Snares, Snags, and Spring-Guns: Injunctive Relief in Pre-Award Bid Protests for Violations of a Conflict of Interest Statute

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SNARES, SNAGS, AND SPRING-GUNS: 1
INJUNCTIVE RELIEF IN PRE-AWARD
BID PROTESTS FOR VIOLATIONS
OF A CONFLICT OF
INTEREST STATUTE

Conflicts of interest in the federal procurement process have long engaged
the attention of Congress, courts, and federal agency officials. 2 The term
"conflict of interest" stems from the Biblical maxim that "a man cannot
serve two masters." 3 In government contracting, the term describes a rela-
tionship between a bidding contractor and a government procuring officer
that is inconsistent with a competitive government contracting process. 4 A
procurement official-private contractor conflict of interest falls somewhere
between associations that are inconsequential, and those that amount to
bribery and graft. 5 Accordingly, Congress created conflict of interest stat-
utes that govern a person's pre-employment, present employment, and post-
employment dealings with the United States Government. 6 These statutes

1. As early as 1952, one scholar warned of problems that might occur if Congress were
to develop too many rules and regulations applicable to the United States Government
procurement process. That authority stated, "[t]here is a danger that in attempting to legislate
morals we are likely to surround the Government service with so many snares, snags and
spring-guns that only the unwary can be recruited." McElwain & Vorenberg, The Federal
Conflict of Interest Statutes, 65 HARV. L. REV. 955, 955 (1952) (emphasis added).
3411, H.R. 3412, and H.R. 7139 Before the Subcomm. on Antitrust of the House Comm. on the
Judiciary, 8th Cong., Sess. 1 (1961) [hereinafter Hearings]; see also Vaughn, Ethics in Govern-
ment and the Vision of Public Service, 58 GEO. WASH. L. REV. 417, 419 (1990) (tracing "cor-
ruption" in American political life to the time of the founding of our Constitution).
3. Matthew 6:24. The concept is readily apparent in common law rules which govern
the master-servant, principal-agent, fiduciary-beneficiary, and attorney-client relationships.
Hearings, supra note 2, at 1.
4. Hearings, supra note 2, at 1. Here, the Biblical maxim provides only the vaguest
guidance.
5. Id. "A conflict of interest may exist when there is a clash, or the appearance of a
clash, between (a) the interest of a Government official in properly performing his official du-
ties, and (b) the official's interest in his private affairs . . . ." Pasley, Individual Conflicts of
Interest: Basic Principles and Guidelines, 64 THE GOVERNMENT CONTRACTOR BRIEFING PA-
PERS 1 (1964) (emphasis in original) (footnote omitted).
6. Congress has enacted both criminal and civil conflict of interest statutes. One such
criminal statute prohibits a former government employee from acting as an agent or represent-
tative in a matter where the employee "participated personally and substantially" while work-
Jan. 1, 1991). Another criminal statute applies to higher level employees and prohibits, for a

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do not proscribe all relationships, activities, and interests associated with the normal process of doing business. Rather, the statutes address activities that damage the integrity of the procurement system and deprive the government of the full performance of a contract.

Despite Congress' lengthy discourse on which relationships and activities it intended the statutes to prevent, the legislative branch gave little guidance as to the scope of the remedies available in contract award controversies where a party alleges a violation of a conflict of interest statute. From the legislative history of the conflict of interest statutes, however, courts have carved out two available remedies: monetary relief in the form of bid preparation costs, and injunctive relief.

period of two years, any involvement, including representation, counsel or advice. Id. § 207(b). A third statute which carries a criminal penalty prohibits a government employee from participating "personally and substantially" in matters in which the employee has a financial interest. Id. § 208. One civil conflict of interest statute requires certain former Department of Defense military personnel to file a report if a contractor who receives $10,000,000 or more per year in defense contract awards employs the person. 10 U.S.C.A. § 2397 (West Supp. 1990). A second civil statute prohibits former civilian government officials who participated substantially in any federal agency procurement from participating in negotiations for the award of that contract and from participating substantially in the performance of that contract for a period of two years. 41 U.S.C.A. § 423(e) (West Supp. 1990). This article covers the statutes governing Department of Energy employees, 42 U.S.C. §§ 7215, 7216 (1988).

7. The statutes do not prevent all contact between a government employee and a contracting officer. For example, in a negotiated procurement where a contracting officer may have "meaningful discussions" with an offeror, government employees such as contracting officers will necessarily have more contact with the contractors than they would in a sealed-bid procurement. Generally, a contracting officer has broad discretion in the conduct of discussions with offerors. See J. CIBINIC & R. NASH, FORMATION OF GOVERNMENT CONTRACTS 614 (2d ed. 1986).

8. "The necessity for maintaining high ethical standards of behavior in the Government becomes greater as its activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy." S. REP. NO. 2213, 87th Cong., 2d Sess. 4, reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 3852, 3853.

9. Hearings, supra note 2, at 1.

10. One of the few statements that Congress made addressing specifically the Claims Court's injunctive power is that "[t]he courts ordinarily refrain from interference with the procurement process by declining to enjoin the Government from awarding a contract to a contractor which the Government has selected." S. REP. NO. 275, 97th Cong., 1st Sess. 23 (1981), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 11, 33.

11. The protestor usually seeks award of the contract. Courts, however, rarely grant injunctive relief. The alternative is monetary relief in the form of bid preparation costs and/or attorney's fees. Bid preparation costs are costs that the bidder incurred in preparing the bid or proposal. See J. CIBINIC & R. NASH, supra note 7, at 1043.

Even more uncommon than injunctive relief is the recovery of anticipated profits. See Keco Indus., Inc. v. United States, 428 F.2d 1233, 1240 (Ct. Cl. 1970) (noting that an award of lost profits for a contract that does not exist is improper).

12. See Keco Indus., Inc. v. United States, 492 F.2d 1200, 1204 (Ct. Cl. 1974) (describing the elements of an injunction). Disappointed bidders bring two types of protests: pre-award
Injunctive relief is drastic in terms of its effect on the operating efficiency of the procurement process. A preliminary injunction prevents the award of the contract. Without an award, the contractor cannot fulfill the government’s requirements as articulated in the contract. A permanent injunction may require the government to resolicit the contract, which starts the procurement process all over again. Therefore, courts usually defer to a government agency’s contract award decision because of the intrusive nature of injunctive relief and the lack of clear congressional intent regarding that remedy. By upholding agency decisions, the courts avoid the difficult issue of setting an appropriate remedy in bid protest cases.

This Comment analyzes the primary judicial pronouncements on injunctive relief for violations of a conflict of interest statute. First, this Comment examines United States v. Mississippi Valley Generating Co. to demonstrate the United States Supreme Court’s view of conflict of interest statutes. Then, to ascertain when the United States Court of Appeals for the Federal Circuit will affirm a lower court’s decision to intervene in the procurement process, this Comment analyzes the Federal Circuit’s application of Mississippi Valley. Next, the Comment discusses the legislative history of the United States protests and post-award protests. If the disappointed bidder brings a claim after the government has awarded the contract, the protest is a post-award protest. In post-award cases, the disappointed bidder must file in some forum other than the Claims Court. See J. CIBINIC & R. NASH, supra note 7, at 1010.

The other type of protest is a pre-award protest. The disappointed bidder brings the protest before the government awards the contract. The Claims Court can only hear pre-award bid protests. See United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983) (explaining the Federal Circuit’s ruling on post-award disputes). The Claims Court, implementing the Federal Circuit’s ruling, routinely holds that post-award disputes are not part of its jurisdiction. See, e.g., Space Age Eng’g, Inc. v. United States, 4 Cl. Ct. 739 (1984).

Pre-award bid protests may be brought in the United States Claims Court, the General Accounting Office, and the General Services Board of Contract Appeals. See J. CIBINIC & R. NASH, supra note 7, at 1029-34. There is a split among the district courts as to whether injunctive relief can be granted in pre-award bid protests brought to the district courts. Compare Price v. United States, 894 F.2d 323 (9th Cir. 1990) (holding that the district court had no jurisdiction to grant injunctive relief) with Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1057-58 (1st Cir. 1987) (holding that the district courts retained jurisdiction over pre-award bid protest cases).

Pending the court’s decision on the permanent injunction, the government halts all action with regard to the contract. The court may mandate a resolicitation of the contract which requires the agency to start the procurement process all over again. With either version of injunctive relief, the court interrupts the procurement process.

Courts can grant this remedy as an alternative to preventing the award. In a resolicitation, the procuring agency returns the offerors’ proposals and sends out a new solicitation. See J. CIBINIC & R. NASH, supra note 7, at 1042.

See infra note 142 and accompanying text.

See infra note 188 and accompanying text.

Claims Court's injunctive power and the applicable conflict of interest statutes to determine the circumstances under which Congress intended for the Claims Court to grant injunctive relief in a conflict of interest case. This Comment supports the Claims Court's decision in *TRW Environmental Safety Systems, Inc. v. United States*, which held that where there is a clear violation of a conflict of interest statute, the potential contract award is invalid. Finally, this Comment concludes that although it is questionable whether Congress should, or can, legislate ethics and morals, the fact remains that Congress' mandate, as interpreted and articulated in *Mississippi Valley*, requires courts to enforce conflict of interest statutes by preventing the award of such "tainted" contracts.20

I. *MISSISSIPPI VALLEY: A RULE INTENDED TO PREVENT THE APPEARANCE OF IMPROPRIETY*

The leading United States Supreme Court decision on the cancellation of government contracts tainted by the appearance of a conflict of interest is *United States v. Mississippi Valley Generating Company*. In *Mississippi Valley*, the Supreme Court reversed a Court of Claims decision in favor of a contractor for the government's breach of a $1.8 million contract. The Supreme Court's holding turned on its interpretation of and application of 18 U.S.C. § 434, a conflict of interest statute that prohibited government employees from participating in contract award decisions in which the em-

19. See *Hearings*, supra note 2, at 3. In periods of peace, Congress tends to legislate morals and ethics in government procurement. In periods of war, Congress tends to carve out exceptions and exemptions from conflict of interest statutes on the theory that the statutes should not deter the best and brightest from accepting public office. *Id.* at 20.

Scholars often question whether it is possible to legislate morals. One argument is that it is not possible to legislate morality given "that the public gets the kind of government it tolerates; [and] that corruption in high places, when it occurs, merely reflects degeneration of public morality." *Id.* at 3-4. Other scholars, however, make a strong argument for legislating morality, suggesting that civilized society has always done so as the existence of criminal codes evidences. Thus, Congress has no less reason here than elsewhere to prohibit what is *socially intolerant*. *Id*.

21. *Id*.
22. *Id.* at 566.
ployee had a financial interest.\textsuperscript{24} The \textit{Mississippi Valley} controversy grew out of a contract between the Atomic Energy Commission (AEC) and the Mississippi Valley Generating Company (Mississippi Valley) for the construction of an electric power plant.\textsuperscript{25} Eight months after Mississippi Valley began performance on the contract, the AEC cancelled the contract under orders from President Eisenhower,\textsuperscript{26} who had determined that the government no longer required the power that the proposed plant would have generated.\textsuperscript{27} Mississippi Valley sued the United States in the Court of Claims to recover money that the company had already expended in connection with the contract.\textsuperscript{28}

As an affirmative defense, the government argued that Mississippi Valley could not sue to enforce the contract because a part-time government employee had violated section 434, which rendered the contract illegal.\textsuperscript{29} The government's defense stemmed from the conduct of Adolphe Wenzell, a part-time government employee. In addition to working for the government, Wenzell also worked for First Boston,\textsuperscript{30} the most likely source of financing for the project.\textsuperscript{31} AEC had recruited Wenzell's services as an uncompensated consultant to the government for the purpose of negotiating with Mississippi Valley regarding interest costs and financing.\textsuperscript{32} As a representative of the government, Wenzell negotiated with Mississippi Valley officers;\textsuperscript{33} as

\begin{itemize}
  \item \textsuperscript{24} The statute requires:
  \begin{verbatim}
  Whoever, being an officer, agent or member of, or directly or indirectly interested in
  the pecuniary profits or contracts of any corporation, joint-stock company, or
  association, or of any firm or partnership, or other business entity, is employed or acts
  as an officer or agent of the United States for the transaction of business with such
  business entity, shall be fined not more than $2,000 or imprisoned not more than two
  years, or both.
  \end{verbatim}


  Judge Cudahy of the United States Court of Appeals for the Seventh Circuit noted that the
  Supreme Court, in \textit{Mississippi Valley}, gave the “broadest possible interpretation” to section
  434 while Congress was considering the need for change in the conflict of interest laws. United
  States v. Irons, 640 F.2d 872, 877 (7th Cir. 1981).

  25. \textit{Mississippi Valley}, 364 U.S. at 524. The contract required Mississippi Valley to con-
  struct and operate a $100,000,000 steam power plant in the Memphis, Tennessee area. The
  plant would supply electrical energy to the Atomic Energy Commission. \textit{Id.} at 523.

  26. \textit{Id.} at 532. After the AEC identified the need for the plant, the City of Memphis
decided to construct a municipal power plant. President Eisenhower asked the AEC to deter-
mine whether the government should terminate the contract for lack of need. Several weeks
later, the President terminated the contract without considering the AEC's position. \textit{Id.}

  27. \textit{Id.}

  28. \textit{Id.}

  29. \textit{Id.} at 524.

  30. \textit{Id.}

  31. \textit{Id.} at 532.

  32. \textit{Id.} at 538.

  33. \textit{Id.} at 541.
\end{itemize}
a First Boston Vice President, Wenzell advised Mississippi Valley of financing rates.\textsuperscript{34} In addition, First Boston had previously financed a number of significant power plants. For this reason, it was likely that First Boston could expect to handle some, if not all, of Mississippi Valley's financing needs.\textsuperscript{35} The alleged conflict of interest did not impress the Court of Claims,\textsuperscript{36} however, and the court found for the plaintiff, Mississippi Valley.\textsuperscript{37}

Reversing the judgment of the Court of Claims, the United States Supreme Court held that Wenzell violated the conflict of interest statute.\textsuperscript{38} Noting that termination of the contract would require the government to pay substantial reimbursement costs for Mississippi Valley's expenses,\textsuperscript{39} the Court stated that the public should be protected from "corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction."\textsuperscript{40} The Court summarily rejected Mississippi Valley's

\begin{footnotesize}
\textsuperscript{34} Id. The cost of money is the interest paid on the capital used to finance the project. That amount represents a large part of the overall cost of the project. Mississippi Valley was in competition for the project with a public utility, namely, the Tennessee Valley Authority (TVA). TVA gets its money, interest free, from federally appropriated funds. Thus, Mississippi Valley had to have an unusually low interest rate in order to compete. A. Wildavsky, Dixon-Yates: A Study in Power Politics 55 (1962).

\textsuperscript{35} Mississippi Valley, 364 U.S. at 556. At the time of the controversy, Adolphe Wenzell had been working with First Boston, its predecessors, and the top management officials for over twenty-five years. Wenzell and his colleagues had developed a dislike for public utilities because First Boston frequently financed private utility projects. Wenzell had characterized TVA as "galloping socialism." A. Wildavsky, supra note 34, at 24-25.

\textsuperscript{36} Mississippi Valley, 364 U.S. at 524.

\textsuperscript{37} Id. Wenzell's failure to resign did not impress the Court of Claims. Judge Madden said: "We think that Wenzell's failure to resign ostentatiously and immediately, as a lawyer might have done, is of no significance." Mississippi Valley v. United States, 175 F. Supp. 505, 519 (Ct. Cl. 1959), rev'd, 364 U.S. 520 (1961).

\textsuperscript{38} Mississippi Valley, 364 U.S. at 563.

\textsuperscript{39} Id. Termination costs were estimated at $3.5 million. This would simply be calculated as the amount due to Mississippi Valley for out-of-pocket expenses. A. Wildavsky, supra note 34, at 283; see also infra note 208 (discussing termination costs).

\textsuperscript{40} Mississippi Valley, 364 U.S. at 565.

The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of public welfare. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. . . .

. . . The statute is thus directed not only at dishonor, but also at conduct that temptis dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.

\textit{Id.} at 548-49 (emphasis added) (citations omitted).
\end{footnotesize}
argument that nonenforcement of the contract would be too harsh, even though Mississippi Valley could not recover the costs already expended in the course of performing the contract.41 Rather, the Court emphasized the importance of maintaining the integrity of the federal contracting process, and allowed the government to disaffirm the contract.42 Thus, according to the Supreme Court, the purpose of the conflict of interest statute demanded that courts disaffirm the contract when contracting parties violate section 434.43

Mississippi Valley allows the government to disaffirm a contract where an appearance of impropriety exists because of a potential conflict of interest between the government and the contractor. Lower courts have applied Mississippi Valley to criminal and civil conflict of interest statutes, to the government and the disappointed bidder, and to pre-award and post-award contract controversies.44 Because of the varied application of the standard,

41. Id. (noting that the Court must extend to the public the protection that Congress mandated by enacting section 434). With the termination of the Mississippi Valley contract inevitable, concerns turned to termination costs. The controversy was wrought with political underpinnings. As Aaron Wildavsky noted: "[i]f this had been an ordinary contract, a speedy settlement, with the normal amount of haggling over the precise amount, might have been expected. But there were men who were determined to prevent the payment of termination costs and to embarrass the [Eisenhower] Administration even further." A. WILDAVSKY, supra note 34, at 267.

Wildavsky believed that the Supreme Court's decision was harsh. He thought that the Court could have characterized Wenzell's activity as contrary to public policy, but grant Mississippi Valley its reliance costs based upon principles of equity. Id. at 291.

42. Mississippi Valley, 364 U.S. at 566. Justice Harlan, in dissent, strictly construed section 434, which would have relieved Wenzell of culpability. His concern, and the concern of many scholars today, was how an official would know to disqualify himself for a conflict of interest on the basis of the "illusive factors" and "subtle niceties" inherent in Justice Warren's opinion. Mississippi Valley Generating Co. v. United States, 175 F. Supp. 505, 571 (Ct. Cl. 1959), rev'd, 364 U.S. 520 (1961).

43. Mississippi Valley, 364 U.S. at 563. The Court indicated that the only way to fully protect the public was to allow the government to disaffirm contracts tainted by conflicts of interest. Justice Warren stated: "If the Government's sole remedy . . . is merely a criminal prosecution against its agent . . . 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.

More recently, the United States Supreme Court, in Crandon v. United States, noted that "Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States." 110 S. Ct. 997, 1005 (1990) (citing Mississippi Valley, 364 U.S. at 562).

the lower courts’ attempts to apply Mississippi Valley are confusing, if not arguably inconsistent.\textsuperscript{45}

II. LOWER COURTS’ APPLICATION OF MISSISSIPPI VALLEY

A. NKF Engineering and CACI, Inc.-Federal: The Federal Circuit’s Application of Mississippi Valley

In CACI, Inc.-Federal v. United States, the United States Claims Court considered an unsuccessful offeror’s protest of an award of an automated data processing (ADP) contract on the basis of a violation of 18 U.S.C. § 208.\textsuperscript{46} Section 208 is a criminal conflict of interest statute that prohibits discussions about offers of employment between a government contract bidder and a government employee involved in a solicitation.\textsuperscript{47} Section 434, the conflict of interest statute that the Court construed in Mississippi Valley, is the predecessor to section 208.\textsuperscript{48}

In CACI, Inc.-Federal, the Department of Justice (DOJ) requested proposals for an ADP contract for the Information Systems Support Group (ISSG) of DOJ’s Antitrust Division.\textsuperscript{49} CACI, Inc.-Federal alleged that there were conflicts of interest involving the personnel of DOJ and the apparent winning bidder, Sterling Systems, Inc.\textsuperscript{50} Specifically, CACI, Inc.-Federal maintained that there was a conflict of interest between members of the government’s Technical Evaluation Board\textsuperscript{51} and an officer of Sterling,

\textsuperscript{45} See infra text accompanying notes 197-208.
\textsuperscript{46} 719 F.2d 1567 (Fed. Cir. 1983). The applicable statute provides in pertinent part that: [W]hoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . contract, . . . or other particular matter in which, to his knowledge, he . . . is negotiating or has any arrangement concerning prospective employment has a financial interest . . . .
\textsuperscript{47} 18 U.S.C.A. § 208(a) (West Supp. 1990). Penalties for a violation include up to $10,000 in fines and up to two years in prison. Id. § 216.
\textsuperscript{48} See Perkins, Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1134 (1963) (detailing the development of sections 434 and 208, and other conflict of interest statutes).
\textsuperscript{49} CACI, Inc.-Federal, 1 Cl. Ct. 352, 353, rev’d, 719 F.2d 1567 (Fed. Cir. 1983).
\textsuperscript{50} Id.
\textsuperscript{51} The government evaluator of a contract is usually the contracting officer. That officer, however, may utilize other persons to assist in the selection process. For large or complicated solicitations, agencies will use a board of persons either to make the entire decision, or to make a preliminary decision on the technical merit of the proposal. In TRW, for example, the decisionmaking entity was a panel called the Source Evaluation Board. See TRW Envtl. Safety Sys., Inc. v. United States, 18 Cl. Ct. 33, 38-39 appeal docketed, No. 90-5013 (Fed. Cir. Oct. 24, 1989). In CACI, Inc.-Federal, the contracting officer made the final decision but based his analysis, in part, on the findings of a panel known as the Technical Evaluation Board. That
Robert Stevens. Stevens, the former Chief of ISSG,\(^2\) directed Sterling's preparation of its proposal in response to the request for proposals for the ISSG contract.\(^3\) Three members of the government's technical evaluation board had a prior social and professional relationship with Stevens: Terence Sweeney was Stevens' former colleague at the Federal Food and Drug Administration, Carl Anderson was Stevens' former colleague at a private company; and Patricia Shelton was Stevens' former employee at ISSG.\(^4\) In sum, only one of the five members of the Technical Evaluation Board did not have a prior social or professional relationship with Stevens.\(^5\)

The Claims Court enjoined DOJ from awarding the contract to Sterling noting that "judicial and statutory authorities . . . would characterize the proposed award to Sterling as illegal by reason of the relationships, contacts, and actions described in the trial record."\(^6\) The court relied specifically on *Mississippi Valley*, noting that, because of ethical standards, the Supreme Court required the cancellation of a contract already in existence and underway.\(^7\) The Claims Court stated that the issue presented in *CACI, Inc.-Federal* was analogous to the issue in *Mississippi Valley*. The court characterized the issue as whether the ethical standards set forth in *Mississippi Valley*, which allowed for the cancellation of a contract during performance, were sufficient to enjoin the formation of a contract.\(^8\) In support of its holding enjoining the contract award, the Claims Court stated that the rec-

\(^{52}\) *CACI, Inc.-Federal*, 719 F.2d at 1570.

\(^{53}\) *CACI, Inc.-Federal*, 1 Cl. Ct. at 354.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Stevens' tenure as Chief of ISSG ended in late 1980. His successor was Terence Sweeney, who had worked for ISSG since 1979 and had reported directly to Stevens when Stevens was Chief. Their professional association dated back to 1978, when both worked at the Food and Drug Administration. Stevens and Sweeney were friends who "'worked together very intensely for two years'" at DOJ. *Id.* Sweeney helped draft and develop the RFP and was a member of the Technical Evaluation Board, a board designed to determine the technical acceptability of the proposals for the ADP contract. *Id.*

Carl Anderson was the Chief of the Data Processing Unit in ISSG at the time of trial. He helped draft the statement of work for the RFP and was Chairman of the Technical Evaluation Board. Anderson's professional association with Stevens dated back to 1971, when they worked together for a private company. *Id.* at 354.

Patricia Shelton was Chief of the Litigation Services Unit at ISSG at the time of trial. She, too, was a member of the Technical Evaluation Board and had worked under Stevens at DOJ. Durwin Smith was a member of the Data Processing Unit at ISSG and a member of the technical evaluation board. In addition, Anderson, Sweeney, Shelton, and Smith had social relationships with Stevens. *Id.* at 354-55.

\(^{57}\) *Id.* at 362-63.

\(^{58}\) *Id.* at 363.
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ord was replete with circumstances in which Stevens and his former ISSG associates “exceeded the bounds of propriety, and thus created at least the appearance of and the opportunity for impropriety discussed in Mississippi Valley.”

Notwithstanding the Claims Court’s reliance on the Supreme Court’s decision in Mississippi Valley, the United States Court of Appeals for the Federal Circuit reversed the Claims Court’s decision to enjoin the award of the contract. Judge Friedman, writing the court’s opinion, suggested that the Claims Court did not clearly state the precise grounds upon which it enjoined the award. While noting that the Claims Court discussed the criminal conflict of interest sections of the Ethics in Government Act, Judge Friedman stressed that the Claims Court did not hold that DOJ violated these provisions. Moreover, the court surmised that “[t]he rationale of [the Claims Court’s] decision appears to be that the relationships between Stevens . . . and . . . members of the Technical Evaluation Committee[ ] created a sufficient opportunity for and appearance of impropriety that the award of the contract . . . would be ‘arbitrary, capricious and an abuse of discretion.’”

In reaching its decision in CACI, Inc.-Federal, the Federal Circuit relied in part on a DOJ ruling issued before Stevens started work on the project for Sterling. The DOJ ruling stated that “Mr. Stevens would be qualified to manage Sterling’s proposal activities, represent Sterling with respect to the [proposal for the ADP contract] and manage Sterling’s performance on the resulting contract.” Based on the DOJ ruling and the record, the court concluded that no person had violated the conflict of interest statutes, that the record did not contain conclusive evidence of actual bias or favoritism on the part of any DOJ employees toward Sterling, and that no appearance of impropriety in the award of the contract to Sterling justified enjoining the award. After meticulously analyzing the facts of the case, Judge Friedman ruled that the ISSG showed no favoritism to Sterling.

59. Id. at 366 (footnote omitted).
60. CACI, Inc.-Federal, 719 F.2d 1567, 1581-82 (Fed. Cir. 1983).
61. Id. at 1575.
62. Id. at 1581.
63. Id. in F. Alderete General Contractors, Inc. v. United States, Judge Cowen wrote: “[i]t would be intolerable for any frustrated bidder to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign.” 715 F.2d 1476 (Fed. Cir. 1983) (citing M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1303 (D.C. Cir. 1971)).
64. CACI, Inc.-Federal, 719 F.2d at 1576.
65. Id.
66. Id. at 1575.
67. Id. at 1582.
The Federal Circuit also dismissed the Claims Court’s reliance on *Mississippi Valley*, stating that the holding in that case “rested solely on the Court’s conclusion that the government employee had violated the conflict of interest statute.” In *CACI, Inc.-Federal*, the Claims Court did not reach such a conclusion. Therefore, the Federal Circuit maintained that the broad language in *Mississippi Valley* did not apply in *CACI, Inc.-Federal* because the factual context of the two cases differed.

In *NKF Engineering, Inc. v. United States*, the Claims Court, believing that it was following the rule in *CACI, Inc.-Federal*, held that if a disappointed bidder is able to show only the appearance of impropriety, the court should not disqualify an otherwise acceptable bidder. NKF Engineering sued the United States in the Claims Court for improperly disqualifying NKF Engineering from a contract competition because of an employee’s alleged violation of a criminal conflict of interest statute. The controversy in *NKF Engineering* arose from a government contract to provide engineering services for Navy ships. The request for proposals (RFP) for the engineering services contract originated from a sub-group of the Naval Sea Systems Command headed by Deputy Director Yip Park. Park was a Navy civilian employee with 30 years of Navy contracting experience. The Navy named Park to be the contracting officer’s technical representative and Chairman of the Contract Award Review Panel (CARP), the government board appointed to oversee the contractor selection process.

Holding these two positions, Park was responsible for the evaluation plan, the government’s labor mix and cost estimates, and the technical

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68. *Id.* at 1581.
69. *Id.*
70. *NKF Eng’g, Inc. v. United States*, 9 Cl. Ct. 585, 592-93, *vacated*. 805 F.2d 372 (Fed. Cir. 1986). An agency will consider a bidder acceptable if the bidder is both “responsive” and “responsible.” The Federal Acquisition Regulation (FAR) defines responsiveness, stating that “[t]o be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables all bidders to stand on an equal footing and maintains the integrity of the sealed bidding system.” Federal Acquisition Regulations, 48 C.F.R. § 14.301(a) (1989). Thus, a bid is responsive where the only defects in the bid are minor informalities or irregularities which are “a matter of form and not of substance.” *Id.* § 14.405.

A bidder is “responsible” if it can or will perform as promised. A contracting officer makes the responsibility determination after choosing the winning bidder but before awarding the contract. See J. CIBINIC & R. NASH, supra note 7, at 400-01.
71. *NKF Eng’g*, 9 Cl. Ct. at 590.
72. *Id.* at 587.
73. *Id.*
74. *Id.*
75. In a negotiated procurement, the evaluation of proposals is, according to the FAR, “an assessment of both the proposal and the offeror’s ability . . . to successfully accomplish the prospective contract.” The FAR also requires an agency to evaluate the proposals “solely on
weighting formula. Park learned the number of offerors for the contract that the Navy had chosen for the second stage of the competition; he also knew NKF Engineering's rank in comparison to the other offerors after CARP evaluated the initial proposals. Most importantly, Park knew that of the five offerors selected to participate in oral and written discussions, two offerors for the contract, NKF Engineering and Weidlinger, had received almost identical rankings on their technical proposals while NKF Engineering's proposed total cost estimate was $2.5 million greater than Weidlinger's estimate.

One year after the government received the initial proposals under the RFP, Park announced his retirement and began contacting private companies for employment. One of the companies that Park contacted was NKF Engineering. Park interviewed with NKF Engineering's president who asked that Park check with the appropriate Naval personnel to confirm that the Navy would not consider NKF Engineering's employment of Park a conflict of interest. Park, in fact, never checked with the Navy legal counsel. He told the President, however, that the Naval legal counsel had assured Park that there was no problem with NKF Engineering employing Park. Based on Park's oral assurances, NKF Engineering's president offered Park a consulting job. At that time, neither the president nor anyone else at the company knew of Park's extensive involvement in the Naval engineering services contract.

76. The Federal Circuit described the labor mix as the government's estimate of the amount of services that it anticipates needing from each of the labor categories described in the request for proposals. NKF Eng'g, 805 F.2d at 373 n.1.

77. Id. at 373.

78. Id. at 373.

79. Id. at 378.

80. See supra note 78 (defining "competitive range").

81. Id. at 378.

82. Id. The Federal Circuit noted that the government challenged the retirement announcement, finding that fact "clearly erroneous." The court never resolved the issue noting that it was irrelevant to the court's decision. NKF Eng'g, 805 F.2d at 374 n.2.

83. Id. at 374.

84. Id.

85. Id.

86. Id.

87. Id.

88. Id.
Three months after Park began working for NKF Engineering, the company submitted its best and final offer for the Naval contract. NKF Engineering's final offer was significantly lower in price than its first offer. According to the Claims Court, two reasons explained the lower cost estimate. First, DOJ substantially decreased the technical requirements of the contract by amending the solicitation. Second, NKF Engineering decided it would have to lower the final cost proposal to win the competition for the contract because the government had indicated that the first proposal was too high. With this in mind, NKF Engineering re-evaluated the entire proposal and significantly reduced its original bid.

The Navy evaluation panel scored each proposal. Weidlinger received the highest technical score and NKF Engineering the second highest. Yet, when the evaluation panel weighted technical score along with each bidder's cost, NKF Engineering received the highest overall score. Soon after the panel issued its report on the competition results, the contracting officer for the Naval engineering contract indicated that Park's involvement in NKF Engineering's preparation of its final offer could present a conflict of interest. Naval officials reviewed the potential conflict and, with their concurrence, the contracting officer disqualified NKF Engineering because of the conflict of interest. The Navy based NKF Engineering's disqualification on the fact that the reduction in cost estimates was unprecedented in contracting competitions. Such a cost swing, the Navy concluded, must have resulted from "inside" Navy information that Park passed on to NKF Engineering during the competition for the contract.

The Claims Court, however, reversed the contracting officer's decision to disqualify NKF Engineering because of the conflict of interest. The court, citing CACI, Inc.-Federal, held that the "mere appearance of impropriety" alone is not a sustainable basis for the disqualification of an otherwise acceptable offeror. The Claims Court noted that the Federal Circuit, in CACI, Inc.-Federal, stated that a court could not withhold award of a con-

89. Id.
90. NKF Eng'g, 9 Cl. Ct. at 594.
91. Id.
92. Id. at 588-94.
93. Id.
94. NKF Engineering's original cost proposal was $16.7 million; its best and final offer was $11.2 million, a 33% decrease in NKF's initial pricing. Id. at 588.
95. Id.
96. Id. at 589.
97. Id.
98. Id.
99. Id. at 596.
100. Id. at 593.
tract based solely on the appearance of impropriety.\textsuperscript{101} Applying the \textit{CACI, Inc.-Federal} rule, the Claims Court stated that, as a matter of law, the contracting officer's decision was erroneous.\textsuperscript{102}

Yet, on appeal, the Federal Circuit reversed the Claims Court ruling.\textsuperscript{103} The Federal Circuit stated that the Claims Court misread the \textit{CACI, Inc.-Federal} decision.\textsuperscript{104} Judge Baldwin, writing for the court, suggested that read properly, \textit{CACI, Inc.-Federal} simply "prohibit[s] the agency from rejecting the relevant bidder where the facts of the case do not support a finding of an appearance of impropriety."\textsuperscript{105} The court explained that its holding in \textit{CACI, Inc.-Federal} did not mean that such prohibition applied in all cases,\textsuperscript{106} rather, "the result would depend upon the circumstances of each case."\textsuperscript{107} The court noted that in both \textit{CACI, Inc.-Federal} and \textit{NKF Engineering}, the agency's award of the contract was founded on a rational basis and did not warrant the Claims Court's interference in the procurement process.\textsuperscript{108} Analyzing the facts in \textit{NKF Engineering}, the Federal Circuit stated that the contracting officer's decision that the conflict of interest amounted to an appearance of impropriety was neither irrational nor unreasonable.\textsuperscript{109} The court, noting Park's involvement with the RFP before leaving the government, concluded that the facts of \textit{NKF Engineering} sufficiently demonstrated a basis on which the contracting officer made a rational decision to disqualify NKF Engineering.\textsuperscript{110}

\textbf{B. United Telephone: The General Services Board of Contract Appeals' Application of Mississippi Valley}

Courts have also construed civil conflict of interest statutes. A recent case is \textit{United Telephone Company of the Northwest}.\textsuperscript{111} In \textit{United Telephone}, the General Services Board of Contract Appeals (GSBCA), an administrative body which hears automatic data processing contract protests, considered

\begin{itemize}
  \item\textsuperscript{101} \textit{Id.}
  \item\textsuperscript{102} \textit{Id.}
  \item\textsuperscript{103} \textit{NKF Eng'g}, 805 F.2d at 376.
  \item\textsuperscript{104} \textit{Id.}
  \item\textsuperscript{105} \textit{Id.}
  \item\textsuperscript{106} \textit{Id.}
  \item\textsuperscript{107} \textit{Id.}
  \item\textsuperscript{108} \textit{Id.}
  \item\textsuperscript{109} \textit{Id.}
  \item\textsuperscript{110} \textit{Id.}
  \item\textsuperscript{111} GSBCA No. 10031-p, 89-3 B.C.A. (CCH) ¶ 22,108 (May 17, 1989), \textit{appeal docketed sub nom.} U.S. West Communications Servs., Inc. v. United States, Nos. 89-1662, 90-1052 (Fed. Cir. Aug. 16, Nov. 2, 1989).
\end{itemize}
United Telephone's protest over the potential award of an ADP contract to United States West.\textsuperscript{112}

The Department of Energy (DOE) conducts research and development and stores nuclear waste at the Hanford site in Washington.\textsuperscript{113} Pursuant to a maintenance and operations contract with DOE, Westinghouse had authority to enter into subcontracts only when DOE directed or authorized the use of subcontractors. As such, Westinghouse was considered a procuring agent of DOE; thus, subcontracts by Westinghouse amounted to federal agency procurements. United Telephone, the disappointed bidder, protested the potential award of one such subcontract at the GSBCA.\textsuperscript{114} United Telephone alleged that Jack Smith, a former DOE employee who retired to work for an engineering consulting firm, "had access to 'inside information' concerning the [ADP contract] proposals, the evaluation plan, the competitive positions of offerors, and other confidential information."\textsuperscript{115} Further, Smith used this information to assist the winning bidder, United States West, in preparation of its final offer for the ADP contract. Specifically, United Telephone alleged that Smith provided United States West with procurement sensitive information and held discussions with contracting officials that gave United States West an "unfair competitive advantage" in bidding for the ADP contract.\textsuperscript{116} United Telephone claimed that, because United States West had acquired information about the requirements of the contract that no contractor was allowed to have, the winning bidder had a material advantage over other bidders.\textsuperscript{117}

\begin{enumerate}
  \item Id. at 111,190.\textsuperscript{112}
  \item United Tel. Co. of the Northwest, GSBCA No. 10031-p, 89-3 B.C.A. (CCH) ¶ 21,916, at 110,270, appeal docketed sub nom. U.S. West Communications Servs., Inc. v. United States, Nos. 89-1662, 90-1052 (Fed. Cir. Aug. 16, Nov. 2, 1989).\textsuperscript{113}
  \item Id. (denying motion to dismiss). The General Services Board of Contract Appeals has bid protest jurisdiction in automatic data processing equipment (ADPE) procurements by federal agencies. Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals, 792 F.2d 1569 (Fed. Cir. 1986); see also 40 U.S.C.A. § 759 (West Supp. 1990). Only "interested parties" may bring a protest involving an ADPE contract. An interested party is either an actual bidder (one who has submitted a bid) or a prospective bidder (one who is considering submitting a bid), whose direct economic interest would be affected by the award of the contract. Id. § 759(f)(9)(A).
  The Board has held that its standard of review allows it to make a de novo review of the entire protest. It will not defer to the agency's judgment, nor will it make any presumption of the agency's correctness. Thus, the Board's review exceeds the "rational basis" standard of other forums such as the Claims Court. Computer Lines, GSBCA No. 8206-P, 86-1 B.C.A. (CCH) ¶ 18,653 (December 18, 1985).\textsuperscript{114}
  \item United Tel., GSBCA No. 10031-p, 89-3 B.C.A. (CCH) ¶ 21,916, at 110,271.\textsuperscript{115}
  \item Id.\textsuperscript{116}
  \item Id.\textsuperscript{117}
\end{enumerate}
Rejecting DOE's motion to dismiss United Telephone's protest, Administrative Law Judge Borwick, writing for the GSBCA, relied on *Mississippi Valley*. The Judge noted that the Supreme Court had sanctioned the remedy of voiding contracts for violations of laws governing conflicts of interests. He explained that United Telephone had alleged facts which, if proven, would show a violation of a conflict of interest statute requiring the GSBCA to prevent the award. Although the opinion mentioned no specific conflict of interest statute, the GSBCA denied DOE's motion to dismiss.

In a separate opinion, Judge Borwick concluded that Smith's actions as a consultant did violate a conflict of interest statute codified at 42 U.S.C. § 7215. Section 7215, enacted when Congress created DOE, prohibits former DOE employees from appearing before or writing a letter to DOE on behalf of a contractor if that former employee was involved in the contract while employed by DOE. Partly because of the violation of section 7215, Judge Borwick held that awarding the contract to United States West would not protect the public's interest and would not result in a procurement founded on a fair and competitive basis.

Judge Borwick concluded that the facts in *United Telephone* required the GSBCA to enjoin the award of the contract to United States West for two reasons: First, Smith's activities and the resulting conflict of interest created a contract competition that was not fair to the other offerors, specifically, United Telephone; second, United States West violated a federal acquisition regulation that prohibited discussions between the agency and a single competitor after the submission of final offers. Judge Borwick indi-

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118. *Id.* at 110,274; *Mississippi Valley*, 364 U.S. at 520 (1960).
120. *Id.*
121. *Id.* at 110,275.
122. *United Tel.*, GSBCA No. 10031-p, 89-3 B.C.A. (CCH) ¶ 22,108.
123. *Id.* at 111,206.
124. *Id.* at 111,210.
125. *Id.*
126. *Id.*
cated that the facts in *United Telephone* offered a compelling reason to apply the Supreme Court's *Mississippi Valley* principle to violations of a civil conflict of interest statute. The GSBCA granted United Telephone a permanent injunction and required Westinghouse to award the contract to United, partly because of the violation of the conflict of interest statute. Westinghouse appealed the case to the United States Court of Appeals for the Federal Circuit. The appeal is pending.

Despite the court's partial reliance on reasons other than the conflict of interest for granting United Telephone an injunction, *United Telephone* stands largely for the principle that where a disappointed bidder shows a clear violation of a conflict of interest statute, the GSBCA will prevent the award. The Federal Circuit has not yet tested the principle, as applied to a violation of a civil conflict of interest statute, in any appealed GSBCA or Claims Court case.

**III. INJUNCTIVE RELIEF AT THE CLAIMS COURT: TRW ENVIRONMENTAL SAFETY SYSTEMS v. UNITED STATES**

**A. Legislative History of the Claims Court's Injunctive Power: Section 1491(a)(3) of the Federal Courts Improvement Act**

After the United States Supreme Court's *Mississippi Valley* decision, Congress reorganized the United States Court of Claims and created the United States Claims Court. Congress empowered the new Claims Court with equitable power to enjoin the government from awarding a contract under section 1491(a)(3) of the Federal Courts Improvement Act. Section 1491(a)(3) provides that in pre-award protests, the Claims Court may grant declaratory judgments, including injunctive relief. Thus, Congress

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127. The statute violated in *Mississippi Valley* was a criminal statute. See supra note 23.
130. *Id.* ¶ 22,108, at 111,208. Judge Borwick cited United States v. Medico Industries, Inc., 784 F.2d 840, 843 (7th Cir. 1986), for the analogous proposition that *criminal* conflict of interest statutes provide a "sharp rule" mandating termination of contracts tainted with conflict of interest regardless of [the] fact that inside information [was] not revealed." *Id.*
133. *Id.*
134. See supra note 12 (discussing the types of bid protests and the forums in which they may be brought).
135. The statute provides:
greatly expanded the court's power to remedy violations of procurement statutes. With injunctive relief available, the disappointed bidder can obtain complete relief in pre-award bid protest cases if the Claims Court finds that the facts of the case warrant an injunction.

Both the Senate Judiciary Committee and the House Judiciary Committee issued reports addressing the Claims Court's new injunctive power. The Senate Judiciary Committee Report observed that courts usually avoid interfering in the procurement process. The Committee noted that courts typically refuse to enjoin the government from awarding a contract to the government's selected winner. By emphasizing the court's historical reluctance to interfere in the procurement process, the Senate intended to signal that the Claims Court should continue its limited role in the government contracting process, despite the new injunctive powers.

The House Judiciary Committee also stated that the Claims Court should rarely use its injunctive power and emphasized that the public has a "strong interest" in the ability of the government to fulfill its contract requirements at the lowest possible cost. Because the public's money was at issue, the House Committee warned the courts not to interfere in the contracting process unless necessary, so as to avoid adding to the cost of government procurement.

The House Judiciary Committee, however, purported to have an additional purpose for approving section 1491(a)(3). The House was not only interested in a cost effective government contracting system, but also a lawful contracting system. The House Committee Report stated that the government "must respect the rule of law. If it deviates from that norm, it must be accountable for its actions in the courts, which are equipped with 28 U.S.C.A. § 1491(a)(3) (West Supp. 1990).


137. Congress intended that "the Government . . . be permitted to exercise its right to conduct business with those suppliers it selects and to do so in an expeditious manner." S. REP. No. 275, supra note 10, at 33.

138. Id.

139. H.R. REP. No. 312, supra note 136, at 43.

140. Id. This philosophy stems from the fact that the government utilizes public funds to purchase goods and services. Id.

141. Id.
certain powers to redress proven wrongs." With this statement, the House admonished the courts to protect the public from illegal agency actions such as conflicts of interest in the procurement process.

B. The Courts' Interpretation of Section 1491(a)(3)

The seminal case in which the court interpreted 28 U.S.C. § 1491(a)(3) and its legislative history is United States v. John C. Grimberg Co. In this case, Grimberg, the disappointed bidder, filed a post-award complaint, protesting that the winning bidder had violated a clause in the invitation for bids regarding the use of subcontractors. The complaint sought termination of the contracts awarded to the winning bidder and the re-awarding of the same contracts to the disappointed bidder. Grimberg presented the issue of whether the Claims Court lacked jurisdiction to grant equitable relief in a suit brought after the government awarded the contract. The United States Court of Appeals for the Federal Circuit held that the Claims Court may exercise its new equitable powers only when the protestor disputes the contract award during the pre-award stage. Thus, the Federal Circuit excluded post-award bid protests from the Claims Court's jurisdiction and solidified the Claims Court's remedial powers in pre-award bid protests.

In Grimberg, the Federal Circuit stated that the disappointed bidders' claim on the contract arose from the government's breach of an "implied duty of fair bid evaluation." The court asserted that this implied duty to consider and evaluate each bid fairly amounted to an implied contract, which the government breached. In finding an implied contract for fair bid evaluation, the court defined the solicitation of bids as an offer "to evaluate...
each bid fairly and honestly.’’ The contractor’s submission of the bid amounted to an acceptance. Thus, the bargained for exchange required in every contract was the government’s promise to fairly and honestly evaluate each bid in exchange for the contractor’s bid preparation efforts. The Federal Circuit identified this implied contract for fair bid evaluation as an implied contract which the Federal Courts Improvement Act created.

The court’s interpretation of its injunctive authority in Grimberg relied substantially on its interpretation of the legislative history of section 1491(a)(3). The legislative history indicated that Congress intended for the Claims Court to interfere with the government agency’s award of a contract only if the court found the agency’s decision to be “arbitrary and capricious.” The Claims Court later explained that where a government agency’s contract award decision is arbitrary and capricious, the disappointed bidder can recover on an implied contract for fair bid evaluation if the disappointed bidder shows a clear violation of a procurement statute. In the alternative, the disappointed bidder has to show that there was “no rational basis” for the government agency’s contract award decision.

After Congress empowered the Claims Court with equitable relief powers, the court continued its long standing policy that not every violation of a statute amounted to an infraction so egregious that the disappointed bidder could recover on a claim for breach of the implied contract for fair bid evaluation. The rule remained that government contractors could recover only where there was a clear and prejudicial violation of a statute. Moreover, the Claims Court defined a prejudicial violation of a statute as a violation that harmed the disappointed bidder’s chances to win a government con-

151. Grimberg, 702 F.2d at 1367.
152. Id. at 1367 n.8.
153. Id.
154. Id. at 1365.
155. S. REP. NO. 275, supra note 10, at 23.
158. Id.
159. See CACI Field Servs., Inc. v. United States, 854 F.2d 464, 466 (Fed. Cir. 1988). Here, the Federal Circuit held that a bidder must “establish sufficient prejudice” resulting from violation of a procurement regulation or statute to be entitled to relief. Id. at 465.

The disappointed bidder, CACI Field Services, challenged the award of a contract to the apparent winning bidder on two grounds. First, CACI Field Services charged that the contracting officer had been too vague when holding the oral and written discussions regarding the inadequacies of its proposal. CACI Field Services alleged that it did not know further changes in its proposal were necessary to become competitive because the contracting officer was not specific enough about suggested changes. Second, CACI Field Services charged that the contracting officer did not adhere to the evaluation factors in the solicitation. Accordingly, CACI
tract. Thus, by requiring prejudice, the Claims Court followed the legislative history that admonished the court to construe strictly section 1491(a)(3).

C. TRW Environmental Safety Systems v. United States: Application of the United States Claims Court's Injunctive Power

In TRW Environmental Safety Systems v. United States, the Claims Court considered a bid protest in which TRW, the disappointed bidder, sued the government for breach of an implied contract for fair bid evaluation. The TRW controversy arose from a DOE request for proposals on a $1 billion nuclear waste cleanup contract. The contract required the winning bidder to site-test, build, and operate a nuclear repository in Yucca Mountain, Nevada. DOE estimated that the nuclear repository would eventually cost $35 billion. The project called for a tunnel to honeycomb 1,500 acres inside Yucca Mountain for a total length of 112 miles. DOE estimated that it would hold about 63,500 tons of nuclear waste. Experts calculated that with trucks arriving at Yucca Mountain every workday at 90-minute intervals, the government would take 28 years to transport the nuclear waste to the mountain.

After DOE evaluated the contract proposals, the agency unofficially awarded the contract to Bechtel Systems Management, Inc. (Bechtel), the company that had placed first in the competition for the contract. The disappointed bidder, TRW, placed second. TRW protested the potential

Field Services argued that the contracting officer did not fairly and honestly evaluate its proposal.

The Federal Circuit disagreed, however, noting that the disappointed bidder must prove a "'clear and prejudicial' violation of a procurement statute or regulation." Id. at 466. Most significantly, Chief Judge Markey of the Federal Circuit stated that prejudice is a separate element which the disappointed bidder must prove to recover. Id.; see also Kinetic Structures Corp. v. United States, 6 Cl. Ct. 387, 394 (1984); DeMat Air, Inc., 2 Cl. Ct. at 202.

160. Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974) (noting that "if one thing is plain in this area it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process").


162. Id. at 36.

163. Id. at 36-37.


165. Id.

166. Id.

167. Id. at 50. DOE has indicated that after 10,000 years, the waste will lose its toxicity. Id.

168. Id. at 41.

169. Id.
award, alleging that a DOE employee violated the agency conflict of interest provision, 42 U.S.C. § 7216. The DOE conflict of interest statute prohibited former employees of energy companies from participating in contract award decisions within a year of joining DOE. TRW asserted that Sam Rousso violated section 7216 by accepting and functioning in the position of Chairman of the Source Evaluation Board (SEB), the DOE group charged with selecting the contractor for the Yucca Mountain contract. TRW maintained that Rousso violated section 7216 by substantially participating in the Yucca Mountain contract award within a year of leaving the employment of a Bechtel subcontractor for the Yucca Mountain project.

The Claims Court agreed with TRW's claim. The court held that Rousso had violated section 7216 by his actions as Chairman, which required him to make procedural and substantive determinations regarding the SEB's contractor selection process. In view of Rousso's participation on the SEB, the court found a clear violation of section 7216. Having found that Rousso violated the conflict of interest statute, the court stated that TRW did not have to prove that the violation prejudiced the company in order to succeed on the merits.

The Claims Court's decision to enjoin the award rested in large part on the legislative history of section 7216. The court reasoned that if Congress

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170. DOE's conflict of interest statute provides:

For a period of one year after terminating any employment with any energy concern, no supervisory employee shall knowingly participate in any Department proceeding in which his former employer is substantially, directly, or materially involved, other than in a rulemaking proceeding which has a substantial effect on numerous energy concerns.


171. DOE refers to energy companies that the conflict of interest provisions cover as "energy concerns." DOE defines an "energy concern" as any company department personnel designated as such. Although Congress requires DOE to maintain a list of energy concerns, DOE does not. Thus, the only indication that Science Applications International Corp. (SAIC) was an "energy concern" for the purposes of the statute is a letter from DOE counsel to Rousso stating that SAIC was an "energy concern." This same letter contained a warning to Rousso about violations of section 7216. The Claims Court concluded that SAIC was indeed an "energy concern," in part, because of that letter and testimony to the same effect at trial. TRW Envtl. Safety Sys., Inc. v. United States, 18 Cl. Ct. 33, 44-47 (discussing DOE's definition of an energy concern and DOE's letter to Rousso), appeal docketed, No. 90-5013 (Fed. Cir. Oct. 24, 1989).

172. See infra note 174 and accompanying text.

173. See supra note 51 (explaining the selection process).

174. Before joining DOE, Rousso worked for SAIC. That company was a subcontractor which Bechtel hired to help perform the Yucca Mountain, nuclear repository contract. TRW Envl. Safety Sys., 18 Cl. Ct. at 44.

175. Id. at 39.

176. Id. at 44.

177. Id.
had the same intent in enacting section 7216 as it had in enacting the conflict of interest statute interpreted in *Mississippi Valley*, the court could apply the *Mississippi Valley* standard. Thus, the legislative history of section 7216 became highly significant.

In analyzing the statute's legislative history, the court observed that Congress passed section 7216 under the Department of Energy Organization Act (Organization Act). The court also noted that the Carter Administration asked specifically that Congress include provisions in the legislation to prevent conflicts of interest. Thus, Congress added section 7215 and section 7216 to the Organization Act to keep conflicts of interest out of contracts designed to implement the nation's energy policy.

During debate over the conflict of interest statutes on the House floor, Representative Harris, a sponsor of the DOE conflict of interest statutes, stated that "[t]he public expects and we must demand our top energy policymaking officials to put the public's interest first—not their own private interests, not regional interests, not the oil companies [sic] interests." Representative Hughes displayed concern with the "revolving door" in government regulatory agencies, particularly in those agencies that dealt with energy questions. He suggested that "[a]lthough this problem exists throughout all Government regulatory agencies, those that deal with energy questions must be of greatest concern." Moreover, the Senate Report on the Organization Act emphasized that the conflict of interest statutes provided maximum assurance that the provisions would eliminate any conflicts of interest or potential conflicts of interest. With this legislative perspec-

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180. The Organization Act was the legislation the Carter Administration requested "as a means of helping our Nation meet the energy challenge which is rapidly being thrust upon us." 123 CONG. REC. 17,281 (1977) (statement of Representative Fascell); see also 42 U.S.C. § 7216 (1988).
182. *Id.* at 17,279.
183. *Id.* at 17,409.
184. *Id.*
tive, the Claims Court found *Mississippi Valley* controlling where a disappointed bidder violates a conflict of interest statute.\textsuperscript{186} Both DOE and Bechtel have appealed the case to the United States Court of Appeals for the Federal Circuit.\textsuperscript{187}

IV. COMMENT: WILL THE FEDERAL CIRCUIT UPHOLD INJUNCTIVE RELIEF FOR THE DISAPPOINTED BIDDERS IN *TRW* AND *UNITED TELEPHONE*, AND SHOULD IT?

*TRW* is an unusual case because the United States Claims Court rarely grants permanent injunctive relief where a disappointed bidder protests a government contract award.\textsuperscript{188} The Claims Court's reluctance to grant injunctive relief is probably based on Congress' mandate that courts review administrative agency decisions in bid protest cases under the arbitrary and capricious standard.\textsuperscript{189} Furthermore, in bid protests where the disappointed bidder attempts to prove a violation of a statute, the Claims Court requires the disappointed bidder to show that the government's violation of the statute was prejudicial.\textsuperscript{190} The United States Court of Appeals for the Federal Circuit has also held that prejudice is a separate element of the claim that the disappointed bidder must prove.\textsuperscript{191} Both *TRW* and *United Telephone*, however, stand for the proposition that where the statute violated is a civil


\textsuperscript{187} Id.

\textsuperscript{188} The Claims Court has enjoined the government from awarding a contract to the winning bidder nine times since the court's reorganization. Claims Court Annual Reports (1982 - May 1989) (available at the Clerk's Office, United States Claims Court); see Honeywell, Inc. v. United States, 16 Cl. Ct. 173, rev'd, 870 F.2d 644 (Fed. Cir. 1989); NKF Eng'g, Inc. v. United States, 9 Cl. Ct. 585, vacated, 805 F.2d 372 (Fed Cir. 1986); Essex Electro Eng'rs, Inc. v. United States, 3 Cl. Ct. 277 (1984), aff'd, 757 F.2d 247 (Fed. Cir. 1985) (appealed and affirmed only with regard to the application for attorney fees under the Equal Access to Justice Act); CACI, Inc.-Federal v. United States, 1 Cl. Ct. 352, rev'd, 719 F.2d 1567 (Fed. Cir. 1983); Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68 (1984); Laboratory Supply Corp. v. United States, 5 Cl. Ct. 28 (1984); Related Indus., Inc. v. United States, 2 Cl. Ct. 517 (1983); AABCO, Inc. v. United States, 3 Cl. Ct. 109 (1983), aff'd, 757 F.2d 247 (Fed. Cir. 1985); DeMat Air, Inc. v. United States, 2 Cl. Ct. 197 (1983).

Of these nine cases where the Claims Court granted permanent injunctive relief, three were appealed. Of those appealed, all were reversed by the Federal Circuit. Thus, the Federal Circuit has yet to affirm an injunction granted by the Claims Court enjoining the government from awarding a contract to the winning bidder.

\textsuperscript{189} See supra text accompanying note 155.

\textsuperscript{190} See supra text accompanying note 159.

\textsuperscript{191} CACI Field Servs., Inc. v. United States, 854 F.2d 464 (Fed. Cir. 1988).
conflict of interest statute, the court does not require the disappointed bidder to show prejudice in order to win relief.192

In TRW, the Claims Court, using Mississippi Valley for support, acknowledged the inherent difficulties in proving prejudice where the government violates a conflict of interest statute.193 According to the Claims Court, TRW had to prove only that Rousso substantially participated in the contract within the prohibited time period.194 The court stated that TRW did not have to show that Rousso's participation in the Source Evaluation Board harmed TRW's chances for obtaining the Yucca Mountain contract award.195 Similarly, in United Telephone, the GSBCA stated that United Telephone did not have to show that Smith's participation in United States West's bid preparation harmed United Telephone's chances for obtaining the Westinghouse contract.196

In TRW and United Telephone, the Claims Court and the GSBCA initially disregarded the Federal Circuit's prejudice requirement.197 Both forums applied Mississippi Valley to reach the conclusion that where the statute in question is a conflict of interest statute, the disappointed bidder need not show prejudice.198 Neither the GSBCA nor the Claims Court, however, relied solely on the finding that a contracting party violated a DOE conflict of interest statute. Rather, both courts stated that although the disappointed bidder did not have to prove prejudice, the disappointed bidder in each case did indeed prove prejudice.199

Undoubtedly, both the Claims Court and the GSBCA are aware that the Federal Circuit decisions, NKF Engineering and CACI, Inc.-Federal, are difficult to reconcile. In CACI, Inc.-Federal, the Federal Circuit held that the disappointed bidder could not recover where the disappointed bidder only showed an appearance of impropriety.200 In contrast, the Federal Circuit, in NKF Engineering, held that the government could disqualify a bidder based

194. Id. at 66.
195. Id. at 66 (stating that "corruption or loss need not be proven").
197. Id.; TRW Envtl. Safety Sys., 18 Cl. Ct. at 66.
200. CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983); see also supra note 63 and accompanying text.
on the appearance of impropriety.\textsuperscript{201} Thus, both the government, in \textit{NKF Engineering}, and the disappointed bidder, in \textit{CA CI, Inc.-Federal}, established a substantial appearance of impropriety. Yet, only the government was granted relief based upon the finding of an appearance of impropriety.\textsuperscript{202}

One scholar asserts that the \textit{NKF Engineering} and \textit{CA CI, Inc.-Federal} decisions are inconsistent and, thus, reveal the Federal Circuit's predisposition toward favoring the government.\textsuperscript{203} The theory implied is that the Federal Circuit illogically applied the conflict of interest statutes to rubber-stamp government contract award decisions.\textsuperscript{204} Significantly, the Federal Circuit has yet to affirm a permanent injunction that the Claims Court has granted in favor of the disappointed bidder.\textsuperscript{205}

Others, however, maintain that the Supreme Court never intended for the \textit{Mississippi Valley} standard to apply where the disappointed bidder seeks relief, but only where the government attempts to disqualify a bidder or disaffirm a contract.\textsuperscript{206} Indeed, there are numerous examples of how the federal procurement system is structured to favor the government.\textsuperscript{207} Perhaps a rule stating that only the government can use a conflict of interest to void a contract is beneficial for procurement efficiency. Employing the argument that the \textit{Mississippi Valley} standard does not apply to disappointed bidders, \textit{NKF Engineering} and \textit{CA CI, Inc.-Federal} are much easier to reconcile. \textit{CA CI, Inc.-Federal} involved a disappointed bidder's attempt to prevent a contract award, whereas \textit{NKF Engineering} involved the government's attempt to disqualify a winning bidder before awarding the contract.\textsuperscript{208}

The two applications of the \textit{Mississippi Valley} standard in bid protests differ because of tension between competing goals of the federal procurement system.\textsuperscript{209} The first goal emanates from the practical consideration that in order to keep the federal procurement system running smoothly, courts must

\begin{itemize}
  \item \textsuperscript{201} \textit{NKF Eng'g.}, 805 F.2d at 376.
  \item \textsuperscript{202} \textit{Id.} at 372.
  \item \textsuperscript{203} Hazelton, \textit{The Federal Circuit's Emerging Role in Bid Protest Cases}, 36 Amer. L. Rev. 919, 923, 932 (1987).
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} \textit{See supra} note 188 and accompanying text.
  \item \textsuperscript{206} Woehr, \textit{supra} note 179, at 394.
  \item \textsuperscript{207} For example, the government can terminate a contract for convenience and, unlike private contract law, the only remedy available is reliance costs. Federal Acquisition Regulations, 48 C.F.R. § 49.101(a) (1989); see U.C.C. § 2-106(3) (1990) (for private law).
  \item In deciding whether to grant injunctive relief for an unlawful procurement, the courts will consider "whether the national welfare will be materially affected by the injunction" and whether the procurement is "vital to the national interest." D. Arnavas & W. Ruberry, \textit{supra} note 143, ch. 21, at 4.
  \item \textsuperscript{208} See \textit{CA CI, Inc.-Federal v. United States}, 719 F.2d 1567, 1567 (Fed. Cir. 1983); \textit{NKF Eng'g., Inc. v. United States}, 805 F.2d 372, 372 (Fed. Cir. 1986).
  \item \textsuperscript{209} \textit{See supra} notes 136-42 and accompanying text.
\end{itemize}
limit judicial interference in the formation stages of a contract.\textsuperscript{210} The second goal flows from society's requirement that the legislature and courts maintain the integrity of the federal procurement system.\textsuperscript{211} Disappointed bidders have had difficulty recovering under any of the traditional theories defined in \textit{CACI, Inc.-Federal},\textsuperscript{212} precisely because of the tension between these two goals. Thus, the Federal Circuit should resolve the prejudice issue, in the context of an alleged violation of a conflict of interest statute, to afford a cogent evaluation of federal conflict of interest statutes.

\section*{V. CONCLUSION}

Conflicts of interest in federal procurement present a continuing problem in government.\textsuperscript{213} Although Congress has enacted numerous bills to curb conflicts of interest, the procuring agencies are reluctant to enforce conflict of interest statutes. The United States Claims Court and the GSBCA are two bid protest forums that have accepted the challenge.\textsuperscript{214} The United States Court of Appeals for the Federal Circuit, however, in its review of its decisions, has not supported these two forums.\textsuperscript{215} Consequently, as publicized procurement contracts demonstrate, conflicts of interest abound.\textsuperscript{216} With such publicity, citizens lose faith in the procurement process and question the government's integrity.\textsuperscript{217}

The Federal Circuit should address the issue of whether a disappointed bidder must prove prejudice, due to a conflict of interest violation, to merit an injunction. In its application of the conflict of interest statutes, the Federal Circuit must fulfill two congressionally mandated goals. Specifically, the Federal Circuit must limit the judiciary's involvement in the government contracting process while simultaneously maintaining the integrity of the federal procurement system. Courts, if not the legislature, should seek to implement the policies underlying \textit{Mississippi Valley}, which emphasize that suspicions of malfeasance and corruption destroy the people's faith in government. In doing so, they must seek to avoid "so many snares, snags and

\begin{footnotesize}
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\item \textsuperscript{210} See supra notes 136-40 and accompanying text.
\item \textsuperscript{211} See supra notes 141-42 and accompanying text; see also \textit{Mississippi Valley}, 364 U.S. 520, 549 (1960); \textit{Hearings}, supra note 2, at 1.
\item \textsuperscript{212} \textit{CACI, Inc.-Federal}, 719 F.2d at 1567.
\item \textsuperscript{213} See Nolan, \textit{Regulating Ethics: When It's Not Enough to Just Say No}, 58 GEOR. WASH. L. REV. 405, 405 (1990) (commenting that today "government ethics is a growth industry").
\item \textsuperscript{214} See supra note 192 and accompanying text.
\item \textsuperscript{215} See supra note 188 and accompanying text.
\item \textsuperscript{216} See supra note 213 and accompanying text.
\item \textsuperscript{217} See supra note 211 and accompanying text.
\end{itemize}
\end{footnotesize}
spring-guns that only the unwary can be recruited [for public service]." 218 By definitively resolving the issue of prejudice, the Federal Circuit will clear confusion at lower decision-making levels. Moreover, a Federal Circuit decision on the prejudice issue would, at the very least, provoke a much needed analysis of whether the current conflict of interest legislation is furthering either of the congressionally mandated goals in the federal procurement system.

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218. See E. McELWAIN & J. VORENBURG, supra note 1, at 955; see also Murdock, Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989, 58 GEO. WASH. L. REV. 502 (for a good summary of the most recent changes in conflict of interest legislation).