courts with regard to any facts herein.

167. *CACI, Inc.–Federal*, 719 F.2d at 1570.

168. *Id.*

169. *Id.*

social or professional association with Stevens.[170] Anderson had discussed with Stevens the possibility of accepting future employment for Stevens at Sterling, and had an open-ended expectation of working for Stevens.[171] There was also evidence of efforts to recruit Shelton to work

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170. *Id.* The TEC Chairman, Mr. Carl E. Anderson, had worked for Stevens, either directly or indirectly, for nine years, both in and out of government service. *Id.* at 1571. Mr. Terence Sweeney, who succeeded Stevens as ISSG Chief; Ms. Patricia J. Shelton; and Mr. Durwin E. Smith, had worked for Stevens from 1978 until his departure in 1980. *Id.* Smith also had a social relationship with Stevens. *Id.* Mr. Thomas E. Powers was the only TEC member who had no prior professional or social relationship with Stevens. *Id.*

Although mention was omitted by the Federal Circuit opinion, Anderson, Sweeney, and Shelton also had social relationships with Stevens. *CACI, Inc.–Federal*, 1 Cl. Ct. at 355. In addition, Sweeney was hired by Stevens at ISSG, and reported directly to him. *Id.* at 354. They were friends who "worked together very intensely for two years." *Id.* Stevens had hired Sweeney to work at ISSG. *Id.* at 355. A veteran ISSG employee testified under oath at trial in Claims Court that these circumstances appeared "suspicious" because "[t]hey [Sweeney and Smith] owe their jobs" to Stevens. *Id.* Shelton and Stevens were "poker budd[ies]." *Id.*

171. There is conflicting evidence regarding specificity and immediacy of employment negotiations between Stevens and Anderson. Anderson testified at trial as follows:

> Q: When you had the last discussion, at that time did you contemplate there being any further discussions?
>
> A[Anderson]: I would say I would contemplate that there would be further discussions. We left it sort of hanging. He indicated that he had hoped to have positions available in the future, but right now he had nothing he could offer me, and *I sort of anticipated some future contact from Mr. Stevens*.

Tr. 402. *CACI, Inc.–Federal*, 1 Cl. Ct. at 356 (emphasis added). According to Anderson, these discussions took place in April of 1981. *CACI, Inc.–Federal*, 719 F.2d 1577. No specific positions or salary was discussed, but it was clear that Anderson was going to be chief of a division within Sterling. *Id.*

However, two CACI employees testified that Anderson had informed them that he had been offered a job by Stevens, and would be leaving to accept the job "in a few months." *CACI, Inc.–Federal*, 1 Cl. Ct. at 355; *CACI, Inc.–Federal*, 719 F.2d at 1577.

Stevens's testimony on this issue is both self-serving and suspect in its own right. Stevens admitted that he had offered a job to Anderson, but testified that he believed the job offer had been made "years" earlier. *CACI, Inc.–Federal*, 1 Cl. Ct. at 361. However, the record disclosed that the offer had been made much more recently. *Id.* (Claims Court opinion avers that "[t]he record shows that it was quite recent."). Stevens testified that after he (Stevens) "left the government, Anderson 'was promoted and his salary at that point was . . . above the rates that I was able to compete with or use him on contracts . . . . '" *CACI, Inc.–Federal*, 719 F.2d at 1577. However, in view of the fact that he intended to employ Anderson as a division chief, the statement that he could not compete with Anderson's new

at Sterling.[172] The procuring contracting officer (PCO), Mr. Ronald L. Endicott, apparently had no prior professional or social relationship with Stevens.[173]

In August 1981, Sterling requested from the Antitrust Division an opinion regarding the propriety of Stevens's participation in the upcoming litigation services contract competition.[174] The Assistant Attorney General in charge of the Antitrust Division replied by letter on 23 November 1981 that Stevens participation would not violate 18 U.S.C. § 207.[175]

Proposals were required to be subdivided into technical and business management (cost) parts. They were weighted at seventy percent and thirty percent respectively, and evaluated separately.[176] On a 100-point scoring system, initially, the CACI (85.2) and Sterling (79) technical pro-

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171. (continued) salary following his government promotion appears dubious. Finally, Stevens at one point in his testimony swore that "there was no specific job" under discussion, yet at another point, he referred to "the position we had talked about." *Id.*

172. *CACI, Inc.–Federal*, 1 Cl. Ct. at 355-56. The Federal Circuit opinion related the following regarding Stevens's overture to Shelton:

> Stevens had similar discussions about possible employment with Shelton. Shelton testified that in March or April of 1981, they had "some discussions about the possibility of my moving to Sterling Systems at some point." No specific position or salary was discussed. After that time, there were no additional discussions about employment. Stevens testified that after he staffed a contract using personnel within the company, that "terminated any possibility of discussion with Pat [Shelton]." He also stated that although he had a specific job in mind for Shelton on another contract then under consideration, "the job did not materialize" because the contract was not awarded.

CACI, Inc.–Federal, 719 F.2d at 1577-78.

173. *CACI, Inc.–Federal*, 719 F.2d at 1571. Endicott was employed by another DOJ division.

174. *Id.* at 1576.

175. *CACI, Inc.–Federal*, 1 Cl. Ct. at 361. The Federal Circuit appears to be confused regarding the date of the reply letter from DOJ, indicating that it was issued in May 1981, three months prior to the request for opinion by Sterling. *CACI, Inc.–Federal*, 719 F.2d at 1576. If the Federal Circuit date is correct, however, it would indeed be a strange and suspicious circumstance in its own right.

176. *CACI, Inc.–Federal*, 719 F.2d at 1570. The TEC evaluated the technical part; the PCO evaluated the business management part. However, in spite of the Federal Circuit's characterization of the evaluations as separate, Anderson assisted the PCO in evaluating the business management proposals. *Id.* at 1571. Further, Anderson "conveyed some of the cost rankings of the various proposals to Sweeney." *CACI, Inc.–Federal*, 1 Cl. Ct. at 358.

posals were ranked first and second respectively.[177] Discussions were conducted with all eight firms, culminating in a request for best and final offers (BAFOs) which were to be submitted not later than 22 November 1981.[178] During the conduct of the procurement, Stevens was, "quite a constant visitor" to ISSG, and kept in telephonic contact with TEC members.[179]

During discussions, the PCO denied CACI the opportunity to present its technical proposal, and limited the session to one hour.[180] CACI's final technical score was 87.4, while Sterling's was 84.6.[181] The TEC members who had prior relationships with Stevens: Anderson, Shelton, Smith, and Sweeney, raised their rankings for Sterling's technical proposal by ten, seven, eight, and three points respectively.[182] Powers, the only TEC member with no prior relationship to Stevens, lowered the Sterling score by three points.[183] CACI did not enjoy proportionally similar improvements in its score.[184] However, all offerors that submitted BAFOs increased their technical scores.[185]

Thereafter, the PCO and Anderson evaluated the final business management proposals, applied the weighted formula, and ascertained that Sterling had won the competition.[186] Neither the Claims Court nor the Federal Circuit opinion indicated precisely how close were the final overall rankings of the CACI and Sterling proposals.

CACI was an incumbent contractor for a portion of the requirement that was the subject of the procurement.[187] Further, in the opinion of the

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177. *CACI, Inc.–Federal*, 719 F.2d at 1571. CACI's technical proposal, however, actually scored 85.21, as reported by the Claims Court. *CACI, Inc.–Federal*, 1 Cl. Ct. at 358.

178. *CACI, Inc.–Federal*, 1 Cl. Ct. at 359.

179. *Id.* at 356 (testimony of an unnamed ISSG employee). The subject of the contacts was not reported in the opinion.

180. *Id.* at 358. Neither opinion stated whether Sterling's discussions were limited in similar fashion. However, it is reasonable to assume that if they were treated in a substantially different manner, that circumstance would have been noted.

181. *CACI, Inc.–Federal*, 719 F.2d 1567, 1571 (Fed. Cir. 1983). The next closest offeror's proposal received a grade of 75.8 points.

182. *CACI, Inc.–Federal*, 1 Cl. Ct 352, 359 (1983).

183. *Id.*

184. *Id.*

185. *CACI, Inc.–Federal*, 719 F.2d at 1580.

186. *Id.* at 1571.

187. *CACI, Inc.–Federal*, 1 Cl. Ct. at 356.

Claims Court, the procurement requirements were "not substantially different in kind from those which [CACI] and others had been fulfilling for some time.[188] The Federal Circuit, based, apparently, exclusively on Sweeney's testimony, viewed the litigation services requirement under the procurement as substantially different from that procured by the ISSG when Stevens was in charge.[189] Anderson was responsible for drafting the statement of work for the procurement at a time when he was discussing employment at Sterling with Stevens.[190]

At some point,[191] the PCO conducted an investigation of the appearances of impropriety surrounding Stevens's participation in the procurement.[192] He examined the score sheets, read some General Accounting Office decisions, and reviewed the 23 November 1981 letter from the Antitrust Division in response to Sterling's request for opinion regarding the propriety of Stevens' participation in the procurement.[193] The investigation, however, did not include a consultation with an agency ethics official with regard to issues raised by events subsequent to the 23 November 1981 letter to Sterling regarding Stevens's participation in the procurement.[194]

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188. *Id.* at 357. The Claims Court further stated:

> Although somewhat different in form, the proposed contract is essentially a follow-on to the type of continuing automatic data processing and litigation support services procured during Stevens' tenure at ISSG and thereafter. In any event the procurement is part of the same particular matter [as defined in 18 U.S.C. § 207].

Id. at 364.

189. The court found that the new requirement was, "broader in scope, different in concept, and incorporates different features than the prior contracts." *CACI, Inc.–Federal*, 719 F.2d at 1576. Sweeney, according to the Federal Circuit, stated that the services acquired under the new contract "far exceed[]" the service previously acquired, and that the "broad objective" was consolidation, management control, redundancy elimination, and the provision of new services, such as production control, to the Antitrust Division. *Id.* Some unidentified services provided under the previous contracts were to be eliminated. *Id.*

190. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352.

191. The Claims Court opinion, suggests that the investigation was undertaken sometime after 22 December 1982. *See CACI, Inc.–Federal*, 1 Cl. Ct. at 361.

192. *Id.* The record does not indicate who ordered the investigation, or the reason why.

193. *Id.*

194. *Id.*

2. Protest

(a) Claims Court[195]

On 3 January 1983, CACI filed a complaint in the Claims Court, seeking declaratory and injunctive relief, along with a motion for a preliminary injunction and an application for a temporary restraining order seeking to preclude the award of the litigation services contract by DOJ to Sterling.[196] A two-day trial commenced on 10 January 1983. The testimony of sixteen witnesses was taken, consuming 529 pages of trial transcript.[197]

CACI alleged that the award to Sterling "violated ethical standards of conduct for government employees, created the appearance of impropriety, and resulted in prejudice in favor of [Sterling] and against other firms seeking the contract."[198]

On 2 February 1983, the Claims Court held in favor of CACI, finding that nontrivial improprieties had occurred, of the sort that, in *United States v. Mississippi Valley Generating Co.*,[199] the U.S. Supreme Court had deemed adequate to support government cancellation of a partially-performed contract.[200] The Claims Court reasoned that such violations justified permanently enjoining the Antitrust Division from awarding the litigation services contract to Sterling.[201] Though no explicit findings

195. CACI originally filed a General Accounting Office protest. However, when CACI learned that the agency would not delay award of the contract, it pursued its protest in court. *CACI, Inc.–Federal*, 719 F.2d at 1571.

196. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352.

197. *Id.*

198. *CACI, Inc.–Federal*, 719 F.2d at 1570. CACI also advanced several speculative indicia of impropriety on the part of Anderson and Sweeney in favor of Stevens and Sterling. These included the timing of the request for proposals (RFP), the nature and relative weights of the evaluation criteria, and the type of contract. *CACI, Inc.–Federal*, 1 Cl. Ct. at 360. Further, Sterling submitted its original offer as a "teamed" proposal that included another firm, Infodata, as a subcontractor; Infodata also submitted a proposal for the prime contract listing Sterling as a subcontractor. *Id*. at 358-59. Teamed proposals entail a tradeoff of enhanced technical expertise stemming from the combination of the two firms staffs versus the extra costs associated with combined overheads of the prime contractor and the subcontractor. *Id.* at 358. Following discussions with Anderson and Sweeney, however, Sterling submitted two BAFOs, one with Infodata as its subcontractor, and another under which Sterling would perform the contract without Infodata. *Id.* at 359.

199. 364 U.S. 520 (1961).

200. *CACI, Inc.–Federal*, 1 Cl. Ct. at 366-67.

201. *Id.* at 367. The Claims Court also held that CACI had standing to bring the action. This issue, however, is beyond the scope of this article.

were made that Sterling or Stevens had violated Title 18, Sections 207 or 208, the Claims Court found the proposed award tainted by actual improprieties and the appearance of impropriety. Award under such circumstances would in the Claims Court's view be arbitrary, capricious, and an abuse of discretion. It summarized the basis for the holding as follows:

> Aside from the "appearance of evil" throughout that record, there are a number of instances in which Stevens' prior service as Chief of ISSG, and his long-standing and continuing professional and social relationships with his successors, and with all but one of the 5-member Technical Evaluation Board ripened into concrete manifestations of prejudice in favor of Stevens' company, and against plaintiff and others.[202]

(b) Federal Circuit

Harsh Criticism Rather Than Disagreement Among Colleagues—On 28 October 1983, the Federal Circuit reversed the decision of the Claims Court and remanded the case with instructions to dismiss CACI's complaint.[203] The Federal Circuit opinion's tone was acerbic and unforgiving. The higher court implicitly criticized the completeness of the Claims Court's recitation of fact.[204] It characterized a theory of impropriety, purportedly advanced by CACI, and implicitly accepted by the Claims Court, as "border[ing] on the bizarre."[205] Its disagreement with the Claims Court over the propriety of a meeting between Stevens, Anderson, and Sweeney following the initial protest was cause for ridicule.[206] The failure of the

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202. *Id.* at 363. The court mentioned various manifestations of prejudice, including biased technical proposal scoring, undue delay in commencing the procurement in order to permit Sterling to gain experience, and adoption of source selection criteria designed to favor Sterling.

203. *CACI, Inc.–Federal*, 719 F.2d at 1582.

204. A proper statement of facts required the Claims Court's recitation to be "considerably amplified by the uncontradicted evidence in the record." *Id.* at 1570.

205. *Id.* at 1579 ("It borders on the bizarre to suggest, as CACI apparently does, that the Department officials who allegedly favored Sterling anticipated that Sterling would be ranked second or lower on its technical proposal so that it could obtain the contract only if its costs, which for some unknown reason would be lower, were given substantial weight.").

206. *Id.* at 1580 ("Finally, the Claims Court and CACI *see something sinister* in the fact that Sweeney met with Stevens to discuss implementing the contract even though CACI had filed with the Comptroller General a protest over the anticipated award to Sterling." (emphasis added)).

Claims Court clearly to state the legal basis for its ruling was highlighted with exquisite yet devastating finesse at the beginning of a major section of the Federal Circuit opinion.[207]

The Federal Circuit resolved several key issues involving questions of law and fact adversely to CACI, most importantly, the issue of whether the contract under the protested procurement was the same "particular matter" as the contract Stevens administered while head of ISSG. The disposition of this issue hinged almost exclusively upon the testimony of Stevens and Sweeney,[208] which the Claims Court evidently discounted in ruling that the contracts were the same particular matter.[209] Despite that the Claims Court held a two-day trial and had the opportunity to observe the demeanor of the witnesses, the Federal Circuit, which had no such opportunity, decisively overruled the lower court's finding without even an acknowledgement of the provisions of Rule 52(a), Federal Rules of Civil Procedure.[210] Finally, the Federal Circuit stated that "[t]he Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts."[211]

Bases for Reversal—The Federal Circuit rejected every circumstance and theory discussed by the Claims Court in connection with actual impropriety or the appearance of impropriety as bases for its injunction. The higher court found that Stevens had not violated 18 U.S.C. § 207;[212] that Anderson, Shelton, Sweeney, and Smith had not violated 18 U.S.C. § 208;[213] and, that these officials were not biased in favor of Stevens and Sterling.[214]

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207. *Id.* at 1575 ("The precise grounds upon which the Claims Court enjoined the award of the contract to Sterling are unclear.").

208. *Id.* at 1576.

209. *CACI, Inc.–Federal*, 1 Cl. Ct. at 364. Admittedly, the Claims Court's finding did not explicitly comment on the credibility of Stevens and Sweeney on this issue. Nevertheless, the Claims Court must perforce have disbelieved their testimony in reaching its finding.

210. FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

211. *CACI, Inc.–Federal*, 719 F.2d at 1582.

212. *Id.* at 1575-76.

213. *Id.* at 1576-78.

214. *Id.* at 1578-81.

The Federal Circuit then stated that an appearance of impropriety was "not an adequate or proper basis" for an injunction against awarding the litigation services contract to Sterling.[215] The Federal Circuit further opined that an Office of Personnel Management standards of conduct regulation[216] referred to in the Claims Court opinion did not "provide specific and precise standards, the violation of which would justify enjoining the [DOJ] from awarding the contract."[217]

The Federal Circuit explained the reasons injunctive relief was appropriate "only in extremely limited circumstances."[218] It then rejected the Claims Court's purported reliance upon the U.S. Supreme Court's decision in *United States v. Mississippi Valley Generating Co.*[219] as support for enjoining the award to Sterling based upon appearances of impropriety. The Federal Circuit stated:

> [The] holding [in *Mississippi Valley*] rested solely on the Court's conclusion that the government employee had violated the conflict of interest statute. In the present case, in contrast, there has been no violation of the Ethics in Government Act. The broad language in *Mississippi Valley* cannot properly be applied to the significantly different situation in the present case.[220]

The Federal Circuit opinion, however, misstated the Claims Court's rationale, which was based on its findings of *actual* improprieties.[221]

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215. The Federal Circuit rejected the theory in terms that, at least facially, were unequivocal, as follows, "[a] major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process. That was not an adequate or proper basis for enjoining the award of the contract to Sterling." *Id.* at 1581. *But see* NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (Fed. Cir. 1986).

216. 5 C.F.R. § 735.201a (1982) (no longer in effect; largely superseded by 5 C.F.R. § 2635.101 (2000), Standards of Ethical Conduct for Employees of the Executive Branch, Basic Obligation of Public Service).

217. *CACI, Inc.–Federal*, 719 F.2d at 1581. However, the Claims Court had not attempted to use the regulation in such manner. The regulation is arguably too vague to be employed for this purpose. The Claims Court, however, referred to the regulation merely as additional authority on the issue of whether Anderson and Shelton should be deemed to have been "negotiating" for employment with or to have had an "arrangement for employment with Sterling. *See supra* Section II.C.1.(c).

218. *CACI, Inc.–Federal*, 719 F.2d at 1581 (citing United States v. John C. Grimberg Co., 702 F.2d 1362, 1372 (Fed. Cir. 1983)).

219. 364 U.S. 520 (1961).

220. *CACI, Inc.–Federal*, 719 F.2d at 1581.

221. In spite of the Claims Court's mention of "the appearance of evil," in the end it relied upon actual improprieties. CACI, Inc.–Federal v. United States, 1 Cl. Ct. 352, 363,

1. Sequelae

Introduction—The effects of the *CACI, Inc.–Federal* case have manifested themselves in four areas. First, the Federal Circuit opinion set the standard unattainably high when it ruled that the undisputed facts of the case did not create a sufficiently odious appearance of impropriety so as to justify Sterling's disqualification. By requiring "hard facts" evidence of actual criminal impropriety, the decision made it virtually impossible to protect the integrity of the procurement system from the equally deleterious effects of appearances of impropriety.

Second, the unnecessarily harsh language of the Federal Circuit opinion reversing the Claims Court sent a strong and chilling message, all by itself, to the bid protest fora: "be careful and conservative, or you may be publicly humiliated in the Federal Reporter." A reasonable conclusion was that the Federal Circuit disfavors revolving door protests.

Third, both the Claims Court and the Federal Circuit opinions created confusion regarding whether an appearance of impropriety can be a ground for protest. Such confusion, by making it more difficult to predict the correct outcome, tends to further encourage undue timidity in deciding whether to disqualify an offeror, on pain of reversal as in the *CACI, Inc.–Federal* decision. Confusion also serves to blur the rules and thus to encourage unwarranted boldness in government procurement officials in choosing to overlook evidence of actual impropriety or appearance of impropriety.

Fourth, the Federal Circuit decision tacitly encouraged two significant faults that have been reflected in revolving door protests since 1983: uncritical acceptance of testimony by witnesses with unquestionably significant personal business, investment, and criminal interests in the outcome; and, failure to consider the synergistic impact of several circumstances contributing to an overall unacceptably improper appearance warranting remedial action.

This is the legacy of *CACI, Inc.–Federal*

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221. (continued) 366-67 (1983) ("This case presents improprieties of the kind which were not condoned in *Mississippi Valley*."). The Claims Court, however, did not make definitive findings regarding violations of any specific statute, thereby contributing to the impression that the ground of its decision was the appearance of impropriety.

(b) Appearance of Impropriety: The Impossible Dream

Several of the more speculative theories advanced by CACI as evidence of impropriety require careful investigation and concern,[222] but they would not by themselves necessarily warrant remedial action. Nevertheless, in view of the far more serious undisputed facts found in the case, these circumstances are a substantial part of the ethical background of the case, and therefore should not be discounted.

The essential and undisputed[223] facts that demand remedial action are as follows:

- Stevens was the head of the ISSG, the requiring activity for a substantial portion of the requirement that later became the litigation services procurement.[224]

- Stevens had personal and professional relationships with four out of five members of the TEC that would evaluate the Sterling proposal.

- Two TEC members were hired into their government jobs by Stevens.

- Two TEC members, including the Chairman of the TEC, had recently entertained job offers from Stevens to work for him at Sterling. Anderson anticipated future employment discussions with Stevens.

- The job offers were contingent upon Sterling receiving government contracts.

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222. These include the timing of the RFP, the nature and relative weights of the evaluation criteria, the type of contract used in the procurement, Sterling's alleged efforts to recruit CACI employees, and the 22 December 1982 meeting between Anderson, Sweeney, and Stevens following the initial protest. *CACI, Inc.–Federal*, 1 Cl. Ct. at 352, 360-61.

223. "Undisputed" is used in the context of the Claims Court and Federal Circuit opinions. If the Federal Circuit did not dispute a fact found by the Claims Court, it is considered "undisputed," regardless of whether one of the parties might dispute it.

224. It is reasonable to believe that in such capacity, Stevens would have had complete access to CACI cost and price information submitted in connection with its litigation services contract, and to government cost data, estimates, and acquisition plans.

- Neither TEC member who had entertained a job offer from Stevens had either formally terminated employment discussions, nor informed the PCO regarding the offer.[225]

- During the competition, Stevens stayed in regular contact with the TEC members with whom he had prior personal relationships.

- After submission of BAFOs, the four TEC members who had prior relationships with Stevens raised Sterling's technical score by a greater percentage than was enjoyed by any other offeror.

- The only TEC member who did not have a prior relationship with Stevens lowered the Sterling score.

- Although the technical and business portions of the proposals were to be scored separately, Anderson participated substantially[226] in evaluating both proposals, and, for no apparent reason, provided some information regarding the business portion evaluation to Sweeney.[227]

- Although CACI received the higher technical score, it lost the competition because of Sterling's lower price, under the source selection criteria, made it the highest rated proposal overall.[228]

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225. Though not in effect at the time, these failures, if occurring today, would arguably violate the Procurement Integrity Act. 41 U.S.C. § 423(c)(1) (2000).

226. It is reasonable to argue that Anderson's role in evaluating the business proposals would be unusually important, and not merely advisory, since Endicott, the PCO, came from outside the Antitrust Division, and would therefore be unfamiliar with the requirement.

227. As the Federal Circuit pointed out, there was nothing inherently wrong with Anderson serving on both committees. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1579 (1983). This, however, misses the point: that the source selection plan had apparently intended that the evaluations would be conducted separately, presumably to avoid the kind of manipulation that was suspected in this case. In view of Anderson's prior longstanding relationship with Stevens, there is no basis on which to place a benign interpretation on Anderson's participation in evaluating the technical and business proposals. Further, there was no attempt to justify Anderson's disclosure of the relative cost standings of the initial proposals to Sweeney prior to TEC evaluation of the BAFOs.

228. It would have been very useful to know, when attempting to sort out the ethical issues in this case, how close the final overall scores of CACI and Sterling were. Neither

These facts, even without the admittedly equivocally suspicious circumstances noted above,[229] constitute an appearance of impropriety that demands disqualification. All four TEC members should have fully disclosed their prior relationships with Stevens to the PCO prior to assuming their duties, especially Anderson and Shelton in regard to their job discussions.[230] The PCO should have followed the apparent source selection plan provision to conduct separate evaluations of the technical and business portions of the proposals. Stevens should not have known who the TEC members were, much less should he have been in regular contact with them during the competition. The totality of circumstances created by the conduct of Stevens, Anderson, Shelton, Sweeney, and Smith indelibly stained the procurement and demanded radical remedial action.

It would be unfair, however, to ignore the most compelling fact in favor of Stevens and Sterling, namely the August 1981 ethics opinion request, and the Antitrust Division response that sanctioned Stevens's participation in the litigation services procurement.[231] How can Sterling be disqualified after it relied on the Antitrust Division approval?

There are several grounds for doubt regarding the ethics opinion process in this instance. First, the Federal Circuit opinion does not indicate

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228. (continued) opinion so informs us. The failure to include important facts such as this is also a failing of many post-*CACI, Inc.–Federal* revolving door bid protest decisions.

229. *See supra* note 221.

230. It is reasonable to presume that they did not do so. If they had, the government would certainly have proffered evidence of it, and the Federal Circuit would certainly have highlighted it.

231. In response to Sterling's letter, on 23 November 1981, William F. Baxter, the Assistant Attorney General in charge of the Antitrust Division, replied:

> Mr. Stevens would be qualified to manage Sterling's proposal activities, represent Sterling with respect to the RFP [proposal] and manage Sterling's performance on any resulting contract for at least two reasons: (1) the program covered by the RFP did not involve any specific party or parties while Mr. Stevens was employed by the Division, and (2) the RFP to be issued does not involve the "same particular matter" as anything with which Mr. Stevens was involved as a government employee. Specifically, the Antitrust Division's 1978 Litigation Support RFP and our new one will not be the "same particular matter" because of (a) time elapsed between them, and (b) fundamental differences in their scope and approach.

CACI, Inc.–Federal, 719 F.2d at 1576.

what facts were disclosed by Sterling in its request. For example, it is unknown whether the Sterling letter disclosed the extent to which Stevens had access to inside information that could be competitively useful in the upcoming litigation services procurement. Second, the opinion rests upon the controversial position (not shared by the Claims Court) that the predecessor contract administered by Stevens was not the same particular matter as the litigation services requirement to be procured. Finally, and most importantly, it is unknown who prepared the response on behalf of the Assistant Attorney General. Although no such finding was entered, it is difficult to imagine that the response was written without Anderson and Sweeney playing central roles. Who else for example, other than Sweeney, the current ISSG chief, and Anderson, the TEC chairman, would be able to educate the Assistant Attorney General regarding the issues raised by Sterling's letter? It is difficult to believe that Sweeney and Anderson disclosed to the Assistant Attorney General the their relationships with Stevens. Certainly, if these disclosures had been made, the Assistant Attorney General would have sought impartial advice on the issue, and documented his efforts. There is no evidence that this was done—there should be. Accordingly, the 23 November 1981 letter apparently sanctioning Stevens's participation in the litigation services procurement is of limited weight.

Also entitled to little weight is that the PCO conducted an "investigation" of the allegations of impropriety. This investigation consisted of reading the flawed letter from the Assistant Attorney General to Sterling, an examination of the score sheets, and review of several bid protest decisions. These meager efforts appear incomplete and inadequate, not an impartial attempt to seek the truth and ensure fair play.

By demanding greater evidence of the appearance of impropriety than was furnished by the undisputed facts of this case, the Federal Circuit effectively gutted the theory as a means of protecting the integrity of the procurement system. This was the most profound effect of the *CACI, Inc.–Federal* decision.

(c) In Terrorem Effect

The penultimate paragraph of the Federal Circuit opinion, as follows, was a stinging rebuke to the Claims Court:

> We have carefully reviewed the record in this case. We conclude that the Claims Court ruling that the Department's award of the contract to Sterling would be "arbitrary, capricious, and an abuse of discretion" because of the possibility and appearance of impropriety is not supported by the record and therefore is not a proper basis for enjoining award of the contract. *The Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts. The kind of inquiry and analysis the Claims Court made in this case, which without factual basis ascribed evil motives* to four members of the Technical Evaluation Committee in their handling of bids, was clearly erroneous and did not justify an injunction against the government's award of the contract to Sterling.[232]

These are indeed strong words that directly impugn the Claims Court's judicial temperament. In the face of the criticism it received from the higher court, it is not surprising that, when called upon to rule in a bid protest case involving different allegations of impropriety a mere two months following the *CACI, Inc.–Federal* reversal, the Claims Court sullenly denied the protest, stating: "*This court has been instructed* that 'inferences of actual or potential wrongdoing' based on 'suspicion and innuendo' are insufficient if 'not supported by the record.'"[233] The record of revolving door protest decisions following the *CACI, Inc.–Federal* decision suggests that the other protest fora were frightened as well. Such a suggestion is admittedly speculative.[234] Further, it would be wrong to ascribe undue weight to the language employed by the Federal Circuit in its *CACI, Inc.–Federal* opinion. However, in view of the overall statistical disparity between the sustain rates for thesis case protest results and protests in general (3.03% v. 13.4%) since 1983,[235] the potential for an *in terrorem* effect stemming from the language employed by the Federal Circuit is substantial, and may not lightly be dismissed as a contributing factor.

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232. *Id.* at 1581-82 (emphasis added).

233. Planning Research Corp. v. United States, 4 Cl. Ct. 283, 301 (1983) (emphasis added).

234. Further, it must be acknowledged, that in a not insubstantial number of cases, contracting officers have disqualified offerors because of an appearance of impropriety pertaining to the revolving door, and their decisions were upheld in protests. *See* NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638. Such cases, however, may only demonstrate protest fora predilection toward upholding government action, rather than concern for the integrity of the procurement system.

235. *See supra* note 12.

(d) Confusion

The Seeds Are Sown—The Federal Circuit in *CACI, Inc.–Federal* was indeed presented with a muddled case. The Claims Court appears to have amassed a great deal of evidence, which it recited in its opinion recounting the two-day trial. However, it failed to make specific findings regarding the alleged violations of the Ethics in Government Act. Although the Claims Court addressed perhaps the most important legal issues, particularly whether the procurement under protest was the same "particular matter" as the contracts administered by Stevens while he was the ISSG Chief, it did not analyze all of the elements of the statute. Further, it did not clearly state whether the outcome was based upon actual improprieties alone, or in combination with appearances of impropriety. The problem was exacerbated when the Claims Court adopted a questionable position regarding the holding in *Mississippi Valley Generating Co.*, namely that somehow the Supreme Court's action was based upon the "opportunity for a conflict of interest,"[236] thus injecting yet another possible basis for the relief it granted in *CACI, Inc.–Federal.*

The Federal Circuit, however, still was in a position to bring order out of the confusion, because it had before it a wealth of evidence. However, the higher court instead misconstrued the burden of the Claims Court's opinion, stating that "[a] major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process."[237] Whether it did or did not rely on such grounds, it is clear that the Claims Court did find actual impropriety.[238] The Federal Circuit, nevertheless, focused on the easier target presented by the Claims Court opinion: the vague notion of "appearance of or opportunity for" impropriety. The Federal Circuit flatly stated that these circumstances "[were] not . . . adequate or proper [bases]" for an injunction against award to Sterling.[239] The Federal Circuit compounded the confusion by subsequently characterizing the bases for the Claims Court's injunction as "the possibility and appearance of impropriety."[240]

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236. CACI, Inc.–Federal v. United States, 1 Cl. Ct. 352, 366 (1983). In fact, the term "opportunity for a conflict of interest" was not used in *Mississippi Valley Generating Co.* Although the Supreme Court did in general criticize improper appearances, it clearly found that actual impropriety (a violation of 18 U.S.C. § 434) had occurred, and that nonenforcement of the contract tainted by the violation was warranted. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562-63 (1961).

237. *CACI, Inc.–Federal*, 719 F.2d at 1581.

238. *CACI, Inc.–Federal*, 1 Cl. Ct. at 366-67.

239. *CACI, Inc.–Federal*, 719 F.2d at 1581.

240. *Id.*

The final score in *CACI, Inc.–Federal* discloses that actual improprieties, and appearances, opportunities, possibilities, and potentialities for improprieties (or wrongdoing) were considered, and that the Federal Circuit took a disfavored view of all but actual impropriety as a basis upon which to enjoin the award of a federal government contract.

The higher court then posed a riddle for all to ponder when pronouncing the type of proof required for such an injunction, stating that the requisite wrongdoing must be proven, not by "suspicion and innuendo," but by "hard facts."[241] Remaining unexplained, however, by the Federal Circuit opinion was the distinction between a hard fact and a "soft fact." We are not informed whether hard facts means proof beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence, or an "I know it when I see it" standard. Without any definition or guidance regarding the "hard facts" standard, confusion was certain to follow.[242]

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241. *Id.*

242. The term "hard facts" is protean. The word "fact" is defined in terms suggesting actual, undisputed occurrence. BLACK'S LAW DICTIONARY 591 (6th ed. 1990). Modification using the adjective "hard" thus appears redundant. The courts have not provided a great deal of assistance in defining the term. For example, no case states whether "hard facts" is a type of evidence or a standard of proof.

The term is evidently easier to define by saying what it is *not*. "Hard facts" has been variously contrasted to: "circumstantial evidence" (*In re* Disciplinary Proceedings of Fred W. Phelps, Sr., 637 F.2d 171, 180 (10th Cir. 1981), Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623)); "soft facts" (*In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67, 71 (2d Cir. 1980)); "conclusions" (Sullivan v. Manhattan Life Ins. Co. of New York, 626 F.2d 1080, 1082 (1st Cir. 1980)); "inferenceand speculation" (United States v. Federal Communications Comm'n, 652 F.2d 72, 94 (D.C. Cir. 1980)); "suppositions and opinions" (Colorado v. New Mexico, 467 U.S. 310, 311 (1984)); "personal views" (Thomasson v. Perry, 80 F.3d 915, 952 (4th Cir. 1996)); "conclusory assertions" (R. Dement v. Richmond, Fredericksburg & Potomac R.R Co., 845 F.2d 451, 458 (4th Cir. 1988)); "fragmentary, inconclusive evidence" (Romero-Feliciano v. Torres-Gotzambide, 836 F.2d 1, 3 (1st Cir. 1988)); "a potpourri of conjecture, supposition, innuendo, and surmise" (Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987)); "flimsy possibilities" (Boese v. Department of the Air Force, 784 F.2d 388, 390 (Fed. Cir. 1986)); "naked, conclusory allegations" (Coleman v. Dines, 754 F.2d 353, 357 (Fed. Cir. 1985)); "circumstantial evidence" (Heinish v. Tate, 9 F.3d 1548 (6th Cir. 1993)); and, "rumors and published reports" (Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984)).

"Hard facts" has also been equated to: stipulated facts (E.F. Hutton Group, Inc. v. United States, 811 F.2d 581 (Fed. Cir. 1987)); actual facts (Llaguno v. Mingey, 763 F.2d 1560, 1579 (7th Cir. 1985) (Wood, J., dissenting), *abrogated by* County of Riverside v. McLaughlin, 500 U.S. 44 (1991)); uncontested facts (*In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67, 71 (2d Cir. 1980)); "precise factual accuracy" (Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 760 (1975) (Powell, J. concurring)).

NKF Engineering, Inc. v. United States—Background. The seeds of confusion sown by *CACI, Inc.–Federal* ripened in the 1986 case of *NKF Engineering, Inc. v. United States*.[243] In *NKF*, the facts that suggested impropriety, though not so numerous, were comparably egregious to those in *CACI, Inc.–Federal*.[244] During the conduct of the procurement, the chairman of the Contract Award Review Panel (CARP), who was aware, among other salient data, of the relative standings of the offerors' proposals, left government service and accepted a position with NKF Engineering, Inc., a competitor. Thereafter, NKF's best and final offer came in thirty-three percent below its initial cost proposal, making it the apparent winner. The contracting activity, the U.S. Navy, believing that NKF appeared to have obtained and exploited an unfair competitive advantage in its hiring of the former CARP chairman, disqualified NKF for having an organizational conflict of interest.[245]

General Accounting Office Protest—The Comptroller General denied NKF's protest.[246] Asked by NKF to apply the "hard facts" standard set forth in *CACI, Inc.–Federal*, the Comptroller General agreed, but held that actual impropriety was not required to support the Navy's action. The crucial passage reads as follows:

> We agree that it is appropriate to use the CACI standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in CACI was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system. *Our role is to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety warranted excluding an offeror.*[247]

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243. 9 Cl. Ct. 585 (1986), *vacated* 805 F.2d 372 (Fed. Cir. 1986).
244. *CACI, Inc.–Federal*, 719 F.2d at 373-75.
245. NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638.
246. *Id.*
247. *NKF Eng'g, Inc.*, 85-2 CPD ¶ 638 (citations omitted) (emphasis added).

Thus the Comptroller General appeared to interpret the "hard facts" requirement to mean that the agency need only have a "reasonable basis" to support its decision to disqualify.[248] The Comptroller General then found that the Navy did have a reasonable basis to conclude that an impropriety or conflict of interest was likely and that a potential "decisive unfair advantage" had been gained by NKF.[249]

Claims Court Protest—NKF brought suit in the Claims Court, seeking an injunction to bar the Navy from awarding the contract to the next offeror in line.[250] The Claims Court held that, to the extent that the Navy had disqualified NKF based upon the appearance of impropriety associated with the employment of the former CARP chairman, disqualification was not justified. Explicitly relying on the Federal Circuit opinion in *CACI, Inc.–Federal*, the apparently gun-shy Claims Court held that the "mere" appearance of impropriety cannot be "in and of itself a sustainable basis for the disqualification of an otherwise responsive and responsible bidder."[251]

In addressing actual impropriety as a basis for disqualification, the Claims Court ruled that the former CARP chairman's inside knowledge, coupled with the unusual decrease in NKF's BAFO cost proposal constituted "hard facts" within the meaning of the Federal Circuit decision in *CACI, Inc.–Federal*.[252] However, the Claims Court ruled that these "hard facts" had been considered in a vacuum that did not contain "critically important facts" that cut in favor of NKF.[253] This was error, in the opinion of the Claims Court.[254] Accordingly, the Claims Court granted the injunc-

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248. If "reasonable basis" is synonymous with "hard facts," it is difficult to *see* the need for the latter term, as the former is already recognized as the standard for review of most agency actions in the bid protest context. *See, e.g.*, Madison Servs., Inc., Comp. Gen. B-278962 (Apr. 17, 1998) (determination of agency needs); Jack Faucett Associates—Reconsideration, Protest, and Costs, Comp. Gen. B-278961.2 (Apr. 17, 1998) (RFQ cancellation); Goshen Excavators, B-279093.2 (Apr. 20, 1998) (nonresponsibility determination).

249. *NKF Eng'g Inc.*, 85–2 CPD ¶ 638.

250. NKF Eng'g Inc. v. United States, 9 Cl. Ct. 585, 587 (1986).

251. *Id.* at 592. The Claims Court referred specifically to the Federal Circuit's statement, in *CACI, Inc.–Federal*, that appearance of impropriety was an "inadequate basis for withholding award of the contract." *Id.*

252. *Id.*

253. *Id.*

254. *Id.* (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

tion, but remanded the case to the Navy to reconsider its disqualification decision in light of these additional facts and the court's ruling in regard to the appearance of impropriety.[255]

Federal Circuit Appeal—The Claims Court's opinion in *NKF* put the Federal Circuit court in a very difficult position indeed. Right or wrong, one unmistakable burden of its decision in *CACI, Inc.–Federal* had been that an appearance of impropriety "was *not an adequate or proper basis* for enjoining the award of the contract."[256] Yet in *NKF* the Federal Circuit was confronted with facts at least as unsavory as in *CACI, Inc.–Federal*. In *NKF*, further, it was the *government's* remedial action based upon an appearance of impropriety, rather than its inaction, which was at issue. The apparently unnecessary pronouncement in *CACI, Inc.–Federal* regarding the appearance of impropriety as a basis for radical remedial actions such as disqualification had thus returned to haunt the Federal Circuit.

Its choices were stark: acknowledge its mistake and overrule *CACI, Inc.–Federal* on the appearance of impropriety issue; affirm and thereby further entrench the error; or, clarify *CACI, Inc.–Federal* and overturn the Claims Court's decision. The Federal Circuit elected to take the last course of action.

This choice, however, regrettably and inevitably led to judicial artifice. In order to dispute the Claims Court's reading of the unambiguous language in *CACI, Inc.–Federal*, the Federal Circuit manipulated portions of its earlier opinion to make it appear that it had never disapproved of the appearance of impropriety as a basis for disqualification of an offeror. The operative passage from *NKF* reads as follows:

> In *CACI, Inc.–Federal*, the Claims Court enjoined the agency's award of a contract to the successful bidder based on a conflict of interest, but this court reversed. *After* noting that "*a major thrust of the decision of the Claims Court was that there were both the opportunity for and the appearance of impropriety in that process*," [clause 1] this Court concluded "*that there was no appearance of or opportunity for impropriety that would warrant enjoining the award*." [clause 2][257]

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255. *NKF Eng'g Inc.*, 9 Cl. Ct. at 595-6.

256. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (1983) (emphasis added). *See infra* Section III.B.3.(d).

This passage quotes two clauses**,** from the Federal Circuit's *CACI, Inc.–Federal* opinion. Both are cited to the same page.[258] However, clause one actually appears six pages *after* clause two.[259] Further, the Federal Circuit opinion makes it appear that the second clause followed the first, and misleadingly promotes the impression that the two clauses were combined within a single thought.

Finally, the Federal Circuit's *NKF* opinion overlooks the language from *CACI, Inc–Federal*, on which the Claims Court, in *NKF*, relied in stating that the appearance of impropriety was not an adequate basis for an injunction. This sentence (the one rejecting, in *CACI, Inc.–Federal*, the appearance of impropriety as a basis for remedial action), however, immediately followed the sentence in which the first clause appeared.[260] The Federal Circuit could have found a more straightforward, although not entirely satisfying, basis on which to reconcile its decisions in *CACI, Inc.–Federal* and *NKF*.[261]

This sleight of hand set the stage for the Federal Circuit to correct its error in *CACI, Inc.–Federal.* It did so with one last criticism of the Claims Court, as follows: "Though the Claims Court erroneously limited that power to cases involving actual, but not the appearance of, impropriety, we

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257. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376 (Fed. Cir. 1986) (emphasis, parentheticals, and text formatting changes added; quotation marks in original).

258. *Id.* These clauses are cited to *CACI, Inc.–Federal*, 719 F.2d at 1567, 1575.

259. Clause one actually appears on page 1581 of *CACI, Inc. v. United States*. *See CACI, Inc.–Federal*, 719 F.2d at 1581.

260. *Id.* at 1581 ("A major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process. That was not an adequate or proper basis for enjoining the award . . . .").

261. A later passage in the opinion appears to base the outcome on the failure of proof regarding the appearance of impropriety, rather than on a determination that appearances of impropriety could not constitute a basis for disqualification, as follows:

> We conclude that the Claims Court ruling that the Department's award of the contract to Sterling would be "arbitrary, capricious, and an abuse of discretion" because of the possibility and *appearance of impropriety is not supported by the record* and therefore is not a proper basis for enjoining award of the contract.

Id. at 1582 (emphasis added). However, the proposition that appearances of impropriety, supported by hard facts, could constitute a basis for disqualification, is only implicit from this passage, and cannot overcome the clear statement, , that appearances of impropriety were "not an adequate and proper basis for enjoining award . . . ." *Id.* at 1581.

do not repeat that mistake here."[262] Thus the right thing was done: the appearance of impropriety was recognized as a basis for disqualification in revolving door cases. However, the less than forthright manner through which this worthy end was accomplished could not inspire great confidence in the permanence of the rule.[263]

Furthermore, the Federal Circuit opinion in *NKF* appears to be result-oriented, the favored result being to support government action. In attempting to reconcile its decisions in *CACI, Inc.–Federal* and *NKF*, the Federal Circuit disclosed its real agenda, as follows:

> Indeed, our vacating the Claims Court order in this case is consistent with the reversal in *CACI, Inc.–Federal*. *In both cases*, this Court finds the agency award to be based on a rational ground and Claims Court *interference with the normal procurement process* to be *error*.[264]

The Federal Circuit *NKF* opinion thus appears to combine an endorsement of the appearance of impropriety as a basis for remedial action in revolving door cases, along with a vote of confidence in the judgment of the government procurement officials who are called upon to deal with such issues. It could, therefore, be argued that in its *NKF* opinion, the

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262. NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (1986).

263. Moreover, such a lack of confidence would be increased by a comparison of the inconsistent rulings. The rejection of the appearance of impropriety in *CACI, Inc.–Federal* is unequivocal ("not an adequate or proper basis,"), whereas the Federal Circuit's embrace of the appearance of impropriety in *NKF* is not of the same clarity. *See CACI, Inc.–Federal*, 719 F.2d at 1581.

264. *NKF Eng'g Inc.*, 805 F.2d at 376 (emphasis added). David Hazelton explained the apparent inconsistency as follows:

> The Federal Circuit's pro-agency bias was also revealed in the 1986 decision of NKF Engineering, Inc. v. United States. The Federal Circuit, in ruling on the issue of ethical conflicts of interest between the contracting agency and a prospective contractor, took a position opposite to its conclusion in the earlier case of CACI, Inc.–Federal v. United States. The factual differences between the two cases do not explain adequately the different results. Instead, the two decisions can be reconciled best by noting that the Federal Circuit deferred to the contracting agency in each instance.

David R. Hazelton, *The Federal Circuit's Emerging Role In Bid Protest Cases*, 36 AM. U. L. REV. 919, 936-37 (1987).

Federal Circuit unleashed the government to do the right thing when former employees go to work for competing contractors. However, in view of the significant ways that revolving door cases differ from those of the garden-variety,[265] and the results as reflected in the bid protest sustain rates,[266] it is probably more accurate to say that the *CACI, Inc.–Federal/ NKF* message was at best, confusing, and at worst, a license for procurement officials to ignore unpleasant facts and circumstances and a catalyst for entropy in revolving door bid protest law.

The Federal Circuit created further confusion in its *NKF* opinion. After accepting the appearance of impropriety as a basis for remedial action to protect the integrity of the procurement system, the court failed to explain what it meant by "hard facts." The term is only mentioned once in *NKF*, quoting the Federal Circuit opinion in *CACI, Inc.–Federal*.[267] No attempt was made to define the term. Instead, the court posited a new standard: the "strong appearance."[268] What constitutes a "strong appearance" is not defined, though presumably the facts of *NKF* qualify. We were likewise not told whether "strong appearance" is a more rigorous standard than "hard facts."

Flip-Flop on the Appearance of Impropriety—The Federal Circuit's rejection, in *CACI, Inc.–Federal*, of the appearance of impropriety as a basis for disqualification, was promptly followed by the Comptroller General in six protests over the following year.[269] Up until the *NKF* decision in 1986, at least three additional General Accounting Office protests were

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265. *See supra* Section I.B.2.

266. *See supra* note 12.

267. *NKF, Eng'g Inc.*, 805 F.2d at 376.

268. "Hence, when a CO perceives a *strong appearance of impropriety* in a situation not precisely covered by the Act, it would undermine Congressional concern in the conflict of interest area to tie the hands of the CO." *Id.* at 377.

269. Hudson Valley Med. Prof'l Review Org., B-212618, Oct. 2, 1984, 84-2 CPD ¶ 378 ("The mere appearance of, or opportunity for, bias is not a sufficient basis for questioning a contract award, but that a protester must provide "hard facts" showing actual bias."); Canaveral Port Servs., Inc., B-211627.3, Sept. 26, 1984, 84-2 CPD ¶ 358 ("The protester must establish more than the appearance of a conflict of interest and the opportunity for bias; it must establish "hard facts" that a conflict of interest . . . ."); Booze, Allen & Hamilton, B-213665, Sept. 24, 1984, 84-2 CPD ¶ 329) ("The opportunity for bias is not a sufficient basis to question an award of a contract, but that the protester must provide "hard facts" showing actual bias."); Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694 ("The Court of Appeals found that the appearance of conflict and the

decided in accordance with the later-found to be inoperative *CACI, Inc.–Federal* rejection of the appearance of impropriety.[270]

The General Accounting Office, however, evidently began to doubt the validity of the Federal Circuit's *CACI, Inc.–Federal*. By December 1985, in *Defense Forecasts, Inc.*, the first hint of change appeared.[271] The Comptroller General, however, was forced to adopt tortured legal reasoning to achieve its goal, which was to support the agency decision to take action to protect the integrity of the procurement.[272] In *NKF*, the Comptroller General abandoned the Orwellian logic of *Defense Forecasts, Inc.* in favor of a plain refusal to acknowledge the unambiguous ruling of the Federal Circuit in *CACI, Inc.–Federal*.[273]

> We agree that it is appropriate to use the CACI standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in CACI was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system.[274]

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269. (continued) opportunity for bias were not sufficient to overturn the award of the contract in the absence of 'hard facts' showing actual bias."); Applicon, a Division of Schlumberger Tech. Corp., B-213355, June 11, 1984, 84-1 CPD ¶ 613; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17 ("Mere inferences of actual or potential conflict of interest do not afford a basis for disturbing a contract award; there must be 'hard facts' showing an actual conflict of interest." (citation omitted)). The Claims Court was misled as well. *See* Space Age Eng'g, Inc. v. United States, 4 Cl. Ct. 739, 744 (1984).

270. HSQ Tech., B-219410, Sept. 18, 1985, 85-2 CPD ¶ 300; NAHB Research Found., Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248; Petro-Eng'g, Inc., B-218255.2, June 12, 1985, 85-1 CPD ¶ 677.

271. B-219666, Dec. 5, 1985, 85-2 CPD ¶ 629 ("An agency may reject an offer, which proposes a special government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist.").

272. The Comptroller General determined that, because the appearance of conflict of interest involved a *current* government employee, "hard facts" need not be proffered. *Id.* ¶ 629. However, as discussed above, a major aspect of the appearance of impropriety alleged in *CACI, Inc.–Federal*, was bias on the part of four members of the TEC, *current* government employees. *See supra* Section III.B.1.

273. *See supra* Section III.B.3.(d).

274. 85-2 CPD ¶ 629 (citation omitted).

In view of the Federal Circuit's ruling in *CACI, Inc.–Federal*, as followed by the General Accounting Office in nine protests, the Claims Court must have believed itself to be on firm ground when it enjoined the Navy in *NKF v. United States*. Imagine the Claims Court's confusion and chagrin, and that of the nine disappointed protesters, when the Federal Circuit executed a 180° turn in *NKF*.[275]

The "Hard Facts" Quandary—Adopting the "hard facts" standard promoted confusion in three ways. First, as discussed above, the term itself is vague and undefined in the revolving door context.[276] Second, use of the term in conjunction with the appearance of impropriety looks illogical and internally inconsistent.[277] If hard facts are available, actual impropriety has been proven, not the mere appearance of impropriety. As a tool for principled decision-making, "hard facts" is of little use. As a slogan to be invoked when convenient in upholding agency inaction in the face of appearances of impropriety, "hard facts" is perfectly suited.

Third, it is unclear whether hard facts must be proven regarding the mere existence of a conflict of interest, or, must there also be hard facts demonstrating unfair competitive advantage or prejudice resulting from the conflict? Bid protests since *CACI, Inc.–Federal* have typically required the protester to prove that it was prejudiced by the actions of the competitor that hired the former government employee.[278] Further, the Comptroller General has decided that hard facts must be proven regarding the existence of prejudice.[279] However, the Federal Circuit opinion in *NKF* suggests that proof of prejudice is not required.[280] A recent organi-

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275. Moreover, the confusion regarding the appearance of impropriety issue did not end with *NKF*. At least two years after *NKF*, the Comptroller General was still issuing decisions that required "hard facts showing an *actual* conflict of interest." Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123 (emphasis added).

276. *See supra* Section III.B.3.(d).

277. The Federal Circuit initially linked the hard facts standard to the appearance of impropriety in its *CACI, Inc.–Federal* opinion. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 582 (1983) ("The Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts.").

278. *See* AT & T Techs., Inc., B-237069, Jan. 26, 1990, 90-1 CPD ¶ 114; Wall Colmonoy Corp., B-217361, Jan. 8, 1985, 85-1 CPD ¶ 27; Damon Corp., B-232721, Feb. 3, 1989, 89-1 CPD ¶ 113; HLJ Management Group, Inc.—Request for Reconsideration, B-225843.5, Mar. 6, 1989, 89-1 CPD ¶ 237 .

279. Imperial Schrade Corp., B-223527.2, Mar. 6, 19987, 87-1 CPD ¶ 254.

280. *CACI, Inc.–Federal*, 805 F.2d 372, 376 (1986) ("Whether or not inside information was actually passed from Mr. Park to NKF, the appearance of impropriety was certainly enough for the CO to make a rational decision to disqualify NKF.").

zational conflict of interest protest decision comports with this latter suggestion.[281] These conflicting results stem directly from inadequate guidance from the Federal Circuit regarding the hard facts standard it imposed.

(e) Bad Example for Protest Fora

Applicability of the Judicial Standard—The initial issue with regard to the *CACI, Inc.–Federal* legacy is whether the Federal Circuit's decision regarding the propriety of an injunction should have a significant effect on the administrative protest fora. In *CACI, Inc.–Federal*, the Federal Circuit employed the hard facts standard in its review of an appeal from an *injunction* issued by a *court* against the government.[282] Yet the standard was immediately seized upon and applied by the Comptroller General in the context of administrative bid protests in which the coercive power of an injunction was not implicated.[283] Judging from the earliest post-*CACI, Inc.–Federal* protests, moreover, no thought was given to the differing nature of judicial and administrative protests, and the remedies available in each forum, as affecting the applicability of the hard facts standard to protests lodged with the General Accounting Office.[284]

In regard to revolving door protests, is there a meaningful distinction between judicial and administrative protests? After all, they share a fundamental characteristic, namely: in each case, an entity of one co-equal branch of government (legislative or judicial) is interfering with the operations of the executive branch.

Yet the decisions of the Comptroller General are mere recommendations.[285] In view of the requirement that agencies report their noncompliance with the Comptroller General's recommendations,[286] however, the practical impact of a bid protest decision is undoubtedly more coercive than the use of the term "recommendation" would imply. Nevertheless, an

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281. Aetna Gov't Health Plans, Inc.; B-254397.15, July 27, 1995, 95-2 CPD ¶ 129 ("There is a presumption of prejudice to competing offerors where an organizational conflict of interest (other than a de minimis matter) is not resolved.").

282. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983).

283. *See supra* notes 273-274.

284. Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17.

285. 31 U.S.C. § 3554(b)(1) (2000).

286. *Id.* § 3554(b)(3), (e).

agency is at least technically free to pursue procurement integrity and mission accomplishment as it sees fit, even if the Comptroller General disagrees. The circumstance that executive agencies rarely if ever elect to do so does not place an injunction on the same level with a recommendation of the Comptroller General. There is, therefore, a legitimate issue as to whether the hard facts standard should be applied in administrative protests. Considering the differing contexts of judicial and administrative protests, and its failure to define or explain the hard facts standard, it may have been a mistake for the Federal Circuit not to have examined this issue and given appropriate guidance for the administrative protest fora on the applicability of its ruling.

Impact on Analysis of Revolving Door Protests—Nevertheless, the deed was done. The hard facts standard, being so ill-defined, could be deployed whenever a protest forum wished to deny a revolving door protest. Much like in an equal protection case where, when the term "strict scrutiny" appears, the challenged classification is almost invariably about to be found unconstitutional, when the Comptroller General starts talking about "hard facts," the protester knows that it is time to move on and get over it.[287]

In addition to promulgating a vague standard for reviewing allegations of revolving door improprieties in bid protests, the Federal Circuit, in its *CACI, Inc.–Federal* and *NKF* opinions, set a poor example for the administrative protest fora regarding the mechanics of deciding such cases, and in publishing their decisions.[288]

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287. It is telling that in the two cases in which the Comptroller General did grant revolving door protests, the hard facts standard was (needlessly, in view of the facts in each case) diluted. Guardian Techs. Int'l, B-270213.2, Feb. 20, 1996, 96-1 CPD ¶ 104 (disqualification may be based on "facts" demonstrating that awardee "may" have obtained an unfair competitive advantage); Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 (agency may exclude offeror because of the *likelihood* that it has obtained an unfair competitive advantage). In neither case was the term "hard facts" employed.

288. The ensuing critiques of Comptroller General decisions may not be unique to revolving door protests, and may ante-date *CACI, Inc.–Federal.* The relationship between this decision and the analytical weaknesses evident in revolving door cases might therefore be difficult to establish. Nevertheless, *CACI, Inc.–Federal* at a minimum contributed to the problem. Further, to the extent that these weaknesses stem from limitations in the revolving door rules, or can be ameliorated by the reforms proposed herein, they are relevant to this article.

Poverty of Detail—The exegesis of facts in *CACI, Inc.–Federal* is superficially impressive. Both the Claims Court and the Federal Circuit set forth in apparently minute detail the facts adduced at trial. Nevertheless, critical facts necessary to understanding the issues and the correctness of the outcome are missing. For example, the decision does not discuss the involvement of Anderson and Sweeney in the preparation of the DOJ reply to Sterling regarding Stevens's status in the ISSG litigation services procurement.[289] The DOJ letter was of central importance to the Federal Circuit's resolution of the issue of whether the instant procurement was the same "particular matter" as the contracts administered by Stevens while in government service, a determinant of whether a violation of 18 U.S.C. § 207 had occurred.[290] Despite this, readers of the Federal Circuit opinion are left guessing whether these individuals played any role in this very important decision. Even a bare finding that they did not participate would have been better than the appearance that the issue was simply overlooked.

In evaluating whether any impropriety affected the litigation services procurement, the CACI and Sterling cost proposals were vital, because their relative standings determined the winner.[291] However, neither opinion gives specifics regarding any offeror's cost proposal, either initially, or following the BAFO request. In view of the Federal Circuit's determination that Sterling did not manipulate its costs to win the competition,[292] some explication of the competitors' cost proposals was necessary to evaluate and appreciate the correctness of the court's finding. Such facts would also have permitted intelligent scrutiny of the possibility that Stevens was able to exploit his inside knowledge regarding information about CACI's costs in performing its prior litigation support contracts for the ISSG.

The omission of such facts does not prove that the ultimate decision was wrong. Rather, it simply makes it very difficult for the parties and the public to decide for themselves whether the proper outcome ensued. Especially when integrity issues are involved, protest decisions should err on the side of including more facts bearing on the issue than is absolutely necessary. Nevertheless, perhaps following the Federal Circuit's example, the

289. *See supra* Section III.B.3.(b).

290. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 576 (1983) ("Th[e DOJ] ruling is entitled to weight.").

291. This is so because of the tightness of the competition, at least in regard to the final technical scores (CACI: 87.4; Sterling: 84.6). *Id.* at 1571. Although CACI was the technical winner, Sterling's costs gave it the award under source selection plan.

292. *Id.* at 1578-79.

revolving door protest decisions following *CACI, Inc.–Federal* have too frequently omitted critical facts necessary to understanding whether the integrity of the procurement system was adequately protected.[293]

Unwarranted Credulity—In a bid protest, as in any other type of litigation, the finder of fact must decide whether the witnesses are telling the truth. Among the means of divining the truth are consideration of the motivations of a witness to lie or to tell the truth; whether the witness's story

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293. A major area in which the protest decisions fail the parties and the public is in the detail afforded regarding the nature of the former government employee's duties as a government employee and his or her relationship to the requirement that is the subject of the procurement. *See* Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 (former government employees "involved with administering the prior contract." No further information given regarding their position or duties); Universal Tech., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63 (General Accounting Office says it cannot evaluate allegation of impropriety because protester did not give name of former government employee; agency, however, knew to whom the protester referred, and even supplied some information regarding the employee); Bendix Field Eng'g Corp., B-232501, Dec. 30, 1988, 88-2 CPD ¶ 642 (no facts given regarding former government employee's duties while in government service or in his position with contractor); Holsman Servs. Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484 (no facts given regarding the position held by the former government employee); FXC Corp., B-227375.2, Nov. 6, 1987, 87-2 CPD ¶ 454 (former government employee was "responsible for technical review of the program supported by this procurement," no further information provided); Space Sys. Techs., Inc., B-220935, Nov. 6, 1985 (former government employee described only as a "former Army officer," no further information given); Washington Patrol Serv., Inc.—Reconsideration, B-214568.2, July 17, 1984, 84-2 CPD ¶ 57 (former Chief of Staff of closely-related but organizationally separate command from procurement activity employed by proposed awardee; no information regarding former officer's access to or participation in protested procurement).

Another category of recurring omission are details regarding the fruits of former government employees' purported efforts to *see*k legal review of proposed post-government service employment arrangements. While production of the documentation resulting from such consultations should be relatively easy, thereby permitting reference to such documentation in the protest decision, this rarely occurs. *See* Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Blue Tee Corp., B-246623, Mar. 18, 1992; Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210 (former government employee testifies he notified supervisor regarding acceptance of conflict-creating job by memorandum; memorandum not produced). *But see* The Earth Tech. Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113.

A third important category of important omitted information is the relative standing of the protester and awardee, where, as in *CACI, Inc.–Federal*, such information is required to adequately assess the potential for unfair competitive advantage. *See* Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246 (former government employee's firm wins competition based on suspect prices; protester's price not given, even in redacted form); Sterling Med. Assocs., B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60; .

makes sense; and the extent to which the overall credibility of the witness is eroded by the telling of one or more lies. These are by no means the only ways of assessing credibility, and they must of course be used with care and discrimination.[294] Nevertheless, especially when adjudicating protest allegations in which ethical and criminal concerns are implicated, as in revolving door cases, the protest fora must, to conscientiously discharge their duties, at least consider such factors when deciding whether witnesses are testifying truthfully.

Unfortunately, however, the Federal Circuit in *CACI, Inc.–Federal* set a poor example by its uncritical acceptance of testimony that demanded far more rigorous scrutiny. In view of the fact that the Federal Circuit judges did not have the benefit of observing the witnesses at trial, extra caution in this regard was warranted.[295] Nevertheless, the Federal Circuit relied almost exclusively and uncritically on Sweeney's testimony in finding, contrary to the determination of the Claims Court, that the prior litigation services contracts over which Stevens presided while ISSG Chief was not part of the same "particular matter" as the instant procurement.[296] Sweeney's testimony should not only have been partially discounted because of Sweeney's motive to lie on behalf of his patron and friend Stevens, and his current colleague Anderson,[297] but also it should have been substantially downgraded in light of the story's inherent unbelievability,[298] and evidence that Sweeney may have been less than completely honest with regard to another issue in the case.[299]

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294. For example, undue reliance on motivation is particularly ill-advised, "because it is simply not true that an individual with a motive to lie always will do so." United States v. Tome, 3 F.3d 342 (10th Cir. 1993), *rev'd* 513 U.S. 150 (1995).

295. "Due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. RULE 52(a). "We have repeatedly held that [Rule 52(a)] means what it says." Bose Corp. v. Consumer's Union, 466 U.S. 485, 498 (1984). Admittedly, the issue was not strictly factual in nature. The higher court's deference to the trial court need not have been as pronounced as it would be on a purely factual matter. However, the predominant role of the credibility of Sweeney's testimony to the resolution of the issue should have led the Federal Circuit to greater deference toward the Claims Court's finding.

296. The court also relied on the DOJ letter, however, the court's reliance on this letter was itself uncritical. CACI, Inc.–Federal v. United States, 719 F.2d 1567, 1576 (1983). *See supra* Section III.B.3.(b).

297. *See supra* Section III.B.1.(b).

298. It requires only a moderate stretch to believe Sweeney when he testified that Stevens played no role "whatsoever" in the development of the "baseline services concept" under which the procurement was conducted. *CACI, Inc.–Federal*, 719 F.2d at 1576. However, Sweeney's statement that the service to be provided under the new contract "far

Reasonable people may differ regarding Sweeney's credibility based upon the limited evidence presented in the opinions. The point, however, is not so much whether Sweeney lied or not. Rather, it is that as a critical witness on a question of enormous significance to the case (the "particular matter" issue) Sweeney's truthfulness should have been subjected to far more exacting scrutiny than the Federal Circuit applied, especially because it did not have the advantage of observing Sweeney's demeanor while testifying.[300] It is important that all factors affecting the credibility of key witnesses be addressed, but the Federal Circuit failed to do so in *CACI, Inc.–Federal*. This failure appears to have been emulated by bid protest fora in revolving door cases since *CACI, Inc.–Federal*.[301]

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298. (continued) exceeds" those under the prior contracts is not supported by additional detail. Though the court apparently paraphrases the ways in which the new contract "far exceeds" the old, the new contract actually calls for little in the way of new service. The only such new service set forth in the opinion is production control activities. *Id.* Moreover, the fact that the court could not quote Sweeney more than one or two phrases at a time indicates that that he must have had little detailed, compelling testimony on the issue. If Sweeney had provided greater detail on this crucial issue, it is logical to expect that the court, which had otherwise painstakingly recited the facts of the case that favored the result, would have noted them.

299. Concerning the release by Anderson to Sweeney of the results of the initial review of the offerors cost proposals, Sweeney testified that he was nevertheless unable to predict the ultimate outcome of the competition. *Id.* at 1580. This testimony, if believed, would tend to negate allegations that Sweeney and the other TEC members with prior links to Stevens had manipulated the technical evaluations to favor Stevens and Sterling. However, Sweeney testified that he believed that "someone other than Sterling was going to be the lowest." *Id.* Sweeney, though, would have no way of making such a prediction based on the limited knowledge regarding the cost proposals that he was *supposed to have*. Under these circumstances his stated belief that someone other than Sterling would be lowest appears at best, disingenuous.

300. Stevens's credibility problems were also given a free pass by the Federal Circuit. *See supra* note 177.

301. Again, the critical issue is whether all factors affecting credibility are properly addressed. *See* Caelum Research Corp. v. Department of Transp., GSBCA No. 13139-P, Apr. 13, 1995, 95-2 BCA 27,733 (A former government employee, Ruble Garner, employed by subcontractor of awardee, engaged in series of misrepresentations regarding his prior role in the procurement while in government service; nevertheless the GSBCA credited without acknowledging these circumstances his testimony on key issues in protest); Biomedical Research, Inc., B-249522, Nov. 25, 1992, 92-2 CPD ¶ 381 (C.G.) (no consideration of motivation to lie affecting, and the inherent unlikelihood of, testimony by awardee's employees that the key person for the contract, a company vice president, was not informed until after award, that she would be the key person); Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210 (Former government employee, Bill W. Colston, testified that he announced his acceptance of a position with a competitor for a contract at a meeting attended by the source evaluation board (SEB) chairman for the

Contextual Myopia—In some cases, perhaps, comprehensive analysis of a bid protest may be possible even if the forum considers the protest grounds *seriatim*, as discrete issues. This, however, may not be an appropriate way to approach revolving door protests. The existence of several protest grounds in such a case requires the forum to take into account possible relationships among the protest grounds suggestive of actual impropriety that might not be revealed when the grounds are analyzed in isolation. Also, even if there is no obvious relationship among protest grounds, the coincidence of several suspicious circumstances should alert

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301. (continued) procurement, but the chairman does not remember any such announcement (he could not say that it did not occur, only that he did not remember it—an improbable memory lapse by the SEB chairman)). Nevertheless, Comptroller General found Colston's testimony "entirely credible," on critical issues without any apparent consideration of his problematic testimony in regard to his announcement. *Id.* 90-2 CPD ¶ 210. Laser Power Tech., Inc., B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. The technical evaluation team (TET) chairman for a procurement met at restaurant late at night with the vice president of a competitor for the contract (his former military supervisor) just prior to the release of the RFP. The procurement was discussed, but the TET chairman denies divulging procurement sensitive or inside information. Comptroller General took the chairman's denial of what would have been criminal misconduct at face value. *Id.*

Further where the Comptroller has not had the opportunity to observe the demeanor of a key witness, it should carefully and explicitly address and resolve credibility issues such as motivation to lie in one's self interest. Dayton T. Brown, Inc., B-231579, Oct. 4, 1989, 88-2 CPD ¶ 314 (Former government employee, who was the head of requiring activity for the instant procurement, had responsibility for technical evaluation team for a predecessor contract that was awarded to the protester. Former government employee stated in an affidavit that he did not learn any proprietary information of the protester in his former capacity, nor did he participate in the current procurement. The Comptroller General, without citing any corroborating evidence, and without being able to *see* him testify, accepted the former government employee's averments without acknowledging his motive to lie.).

Finally, it is notable that in one of only two revolving door protests sustained by the General Accounting Office, where the Comptroller General wishes to find impropriety, it was willing to hold the inconsistent testimony of a former government employee against him. Guardian Techn., Int'l, B-270213.2, B-2702013.3, Feb. 20, 1996, 96-1 CPD ¶ 104. In that case, the Comptroller General sarcastically but correctly evaluated credibility as follows:

> The FBI attributes these contradictions to Mr. Pisenti's faulty "recollection." In our view, the most benign interpretation of these contradictions is that Mr. Pisenti does not understand that cost information is information "related to the procurement," casting doubt on the accuracy of his responses; a more unfavorable interpretation is that Mr. Pisenti's responses are not credible.

Id. 96-1 CPD ¶ 104. With regard to the reasons why the Comptroller General wished to rule in favor of the protester, *see infra* Section III.3.(e).

the forum to the possibility of impropriety requiring closer scrutiny and, potentially, remedial action.[302]

The Federal Circuit in *CACI, Inc.–Federal*, however, did not acknowledge, much less analyze, potential synergism among the various circumstances advanced by CACI as evidence the existence of impropriety. Again, reasonable persons may differ on the issue of whether this, or any other, combination of suspicious circumstances should be taken as evidence of actual impropriety. Further, the court was evidently laboring at the time under the belief that appearances of impropriety did not constitute an "adequate or proper basis" for relief,[303] and thus synergistic considerations regarding the various superficially discrete circumstances suggestive of impropriety may not have seemed required. However, even after the Federal Circuit clarified, in *NKF*, that mere appearances of impropriety could, by themselves, constitute a basis for remedial action,[304] the Comptroller General apparently has not recognized that where there's smoke, there may be fire.[305]

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302. "I only believe in coincidence occasionally." Chuck Lewis, Center for Public Integrity, *quoted in* Ken Silverstein, *Ron Brown's V.I.P. Junkets, Flying For D.N.C. Dollars*, Mendocino Environmental Center (1995), *available at* <http://www.pacific.net/~dglaser/ENVIR/MEC/ NEWSL/ISS19/13 Brown.html>.

303. CACI, Inc.–Federal v. United States, 719 F.2d at 1567, 1581 (Fed. Cir.) *See supra* Section III.3.(d).

304. NKF, Eng'g, Inc. v. United States, 805 F.2d 372, 377 (1986). *See supra* Section III.B.3.(d).

305. The problem is especially striking and troubling in best value procurements in which the government is able to reject a lower-priced offer in favor of offer with greater technical merit. *See, e.g.*, Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61. The contractor that hired as its proposed project manager the former contracting officer's technical representative for the predecessor contract was selected for award even though its proposed costs were 12% higher than those of protester. The source selection authority accepted the 12% premium because of selected awardee's purportedly lower performance risk. The protester alleged that inadequate discussions on the issue of performance risk prevented it from addressing the concern that led to its not being selected. Comptroller General was mildly critical of the agency's manner of handling discussions, but ignored the synergy among the revolving door bias, price premium, and inadequate discussions issues. *Id.* 96-1 CPD ¶ 61. Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 83-1 CPD ¶ 17. A former EPA official Mr. Foxen, who had been involved in preparation of a solicitation, left government service and became a subcontractor of a competitor for the contract to be awarded based on the solicitation, and assisted the contractor in the preparation of its proposal. Although both the selected awardee and the protester received excellent technical ratings (98.75/100 and 92.00/100 respectively), the agency chose the former offer in spite of the 11.8% price premium that came with the higher technical rating. The Comptroller

Another disquieting blind spot concerning circumstances that should be considered together is the failure to take into account the closeness of competition when assessing the likelihood of unfair competitive advantage stemming from the employment of a former government employee. Our concerns regarding unfair competitive advantage are justifiably diminished when the proposed awardee has distanced itself from the rest of the field. In a tight race, however, a little inside information, or bias on the part of former colleagues still employed by the requiring activity, can be decisive. Yet the Comptroller General has not recognized this circumstance as having any bearing with regard to unfair competitive advantage in revolving door bid protests.[306]

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305. (continued) General did not consider the possibility of a connection between the awardee's higher technical rating and Mr. Foxen's assistance, and the appearance problem associated with the price premium. *Id.* Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254. Former military officer who worked in small arms research and development activity conducting the procurement (though his work was on different items) was employed by a competitor *see*king a contract to supply the Army with bayonets. The former officer made statements indicating he possessed inside information regarding the requirements (dismissed as mere "puffery" by the Comptroller General. Protester also objected to the establishment of what it considered to be an unusually tight schedule for submission of offers (61 days) as unduly restrictive of competition. The Comptroller General failed to address, in light of the short suspense for submission of offers, any unfair competitive advantage that the employment of the former officer may have afforded. *Id.* Eagle Research Group, Inc., B-230050.2, May 13, 1988, 88-2 CPD ¶ 123. Former contracting officer's technical representative on predecessor contract (with protester) developed, while in government service, the statement of work, technical requirements, evaluation criteria, and general cost estimate for the instant procurement. Protester alleged that awardee should be disqualified because of an organizational conflict of interest unrelated to the former government employee. Protest grounds evaluated separately, without any consideration regarding an actual link between them, or the combined appearance of impropriety engendered by the circumstances surrounding the employment of the former government employee and the awardee's alleged organizational conflict. *Id.*

306. *See, e.g.*, Damon Corp., B-232721, Feb. 3, 1989, 89-1 CPD ¶ 113. Awardee's price per point was 99.83% of protester's price per point ($16,899/16,928). Former government employee: wrote the scope of work for instant and predecessor contracts; served as member of technical review panel for predecessor contract; was the program manager for the requirement supported by the contract; and retired and went to work for awardee two months prior to selection of awardee. *Id.* General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196. Awardee's technical score was 98.16% of protester's score (983.5/965.5); awardee, a small disadvantaged business, even with the benefit of a 10% increase to protester's cost, was only 7% lower than protester ($4,682,410/4,348,039); technical merit, in source selection plan, was "significantly more important than cost. Former government employee was contracting officer's representative on predecessor

Non-foolish Consistencies[307]—The final analytical weakness traceable, at least in part, to *CACI, Inc.–Federal/NKF*, is that of inconsistency. It results from, in particular, the unacknowledged reversal on the appearance of impropriety issue, and, in general, the overall obfuscating manner in which the cases were decided. There are doubtless many bid protest issues regarding which small minds may discern inconsistencies of approach by the protest fora. These are not necessarily evil, and they may in fact be inevitable.[308] However, the post *CACI, Inc.–Federal/NKF* revolving door bid protest cases appear uniquely to reflect the result-oriented approach promoted by the Federal Circuit.[309] Further, the marked disparity of results for such bid protests as compared to bid protests overall provides a sound basis for intelligent scrutiny and criticism of apparently inconsistent decisions in revolving door cases.

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306. (continued) contract (with protester) under which he had access to protester's monthly cost reports, invoices, and other company proprietary information. *Id.* Pinkerton Computer Consultants, Inc., B-212499.2, June 29, 1984, 84-1 CPD ¶ 694. *Id.* Awardee's cost was 99.93% of protester's cost ($396,332/396,592). Comptroller General considered closeness of offers as possible evidence of impropriety, but not as to whether it increased the likelihood of unfair competitive advantage. *Id.* PRC, Inc., B-274698.2, Jan. 23, 1997, 97-1 CPD ¶ 115. Awardee's most probable cost was 96.49% of protester's most probable cost ($67,264257/69,706,454); protester's proposal received higher technical rating. Former government employee was two-star general commander of requiring activity. *Id.*

307. *See* J. BARTLETT, FAMILIAR QUOTATIONS 501 (13th ed. 1955) (citing R. EMERSON, SELF-RELIANCE (1841)).

308. Perceived inconsistency may result from factors other than defects of analysis or other intellectual limitation. For example, inconsistency between two apparently analogous cases may stem from inadequacy of facts, another vice promoted by *CACI, Inc.–Federal*. *See supra* Section III.B.3.(e). Consistency is not, therefore, a universal solvent for general and/or exclusive use in analyzing the decisions of any forum.

Then University of Chicago Law Professor Frank H. Easterbrook wrote, in 1982:

> I, too, *see*k to explain the [U.S. Supreme] Court's performance, but I offer a different perspective. Inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be. I do not argue that consistency is always impossible. Some disputes may be resolved in consistent ways, and doubtless much inconsistency is attributable to slipshod work. But demands for perfect consistency can not be fulfilled, and it is inappropriate to condemn the Court's performance as an institution simply by pointing out that it sometimes, even frequently, contradicts itself.

Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 812 (Feb. 1982).

309. *See supra* Section III.B.3.(d).

The two out of sixty-six revolving door cases in which protests were sustained by the General Accounting Office: *Guardian Technologies International* (GTI),[310] and *Holmes and Narver Services, Inc./Morrison-Knudson Services, Inc* (JV); *Pan Am World Services, Inc.* (H&K),[311] are a logical focus.[312] One would expect these cases to present uniquely egregious hard facts in support of its request to overturn the judgment of the contracting activities. However, while the protester in each case made a strong argument for disqualification, the Comptroller General found circumstances highly significant in each case that had been deemed inconsequential in similar protests.

In *GTI*, the Comptroller General denigrated the efficacy of the recusal of the former government employee whose conduct was at issue, Mr. David W. Pisenti,[313] by noting that, "Mr. Pisenti's desk remained in the same "bull-pen" area as [that of the agent to whom Mr. Pisenti's procurement duties had been transferred] after the recusal."[314] However, in other revolving door cases, recusal had been cited by the Comptroller General as a circumstance in support of a finding that no unfair competitive advantage was involved,[315] even though there was apparently no evidence that the recused employees' places of work were moved.[316]

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310. B-270213.2, B-270213.3, Feb. 20, 1996, 96-1 CPD ¶ 104.

311. B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379.

312. In these cases, inconsistency is both striking and fundamental, as the Comptroller General apparently believed it necessary to dilute the hard facts standard in order to sustain the protests. *See supra* note 295.

313. The protested procurement was conducted by the DOJ, Federal Bureau of Investigation (FBI), for armor load-bearing vests for use by FBI special weapons and tactics teams. *Guardian*, 96-1 CPD ¶ 104. Mr. Pisenti, a career FBI employee, was at the time of his retirement from the FBI a supervisory special agent in the FBI Training Division, Firearms Training Unit at the FBI Training Academy, Quantico, Virginia. Mr. Pisenti was a key person involved with the development of the specifications for the body armor that was the subject of the procurement. *Id.*

314. *Id.*

315. Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("While the two former NASA employees were involved with administering the prior contract, the record shows that they were promptly recused from this procurement, as well as the incumbent Calspan contract, when they were approached concerning employment by Gilcrest."); FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366 ("Because he terminated his involvement in the procurement at such an early stage he neither had inside access to (nor any opportunity to influence) the final version of source selection information.").

316. If the employees' work places had been moved, such circumstance would doubtless have been noted by the Comptroller General as further proof of the efficacy of the recusals.

Further, the Comptroller General repeatedly has declined to "speculate" regarding improprieties surrounding revolving door situations.[317] Speculation, in fact, is such a disfavored activity, that the Comptroller General even declined to engage in it to draw the conclusion that, for Ethics in Government Act purposes,[318] a former government employee would be required, as the contractor's program manager, to represent the contractor before the agency.[319]

Though evidently daunted by such a modest logical leap, in *GTI*, the Comptroller General speculated freely. The Comptroller General was willing to assume the existence, and contents, of a source selection plan, to which Mr. Pisenti may have had access, even though the FBI stated that no source selection plan had been prepared. The Comptroller General further speculated that the information in the source selection plan contained "competitively useful information."[320] The Comptroller General was willing to further speculate that Mr. Pisenti "may have learned inside information inadvertently" because his work place had not been moved following his recusal from the procurement.[321]

The crowning irony of *GTI*, however, was the weight placed by the Comptroller General on the possibility that the awardee, Progressive Technologies of America (PTA) may have benefited from Mr. Pisenti's pur-

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317. Physician Corp. of America, B-270698.5, B-2706-98.7, Apr. 10, 1996, 96-1 CPD ¶ 198; Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61; Cleveland Telecomms. Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30; Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406.2, June 25, 1993, 93-1 CPD ¶ 494; Sierra Tech. & Resources, Inc., B-243777.3, May 19, 1992.

318. 18 U.S.C. § 207(a)(1)(1994). *See supra* Section II.C.1.(b).

319. Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 88-2 CPD ¶ 314 ("While the protester speculates that at some point during performance of the contract the former employee may be in the position of representing the company back to the agency, we will not disqualify a company from an award based on speculation as to the future conduct of an individual.").

320. *Guardian*, 96-1 CPD ¶ 104.

> While we are unable to review the plan to ascertain its contents, such a plan typically contains competitively useful information, including subfactors for evaluation criteria, standards to be used in determining ratings, and the rating scheme itself. We can only conclude that the source selection plan here contained similar information.

Id. (citations omitted).

321. *Id.*

ported knowledge of the independent government cost estimate (IGCE).[322] Although the facts overall justify the Comptroller General's recommendation, it is doubtful that knowledge of the government estimate was helpful. If anything, the facts suggest that PTA, which was evidently capable of delivering vests for $360 less per item than GTI, would have won the competition whether it knew of the IGCE or not. Nevertheless, unlike other revolving door cases, the competitive usefulness of this information was not examined. Instead, competitive harm was presumed: "When it appears that an offeror may have prepared its proposal with knowledge of source selection information, such an appearance taints the integrity of the procurement process, regardless of whether any source selection information was actually obtained or used, and the agency may disqualify the offeror from the competition."[323]

This is inconsistent with prior wording in the *GTI* decision itself, and with the precedent cited with it.[324] Are these inconsistencies foolish? The indulgence in speculation and the failure to test for competitive harm go to the very core of the General Accounting Office's analysis of revolving door cases. Under these circumstances, the inconsistencies are neither foolish nor trivial. What then explains the radical departure from long-standing revolving door jurisprudence? The answer *appears* to be that the Comptroller General may have been punishing the awardee for not cooperating. Mr. Pisenti and other PTA officials answered interrogatories, but declined, without explanation, to appear and testify at the bid protest hearing.[325] On no less than ten separate occasions in the protest decision, the Comptroller General pointedly noted that Mr. Pisenti, or other PTO offi-

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322. The costs per vest for the government estimate and the offerors' proposals was as follows:

Independent Government Cost Estimate	$1152
Guardian Technologies	$1553
Progressive Technologies	$1194

323. *Guardian*, 96-1 CPD ¶ 104.

324. *Id.* ("Where a protester alleges that the awardee has obtained an unfair competitive advantage by virtue of its employment of a former government employee, our role is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee."). *See, e.g.*, General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132.

325. *Guardian*, 96-1 CPD ¶ 104.

cials, failed to appear, thus hampering the fact-finding, and, implicitly, justifying the drawing of conclusions adverse to the uncooperative parties.[326]

Drawing such a conclusion is a valid means of recognizing the appearance of impropriety of the underlying misconduct alleged in *GTI*, as magnified by the unexplained lack of cooperation with the Comptroller General's legitimate inquiries.[327] Nevertheless the better approach would have been to state explicitly such grounds for its recommendation. By instead distorting its own precedent, the Comptroller General followed in the footsteps of the Federal Circuit, reaping the harvest of *CACI, Inc.–Federal* and *NKF*.[328]

D. Conclusion

This section described the ways in which applying the rules in revolving door bid protests eroded the ability of the procurement system to protect itself from the evils of actual impropriety and the appearance of impropriety.

In *CACI, Inc.–Federal*, the Federal Circuit displayed understandable reluctance to join the Claims Court in essentially accusing Stevens, Anderson, Sweeney, Shelton, and Smith of felonious conduct, without the benefit of a criminal trial, and DOJ, of all agencies, of nonfeasance for countenancing such conduct. The Federal Circuit, however, failed to realize that it could rely upon the appearances of impropriety created by the highly questionable conduct uncovered by the Claims Court, as a means of protecting the integrity of the procurement system. After all, there has been no critical storm or legislative response to the Federal Circuit's subsequent

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326. *Id.*

327. The drawing of an adverse inference is sanctioned by General Accounting Office bid protest regulation. *See* 4 C.F.R. § 21.7(f) (2000) ("If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.")

328. In *H&K*, as in *GTI*, the refusal of a party to cooperate with the protest played a critical part. The agency declined to release to the Comptroller General the source selection plan. *Holmes & Narver*, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379. The Comptroller General then speculated in regard to the contents of the plan, presuming them to be competitively useful. *Id.* ("We believe that document clearly included information that would have been useful."). Even though the former government employee denied that he used procurement sensitive information in assisting the awardee in the preparation of its proposal, the Comptroller General assumed that he did. *Id.*

approval of the theory three years later in *NKF*. The blame for the failure in *CACI, Inc.–Federal* lies not only with the problematic Claims Court opinion, but also with the meager legal foundation underlying the appearance of impropriety as a basis for remedial action in revolving door cases.[329]

The setting of impossible standards for remedial action, the undue timidity, the legal confusion, and the exemplification of faulty techniques for deciding and reporting revolving door protests are the unfortunate results of *CACI, Inc.–Federal*. These sequelae are combined with the disadvantages to which revolving door protesters are uniquely subject: the burden of proving what amounts to criminal misconduct against parties who enjoy virtually exclusive control of the evidence, and who thus have every reason to deny wrongdoing and resist efforts to investigate the suspicious circumstances they created by hiring a former government employee. Thus, the current regime shields wrongdoing from scrutiny and remedial action behind a wall of legal confusion, inadequate facts, and poor adjudication. As a result there is no reliable way of distinguishing the ethical former government employees from the other kind, and of protecting the integrity of the federal procurement system.

It is to the goal of addressing these deficiencies in the way revolving door situations are handled that the next section, Section IV, is devoted.

IV. The Uncompromise

If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.

-Benjamin N. Cardozo[330]

A. Introduction

The evidence shows that our revolving door rules are considerably less narrow in scope than they could be; they are unsuited to protecting the procurement system from revolving door impropriety; and they have been

329. *See supra* Section II.B.2.

330. Wendt v. Fischer, 243 N.Y. 439, 443 (1926).

applied with less vigor and intellectual stringency than is appropriate in view of the important interests at stake. Reasonable persons could disagree with some or all of the foregoing analysis of and conclusions about our revolving door rules and the way in which they have been applied in bid protests.[331] Regardless, however, of where one stands on the issue, who would not welcome revolving door rules that enhance the pursuit of the highest ethical standards in post-government service employment without degrading the government's ability to accomplish its mission and promote competition in contracting?

This Section proposes such a regime: "The Uncompromise," a rule, implemented through amendments to 10 U.S.C. § 2304, and 41 U.S.C. § 253 (the core provisions of the Competition in Contracting Act of 1983 (CICA)).[332] The proposed rule would: (1) formally accept the appearance of impropriety resulting from a revolving door situation as a potential basis

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331. One could dispute the legal significance of the statistical disparity between the sustain rates for protests overall and for revolving door protests as a mere "artifact of chance." The critique of the Federal Circuit decisions in *CACI, Inc.–Federal* and *NKF* could be deemed nitpicking, hypertechnical, and oblivious to the fact that the "correct" decisions were reached in each case, namely: the agencies' decisions were upheld. Criticism of post *CACI, Inc.–Federal* revolving door protests could be viewed in the same light. The analysis could also be criticised for failing to take into account the extreme time pressure under which the protest fora operate. Most tellingly, one could argue, if the record is really so dismal, "where is the outrage?"

The complete analysis of the reasons why our revolving door bid protest jurisprudence is currently not more controversial is beyond the scope of this article. It suffices to note, for present purposes, that all of the immediately-involved parties are probably reasonably satisfied with the status quo: agencies are allowed greater freedom in conducting procurements; agencies and the protest fora are not forced to exert themselves in addressing the troubling and difficult issues involved; and the pain and suffering for disappointed protesters is spread over the entire government contracting sector, most of whose members, after all, themselves probably employ former government employees.

The satisfaction of the participants, however, is not the sole basis or proper standard for judging the propriety of our ethical regime. Kant wrote:

> We are indeed legislative members of a moral kingdom rendered possible by freedom, and presented to us by reason as an object of respect; but yet we are subjects in it, not the sovereign, and to mistake our inferior position as creatures, and presumptuously to reject the authority of the moral law, is already to revolt from it in spirit, even though the letter of it is fulfilled.

IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS, pt. I, I, 3 (1898).

332. Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10, 31, and 41 U.S.C.).

for remedial action; (2) enable the protester to shift the burden of persuasion in such cases to the agency, its proposed awardee, and the former government employee; and (3) recognize the competitive value of knowledge obtained in the course of performing contract administration duties. This Section first sets forth and explains the elements of the proposed rule, and then evaluates the impact of the proposed rule on the relevant government interests: efficiency, integrity, competition, and mission accomplishment. The conclusion is that the proposed rule is uncompromising in regard to ethics, without compromising the other vital interests that swirl through the revolving door.

B. A Modest Proposal

1. Policy Change

The proposed amendment[333] first explicitly recognizes that the appearance of impropriety as a bid protest ground, as follows:

> (l)(1) Congressional Policy.
>
> It is the policy of Congress that Federal contracts be awarded under circumstances not tainted by actual impropriety, or the appearance of impropriety, relating to the employment by competing contractors of former government employees. An appearance of impropriety may, by itself, justify remedial action by an agency, as well as a ground for protest by a bidder or offeror in a procurement.

In addition, by clearly identifying protesters as intended beneficiaries of the policy against appearances of impropriety in revolving door cases, the amendment would conclusively settle a previously unresolved issue.[334]

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333. The full text of the author's proposed amendment is at Appendix B, *infra*.

334. In *Inslaw, Inc. v. United States*, 40 Fed. Cl. 843 (1998), the Court of Federal Claims left the protester's standing to pursue protests based upon the standards set forth in FAR 3.101-1 in significant doubt when it wrote as follows:

> The purpose of section 3.101-1 is to set a general standard of conduct for agency procurement practices. The class of persons protected can be construed to include the plaintiffs but encompasses the public at large. [FN31] The violation of the impeccable-conduct standard may, in some cases, benefit contractors at the expense of public policy, such as com

2. Burden Shift

(a) Misplaced Burden

The unique nature of revolving door improprieties as a protest ground demands a different manner of assigning the burden of persuasion. As discussed, it is especially difficult, in the time typically permitted in bid protests, for a protester to unearth hard facts to support a claim of impropriety when a competitor has employed, for example, the former program manager for a requirement being satisfied through the procurement under protest. Because under the current rules, the protester cannot shift its burden of proof, successful revolving door protests will be, as the record indicates, extremely rare; the government nearly always wins.[335] This circumstance, however, is not cause for celebration, because the reported decisions do not promote confidence in the soundness of the analysis underlying them.

Though there is no documentation of it, it is logical to infer that for every reported revolving door protest (or too for any other type of protest), there must be some substantial number of colorable protests that are never filed. Decisions not to file would be based on a wide range of factors, including the poor track record for such protests, and the inherent difficulty of conducting, under terrific time pressure, what amounts to a criminal investigation, without the powers typically available to the most humble county prosecutor.

If the overriding goal of the protest system is to ensure that the government wins as many protests as possible, the system is not broken and therefore is not in need of fixing. If, however, the protest system is intended to promote fairness and competition,[336] changes are needed. It makes sense, therefore, to permit the revolving door protester to shift the

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334. (continued)

> petition. *The interest being protected is the integrity of the government-procurement process, not a particular interest of the contractor.* [FN32] The type of harm alleged here, misuse of the contractor's data rights, is not contemplated by this section on its face. *The hazard, unfair treatment of contractors, is arguably addressed by the section, but the primary purpose is clearly to protect the integrity of the system*.

Id. (emphasis added).

335. *See supra*, Section I.B.2.(a).

336. In describing the reasons for creating an explicit statutory basis for the bid protest jurisdiction of the General Accounting Office, the House-Senate Conference report

burden to the competing contractor that hired the former government employee. Only this party had the opportunity to avoid actual impropriety in hiring and using the former government employee, and the last clear chance to preclude the creation of an appearance of impropriety.

(b) The Burden's Proper Place

The proposed rule shifts the burden in revolving door protests onto the competitor that hires a former government employee, as follows:

> (3) It is rebuttably presumed that a competing contractor[337] has obtained an unfair competitive advantage,[338] and an agency may not award a contract to such competing contractor if:
>
> (A) the amount of the contract exceeds $10,000,000; and
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> (B) the competing contractor has employed[339] a former government employee,[340] and such person, while a government employee, had:
>
> (i) as part of his or her official duties, the responsibility to participate in the administration of a predecessor con-

336. (continued) stated, "[t]he conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." H.R. CONF. REP. NO. 98-861, 1646 (1984).

337. Defined in the amendment as "a non-Federal entity, commercial business, or non-profit organization, that is competing for the award of a Federal contract." Proposed § 2304(l)(2)(F), *infra* Appendix B.

338. Defined as "a substantial, but not necessarily decisive, improvement in competitive position." Proposed § 2304(l)(2)(J), *infra* Appendix B. Thus, the protester would not be required to prove that, but for the employment of the former government employee by the competing contractor, it would have won the competition. However, nothing in the proposed rule would negate the current requirement that the protester be in line for award. *See* 4 C.F.R. §§ 21.0(a), 21.1(a) (2000); United States v. Int'l Bus. Mach. Corp., 892 F.2d 1006, 1011 (Fed. Cir. 1989); Higher Power Eng'g, B-278900, Mar. 18, 1998, 98-1 CPD ¶ 84.

339. The term "employ" is broadly defined to include any form of agreement involving the exchange of services for a thing of value. Proposed § 2304(l)(2)(A), *infra* Appendix B.

340. The term "former government employee" refers to government employees who have been employed by a competing contractor. Proposed § 2304(l)(2)(D), *infra* Appendix B.

> tract for the same or similar property or services as are sought under the instant procurement; or
>
> (ii) by virtue of his or her official position, lawful access to competitively useful information or source selection information pertaining to such procurement.

The protester shifts the burden by proving that a contract worth in excess of $10,000,000 is to be awarded to a competing contractor that has employed a former government employee who had either: contract administration duties[341] as to a predecessor contract for the same or similar services;[342] or lawful access to competitively useful or source selection information.

The presumption thus recognizes the potential competitive impact of two new elements: information acquired while performing contract administration duties, and *access* to, as opposed to actual knowledge of, competitively useful or source selection information.[343] It further presumes that such information has been conveyed by the former government employee to his or her new employer, the competing contractor, which then exploited the information in preparing its bid or proposal. Unless these presumptions are rebutted, award to the competing contractor is prohibited.

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341. Under proposed § 2304(l)(2)(H), *infra* Appendix B, the term "contract administration" refers to any post-award duties except for "purely clerical functions," which are themselves defined by the fact that they do not require "the exercise of discretion or skills acquired through higher education." Proposed § 2304(l)(2)(I), *infra* Appendix B. Further useful refinement of the term "purely clerical" may be possible, but is not worth the effort and the risk of rendering the section less accessible. A list of examples of such functions is included.

Revolving door cases involving purely clerical employees are rare. They have therefore been excluded from coverage to avoid imposing an unwarranted burden on such employees and the contractors that may employ them. This exclusion would not condone the transfer of competitively useful information by purely clerical employees to competing contractors; in such cases, it would merely require the protester to carry its normal burden of proof.

342. The term "predecessor contract for the same or similar services" is not defined. This term, even more so than "purely clerical functions," resists definition and would risk obfuscation rather than enlightenment in the attempt. In most cases, whether a particular procurement does or does not have a predecessor contract will be easy to discern. Where the issue is not readily resolved, the prudent competing contractor or contracting activity should attempt to address it at the earliest possible moment. As discussed in *CACI, Inc.–Federal*, however, such a process will not invariably produce a reliable answer. *See supra* Section III, note 237 and accompanying text.

343. Note that only lawful *access* is required, not actual knowledge.

(c) Carrying the Burden

The competing contractor[344] and the contracting agency wishing to award the contract to it may, under the provisions of proposed section 2304(l)(3)(C), overcome the presumption of unfair competitive advantage if:

> (C) the head of the agency, or his delegee occupying a position at least one level above that of the source selection authority,—
>
> (i) decides, in writing that, by clear and convincing evidence,[345] the competing contractor obtained no unfair competitive advantage by virtue of its employment of such former government employee.

The burden of proof—clear and convincing evidence—is high, but proposed section 2304(l)(C)(ii) provides guidance on the types of measures that can be taken to meet the burden:

> (ii) The burden of demonstrating that unfair competitive advantage did not result from the employment of the former government employee is on the contracting activity and the compet-

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344. Although in the event of a protest, the competing contractor would be permitted to intervene, 4 C.F.R. § 21.3(b) (2000), at least in General Accounting Office protests, the burden formally falls on the contracting agency. Typically, the interests of the intervenor and the contracting agency are allied.

345. "Clear and convincing evidence" is a standard employed in several sections of the Federal Acquisition Regulation, primarily with regard to correction of mistakes in bids, for example 48 C.F.R. § 14.407-4 (2000) (mistakes after award), and responsibility for the loss of government furnished property, for example 48 C.F.R. § 52.245-2 (government property–fixed priced contracts). It is an intermediate standard of proof, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), requiring "an abiding conviction that the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310 (1984). The term has been defined by the Comptroller General in *Capay Painting Corp.*, B-185954, June 10, 1976, 76-1 CPD ¶ 367, as follows:

> That evidence should be clear—that is not ambiguous, doubtful, equivocal, or contradictory—and should be pointed to the issue under investigation. It must be 'convincing' in the sense that the source from which it comes is of such a credible nature that men of ordinary intelligence, discretion, and caution may repose confidence in it, but absolute certainty is not a requirement of clear and convincing evidence.

Id.

> ing contractor that employed him or her. In evaluating whether the presumption of unfair competitive advantage has been overcome, the head of the agency or delegee shall consider all facts and circumstances bearing on such issue. At a minimum, he or she will consider:
>
> (I) the existence of other facts, unrelated to the employment of the former government employee that, in combination with such circumstance creates an unacceptable appearance of impropriety associated with award to the contractor;
>
> (II) the closeness in price and, if applicable, technical merit of, the competing contractor's bid or proposal, and the bids or proposals of the other competing contractors;
>
> (III) the extent to which employment contacts between the contractor and the former government employee were contemporaneously, fully, and accurately disclosed to the former government employee's supervisors and to the cognizant procuring contracting officer;
>
> (IV) the timely request for, and good faith reasonable reliance upon, an ethics opinion from a designated agency ethics official regarding the propriety of the post-government service employment under consideration;
>
> (V) the existence, use, and efficacy of agency procedures to ensure that unfair competitive advantage does not result from employment of the former government employee; and
>
> (VI) the existence, use, and efficacy of competing contractor's procedures to prevent the acquisition of unfair competitive advantage as a result of employment of the former government employee.

Items I and II address two failings, discussed above, in the protests fora analysis of revolving door cases, namely:

- the failure to consider synergism among the revolving door protest grounds, other protest grounds, and other circumstances, that enhance the appearance of impropriety, and the likelihood of

actual impropriety-the "where there's smoke, there's fire" situation; and

- the failure to consider the closeness of the competition in deciding whether the competing contractor obtained an unfair competitive advantage when it employed the former government employee.[346]

Items III through VI encourage those parties that are in the best position to document the propriety of actions related to a revolving door protest to do so in a timely and complete manner. The allied interests of the former government employee; his new employer, the competing contractor; and the contracting activity, are advanced if everyone involved in the employment of a former government employee adopts, and maintains, awareness of, and a defensive posture against, impropriety and the appearance of impropriety. These tasks need not be unduly burdensome. Common-sense measures, rather than a complex compliance system, would in most cases enable an agency to make the required finding of no competitive advantage.

The outlines of a successful outplacement to a competing contractor are as follows: It starts with the government employee and his suitor documenting their employment-related contacts from the very first contact onwards.[347] The employee should notify his supervisor immediately.[348] She, in turn, should document the notice and decide which, if any, procurement officials should be notified, erring on the side of notification. All parties in the notification chain should likewise document their actions. Notification may appear to be an oppressive task; however, in an era in which high-speed personal computers with sophisticated activity journal

346. *See supra* Section III.B.3.(e).

347. The transition of a conversation from normal business or small talk to employment opportunity may be subtle and thus not easily discerned, even by the most conscientious. Again, common sense should prevail, along with a healthy dose of caution, in deciding when documentation and notification should be undertaken.

348. It could also be argued that immediate notification of a supervisor regarding a vague or incipient employment contact could create undue friction in the employee-supervisor relationship. This is a valid concern. However, a decision to delay notification is simply a trade-off that the employee must make and live with. A decision to delay reporting a contact that later ripens into more concrete employment discussions may indeed place the employee and the competing contractor at a disadvantage. The disadvantage could be mitigated, however, if the employee at least fully documents the contact, and his reasons for delaying notification.

software are readily available,[349] it is difficult to argue that full and timely documentation of such contacts are impracticable.

As soon as employment discussions reach the stage at which sufficient mutual interest in employment and factual detail regarding such employment exist, the government employee should request that his designated agency ethics official render an opinion regarding the propriety of such employment in view of all relevant circumstances.[350] The proposed rule makes it clear, however, that reliance upon an ethics opinion must be reasonable in order for it to contribute toward a finding of no competitive advantage.[351]

The importance of timely, complete, and accurate documentation, notification, and advice is manifested in two principal ways: first, it reminds all involved that ethical concerns, including the consideration of measures to protect the integrity of the procurement system, must predominate over personal interests; and, second, it obviates the need, later when the propriety of their actions is questioned, for the parties to rely on their memories and credibility as the sole evidence of the propriety of their actions.[352]

Of equal importance in avoiding impropriety is a systematic approach to the problem by the agencies and the competing contractors. Items V and VI recognize the benefits of procedures designed to discern potential ethics

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349. *See, e.g.*, David Haskin, *Day Timer Organizer 2.1, Editor's Choice*, PC MAGAZINE ONLINE (1998) <http://search.zdnet.com/pcmag/features/infomanagers/pcmg0144.Htm>; Wayne Kawamato, *ECCO Pro 4.01, Editor's Choice*, PC MAGAZINE ONLINE, <http://search.zdnet.com/ pcmag/features/infomanagers/pcmg0145.htm>. These products sell for $60 and $100 respectively.

350. Current and former DOD personnel are entitled to request post-employment ethics advice under the Joint Ethics Regulation. 32 C.F.R. § 84.31(a) (2000). Arguably, such requests are already required. *Id.* § 84.3(e) ("If the propriety of a proposed action or decision is in question for any reason, DOD employees shall *see*k guidance from a DOD component legal counsel, the DOD component DAEO or designee, or Ethics Counselor, as appropriate.").

351. "Reasonable reliance" would entail full and accurate disclosure of all material facts. An ethics opinion could not reasonably be deemed reliable otherwise. A good faith requirement exists for ethics opinions pertaining to the Procurement Integrity Act issued under the Joint Ethics Regulation. *Id.* § 84.26(a)(2)(vi).

352. It is difficult to overstate the importance of *contemporaneous* documentation. As the recent sad case of then Treasury Department Joshua Steiner demonstrates, a journal in which notes are belatedly entered can create more credibility problems than they resolve. Howard Schneider, *Journal 101: The Washington Diary Debate, Josh Steiner Was Preserving His Thoughts. Big Mistake.*, WASH. POST, Aug. 2, 1994, at F1.

problems associated with former government employees, and to avoid them or lessen their harmful effects on the integrity of the procurement system in general, and on individual procurements in particular. Under the proposed rule, such procedures must be effective and conscientiously used prior to the moment when the propriety of the actions of the former government employee and the competing contractor are questioned.[353]

Government or industry-wide uniformity is not required. Instead, an effective procedure is one that systematically ensures that potential conflicts of interest or other ethical concerns are identified in a timely manner; that appropriate prophylactic measures are considered, adopted, and explained to the parties; and, that compliance with such measures is tracked.[354] Under the proposed rule, moreover, resolution of the unfair competitive advantage issue does not depend on total compliance on perfect procedures. Rather, the rule simply credits parties for doing the best they can under the circumstances to anticipate and avoid potential ethical problems, and requires that all facts and circumstances bearing on propriety be taken into account in deciding whether the competing contractor bought an unfair competitive advantage when it hired the former government employee.

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353. Conduct or statements of the parties occurring before a dispute have long been viewed as inherently more reliable than self serving, post hac conduct or statements. Dynamics Corp. v. United States, 389 F.2d 414 (1968). "Only the action of the parties 'before a controversy arises is highly relevant in determining what the parties intended.'" *Id.* (quoting Northbridge Elec., Inc. v. United States, 175 Ct. Cl. 426, 438 n.8 (1966)).

354. The fundamental requirement—common-sense circumspection with regard to the employment of one entity's employees by another entity with whom it does business—is actually no greater than is required of prudent businesses in the commercial world.

Agency procedures should, among other things, consider measures that: provide for additional standards of conduct training for the employee; bring about recusal of the employee from certain procurement actions; furnish written guidance regarding specific remedial measures to the employee and the competing contractor; and physically move the work area of the employee while still in government service.

Competing contractor procedures should consider measures that: mandate that the prospective employee notify the agency in a timely manner regarding employment discussions, and job offers/acceptances, and give proof of such notification to the competing contractor; and provide specifically tailored initial training upon entry into service with the competing contractor in regard to the projects on which the former government employee may work.

To promote efficacy and demonstrate conscientious use of these procedures, complete, contemporaneous documentation is vital.

3. Modest or Radical?

The proposed rule may appear radical because it formally and explicitly recognizes the appearance of impropriety as an independent basis for remedial action in response to revolving door situations; because it recognizes the competitive value of information obtained while discharging contract administration functions; and because it permits the protester to shift the burden to the agency and its chosen contractor. However, recognition of the appearance of impropriety as a protest ground merely cements the Federal Circuit's action on this issue in *NKF*.[355] Further, with regard to the competitive value of contract administration information, the line between the administration and procurement functions is too blurry for such a change to be considered radical.[356]

The element of the proposed rule that may fairly engender a charge of radicalism, however, is the shifting of the ultimate burden of proof to the agency following a modest showing by the protester. This is indeed a rather extreme departure from the norm, under which the protester carries a very heavy burden throughout the proceedings.[357] The radicalism of this aspect of the proposed rule must, however, be analyzed in the context of the problem it is intended to address. If the revolving door were like garden-variety protest grounds, it would be fair to characterize the proposed rule as radical. On the contrary, the revolving door is different, and it would be a mistake to judge a remedy devised to address the problem by normal standards. Nevertheless, this aspect of the proposed rule, because of its radical nature, is significant because it will most likely entail a lengthier period to be accepted by the government, the protest fora, and the contractor community.

However, the issue of whether or not the proposed burden-shifting is radical is less important than how well it harmonizes the interests relevant to the revolving door problem.

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355. *See supra* Section III.B.3.(d).

356. *See supra* Section II.A.1.(c).

357. When considering an allegation of bias by procurement officials in favor of a competing contractor that had employed a former government employee, the Claims Court has stated that the protester must provide "well neigh [sic] irrefragable" proof. Space Age Eng'g, Inc. v. United States, 4 Cl. Ct. 739, 744 (1984).

C. Balancing the Interests: Is Compromise Required?

1. Introduction

There are four primary interests implicated by the proposed rule: efficiency, as potentially affected by the additional administrative burdens imposed on the government and competing contractors; integrity; competition; and mission accomplishment. A careful review of the ways in which the proposed rule affects our ability to pursue these interests demonstrates that it does not require compromise in order to be ethically uncompromising.

2. Efficiency: What is the Actual Burden?

The administrative "burdens" that would actually be imposed under the proposed rule should not require more than mere prudence in personnel management. In these litigious times, what sophisticated commercial enterprise fails to document its efforts to recruit any executive or technical employee, much less one it wishes to hire away from a customer? How ill-advised would it be for a company to hire an employee from a customer or competitor and ignore, in its assignment of the employee, the fact that the employee may have brought proprietary information along with him, the use of which might subject the company to civil or criminal liability?[358]

Regardless of the dictates of prudence, in absolute terms, the proposed rule should not require an unduly burdensome compliance regime, either for the government or the contractor community.[359] In addition, there are several ways in which the proposed rule could be modified to

358. An obvious answer to these questions is: an unethical company; however, it would be a mistake to allow the predilections of such an enterprise to determine the ethical rules under which government contracting is conducted.

359. *See supra* Section III.B.2.(c), especially note 364. It may be that some firms or agencies will elect to assume far greater burdens than are required. Some contractors may even curtail or eliminate recruitment of former government employees. Such exaggerated responses to the proposed rule, if enacted, would undoubtedly grow rare as experience with protests under it demonstrated the proper level of care required when hiring former government employees. Those firms persisting in such unduly timorous practices after such a "shakedown" period would grow less efficient and therefore less profitable. This possibility is a concern of the stockholders or owners of such firms, and should not be allowed to hinder reform.

reduce the burden, if experience in implementing the proposed rule demonstrates a need for adjustment.[360]

Further, in relative terms, the administrative burden should be slight in comparison with other burdens unique to federal government contracting. For example, compliance with the Cost Accounting Standards often requires covered contractors to maintain, at government expense, two sets of books, and endless red tape. Senator Glenn, during the passage of the Federal Acquisition Streamlining Act of 1994 stated:

> When we began drafting this bill, concerns were raised regarding the administrative burden associated with some of these oversight tools, which resulted in the bifurcation of the government and commercial markets. Thus, we sought to minimize this undesirable consequence of these well-intentioned provisions in an effort to strike a balance between efficiency and oversight.
>
> In addition, we have all heard stories that it is too difficult to do business with the government. From cost accounting standards to socioeconomic laws, the Federal marketplace is represented to be a quagmire of laws and bureaucratic redtape.[361]

In view of the significant burdens we have imposed on contractors and procurement officials in order to promote everything from disallowance of entertainment costs to "buying American," it is fair to assert that the relatively minor administrative burden driven by the proposed rule is an acceptable price to pay for helping to preserve the integrity of the procurement system.[362]

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360. The modification menu includes three items: the *dollar threshold*, currently $10,000,000, could be raised in order to encompass fewer procurements; the *approval authority* for the determination of unfair competitive advantage, currently at least one level above the source selection authority, could be lowered; or, the *standard of proof* for a finding of no unfair competitive advantage could be changed from "clear and convincing evidence" to a "preponderance," "substantial evidence," or some lesser standard. While most likely no single item would threaten the efficacy of the proposed rule, adoption of two or more might do so. Accordingly, great care should be taken in deciding which, if any, modifications to adopt.

361. 140 CONG. REC. S12369-03, *S12370, Aug. 23, 1994 (remarks of Sen. Glenn). *See also* 139 CONG. REC. S14381-04, *S14430, Oct. 26, 1993, *Streamlining Defense Acquisition Law-Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws* (cost accounting standards so unique and intrusive that some contractors have simply quit doing business with the government).

362. In 1997, the General Accounting Office reported that a Coopers & Lybrand study estimated that government oversight requirements added 18% to the cost of products

3. Integrity

It is tempting simply to assert that the proposed rule will enhance integrity in government procurement, and then move on. That, however, would not do justice to the several meanings of integrity that would be affected if the proposed rule were enacted. Rather, the central importance of integrity to the proposal requires precision in definition of the term, as follows:

> in·teg·ri·ty (in teg' ri te) 1. soundness of and adherence to moral principle and character; uprightness; honesty. 2. the state of being whole, entire, or undiminished: *to preserve the integrity of the empire.* 3. a sound, unimpaired, or perfect condition: *the integrity of the text; the integrity of a ship's hull.* [late ME *integrite* < L *integritas.* See INTEGER, -ITY][363]

For the purposes of this article, the primary dictionary definition is most important. Will the proposed rule make former government employees, agency procurement officials, and competing contractors adhere to moral principles? Probably not.

For the few who are basically immoral, the rules may affect their external behavior, making them more cautious or more devious. The former result is desirable if not ideal, the latter, regrettable but inevitable. For the vast majority, however, the proposed rule will give them the *opportunity* to act with propriety, actual and apparent while remaining competitive.

What moral dilemma is implicated in the revolving door case? An obvious choice is expressed by the overworked Biblical admonition that

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362. (continued) and services procured by the Defense Department. GAO/NSIAD 97-48, Jan. 29, 1997, *29 (F.D.C.H.), *Acquisition Reform - DOD Faces Challenges in Reducing Oversight Costs.* However, a number of government procurement officials disagreed with the estimate, considering it inflated, and not adequately adjusted for the cost reduction impact stemming from oversight provisions such as the Cost Accounting Standards. Further study of the net effect of such provisions was deemed necessary. *Id.* Nevertheless, it appears that the government pays a substantial amount of money in return for the unique oversight provisions in its contracting system, without any reliable data to whether the oversight results in actual cost reduction.

363. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 738 (1969).

"no man can serve two masters."[364] However, there is by no means universal agreement that this is the case.[365] As Justice Cardozo recognized, one may serve two masters, provided full disclosure of all relevant circumstances has been made to both masters.[366] For example, though only for the stouthearted, representation of multiple clients in a single proceeding is technically permissible.[367] However, two masters cannot be served if their interests conflict. Thus, not only full prior disclosure of relevant circumstances, but also complete prior consideration of the possibility of conflicts is required.

Yet the current rules for non-lawyers do not compel, or even encourage, the parties in many revolving door situations to fully disclose and consider all circumstances bearing on the propriety of post-government employment with a competing contractor. To the extent, therefore, that the proposed rule at least creates an incentive for disclosure and advance protective action, it will cause the parties to stop and think about the propriety of their actions, where they might otherwise not do so. Most former government employees, competing contractors, and agency officials are fundamentally upright and honest. The mere fact that the proposed rule forces them to consider these matters, where, in the hectic swirl of events they might not otherwise do so, will enable their innate moral natures to surface and guide their actions.

The proposed rule furthers integrity in its secondary definition in which it denotes the state of being whole or entire. The proposed rule encourages the disclosure of potential ethical issues relating to post-government service employment, and the adoption and execution of measures to avoid ethical problems in revolving door situations. It thus fills a void in the federal procurement system in which for years agency officials, and sometimes contractors, made decisions in ignorance of material facts relating to propriety.[368]

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364. *Matthew* 6:24 ("No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot love God and mammon.").

365. *See* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (Fall 1991) (corporations have been able to serve multiple masters, e.g. employees, communities, bondholders, customers, suppliers, etc.).

366. *See supra* note 339.

367. MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.7 (1983) (describing the disclosure and consent requirements for multiple representation).

368. Sometimes the former government employee lies not just to the government, but also to his new employer. *See* NKF Eng'g, Inc. v. United States, 805 F.2d 372, 374

Finally, and most subjectively, the proposed rule promotes integrity in its third sense, by making the system sounder, less impaired by cynicism and mistrust, and closer to perfection.[369] Not only does it elevate fairplay and honesty in the hiring of former government employees, but also it does this without significantly sacrificing the government's interests in competition and mission accomplishment. It is to the consideration of these interests that we now turn.

4. Competition in Contracting

(a) What is It? How Important is It?

To weigh the effects of the proposed rule on competition, the term must first be defined and itself weighed. This section demonstrates that competition should neither be measured solely by the number of entrants in a given procurement, nor should competition be regarded as a paramount interest, inevitably sweeping other interests before it.

"[C]ompetition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business."[370] The Federal Acquisition Regulation defines the CICA standard, "full and open competition," to mean that "all responsible sources are permitted to compete."[371]

We say that competition is very important to us. Then Deputy Secretary of Defense Frank Carlucci wrote in 1981:

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368. (continued) (Fed. Cir. 1986) (former government employee told contractor he had received approval for employment from agency legal counsel, when in fact he had not done so).

369. The inclination to regulate ethical behavior through rules of ever-increasing complexity and more onerous demands has been criticized. *See* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417 (Feb. 1990) (conduct of public employees should be guided by public service vision rather than exacting, punctilious observance of rules; reliance on the latter stunts the former). The proposed revolving door rule, however, does not set forth an exacting list of "dos and don'ts," but rather suggests that interested parties take prudent steps to identify, disclose, and mitigate circumstances giving rise to impropriety and the appearance of impropriety. It therefore avoids the danger of further withering of the public service vision.

370. S. REP. NO. 50, 98th Cong., 1st Sess. 1983, 1984 U.S.C.C.A.N. 2174 [hereinafter SENATE CICA REPORT].

371. 48 C.F.R. § 6.003 (2000).

> The value of competition in the acquisitions process is one of the most widely accepted concepts. We believe that it reduces the costs of needed supplies and services, improves contractor performances, helps to combat rising costs, increases the industrial base, and ensures fairness of opportunity for award of government contracts.[372]

Mr. Carlucci's sentiments were embodied three years later in the CICA.[373] The preference for competition in Federal contracting, however, by no means originated in the 1980s, but can be traced back to the early Nineteenth Century.[374]

Competition is an icon.[375] Like heaven, however, everyone says they want to go there, but no one wants to die. The CICA itself permits less than full and open competition[376] and non-competitive acquisitions[377] under seven distinct sets of circumstances. In addition, the statute provides that full and open competition need not occur when authorized by another statute.[378] Accretion of such authorizations antedated the CICA,[379] and is likely to continue.[380] In practice, moreover, agencies take ample advantage of available authorizations for less than full and open competition.[381]

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372. Frank Carlucci, Deputy Secretary of Defense, memorandum to various addressees (July 27, 1981) ('Increasing Competition in the Acquisition Process'), FINAL REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) [hereinafter COMMISSION REPORT], *reprinted in* Competition in Contracting Act of 1983: Hearings on S. 338 Before the Senate Comm. on Armed Services, 98th Cong., 1st Sess. 191 (1983) [hereinafter CICA HEARINGS].

373. Pub. L. No. 99-145, 99 Stat. 583 (1985) (codified in scattered sections of 10, 18, 41, 50 U.S.C.).

374. *See* Andrew Mayer, *International Symposium on Government Procurement Law, Part II, Military Procurement: Basic Principles and Recent Developments*, 21 GEO. WASH. J. INT'L L. & ECON. 165, 168 (1987) (Act of March 3, 1809, ch. 28, 2 Stat. 535, 536).

375. Senator Cohen, a principle draftsmen of the CICA, in remarks on the Senate floor during its consideration, stated that the statute "establishes and absolute preference for competition." 129 CONG. REC. 32,253 (1983) (statement of Senator Cohen).

376. 10 U.S.C. § 2304(b)(1-7) (2000); 41 U.S.C. § 253(b)(1-7) (2000).

377. 10 U.S.C. § 2304(c)(1-7); 41 U.S.C. § 253(c)(1-7).

378. 10 U.S.C. § 2304(a); 41 U.S.C. § 253(a).

379. Examples of competition degrading statutes include New Deal artifacts such as: the Buy American Act, 41 U.S.C. § 10; and the Davis-Bacon Act, 41 U.S.C. § 276a. *See* Mayer, *supra* note 374.

380. *See* Mayer, *supra* note 374, at 186 (number of non-competition driven socio-economic programs will increase, with sporadic retrenchments).

381. At the time of CICA enactment, some two-thirds of all DOD contracts were awarded noncompetitively. 129 CONG. REC. 32,256 (1983) (remarks of Senator Roth). There is evidence that anti-competitive sentiment persists. *See* GAO/NSIAD-97-246,

The prevalence of exceptions to full and open competition reflects substantial misgivings about the benefits of its universal application; in particular, whether cost savings invariably result when it is employed.[382]

The merits of the debate over the value of competition in contracting, however, are beyond the scope of this article. For present purposes, it is sufficient to state that competition is simply one important intermediate goal in the process by which the government discharges its missions through obtaining necessary goods and services from non-federal sources.

However, reducing the cost of government contracts is not the sole reason that competition is sought. As Mr. Carlucci noted, pursuing competition also promotes fair play in the award of federal contracts.[383] Indeed fairness, in the words of the Senate report on the CICA, is a benefit of perhaps paramount importance, as follows: "The last, and *possibly the most important*, benefit of competition is its inherent appeal of 'fair play.' Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism."[384]

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381. (continued) Sept. 24, 1997, *Maritime Security Fleet: Factors to Consider Before Deciding to Select Participants Competitively*; GAO/NSIAD 98-48, Dec. 8, 1997, *Outsourcing DOD Logistics—Savings Achievable But Defense Science Board's Projections Are Overstated* ("91 percent of recent nonship depot maintenance contracts were awarded on a sole-source basis.") GAO/NSIAD 98–48, Dec. 8, 1997; GAO/NSIAD 96-166, May 21, 1996, *Defense Depot Maintenance—More Comprehensive And Consistent Workload Data Needed For Decisionmakers* ("actual contracting environment for most types of equipment [maintenance] is largely noncompetitive"); GAO/NSIAD 96–166, May 21, 1996; GAO/GGD 94-138FS, Sept. 16, 1994, *Executive Office of the President-Major Procurements For Calendar Years 1990 to 1993* (88 % of Executive Office of the President contracts from 1990 to 1993 were awarded under without full and open competition); GAO/HR-97-13, Feb. 1, 1997, *High-Risk Series: Department of Energy Contract Management* (in the Department of Energy "competition now may be the rule but that DOE has a long way to go before it realizes the benefits of competition. Most of DOE's contract decisions continue to be noncompetitive").

382. Norman R. Augustine & Robert F. Trimble, *Procurement Competition at Work: The Manufacturer's Experience*, 6 YALE J. ON REG. 333 (1989) (policymakers must be wary of overemphasizing the value of price competition). CICA Hearings, *supra* note 372, at 304 (testimony of Professor John C. Cibinic, Jr.) (government overhead in administering competition yields diminishing return depending on value of contract and number of competitors).

383. *See* Carlucci, *supra* note 372.

384. SENATE CICA REPORT, *supra* note 372 (emphasis added).

During his 1982 testimony before the Senate Governmental Affairs Committee, Professor Cibinic discussed the reasons we promote competition. Though cost savings and other benefits were acknowledged as important grounds for pursuing competition, Professor Cibinic opined: "But *probably more important* than any of these reasons is the role that competition plays in assuring the public that Government procurement operates in a fair manner with source selection based upon merit rather than favoritism."[385]

Thus, when balancing the proposed revolving door rule against the government's interest in competition, it is essential to keep two points in mind: (1) competition in terms solely of the absolute number of competitors is not a paradigm that must be protected from any degradation, no matter what the reason; and (2) competition means more than merely maximizing the absolute number of bidders or offerors—fairplay and integrity are important goals that competition helps us to pursue. For these reasons, resistance to measures, such as the proposed rule, that appear inimical to competition, as defined by the sheer number of competitors, must be avoided in order to ensure that an accurate balance of interests is achieved.

(b) Competition in the Balance

Just how much, if at all, will this proposed rule affect competition in contracting? It is undeniable that, under the proposed rule, competing contractors will occasionally be disqualified, thereby in such procurements reducing the total number of competitors. Further, such competing contractors, in order to bring on disqualification, must have submitted an advantageous proposal, one the agency wishes to accept.[386] However, the loss of one competitor, even the apparent winner, does not necessarily destroy competition as long as two or more competitors remain. Admittedly, the ideal of full and open competition must yield in such cases, but those should be relatively few.[387] Competent, ethically aware competitors

385. *Competition in the Federal Procurement Process: Hearing on S.2127 before the Comm. on Governmental Affairs*, 97th Cong. 20-21 (1982) (statement of Prof. John Cibinic, Jr., National Law Center, George Washington University).

386. Presumably, protesters will not raise revolving door objections unless the competing contractor is in line for award.

387. Arguably, even under a definition emphasizing the total number of competitors, competition could actually be *enhanced* if potential contractors perceive that bids and offers will be fairly evaluated on their merits. Contractors must carefully consider whether

should have little difficulty in adopting practices that will put them in a

387. (continued) to enter a competition, even without the specter of favoritism or the use of inside information, in view of the substantial costs of preparing bids and proposals. *See* Michael C. Walch, *Dealing With A Not-So-Benevolent Uncle: Implied Contracts With Federal Government Agencies*, 37 STANFORD L. REV. 1367 (May 1985). Mr. Walch wrote that:

> These problems [of risk in estimating costs of performing government contracts] are compounded when several firms compete for a single government contract or bid. Each prospective contractor or bidder must incur these costs in negotiating the contract or preparing its bid before receiving any assurance of receiving the contract. The possibility that the bidder will not get the contract, and thus that these costs will never be recovered, creates a significant disincentive to deal with federal agencies.

Id. at 1383. The expense of bid or proposal preparation is a key factor in the initial bid/no-bid decision. Prospective Federal Government contractors are advised that:

> [t]he [bid/no-bid decision-making] process varies in different organizations, but the basic considerations do not. All organizations, large and small, consider the same factors . . . . It is neither inexpensive nor easy to prepare a proposal, and the decision to undertake the expense should never be made casually.

NATIONAL INSTITUTE OF FEDERAL PROCUREMENT, THE GUIDE TO DOING U.S. GOVERNMENT BUSINESS, WRITING WINNING PROPOSALS 2 (1995).

Thus, in a hotly-contested procurement involving several well-matched contractors, the marginal effect of one competitor having hired a key former government employee could be the critical factor in a potential competitor's decision whether to enter the race. The anti-competitive effect of perceived unfairness in government procurements has long been recognized. In *Heyer Prod. Co., Inc. v. United States*, 140 F. Supp. 409 (1956), the Court of Claims wrote:

> It was an implied condition of the request for offers that each of them would be honestly considered, and that offer which in the honest opinion of the contracting officer was most advantageous to the government would be accepted. *No person would have bid at all if he had known that 'the cards were stacked against him. . . .* It would not have put in a bid unless it thought it was to be honestly considered. It had a right to think it would be. The Ordnance Department impliedly promised plaintiff it would be. This is what induced it to spend its money to prepare its bid.

Id. at 412-13.

It is therefore reasonable to believe that there will be more rather than fewer entrants in federal procurements when the contracting community comes to realize that bids and proposals are to be judged solely on their merits, in competitions in which the impact of inside information is minimized. Minimizing such impact is the best that can be achieved. Any attempt to completely eradicate the effects of inside information would entail a virtual ban on the employment of former government employees by competing

position to avoid impropriety and to demonstrate the absence of unfair competitive advantage associated with the hiring of former government employees. Finally, considering the importance of fairness as a goal of competition, the degradation in competition resulting from the loss from a procurement of a firm unwilling or unable to take such measures, may reasonably be deemed slight.

5. Mission Accomplishment

(a) Introduction

Perhaps John Q. Citizen or Common Cause will not miss such a firm, but what about the program manager who considers such a competing contractor to be essential to national defense, or critical to addressing a huge environmental threat? Congress will not enact any "reform" that it believes will substantially burden the government in the accomplishment of its myriad missions. The impact upon mission accomplishment, therefore, is the most salient criterion in the balance of interests.

Two aspects of the term "mission accomplishment" are relevant: specific and long-term. Analysis of the proposed rule's impact on specific mission accomplishment refers to individual procurements in which revolving door concerns are raised, and examines whether the government will be able satisfactorily to carry out the discrete mission requirements that the procurements are undertaken to support. Long-term mission accomplishment refers to the government's ability to compete for the best-qualified personnel to staff its agencies. The proposed rule does not substantially burden the government with regard to either aspect of mission accomplishment.

(b) Specific Missions

There is no way to predict with any precision how many competing contractors will be disqualified under the proposed rule; however, as discussed, there is reason to believe that the numbers should be relatively small, and the disqualified firms not sorely missed. Further, disqualification would not be required under the proposed rule if the competing con-

tractor is a legitimate sole source, or if award to it is necessary in the public's interest.[388]

Finally, under proposed section 2304(l)(4)(C)(ii)(II), an agency, in deciding whether unfair competitive advantage has been obtained by a competing contractor, must consider the closeness of the competition. If the competing contractor is far ahead of other bidders or offerors, the agency could determine that no unfair competitive advantage accompanied the former government employee, assuming consideration of other factors does not indicate to the contrary.[389] Thus, in cases in which there is a wide disparity between the competing contractor and its rivals in regard to technical merit or price, award to the markedly superior offeror will not be precluded solely because it hired a former government employee.[390]

Thus, the proposed rule provides safety valves to ensure that an agency will not have to go without needed contractor support, or award to a contractor under circumstances counter to the public interest.

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388. Proposed § 2304(l)(4)(a-b), *infra* Appendix B, permits award to a competing contractor in the absence of a finding of no unfair competitive advantage in sole source and public interest situations. To enhance accountability, in both situations, a thirty-day congressional notice period is required.

389. Analysis would be essentially a "harmless error" inquiry, deducing from the wide disparity between bids or offers that the proposed awardee would have won the competition even without the competitive advantage resulting from its hiring of the former government employee. In order to make this logical leap however, the agency would need access to sufficient reliable information to permit an accurate assessment of what the proposed awardee's bid or offer would have been if it had not hired the former government employee. It would further need to be able to rule out the possibility that the disparity in ratings was not itself caused by unfair competitive advantage.

390. *ITT Fed. Servs. Corp.*, B-253740.2, May 27, 1994, 94-2 CPD ¶ 30, is a prime example of how the proposed rule could result in a finding of no unfair competitive advantage, based largely on disparity in the quality of offers. In *ITT*, the former government employee, Mr. Teufel, requested an ethics opinion regarding post–employment restrictions several months before the solicitation was issued in the protested procurement, and executed a certificate acknowledging his duty to refrain from disclosing competition-sensitive information. *Id.* 94-2 CPD ¶ 30. The agency was able to give specific information regarding Mr. Teufel's activities in his last months with the government, and show that his participation on the procurement was minimal. *Id.* More importantly, in view of Mr. Teufel's limited involvement with the procurement, was the fact that the protester's proposal was rated 50% lower overall technically (including a RED [unsatisfactory] rating for quality control). *Id.*

(c) Long-Term Mission Accomplishment

If government is to perform effectively, it must be able to compete for the services of qualified managers, scientists, professionals, engineers, and others possessing required skills and experience. Moreover, the ability to move easily from government service to the private sector through the revolving door undoubtedly serves a very useful function in encouraging talented people to consider short-term government employment where they might otherwise decline it.[391] The purported unduly negative impact of demanding ethical rules regarding post-government service employment is a longstanding *bête noire* of those who value this function, and an often cited argument against rules that might restrict its salutary effect.[392]

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391. Government employees who feel free to come and go from public service have been viewed as unique and valuable assets:

> Individuals who are serving government for limited periods of time have greater freedom to exercise their individual judgment, to challenge conventional wisdom, and to disagree with superiors on important public issues than do career civil servants. They are more likely to speak their own minds, knowing that they can readily find private employment if necessary, than are those whose security depends on continuous government employment and who thus may be reluctant to make waves. Moreover, a law which discourages movement between the private and public sector would further isolate dedicated career civil servants from other citizens at a time when alienation between government and the tax-paying public is eroding faith in our national institutions. Our government has long benefited from the mix of career and short-term employees in its service, ...

H.R. REP. 96-115 at 5 (1979).

392. *See* COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON BUSINESS ORGANIZATION OF THE DEPARTMENT OF DEFENSE 58-59 (1955) ("A particular obstacle to attracting competent men into political service is the problem caused by those portions of the conflict of interest laws requiring divestment of personal investments . . . ."); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 10 [hereinafter CITY BAR REPORT] (citing reports and articles supportive of the negative effects of conflict of interest provisions on recruitment); Thomas D. Morgan, *Appropriate Limits On Participation By Former Agency Official In Matters Before An Agency*, 1980 DUKE L.J. 1, 51 (Feb. 1980) (overly restrictive rules create problems for government recruitment); "To make government service more difficult to exit can only make it less appealing to enter." Remarks of Federal Trade Commission Chairman Calvin Collier before Council on Younger Lawyers, 1976 Annual Convention of the Federal Bar Association (Sept. 16, 1976, *quoted in* S. Doc. No. 25 at 65; *see also supra* Section I.B.

However, studies documenting a negative relationship between existing revolving door rules and the government's competitiveness in the personnel market are difficult to find.[393] It is reasonable to argue that if such a relationship could be measured, that revolving door enthusiasts would trumpet them to advance necessary "reforms." On the contrary, however, available evidence is at worst mixed, and actually supports a finding of no significant impact.[394]

The scarcity of documentation to support fears of mission-crippling personnel shortages resulting from restrictive revolving door rules might have a relatively simple common-sense explanation. For example, these cases frequently involve former government employees who were career civil servants or military officers and who *retired*, rather than resigned, to accept employment from a competing contractor.[395] It is difficult to argue

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393. According to the authors of the *City Bar Report*, as late as 1960, the effects of government ethics rules on recruitment "has never been adequately explored or debated." CITY BAR REPORT, *supra* note 392, at 152. Thirty years later, Professor Robert G. Vaughn noted that the issue was amenable to empirical study and documentation, yet little research into the matter had been conducted and "[a]rguments continue to be based on anecdote and supposition." Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 441 (Feb. 1990).

394. After a 1983 study, the General Accounting Office found it "extremely difficult, if not impossible, to attribute any specific degree of federal recruiting difficulty to the Ethics Act or to any of its provisions." GAO/FPCD 83-22, Feb. 23, 1983, *Information on Selected Aspects of the Ethics in Government Act of 1978*, app. I, at 1. However, the GAO study itself relied heavily on discussions with "individuals at the White House, OGE, other executive branch agencies, public interest groups, and other organizations" in reaching its conclusion, rather than upon a more systematic and scientific approach. *Id.* Further, the GAO report did appear to blame ethics rules for a part of whatever difficulty in recruitment the Federal government was then experiencing, along with other factors unrelated to ethical rules. *Id.* at 2.

In the *City Bar Report*, the authors found that ethics rules (focusing on divestment rather than post-employment restrictions) had little effect on recruitment and retention of civil servants, a substantial effect with regard to political appointees, and no impact with regard to full time government attorneys. CITY BAR REPORT, *supra* note 392, at 154-60.

Critics of the effect of "overly restrictive" revolving door rules are forced to rely on speculation, rather than hard fact, even though such facts should be readily observed and measured. Vaughn, *supra* note 393. Professor Morgan, in an article in which he bemoaned the adverse affect of overly restrictive ethics rules on government recruitment, was nevertheless forced to acknowledge that "[t]he number of desirable public servants who would accept government employment but for post-employment restrictions is unknown." Morgan, *supra* note 392, at 53. In addition, he also conceded that no realistic study of the issue had ever been undertaken. *Id.* at 51. Professor Morgan further admitted that, [t]he Carter Administration reportedly found that no one declined a cabinet position for the stated reason that he or she would not be willing to comply with post-employment restrictions." *Id.*

395. In 33 out of 66 (50%) of thesis cases, the former government employee was

that a high percentage of persons who decide to serve for the twenty or thirty years required for retirement did so with the expectation, *at the time of their commitment to career government service*, that they would be able to leverage the skills gained in public service to obtain employment with a government contractor. Many career public servants may entertain vague notions in this regard, some few may even make specific plans. However, is it reasonable to believe that a high percentage of public servants will forego career status because of the possibility that, decades hence, their prospects for employment might be limited, for a finite period of time, by duties discharged at the close of their government careers? Probably not.

Second, nearly all revolving door protests involve former government employees who are *not* political appointees. Political appointees typically suspend highly successful and remunerative careers to serve in government. As noted in the *City Bar Report*, this group is most likely to be deterred from public service by restrictive ethics rules.[396] Rather, the former government employees most often named in revolving protests serve in mid-level managerial and technical positions: long-term public servants whose career plans are unlikely to be decisively influenced by revolving door restrictions.[397]

Assume, arguendo, that restrictive revolving door rules would have a negative effect on public service recruitment.[398] There is nevertheless no reason to believe that the proposed revolving door rule would have such an effect. The rule does not prohibit former government employees from seeking jobs with contractors—it simply creates an incentive for such contractors, former government employees, and agencies to act properly and document their actions contemporaneously; and to disclose, in the event of a protest, the specific facts and circumstances that demonstrate the propriety of their actions. Further, a contractor's exposure to protests based upon

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395. (continued) identified as having retired from government service. *See infra* Appendix A.

396. CITY BAR REPORT, *supra* note 392, at 156; *but see supra* note 391 (no Carter Administration cabinet nominee declinations due to post-employment restrictions).

397. As noted previously, revolving door protest decisions frequently omit salient details regarding the positions occupied by the former government employees whose actions are at issue. *See supra* Section III.B.3.(c). However, where it is possible to discern the type of duties discharged, they most often involve duties such as program manager, administrative contracting officer, or contracting officer representative. *See infra* Appendix B.

398. Carried to extremes, this is obviously a valid point. If, for example, former government employees were forever barred from working with any government contractor, certainly recruitment would suffer.

the proposed rule, though theoretically of indefinite duration, should precipitously decrease after two or three years following departure from government service;[399] a reasonably short period assuming the contractor values the skills and experience of its new employee, and not merely the inside information or access he or she brings. There is, therefore, small chance that these new requirements will cause contractors to curtail or cease their efforts to recruit former government employees, thereby denying themselves access to a huge pool of talent.[400]

But analysis of long-term mission accomplishment must include, not only the effect of the proposed rule on *recruitment* of new employees, but also, *retention* of current personnel. The government's interest in retention of highly qualified employees is at least as compelling as recruitment of new ones. This is because, in general, veteran public servants have learned their jobs, perform them well, and have been the object of considerable investment in training, mentoring, and career development. The proposed rule does little to degrade retention of employees whom the government should wish to retain. Anything that makes it easier for contractors to hire government employees harms the government's competitive position with regard to retention.

Consider, however, an employee, already thinking of leaving federal service, who is offered an assignment to work on a project or procurement that may restrict his job opportunities. Might not the existence of the proposed rule cause him to leave the government earlier? Yes; but in such a case, what has been lost? The employee, it is stipulated, was already so close to leaving that the mere possibility of a restriction was decisive. It is reasonable in such a case to believe that departure was only a matter of a brief time, and the loss, therefore, minimal. Further, it is just as possible that such an employee, if familiar with the rule, will simply accept the assignment, act prudently to document his actions on the project and in his subsequent job search, and leave government service when it suits him plans, rather than prematurely due to perceived draconian restrictions on

399. After such time, in the great majority of cases, inside information will have grown stale, and insider contacts eroded by turnover within the agency and lack of day-to-day intimacy. *CACI, Inc.–Federal* is the exception that proves the rule. Although Mr. Stevens had been gone from the agency for two years at the time of the protested competition, he evidently worked diligently to maintain his relationships with the TEC members, even discussing future job opportunities with two of them. *See supra* Section III.B.1.(b).

400. As of 1995, according to the AFL-CIO, public employees comprise 15.5% of the U.S. workforce. *Public Workers, Public Employees as a Percentage of All Workers, 1995*, WASH. POST, June 12, 1998, at E2.

post-government service employment. Thus, by giving current government personnel guidance on how to leave on their own terms, the proposed rule furthers, to some small degree, the government's ability to retain good employees.

D. Conclusion

Only enactment of the proposed rule, and a fair trial, will demonstrate definitively whether we must compromise one or more important interests in order to promote greater fairness in addressing the revolving door problem. However, when the true nature of the ostensibly countervailing interests: efficiency, competition, and mission accomplishment; are plumbed, it is reasonable to predict that the proposed rule will enhance (or, at least, not degrade) government's ability to pursue them while strengthening its commitment to procurement integrity.

The magnitude of the revolving door "problem" is indeed controversial. It is, however, difficult to argue that all is well, or that a reform that seeks merely to encourage ethical awareness and prudent practices by agencies, former government employees, and competing contractors, at little or no cost to the other important related interests, is not worthy of serious consideration.

As it currently stands, firms doing business with the federal government have cause, for both right and wrong reasons, to view all personnel of the activities with which they do business as potential employees. The right reason: their character, skills, and experience; the wrong reason: inside information regarding government requirements, incumbent competitors or source selection strategy; or access to and favoritism from former colleagues still working for the agency. Our present rules encourage secrecy in negotiations for, acceptance of, and performance in, positions with competing contractor organizations. Other firms involved in a competition involving a revolving door employee have no way of penetrating the veil of secrecy to learn the truth about whether their offers were fairly evaluated.

The protest fora labor in this ignorance and under the current flawed rules, as further obfuscated by the Federal Circuit's *CACI, Inc.–Federal* decision and its progeny, and the default stance that the government gets the benefit of the doubt. It is therefore not surprising that they overwhelmingly deny revolving door protests in decisions that neither set forth suffi-

cient facts to permit independent judgments regarding their correctness, nor rigorously analyze the available evidence. Intelligent scrutiny of these decisions does not permit the public to decide for itself whether the parties to any given revolving door situation are rogues or saints. Until something is done to permit such intelligent scrutiny, most people will probably conclude that:

"*Few men have virtue to withstand the highest bidder.*"

George Washington

Appendix A: Case Table[a]

CASE NO.	CASE NAME	YEAR	RESULT[b]	CACI[c]	RETD[d]	POSN[e]
B-278129.4	PROTECCION S.A.	1998	Denied	No	No	UK
B-274698.2	PRC, INC	1997	Denied	Yes	Yes	SE
B-272461	MORTARA INSTRMNT	1996	Denied	Yes	Yes	AC
B-270698.4	PHYSICIAN CORP	1996	Denied	Yes	Yes	PM
B-270213.2	**GUARDIAN TECH**	1996	**Sustained**	Yes	Yes	TE
B-266299	CREATIVE MGMT	1996	Denied	No	Yes	CR
B-259925	DIVERSIFIED INTL	1995	Denied	Yes	UK	UK
B-258622	STANFORD TELE	1995	Denied	Yes	Yes	PM
B-257294	CLEVELAND TELE	1994	Denied	Yes	No	UK
B-255737	SCIENCE PUMP	1994	Denied	Yes	Yes	TE
B-255580.3	TEXTRON MARINE	1994	Denied	Yes	Yes	CR
B-253740.2	ITT FEDERAL SVCS	1994	Denied	Yes	Yes	TE
B-253714	RAMCOR SVCS	1993	Denied	Yes	No	PM
B-252406.2	SCI-TECH GAUGING	1993	Denied	No	No	TE
B-250912	LORI HAWTHORNE	1993	Denied	Yes	No	TE
B-248429.2	DFC APPRAISAL	1992	Denied	Yes	UK	UK
B-246793.3	FHC OPTIONS	1992	Denied	No	Yes	TE
B-246623	BLUE TEE CORP	1992	Denied	No	Yes	PM
B-224597.3	GENERAL ELECTRIC	1992	Denied	Yes	Yes	AC
B-245233.4	CENTRAL TEXAS	1992	Denied	No	Yes	PM
B-243927.4	PERSON SYSTEMS	1992	Denied	Yes	No	UK
B-243777.3	SIERRA TECH	1992	Denied	Yes	No	TE
B-241727	TECHNOLOGY CNCPT	1991	Denied	No	Yes	CR
B-241536	MANOFF GROUP	1990	Denied	Yes	No	TE
B-214568	WASHINGTON PTRL	1984	Denied	No	Yes	UR
B-241157	UNIVERSAL TECH	1991	Denied	Yes	No	UK

B-239469.2	HOLMES & NARVER	1990	Denied	Yes	No	TE
B-236903	MDT CORP	1990	Denied	Yes	Yes	CR
B-235906.2	**HOLMES & NARVER**	1989	**Sustained**	Yes	Yes	MI
B-235248.2	INTER-CON SECRTY	1989	Denied	No	No	EM
B-234629.2	INTL RESOURCES GP	1989	Denied	Yes	Yes	PM
B-233369.2	LASERPOWER	1989	Denied	Yes	Yes	SS
B-232721	DAMON CORP	1989	Denied	Yes	Yes	SS
B-233166.3	JOSEPH DECLERK	1989	Denied	Yes	UK	UK
B-232501	BENIDX FIELD ENG'G	1988	Denied	No	Yes	TE
B-232234.2	EMERSON ELECTRIC	1989	Denied	No	Yes	EM
B-231815	USATREX INTL	1988	Denied	No	No	TE
B-231710	MARIAH ASSOCS	1988	Denied	Yes	No	AC
B-231579	DAYTON T BROWN	1988	Denied	Yes	Yes	PM
B-230980	THE EARTH TECH	1988	Denied	No	Yes	PM
B-230248	HOLSMAN SVCS	1988	Denied	No	Yes	UK
B-230050.2	EAGLE RESEARCH	1988	Denied	No	No	CR
B-227375.2	FXC CORP	1987	Denied	No	Yes	AC
B-22584.3	HLJ MANAGEMENT	1988	Denied	Yes	Yes	CR
B-225576	LOUISIANA FOUND	1987	Denied	No	UK	UK
B-224366	RCA SERVICE CO	1986	Denied	Yes	No	SS
B-223555	REGIONAL ENV CON	1986	Denied	No	Yes	PM
B-223527.2	IMPERIAL SCHRADE	1987	Denied	Yes	Yes	PM
B-221250.2	TRACOR APPLIED	1986	Denied	No	UK	UK
B-220935	SPACE SYSTEMS	1985	Denied	No	UK	MI
B-220216.2	WALKERS FREIGHT	1986	Denied	No	No	PM
B-217361	WALL COLMONOY	1985	Denied	No	No	AC
B-216512	BOW INDUSTRIES	198	Denied	No	No	PM
B-213665	BOOZ ALLEN	1984	Denied	Yes	UK	UK
B-213650	STERLING MEDICAL	1984	Denied	No	No	TE
B-213310.2	DJ FINDLEY INC	1984	Denied	No	No	TE

B-212499.2	PINKERTON COMP	1984	Denied	Yes	No	UK
B-212318	CULP WISNER CULP	1983	Denied	Yes	No	PM
B-211180	IONICS INC	1984	Denied	Yes	Yes	UK
B-210800	COMPUTER SCIENCE	1984	Denied	Yes	No	AC
B-207723	BRAY STUDIOS	1982	Denied	No	No	AC
B-205820	DIVERSIFIED COMP	1982	Denied	No	No	UR
B-205464	WESTERN ENG'G	1982	Denied	No	Yes	UK
B-201331.2	JL ASSOCIATES	1982	Denied	No	Yes	PM
B-194669	POLITE MAINT	1979	Denied	No	No	SS
B-186723	RIGGINS & WMSON	1976	Denied	No	Yes	SS

a. In order to be included, the protest must contain an allegation that the proposed awardee gained an unfair competitive advantage as a result of its employment of a former Government employee.
b. SUSTAINED or DENIED refers only to action on the revolving door allegation(s) raised by the protester.
c. YES indicates that the decision relied on either *CACI Inc. Federal* or *NKE*, either by direct reference, or by use of the "hard facts" standard.
d. The following legend applies to the RETD (Retired) column:

YES It is possible to discern from the decision that the former Government employee retired from Government service.

NO It is possible to discern from the decision that the former Government employee left Government service prior to qualifying for retirement benefits, or there is no indication that the former Government employee retired.

UK It is not possible to discern from the decision that the former Government employee's status at the time he or she left Government service.

e. The following legend applies to the POSN (Duty Position) column:

PM Program manager of deputy program manager or program support personnel (other than technical).

CR Contracting officer's representative or contracting officer's technical representative.

AC Administrative contracting officer or contract administration support personnel.

EM Enlisted member of the armed forces not otherwise classified.

MI Military commissioned officer (below pay grade O-7) not otherwise classified.

SS Source selection official or support personnel.

e. (continued)

TE Technical expert, scientist.

SE Senior executive service or flag officer.

UR Employee had no apparent relationship to the contracting activity.

UK It is not possible to discern from the decision that the former government employee's position at the time he left government service.

Appendix B: Proposed Revolving Door Reform Act*

106TH CONGRESS
1ST SESSION

To amend chapter 137 of Title 10, United States Code, to strengthen the integrity of the defense procurement system by recognizing the appearance of impropriety as a basis for disqualification of competing contractors who have employed former Government employees, and to require agencies wishing to award contracts to such contractors to determine, prior to award, that the competing contractor obtained no unfair competitive advantage by hiring a former Government employee.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 25, 1999

MS. REPRESENTATIVE (for herself and MR. CONGRESSMAN) introduced the following bill; which was referred to the Committee on Armed Services

To amend chapter 137 of Title 10, United States Code, to strengthen the integrity of the defense procurement system by recognizing the appearance of impropriety as a basis for disqualification of competing contractors who have employed former Government employees, and to require agencies wishing to award contracts to such contractors to determine, prior to award, that the competing contractor obtained no unfair competitive advantage by hiring a former Government employee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

*. This Proposed Act was drafted by the author in the manner it may be seen if presented to Congress.

SHORT TITLE

SECTION 1. This Act may be cited as the "Revolving Door Reform Act of 1999."

AMENDMENTS

SECTION 2. Section 2304(a)(1) of title 10, United States Code, is amended to read as follows:

(a)(1) Except as provided in subsections (b), (c), ~~and~~ (g) and (l) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services—

SECTION 3. The following subsection is added to section 2304 of title 10, United States Code:

(1) Congressional Policy.

It is the policy of Congress that Federal contracts be awarded under circumstances not tainted by actual impropriety, or the appearance of impropriety, relating to the employment by competing contractors of former Government employees.

(2) Definitions.

As used in this subsection

(A) The term "employ" means the creation any relationship under which services are to be provided in return for money or any other thing of value. A person is considered to have been employed if a contract, understanding, agreement, or other arrangement, whether formal or informal, written or unwritten, has been reached between the employer and employee, for the exchange of services for money or a thing of value, regardless of whether substantial services have been provided thereunder, and without regard to the duration of the employment.

(B) The term "employee" includes, but is not limited to: independent contractors, consultants, advisors, officers, directors, or agents, whether engaged on a full or part time basis.

(C) The term "Government employee" means:

(i) an "officer," as defined in section 2104 of title 5;

(ii) an "employee," as defined in section 2105 of title 5; or

(iii) a "member of the uniformed services," as defined in section 2101 of title 5.

(D) The term "former Government employee" means any Government employee who has been employed, as defined in section 2304(l)(2)(A) of Title 10, by a competing contractor.

(E) The term "competitively useful information" means any of the items in the following list of information pertaining to a procurement, or to the procurement's predecessor contract for the same or similar property services, if that information has not been previously made available to the public or disclosed publicly in accordance with law or regulation:

(i) Cost or pricing data (as defined by section 2306a(h) of Title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section;

(ii) Indirect costs and direct labor rates;

(iii) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation;

(iv) Information marked by the contractor as "contractor bid or proposal information", in accordance with applicable law or regulation;

(F) The term "competing contractor" means a non-Federal entity, commercial business, or non-profit organization, that is competing for the award of a Federal contract.

(G) The term "source selection information" means source selection information, as defined in section 423(f)(2) of Title 41.

(H) The term "contract administration" means assigned postaward functions related to the administration of contracts, but does not include purely clerical functions.

(I) The term "purely clerical function" means a function that does not require the exercise of discretion, or the application of skills acquired through higher education. Examples of purely clerical functions include: typing, transcription, filing, or reception services.

(J) The term "unfair competitive advantage" means a substantial, but not necessarily decisive, improvement in competitive position.

(3) It is rebuttably presumed that a competing contractor has obtained an unfair competitive advantage, and an agency may not award a contract to such competing contractor if:

(A) the amount of the contract exceeds $10,000,000;

(B) the competing contractor has employed a former Government employee, and such person, while a Government employee, had:

(i) as part of his or her official duties, the responsibility to participate in the administration of a predecessor contract for the same or similar property or services as are sought under the instant procurement; or

(ii) by virtue of his or her official position, lawful access to competitively useful information or source selection information pertaining to such procurement.

(4) Notwithstanding the existence of circumstances set forth in section 2304(l)(3) of Title 10, an agency may award a contract to such a competing contractor if:

(A) the competing contractor is the only responsible source; no other type of property or services will satisfy the needs of the agency; and –

(i) the contracting officer justifies such circumstances in writing, and certifies the accuracy and completeness of the justification; and

(ii) the justification is approved by the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority; and

(iii) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(B) the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority, decides in writing that it is necessay in the public interest to award to the competing contractor, the head of the agency or his or her delegee notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(C) the head of the agency, or his or her delegee occupying a position at least one level above that of the source selection authority, decides in writing that, by clear and convincing evidence, the contractor obtained no unfair competitive advantage by virtue of its employment of such former Government employee.

(5) The burden of demonstrating that unfair competitive advantage did not result from the employment of the former Government employee is on the competing contractor that employed him or her. In evaluating whether the presumption of unfair competitive advantage has been overcome, the head of the agency or delegee shall consider all facts and circumstances bearing on such issue. At a minimum, he or she will consider:

(A) the existence of other facts, unrelated to the employment of the former Government employee that, in combination with such circumstance creates an unacceptable appearance of impropriety associated with award to the contractor;

(B) the closeness in price and, if applicable, technical merit of, the competing contractor's bid or proposal, and the bids or proposals of the other competing contractors;

(C) the extent to which employment contacts between the contractor and the former Government employee were contemporaneously, fully,

and accurately disclosed to the former Government employee's supervisors and to the cognizant procuring contracting officer;

(D) the timely request for, and reasonable reliance upon, an ethics opinion from a designated agency ethics official regarding the propriety of the post-Government service employment under consideration;

(E) the existence, use, and efficacy of agency procedures to ensure that unfair competitive advantage does not result from employment of the former Government employee; and

(F) the existence, use, and efficacy of competing contractor's procedures to prevent the acquisition of unfair competitive advantage as a result of employment of the former Government employee.