Is the Procurement Integrity Act “Important” Enough for the Mandatory Disclosure Rule?: A Look at the Procurement Integrity Act and the Case for its Inclusion in the Mandatory Disclosure Rule

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Disclaimer

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Abstract

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Under the new mandatory disclosure rule, federal government contractors must report to the Government their violations of specified criminal laws and the civil False Claims Act, as well as any significant overpayments that they receive. Although this reporting requirement exists to enhance the procurement system’s integrity, the plain language of the mandatory disclosure rule does not extend to the Procurement Integrity Act. Congress passed the Procurement Integrity Act in 1988, however, to enhance procurement integrity. The statute prohibits the misuse of confidential procurement information and identifies prohibited interactions between contractors and Government personnel. Because the Procurement Integrity Act has been described as an important law in combating procurement-related misconduct, the mandatory disclosure rule should include the Procurement Integrity Act.
# Table of Contents

List of Figures .................................................................................................................. vi

I. INTRODUCTION ........................................................................................................... 1

II. From Operation Illwind to the Procurement Integrity Act ........................................ 5
   A. *Operation Illwind* ........................................................................................................ 5
      1. How it Began ............................................................................................................. 5
      2. Lessons Learned ..................................................................................................... 12
      3. Conclusion ............................................................................................................. 19
   B. *The Procurement Integrity Act* ................................................................................ 20

III. Criminal Prosecutions and Bid Protests Involving the Procurement Integrity Act ........ 25
   A. *Criminal Prosecutions* ............................................................................................ 27
      1. Methodology .......................................................................................................... 27
      2. The Cases ............................................................................................................. 28
         i. United States v. Parrish ....................................................................................... 28
         ii. United States v. Lessner .................................................................................. 30
         iii. United States v. Olson ..................................................................................... 30
         iv. United States v. Ferrell .................................................................................... 31
         v. United States v. Honbo .................................................................................... 32
      2. Insights and Observations ..................................................................................... 33
   B. *Bid protests* ............................................................................................................. 41
      1. Methodology .......................................................................................................... 42
      2. Insights and Observations ..................................................................................... 44
   C. *Conclusion* ............................................................................................................. 50

IV. THE MANDATORY DISCLOSURE RULE .................................................................. 55
   A. *The Voluntary Disclosure Program* .................................................................... 56
   B. *The Mandatory Disclosure Rule – The First Proposed Rule* ............................. 60
   D. *A Loophole Still Exists* ......................................................................................... 64

V. Four Reasons to Include the Procurement Integrity Act in the Mandatory Disclosure Rule ......................................................................................................................... 68
   A. *Detecting Procurement Integrity Act Violations* ............................................... 68
   B. *Enhancing the Procurement Integrity Act’s Deterrent Effect* ........................... 72
   C. *The Procurement Integrity Act Complements Currently Listed Statutes* ......... 74
      1. 18 U.S.C. § 201 ..................................................................................................... 74
      2. 18 U.S.C. §§ 207 and 208 .................................................................................... 75
      3. 18 U.S.C. § 641 ..................................................................................................... 77
      4. 18 U.S.C. § 1905 ................................................................................................... 80
      5. 18 U.S.C. § 371 ..................................................................................................... 81
   D. *The Procurement Integrity Act and Mandatory Disclosure Rule Both Exist to Promote Procurement Integrity* ................................................................................. 82

VI. CONCLUSION ............................................................................................................ 85
List of Figures

Figure 1 ......................................................................................................................... 27
Figure 2 ......................................................................................................................... 42
Figure 3 ......................................................................................................................... 43
Figure 4 ......................................................................................................................... 44
I. INTRODUCTION

A June 2008 white paper by the Department of Justice’s National Procurement Fraud Task Force\(^1\) (NPFTF) describes the Procurement Integrity Act\(^2\) (PIA) as an “important statute” in the Government’s fight against corruption in Government contracting.\(^3\) Indeed, and as set forth in more detail below, the PIA prohibits the knowing disclosure and receipt of confidential procurement information, restricts Government employees from negotiating employment with contractors during a procurement, limits specified former Government employees’ post-government employment opportunities, and establishes an “impressive array” of criminal, civil, and administrative penalties for those who violate it.\(^4\) Nevertheless, the PIA does not appear to be a part of the Government’s most recent attempt to enhance the procurement system’s integrity, the mandatory disclosure rule.

Issued on November 12, 2008, the mandatory disclosure rule requires federal government contractors to “timely disclose” “credible evidence” of a “violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, or a violation of the civil False Claims Act.”\(^5\) This “unprecedented” rule indicates the Federal Acquisition Regulation (FAR) Council’s acknowledgment of the need “to emphasize the critical importance of integrity in

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\(^1\) The Department of Justice established the National Procurement Fraud Task Force in October 2006 in order to “promote the prevention, early detection, and prosecution of procurement fraud.” See http://www.justice.gov/criminal/npftf.


\(^4\) See infra notes 109-122 and accompanying text. See also generally 41 U.S.C. § 423(a)-(e); FAR 3.104-3(a)-(d); FAR 3.104-7; FAR 3.104-8; Pikes Peak Family Housing, LLC v. United States, 40 Fed. Cl. 673, 681 n.16 (Ct. Fed. Cl. 1998).

\(^5\) 73 Fed. Reg. 67,064, 67,065 (Nov. 12, 2008). The mandatory disclosure rule also requires a contractor to disclose any “significant overpayments” that it may receive. See id.
contracting. Yet since the PIA is neither a Title 18 statute nor a part of the civil False Claims Act, the mandatory disclosure rule does not require contractors to disclose their violations of it.

The omission of the PIA seems odd considering that the agency that called it “important” was the same agency that recommended the mandatory disclosure rule. The FAR Council promulgated the mandatory disclosure rule as a result of a request by the Department of Justice’s Criminal Division. In fact, the Criminal Division proposed language for the rule, which the FAR Council largely adopted. Notably, the NPFTF, which had described the PIA as an “important statute” at around the same time of the drafting of the mandatory disclosure rule, is based in the Criminal Division. So what happened, then, to the “important” Procurement Integrity Act in between June and November 2008, as the rule was being drafted?

This paper advocates for amending the mandatory disclosure rule by adding the Procurement Integrity Act to it. In doing so, this paper will provide a background of the PIA, including its enactment and enforcement actions brought under it. This paper proceeds as follows.

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6 Id. at 67,071. The FAR Council has acknowledged that “[t]here is no doubt that mandatory disclosure is a ‘sea change’ and ‘major departure’” for the procurement community. Id. at 67,069.
8 Compare Comments of the Department of Justice Criminal Division to Proposed Mandatory Disclosure Rule (January 14, 2008), reprinted in ABA MDR Guide, supra note 7, at app. G (suggesting the mandatory disclosure rule should include language requiring disclosures of incidences “involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18, United States Code”) with 73 Fed. Reg. 67,064, 67,065 (setting forth the final mandatory disclosure rule as requiring disclosure of “a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code”).
Part II will look at the impetus behind the PIA, Operation Illwind, a massive criminal investigation of defense procurement that uncovered the widespread exchange of confidential procurement information by Government contracting personnel, contractors, and consultants. By now no doubt well-known by the procurement community, Operation Illwind provided a number of important lessons that are still relevant today and thus inform the discussion on including the PIA in the mandatory disclosure rule. Part II also will discuss the PIA’s specific provisions.

Part III looks at the procurement system’s experience with the PIA. In particular, Part III will examine the reported criminal prosecutions and published bid protests that have involved the statute. The Department of Justice, in addition to describing the PIA as an “important statute,” has also claimed that it appears to be “underused.” The number of reported criminal and bid protest cases alleging a PIA violation seems to confirm this claim. Since 1988 when Congress passed the PIA, there have been only six reported criminal prosecutions and 137 published bid protests involving the PIA, resulting in five convictions and two sustained protests. Interestingly, however, the Department of Justice’s proposed solution for the apparent “underuse” of the PIA is to change the remedies provisions of the statute, not to include the statute in the mandatory disclosure

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10 Although most of the literature identifies Illwind as two words, the Federal Bureau of Investigation’s official code name for the investigation was actually just one word. See Andy Pasztor, When the Pentagon Was for Sale 187–88 (1995) (writing that agents “got a rise years later, amid the media frenzy, when reporters mistakenly identified the investigation’s code name as two separate words”).
11 See infra notes 20-67 and accompanying text.
12 See NPFTF White Paper, supra note 3.
14 See NPFTF White Paper, supra note 3.
rule. Part III therefore draws insights from the reported cases that should illustrate the value of adding the PIA to the mandatory disclosure rule.

In Part IV, this paper will discuss the mandatory disclosure rule in particular. Part IV will focus on how the mandatory disclosure rule came about, what it requires, and more importantly, what it does not require – i.e., disclosure of PIA violations. Part IV attempts to show that any argument that the mandatory disclosure rule does require disclosure of a PIA violation is not compelling. Part IV will not discuss the propriety of the mandatory disclosure rule in general or go into detail concerning criticisms that commentators and observers have already raised.15

Next, Part V will set out four specific reasons why the mandatory disclosure rule should include the PIA. Part V argues that including the PIA in the mandatory disclosure rule will assist the Government detect violations, will enhance the statute’s deterrent effect, will logically complement the mandatory disclosure rule’s existing list of reportable statutes, and is entirely consistent with the mandatory disclosure rule’s

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15 For an analysis of specific criticisms of the mandatory disclosure rule, see, for example, 73 Fed. Reg. 67,064; ABA MDR Guide, supra note 7, at 19-25; Joseph D. West, Diana G. Richard, Karen L. Manos, and Christyne K. Brennan & Joseph A. Barsolona, Philip Koos, & Richard J. Meene, Contractor Business Ethics Compliance Program & Disclosure Requirements, 09-5 BRIEFING PAPERS 1 (Apr. 2009); Jeremy A. Goldman, New FAR Rule on Compliance Programs and Ethics: A Hidden Assault on the Corporate Attorney-Client Privilege, 39 PUB. CONT. L.J. 71, 73 (2009) (arguing that the “least-clear aspect of the new rule is how the requirements for ‘mandatory disclosure’ . . . will affect the corporate attorney-client privilege”); Mike S. Stanek, Gotta Have Faith: Why the New Contractor Ethics Rules Miss the Mark, 38 PUB. CONT. L.J. 427, 443 (2009) (suggesting that the “mandatory disclosure provisions thus will force contractors to potentially forgo their right to attorney-client privilege” and contravenes “due process rights”); Rand L. Allen & Jon W. Burd, New FAR “Mandatory Disclosure” Rule: Best Practices for Day One Compliance, 90 FED. CONT. REP. (BNA) 443, (Dec. 9, 2008) (noting, for example, that “there is a risk that a contractor may deem evidence not sufficiently “credible” to merit mandatory disclosure, only to have that determination called into question in a later suspension/debarment proceeding”); Marcia G. Madsen & Roger D. Waldron, The FAR Mandatory Disclosure Rule: Is This Supposed to Improve Acquisition?, 90 FED. CONT. REP. (BNA) 419 (Nov. 25, 2008) (arguing that the mandatory disclosure rule has “effectively shifted” “de facto management of the federal acquisition system . . . to agency inspectors general and the Department of Justice” and noting that the rule does not define “credible evidence” or “timely disclosure”).
purpose. This paper concludes by suggesting a seven-word change to the mandatory disclosure rule that would add the Procurement Integrity Act to it.

II. FROM OPERATION ILLWIND TO THE PROCUREMENT INTEGRITY ACT

The United States procurement system survived for almost 200 years without the PIA. Operation Illwind changed that. While the United States has been witness to procurement scandals since the beginning of the republic,\(^\text{16}\) Operation Illwind, which uncovered the rampant exchange of confidential procurement information among Government contracting personnel, contractors, and consultants,\(^\text{17}\) was like no other.\(^\text{18}\) The procurement community is certainly well-versed in what Operation Illwind uncovered, but many of the lessons learned from that time are well worth revisiting. Indeed, “those who cannot remember their past are condemned to repeat it.”\(^\text{19}\)

A. Operation Illwind

1. How it Began

Operation Illwind did not begin with the discovery of massive fraud or even misconduct by a high-level Government official. On the contrary, it started fairly small, with the solicitation of a $20,000 bribe for a $3 million Marine Corps contract – scandalous conduct to be sure, but unlikely worthy of the front page.

\(^{16}\) See generally JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING (2d ed. 1999).


\(^{19}\) GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 284 (2d ed. 1936).
It was September 1986, and a consultant named John Marlowe, a retired Marine Corps major,\(^{20}\) called a defense contractor employee who to this day is known only as Mr. X.\(^{21}\) Marlowe knew Mr. X and his company hoped to secure a communications contract with the Marine Corps.\(^{22}\) Marlowe promised Mr. X his company would win the contract with Marlowe’s help: Marlowe would provide Mr. X with his competitor’s bid information, normally off-limits to someone like Mr. X., for a price of $20,000.\(^{23}\) Mr. X immediately contacted the Naval Investigative Service\(^{24}\) (NIS) and spoke with Agent Steven Fulmer.\(^{25}\)

After listening to Mr. X’s complaint, Fulmer coordinated with a colleague at the Federal Bureau of Investigation (FBI), Special Agent Richard Wade.\(^{26}\) Fulmer and Wade were among many who believed procurement improprieties, such as bribery, were quite common within the Pentagon, though they had never been able to expose that corruption; they thus saw an opportunity.\(^{27}\) Mr. X’s complaint was ideal primarily for one very

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\(^{21}\) Pasztor, supra note 10, at 165; see also BRUCE S. JANSSON, THE SIXTEEN TRILLION DOLLAR MISTAKE 250 (2001) (calling “‘Mr. X,’ a still-anonymous individual”).

\(^{22}\) Id.; see also Pentagon Purchasing Scandal Ends with 10th Firm Convicted, SUN SENTINEL, Jan. 15, 1994, at 3A.


\(^{24}\) Pasztor, supra note 10, at 166–67.


\(^{27}\) Pasztor, supra note 10, at 33, 168–72 (quoting NIS Agent Fulmer as saying, “Everybody suspected criminal activity was going on, but we could never find a way to break it open.”); see also Fortune, supra note 26 (noting that Wade and Fulmer “had been working together for some time on procurement fraud cases with no success”).
important reason: it was fresh. The two agents hoped Marlowe could lead them to other schemes and wrongdoers.

As a result, they had Mr. X re-engage Marlowe to have Marlowe repeat his offer. Mr. X telephoned Marlowe with the agents tape recording the call. Marlowe told Mr. X how Marlowe could ensure Mr. X’s company would win the contract for the “small” $20,000 fee, since he could provide Mr. X with his competitor’s bid information. And to establish his bona fides, Marlowe proceeded to tell Mr. X his very own company’s secret bid numbers on the contract. By revealing Mr. X’s bid numbers, Marlowe proved he did in fact have access to information he should not have.

Soon thereafter, the agents confronted Marlowe about the phone call with Mr. X, visiting him in his office and playing the tape recording of the phone call. The agents, however, wanted more from Marlowe than a confession to procurement misconduct. They wanted him to share with them his knowledge of other procurement improprieties, and more importantly, who else might be involved.

Although the taped phone call was incriminating enough and may have been sufficient by itself to convince Marlowe to cooperate, the agents had additional information they believed they could use to persuade Marlowe to assist them if it was not. At the time of the telephone call with Mr. X, Marlowe reportedly was free on bail

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28 Pasztor, supra note 10, at 167, 171 (quoting Special Agent Wade as saying, “It was never any secret that a live case would be immeasurably better.”).
29 Id. at 167–72; see also Fortune, supra note 26.
30 Pasztor, supra note 10, at 168.
31 Id.
32 Id.
33 Id. at 168.
34 Id.
35 Id. at 174–75.
36 Id. at 32, 168, 172, 175–76; see also Fortune, supra note 26.
following a conviction for child molestation\textsuperscript{37} in a Virginia Circuit Court, as his case was then on appeal.\textsuperscript{38} Thus, the agents had additional leverage over Marlowe: either he could assist them or they would recommend to the prosecuting attorneys that they seek revocation of Marlowe’s bail and have him sent to prison.\textsuperscript{39} In a further interesting twist, Henry Hudson had served as the Commonwealth’s Attorney for the city of Arlington, the office that had prosecuted Marlowe.\textsuperscript{40} The same Henry Hudson had become the United States Attorney for the Eastern District of Virginia by the time Agents Fulmer and Wade had caught Marlowe soliciting the bribe of Mr. X.\textsuperscript{41} Agents Fulmer and Wade had briefed Hudson on the situation, and sought Hudson’s approval to see to what and to whom else Marlowe could lead them.\textsuperscript{42} Hudson agreed,\textsuperscript{43} and Marlowe thereafter readily agreed to help the agents.\textsuperscript{44}

Marlowe first identified Jack Sherman, a Marine Corps contracting officer.\textsuperscript{45} Marlowe had met Sherman while consulting for Whittaker Command & Control Systems on previous procurements.\textsuperscript{46} Knowing that Sherman had accepted bribes in the past, Marlowe was able to approach Sherman with money, provided to him by investigators, to pay Sherman for leaking internal procurement documents to other consultants for

\textsuperscript{37}See \textit{Major Faces Sex Counts}, \textit{WASH. POST}, Mar. 8, 1984, at C2 (reporting that “retired Marine Corps major[,] . . . John P. Marlowe, . . . was charged with two counts of taking indecent liberties” against two minor females, ages 9 and 11); Tucker & Marcus, \textit{supra} note 20 (reporting that Marlowe was convicted in March 1985 of indecent exposure and aggravated sexual battery against two minor females).

\textsuperscript{38}Pasztor, \textit{supra} note 10, at 32, 174–75; \textit{see also} Tucker & Marcus, \textit{supra} note 20 (reporting that “Marlowe did not begin serving his sentence until July 29, 1987, after losing an appeal of his conviction”).

\textsuperscript{39}Pasztor, \textit{supra} note 10, at 175.

\textsuperscript{40}Id. at 19–24, 32.

\textsuperscript{41}Id.

\textsuperscript{42}Id.

\textsuperscript{43}Id.

\textsuperscript{44}Id. at 175; \textit{see also} \textit{FORTUNE}, \textit{supra} note 26.

\textsuperscript{45}Pasztor, \textit{supra} note 10, at 176.

\textsuperscript{46}Id. at 177.
Marlowe would meet Sherman and the two would exchange envelopes containing information and cash. The agents caught it all on videotape. As a result, Sherman became another Government informant.

Marlowe and Sherman led the agents to a number of other consultants and government employees engaged in corrupt practices, including Thomas Muldoon, a Whittaker consultant who had paid Sherman bribes in the past. Muldoon’s clients also included Litton, United Technologies, Unisys, Hazeltine, Honeywell, Emhart, and Gould. Agents put him under video and telephone surveillance and caught him going from contractor to contractor offering his services to obtain “procurement information that was deemed off-limits to contractors.” Muldoon would later say that “the hunt for inside information was universal,” and he too helped the agents identify numerous additional suspects.

Another figure on whom investigators focused was William Parkin, a former Navy contracting official turned consultant. The agents learned about Parkin from Sherman, who knew Parkin only by reputation as someone who had “a lot of good

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47 Id. at 177–78.
48 Id. at 176. One time, when Marlowe suggested that their transactions were illegal, Sherman replied, “We’ll never get caught; we’ll never get caught. I’m sure of it.” Id. at 40.
50 Pasztor, supra note 10, at 177–79.
51 Id. at 180. Ironically, tape recordings of Muldoon’s telephone calls caught him joking with a contractor he was soliciting that his phones “were probably bugged.” Id. at 180–81.
52 Id. at 179.
Marlowe then introduced himself to Parkin, and Parkin did not disappoint as agents captured him selling secrets, bid numbers, and other sensitive procurement information to seventeen different firms. Agents recorded one contractor gratefully acknowledging Parkin’s ability to obtain its competitor’s bid information by calling him a “magic swami.” However, Parkin was not the most loyal of consultants. He often would obtain confidential information and then sell it to competitors on the same contract.

Among his schemes, Parkin would pay a Pentagon contracting official $50 twice a month, by check made out to the nonexistent “Smith’s Maid Service,” then park his car in her parking spot so that she could place pricing documents and confidential contract information in his trunk. Parkin had no illusions as to the illegality of his conduct. The investigator’s wiretaps captured Parkin telling Northrop officials that if law enforcement learned of his activities to help Northrop win government contracts, they would “all go to jail.”

As for contractor personnel, one prominent subject of the investigation was Charles Gardner, a senior executive for Unisys. Gardner candidly admitted to seeking and paying for confidential procurement information. And when he facilitated payments for the information, it resembled something out of a spy movie: payment would occur in

54 Pasztor, supra note 10, at 183.
55 Id. at 180, 192.
56 Id. at 192.
57 Id. at 194.
airport terminals and involve the exchange of money in wads of $15,000–$20,000. As he said, “If I didn’t do it, someone else was going to do it to win the contracts.”

The size of Operation Illwind was impressive, and the extent of wrongdoing disheartening. At its height, the investigation counted “[m]ore than fifteen hundred individuals . . . as subjects.” In addition, investigators placed sixteen of the nation’s top twenty defense contractors under some form of scrutiny. Ultimately, the Department of Justice convicted ninety individuals and companies and collected more than $250 million

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60 Pasztor, supra note 10, at 324.
61 Id. Charles Gardner was sentenced to 32 months’ confinement for his crimes. Robert E. Kessler, “Ill Wind” Sentencing: Ex-Grumman Chief Fined $10,000 in Defense Scandal, NEWSDAY, Apr. 15, 1993, at 6. He eventually agreed to cooperate with investigators, who described him as a “major figure in the investigation,” and his cooperation led to the prosecution and conviction of six additional individuals. Former UNISYS Officials Sentenced in Ill Wind, DEFENSE DAILY, Sep. 18, 1989, at 7.
62 Pasztor, supra note 10, at 318; see also id. at 34 (noting that “[m]ore than 190 individuals were under full-scale investigation”).
63 Id. at 318. The corruption was so widespread that sometimes a company might be the victim in one case and the perpetrator in another. For example, Litton was convicted of paying consultants to obtain the government’s technical specifications and competitors’ bidding information on three contracts, Charles W. Hall, Litton Industries Pleads Guilty, Closing Book on “Ill Wind” Scandal,” WASH. POST, Jan. 15, 1994, at A11, but Litton also was victimized by Loral, which obtained Litton’s proprietary testing methodology for an Air Force contract, see Loral Pleads Guilty, Will Pay Fines, Make Litton Second Source, AEROSPACE DAILY, Dec. 11, 1989, at 396 (noting that Loral officials obtained Litton’s competitive bidding information for an Air Force contract regarding an advance radar warning receiver); see also Litton Systems, Inc., B-234060, May 12, 1989, 89-1 CPD ¶ 450 (sustaining Litton’s protest in light of Loral’s improper receipt of Litton’s methodology for testing its proposed receiver).

By way of illustration of the types of crimes companies were convicted of and the penalties they received, Unisys Corp. paid $190 million in fines “for having bribed its way to hundreds of millions of dollars worth of defense contracts.” Robert F. Howe, Unisys to Pay Record Fine in Defense Fraud; Ill Wind Probe Nets Sixth Corporation, WASH. POST, Sep. 7, 1991 at A1 (explaining further that Unisys obtained “information and influence . . . to give the company an edge against competitors for a Marine air traffic control system, portions of the Navy’s sophisticated Aegis antiair warfare system, several Air Force research projects and other defense systems”). LTV pleaded guilty to bribing government officials to receive confidential bidding information related to a $32 million Navy contract to provide communication systems linking helicopters and ships. Robert F. Howe, LTV Pleads Guilty in “Ill Wind” Probe, Former Aerospace Unit Won Contract Illegally, WASH. POST, May 19, 1993, at F1 (May 19, 1993). Once LTV received the information, it was able to lower its bid and consequently won the contract. Id. United Technologies pleaded guilty to bribing government officials to obtain its competitors’ bidding information in two contracts, one to obtain a Marine contract for a radar command and ground control system worth $100 million to $150 million, and one to win a Navy contract for jet engines. Robert F. Howe, United Technologies to Pay $6 Million in “Ill Wind” Plea Pact, WASH. POST, Aug. 29, 1992, at A6. Grumman settled the Government’s claims of improper influence peddling for $20 million, and also agreed to institute new contracting, accounting, and personnel policies. Grumman Pays $20 Million to Settle Ill Wind Claims, DEFENSE DAILY, Nov. 24, 1993.
in fines.\textsuperscript{64} The individuals who were convicted as a result of Operation Illwind included Melvyn Paisley, an assistant Secretary of the Navy handpicked by then-Secretary of the Navy John Lehman to be the Navy’s procurement czar, James Gaines, a deputy assistant Navy secretary, and Victor Cohen, the Assistant Air Force Secretary of Acquisition for Tactical Systems.\textsuperscript{65} And the list of companies convicted in the aftermath of Operation Illwind was a virtual who’s who of government contractors: Litton, Boeing, United Technologies Corp., Loral Corp., LTV Aerospace and Defense Co., Grumman Corp, Hughes, Unisys, Raytheon, Teledyne, Cubic, Hazeltine, and Whittaker.\textsuperscript{66} As for John Marlowe, the man who started it all? He was never charged for his alleged bribe of Mr. X.\textsuperscript{67}

2. Lessons Learned

Operation Illwind has been the subject of numerous task forces, studies, and congressional hearings, which produced numerous lessons learned that, like the investigation itself, are undoubtedly well-known. But at least four bear emphasizing here, particularly because they continue to be relevant today.

\textsuperscript{64} Bednar, \textit{supra} note 18, at 289 (asserting that “[n]inety companies and individuals were ultimately convicted”).

\textsuperscript{65} See Pasztor, \textit{supra} note 10, at 34–35; Profile of Boeing, \textit{available at} ttp://www.endgame.org/boeing.html #MilitaryScandals (hereinafter Boeing profile). Paisley was sentenced to four years’ confinement for accepting more than $3 million from Martin Marietta Corp. and Unisys Corp. in exchange for ensuring the Navy awarded contracts to them. \textit{See Milestones, TIME,} Oct. 28, 1991, at 89. Also, after he left the Navy to work as a consultant, Paisley took secret Navy documents and shared them with United Technologies Corp. in its pursuit of a Navy jet-engine contract. \textit{See id.} Gaines was convicted of accepting gifts – theater tickets, tires, and a lithograph valued at $1,300 – in exchange for confidential information about defense contracts. Robert F. Howe, \textit{Navy Ex-Official Convicted in 'Ill Wind'; Gaines Found to Have Taken Gifts in Return for Procurement Data,} \textit{WASH. POST,} Mar. 8, 1992, at A11. Cohen was sentenced to 33 months’ confinement and fined $10,000 for accepting hotel rooms and money in exchange for providing confidential information to a Unisys consultant. Robert F. Howe, \textit{Ex-official at Pentagon is Sentenced,} \textit{WASH. POST,} Dec. 7, 1991, at 10.

\textsuperscript{66} See Boeing profile, \textit{supra} note 65.

\textsuperscript{67} Fortune, \textit{supra} note 26 (noting Marlowe, the original target turned informer, was never charged); see also Pasztor, \textit{supra} note 10, at 185 (noting Marlowe was sent to prison for the molestation charge and “was never charged for the attempted bribery scheme involving Mr. X”). Marlowe did, however, serve one-third of his six-year sentence for his state court conviction. \textit{Id.} Henry Hudson wrote two letters of recommendation on his behalf to the Virginia Parole Board. \textit{Id.}
First, both the Government and industry need to establish and maintain effective internal controls to minimize improper conduct.\textsuperscript{68} Hazeltine and Teledyne, two large contractors targeted by investigators during Operation Illwind, which ultimately pleaded guilty to obtaining confidential procurement information, nevertheless claimed that the information “while technically not public, is routinely shared with companies.”\textsuperscript{69} This statement reflects an unacceptable lack of respect for the procurement process, both by Government procurement professionals who “routinely” shared such sensitive information and industry personnel who accepted it.

Does this culture still exist today, twenty years later? To a certain degree, yes, although perhaps not to such a brazen extent. Recently the Army discovered that its program director for a technology center at Fort Belvoir, Virginia, had disclosed to Catherine Campbell, a local contractor employee, the Army’s cost estimates for an upcoming support contract.\textsuperscript{70} Campbell’s company ultimately won the contract, worth approximately $6 million.\textsuperscript{71} The Army’s program director, George Raymond, later acknowledged sharing the confidential cost estimates, but said that he did so to help Campbell understand the procurement process.\textsuperscript{72} Tellingly, however, he explained that the procurement system depends on close relationships between the Government and

\textsuperscript{68} U.S. GOV’T ACCOUNTABILITY OFFICE, DEFENSE WEAPONS SYSTEMS ACQUISITION 43 (1992) (hereinafter GAO Weapons Acquisition report); see also THE PRESIDENT’S BLUE RIBBON COMM’N ON DOD MGMT., A QUEST FOR EXCELLENCE: A FINAL REPORT xxix (1986) (hereinafter Blue Ribbon report) (stating that “[t]o assure that their houses are in order, defense contractors must promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement. They must also develop and implement internal controls to monitor these codes of ethics and sensitive aspects of contract compliance.”); see also Cracking Down, supra note 13, at 11 (stating that “the common denominator of procurement fraud is vulnerability in corporate controls”).


\textsuperscript{71} Id.

\textsuperscript{72} Id.
contractors, such that the lines between professional distance and personal closeness have “started to blur and partnerships [have] formed.” Raymond, as a 61-year-old retired Army officer, was not new to government procurement. Nevertheless, he described an atmosphere that enabled and seemingly tolerated improper procurement conduct. Indeed, he explained that “[i]t goes on all the time. There’s nothing wrong with it, in my view. It was the way it was supposed to work.”

While George Raymond’s experience may not represent that of the majority of procurement professionals, it probably does not stand alone as an isolated incident either. According to a recent U.S. Government Accountability Office (GAO) report, ethics counselors do not consistently brief employees regarding their ethical obligations concerning interacting with Government contractors. Likewise, one commentator has noted that “not all companies doing business with the Government choose to make ethics a company priority.” In the absence of an insistence on ethical conduct, an atmosphere conducive to trading confidential procurement information will most likely exist. One way to minimize such an atmosphere, therefore, might be a rule requiring the disclosure of instances of such trading of confidential information.

A second important lesson learned from Operation Illwind is the potential danger that can arise from the use of consultants. Consultants can work for contractors, the Government, or both. Contractors might hire a consultant (which can be either an

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73 Id.
74 Id.
75 Id.
77 Kathuria, supra note 7, at 806. Predictably, a major reason why contractors fail to invest sufficiently in an internal compliance program lies in costs: “We can’t afford an expensive overhead function. . . . We must keep costs down to be competitive.” See id. at 807 & n.20 (quoting John S. Pachter, The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting, 80 Fed. Cont. Rep. (BNA) 319, 320 (Oct. 7, 2003)).
individual or a firm) to communicate with or attempt to influence Government officials regarding a particular project, or to obtain advice and assistance on company projects. The Government may require a consultant for a variety of reasons, to include obtaining advice regarding developments in industry, obtaining the opinions or special knowledge of specialists and experts, and developing solutions to complex issues. Congress in fact has authorized Government agencies to employ consultants in recognition of the need for specialists and experts for short-term projects. As Operation Illwind showed, however, consultants were major players in the exchange of inside information. So while they can provide valuable expertise and knowledge, there must be rules governing the use of consultants and how to manage them so as to prevent situations where contractors and Government personnel can abuse them.

Indeed, GAO conducted one study that showed some disturbing results. It found occasions where a consultant worked for both the Defense Department and a contractor at the same time. It also found occasions involving consultants who provided assistance to the Government on a particular matter and who would then subsequently consult for

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78 See U.S. Gov’t Accountability Office, Consulting Services: Role and Use in Acquiring Three Weapon Systems 23-24 (1990) (hereinafter GAO Consulting Services report) (reporting to Congress at Congress’ request of how consulting services are used in acquiring weapon systems).
79 See generally FAR 37.203(b).
82 Bednar supra note 18, at 289 (explaining that Operation Ill Wind showed Pentagon procurement executives stealing companies’ information and then “sell[ing] it to corrupt ‘consultants’ outside the Pentagon who, in turn, would resell that precious procurement information to defense contractors”). Reports concluded that “[c]onsultants were the heart of these networks.” Peter Grier, Taking Pentagon to the Cleaners, Christian Science Monitor, Mar. 30, 1989, at 1; see also 134 Cong. Rec. 32156 (Oct. 20, 1988) (providing that the PIA was “intended to break the back of the old-boy network where information and favors are given to contractors, often via consultant intermediaries”).
83 See GAO Consulting Services report, supra note 78, at 8 (noting four uses of consultants: 1. providing special knowledge or skills and information, advice, or recommendations; 2. providing formal assessments of complex issues; 3. providing training, advice, or direct assistance to ensure the more efficient or effective operation of management systems; and 4. providing engineering and technical services to ensure the more efficient or effective operation of weapon systems, equipment, components, and related software).
contractors regarding the very same matter. In sum, the report noted that the Department of Defense “did not accurately identify or report its use of consulting services. . . .

[Thus,] [w]ithout improvements in defining consultants and other internal control weaknesses, [the Department of Defense] and Congress will never have accurate information on how much [the Department of Defense] is relying on consulting services.”\(^84\) The Government and industry still depend on consultants to this day,\(^85\) and problems regarding their oversight and preventing conflicts of interest will continue to persist.\(^86\) Certainly a strong internal control system will contribute greatly to minimizing these problems.

A third lesson from Operation Illwind is the revolving door through which former Government and contractor employees frequently pass.\(^87\) The revolving door can yield undeniable benefits. As President John F. Kennedy once said, “we need to draw upon America’s entire reservoir of talent and skill to help conduct our generation’s most important business – the public business.”\(^88\) Nevertheless, the revolving door also can lead individuals to participate in illegal conduct as well, and sadly, no law can adequately

\(^84\) Id. at 3–4. Contractors also encountered problems working with consultants, particularly consultants’ loyalty. As one Operation Illwind subject complained, “You knew damn well they were working for three other companies at the same time.” Pasztor, supra note 10, at 324; see also Grier, supra note 82, at 1 (noting that “[c]ourt documents show that these [consultants], often retired military officials, operated almost like pirate gangs, passing information among themselves and sometimes double-crossing clients by trying to sell the same data to competing companies”).

\(^85\) Claude P. Goddard, Jr., Business Ethics in Government Contracting-Part I, 03-06 BRIEFING PAPERS 1, 12 (May 2003).

\(^86\) See GAO Ethics report, supra note 76, at 7–8.

\(^87\) As Pasztor recounts, groups formed consisting of industry professionals and government officials, involving golf junkets, fishing, hunting, partying, funded by contractors and using their planes. Pasztor, supra note 10, at 205. “It was no secret that programs were plugged and friendships were cemented on these excursions. . . . The line between personal and professional relationships became so blurred that it lost all relevance. . . . It all but guaranteed an industry job whenever they opted to leave government service.” Id.

prevent every instance of misconduct that can result from this phenomenon. For example, even “[a] prohibition against misuse of information, as it applies to the individual, treads dangerously near the legitimate use of know-how and experience acquired in a government post.” ⁸⁹ One Illwind subject, Richard Fowler, personified the revolving door problem.

Fowler worked as an Air Force financial analyst before accepting a position with Boeing. ⁹⁰ As a former government employee, he developed numerous relationships and capitalized on them by receiving information and knowledge he should not have. Based on his prior Air Force experience and contacts, he quickly became known as the “mother lode” for confidential Pentagon information. ⁹¹ He built a repository of internal Government planning and decision memos, budget projections, and other confidential procurement information that was “intended to remain from . . . inception, strictly off limits to industry.” ⁹² Fowler was so well-connected that he obtained a copy of the Reagan Administration’s highly classified initial “Star Wars” memo dated April 24, 1985 within a few weeks of it being written. ⁹³ As a further indication of the lax internal controls that existed at the time, “[o]ne Air Force lieutenant colonel . . . would slide the in-basket on his desk to [Fowler] during office chats. ‘See if there’s anything you want in there. . . . Just put it in a stack and I’ll make copies for you.’” ⁹⁴

Today, private industry counts innumerable former Government employees among its ranks, all with priceless knowledge of the Government’s needs and ways of

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⁹⁰ Pasztor, supra note 10, at 205–08.
⁹¹ Id. at 212.
⁹² Id. at 208–10 (noting further that over the course of eight years, Fowler amassed over 1,300 such documents); see also United States v. Fowler, 932 F.2d 306, 309 (4th Cir. 1991).
⁹³ Pasztor, supra note 10, at 210.
⁹⁴ Id. at 210.
doing business, as well as contacts with influential personnel. Their knowledge and
contacts are valuable attributes attractive to contractors. Preventing abuse of that
knowledge and those contacts, however, will present a constant challenge for the
procurement system. As such, the employment of former Government employees will be
an issue to which the procurement community will forever need to be sensitive. More
importantly, it is an issue to which the procurement community may need to constantly
adapt, including implementing new rules and procedures to ensure the revolving door
does not lead to the disclosure or receipt of confidential procurement information.
Perhaps a rule that requires disclosure of instances when confidential procurement
information is improperly exchanged is such an adaptation.

The fourth key lesson from Operation Illwind is also an obvious one: the massive
amounts of money involved with Government procurement unfortunately will always lure the less scrupulous, tempt the desperate, and blind the overzealous. GAO
specifically noted in the aftermath of Operation Illwind that the “high stakes” of weapons acquisition in particular “provided the breeding ground for the investigation and charges of influence-peddling known as ‘Ill Wind.’”95 Not coincidentally, Operation Illwind broke at a time of unprecedented Government procurement concentrated on defense acquisitions against the backdrop of the Soviet military threat. During the 1980s, defense spending cost approximately $2 trillion.96 Defense spending continues to account for a majority of Government procurement, increasing from $208 billion in fiscal year 2001 to

95 GAO Weapons Acquisition report, supra note 68, at 6, 10 (noting also that the “big money” involved will create opportunities for fraud). During the 1980s, defense spending cost approximately $2 trillion. See Kathryn Jones, Reagan’s Huge Military Buildup Poses Daunting Challenge for Bush, DALLAS MORNING NEWS, Jan. 22, 1989, at 1A.
96 See id.
$527 billion in fiscal year 2009.\textsuperscript{97} Military procurement has accounted for almost 72% of all federal procurement, and the Government has contracted with approximately 85,000 private companies for defense-related goods and services.\textsuperscript{98} So, the “high stakes” involved during Operation Illwind are very much alive and well today, and create many of the same opportunities for procurement irregularities.\textsuperscript{99} While perhaps an obvious point, it is one that cannot be overemphasized.

3. Conclusion

Notwithstanding its size and results, Operation Illwind obviously did not capture and punish every procurement impropriety that occurred within the federal government. It could not. First, no investigation can ever catch every wrongdoing. Second, Operation Illwind focused on only defense procurement. Defense procurement does constitute the bulk of Government procurement,\textsuperscript{100} but other federal executive agencies engage in procurement as well. And those agencies are equally susceptible to procurement irregularities.\textsuperscript{101}

Moreover, despite the success of Operation Illwind, it would be naïve to believe that the type of conduct that the investigation discovered does not occur today, 20 years later. Whether it is occurring on the same scale, however, is another question. Since many of the circumstances that gave rise to the conduct during the 1980s exist today as

\textsuperscript{97} See http://www.fedspending.org/fpds/chart_total.php.
\textsuperscript{101} See, e.g., infra notes 160-174 and accompanying text (discussing two cases involving PIA violations in non-defense procurements).
well, it is imperative that the procurement community remain vigilant in addressing those circumstances so that the conduct does not repeat itself to the same extent. The less scrupulous will always be looking for new and different ways to take advantage of circumstances allowing them improperly benefit from exchanging confidential procurement information. As such, the procurement community as a whole must look for new and different ways to detect, deter, and punish those who seek to do so. One tool at their disposal is the Procurement Integrity Act, perhaps Operation Illwind’s most important legacy.

**B. The Procurement Integrity Act**

In representing Congress’ response to Operation Illwind, the Procurement Integrity Act was a fairly immediate one. Operation Illwind went public June 14, 1988, when agents executed more than forty search warrants nationwide. Five months later, in November, Congress passed the PIA. It did so as an amendment to the Office of Federal Procurement Policy Act, a statute that at the time was due for new funding authorization. So sure was Congress that the procurement system required new legislation that it did not subject the amendments to “committee hearings, or agency and

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102 134 CONG. REC. 32,155, 32,156 (1988) (statement of Sen. Glenn) (stating that the PIA was intended to “correct the seedy trade of favors and information which [had] fueled the latest scandal [Operation Illwind]”); see also 134 CONG. REC. 23590 (Sept. 13, 1988) (statement of Rep. Horton) (noting that the PIA is intended to combat “procurement fraud and abuses”); H.R. REP. No. 100-911, 100th Cong., 2d Sess. 20 (Sept. 9, 1988) (stating PIA’s purpose is to abate “insider trading of sensitive procurement information”).

103 Ruth Marcus & Caryle Murphy, ‘Ill Wind’: A Scandal Overblown?, WASH. POST, Dec. 27, 1988, at A1; see also In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 577 (8th Cir. 1988) (listing the locations that were the subject of the search warrants, which included the offices and residences of Government officials and contractor personnel).

public comment.” Instead, the House and Senate agreed to the amendments’ language as “an eleventh hour compromise . . . prior to adjournment of the legislative session.”

Congress did so to restore the public’s confidence in public procurement. Although Congress has since amended the original version of the statute, the Procurement Integrity Act still targets three areas: 1) the sharing and receiving of confidential procurement information; 2) employment discussions between contractors and agency officials; and 3) post-government employment opportunities with a contractor.

First, the statute prohibits “any person” (i.e., any present or former United States official) from knowingly disclosing confidential bid, proposal, or source selection information prior to the award of a contract for a procurement concerning that information. It also prohibits “any person” from knowingly obtaining that type of information.

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105 Pikes Peak Family Housing, LLC, 40 Fed. Cl. at 681 n.14 (citing 134 CONG. REC. 31690 (Oct. 19, 1988) (statement of Sen. Levin)).
106 Id.
108 The PIA has been amended several times since its 1988 enactment. The most significant amendment occurred in 1996 as part of the Clinger-Cohen Act, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-65 (1996). Before the Clinger-Cohen Act, the PIA applied to “competing contractors” and “procurement officials” and applied to all procurements (including sole sourcing). Also, it contained prohibitions on giving and receiving gratuities and soliciting confidential procurement information, and required contractors and contracting officers to certify in writing that no known violation of the Act had occurred during the procurement, or if one had, it had been disclosed. See generally Pub. L. No. 100-679, § 27, 102 Stat. 4063 (1988). For a more detailed overview of the original statute and criticisms of it, see generally Elizabeth Dietrich, The Potential for Criminal Liability in Government Contracting: A Closer Look at the Procurement Integrity Act, 34 PUB. CONT. L.J. 521, 524-25, 531-35 (2005); Sharon A. Donaldson, Section 6 of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?, 20 CUMB. L. REV. 421, 438-44 (1990); Greenspun, supra note 17.
109 41 U.S.C. § 423(a); FAR 3.104-3(a). The statute protects: cost or pricing data; indirect costs and direct labor rates; proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; information marked by the contractor as “contractor bid or proposal information”; proposed costs or prices submitted in response to a Federal agency solicitation; source selection plans; technical evaluation plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; rankings of bids, proposals, or competitors; the reports and evaluations of source selection panels, boards, or advisory councils; other information marked as “source selection information.” See 41 U.S.C. § 423(f)(1)-(2); FAR 3.104-1.
information.\textsuperscript{110} The PIA does, however, contain a savings provision describing six circumstances under which the prohibition against disclosing or receiving confidential information does not apply.\textsuperscript{111}

Second, the statute requires agency officials to report, to a supervisor and to an ethics official, any job offers from contractors competing for a contract with which the official is personally and substantially involved.\textsuperscript{112} The affected agency official then must either reject the offer or disqualify himself from further participation in the procurement.\textsuperscript{113} Furthermore, the PIA prohibits contractors from engaging in job discussions with an agency official if they know that the agency official has not reported the discussions and/or disqualified himself.\textsuperscript{114}

Finally, the PIA limits some Government officials’ post-government employment opportunities. The statute provides that the procuring contracting officer, source selection authority, member of the source selection evaluation board, chief of a financial or technical evaluation team for the procurement, and the program manager, deputy program manager, or administrative contracting officer for the contract may not accept compensation from the contractor for one year.\textsuperscript{115} The same prohibition applies to those who personally decide to award a subcontract, contract, modification, or task or delivery order exceeding $10 million to the contractor; to establish overhead rates for contracts exceeding $10 million to the contractor; to approve the issuance of contract payments

\textsuperscript{110} 41 U.S.C. § 423(b), FAR 3.104-3(b).
\textsuperscript{111} 41 U.S.C. § 423(h)(1)-(6) (exempting disclosures authorized by regulation, disclosures by contractors of its own information, disclosures by an agency after it has cancelled a procurement, meetings between agency and contractor officials, or disclosures to Congress, the Comptroller General, another Federal agency, or a federal agency inspector general). \textit{See also} FAR 3.104-4(f).
\textsuperscript{112} 41 U.S.C. § 423(c)(1)(A); FAR 3.104-3(c).
\textsuperscript{113} 41 U.S.C. § 423(c)(1)(B); FAR 3.104-3(c)(1)(ii).
\textsuperscript{114} 41 U.S.C. § 423(c)(4); FAR 3.104-8(b).
\textsuperscript{115} 41 U.S.C. § 423(d)(1)(A)-(B); FAR 3.104-3(d)(1)(i)-(ii).
exceeding $10 million to the contractor; or to pay or settle a claim exceeding $10 million to the contractor.\textsuperscript{116} Despite the PIA’s limitation on post-government employment, it does not forbid a former agency official from working for a division or affiliate of the contractor, so long as that division or affiliate is not producing the same or similar products or services as the entity of the contractor involved in the $10+ million procurement.\textsuperscript{117}

Those who violate the PIA face a range of potential administrative, contractual, civil, and criminal penalties.\textsuperscript{118} The criminal penalties are a maximum of five years of confinement and/or a fine.\textsuperscript{119} For an individual, the civil penalties are $50,000 for each violation “plus twice the amount of compensation . . . received or offered for the prohibited conduct.”\textsuperscript{120} For an organization, the civil penalties are $500,000 for each violation, “plus twice the amount of compensation . . . received or offered for the prohibited conduct.”\textsuperscript{121} Additionally, the Government may cancel a procurement, rescind a contract, suspend or debar a contractor, or take adverse personnel action upon discovering a violation of the PIA.\textsuperscript{122}

Contractors believing that they have lost a Government contract to a competitor because the competitor obtained confidential procurement information in violation of the PIA may protest the procuring agency’s decision to award the contract.\textsuperscript{123} The aggrieved

\textsuperscript{117} 41 U.S.C. § 423(d)(2); FAR 3.104-3(d)(3).
\textsuperscript{118} 41 U.S.C. § 423(e); FAR 3.104-7; FAR 3.104-8. However, the criminal penalties exist only for those who knowingly receive or disclose confidential procurement information, and only then if the knowing disclosure or receipt was done for the purpose of getting something of value or to give or obtain a competitive advantage. See 41 U.S.C. § 423(e)(1)(A)-(B).
\textsuperscript{119} Id. § 423(e)(1).
\textsuperscript{120} Id. § 423(e)(2).
\textsuperscript{121} Id.
\textsuperscript{122} Id. § 423(e)(3)(A)(i)-(iv).
\textsuperscript{123} Id. § 423(g).
contractor may seek relief from the awarding agency, GAO, or the Court of Federal Claims. In order to protest a contract award before the GAO, the protesting contractor must first report the alleged PIA violation to the awarding agency within 14 days of discovering the violation. This 14-day requirement does not apply at the Court of Federal Claims.

As a result of the PIA, Congress improved upon the “confusing, complex, and unclear system of regulations governing disclosure of procurement information that predated [the PIA].” But Congress did much more than that. The PIA represented the first procurement-specific anti-corruption statute that penalized the exchange of confidential procurement information. As such, the PIA broke new ground. Indeed, most would agree that “bribery is the primary form of corruption in the procurement process.” However, “there are many more intricate corruption schemes in which government and private actors participate.” The PIA reflects this reality, and

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125 41 U.S.C. § 423(g).
126 See McKing Consulting Corp. v. United States, 78 Fed. Cl. 715, 722 n.12 (Fed. Cl. 2007).
127 Jamie S. Gorelick & Paul F. Enzinna, Restrictions on the Release of Government Information, 20 PUB. CONT. L.J. 427, 443–44 (1991). However, the PIA has not removed all doubt regarding what constitutes confidential procurement information. In Synetics, Inc. v. United States, 45 Fed. Cl. 1 (1999), for example, an incumbent contractor alleged that its competitor had wrongfully obtained Synetics’ employees’ salary, bonus, position, background, and availability information, as well as a “keepers list,” a document containing the names and positions of twenty-eight of the incumbent’s employees with an opinion on their work habits and qualifications. Id. at 14. Finding no PIA violation, the court concluded that the compensation information did not meet the definition of contractor bid or proposal information and that the “keepers list” appeared to have been generally available. Id.
129 Anne Janet DeAses, Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process, 34 PUB. CONT. L.J. 553, 554–55 (2005); see also Harold C. Petrowitz, Conflict of Interest in Federal Procurement, 29 DUKE L.J. 196, 196–97 & n.2 (1964) (explaining that bribery is “such a flagrant violation of public trust that it was understandably the first aspect of official corruption “to be positively outlawed,” and noting the first general bribery statute to have been enacted in 1853); BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 4 (1964) (stating that in terms of official corruption, “[a]t one end of the spectrum . . . [is] bribery”).
130 DeAses, supra note 129, at 555.
accordingly, as a procurement-specific law, is the mark of a maturing procurement system.

Furthermore, the significance of the PIA should be patent. A system that allows competing contractors to obtain a competitive advantage by receiving, for instance, their competitor’s proprietary or pricing information or the Government’s evaluations of each proposal, ultimately discourages honest contractors from participating in the process.\footnote{131} As a result of this decline in competition, the Government will not receive the best value for its purchases.\footnote{132} The Department of Justice therefore accurately characterized the PIA as an “important statute,” as it serves to strengthen the competitive process of Government procurement.

III. CRIMINAL PROSECUTIONS AND BID PROTESTS INVOLVING THE PROCUREMENT INTEGRITY ACT

Although the Department of Justice called the Procurement Integrity Act an “important statute,” it also called it an “underused” one as well.\footnote{133} Judging by the number of reported criminal prosecutions and published bid protests filed under the PIA, since those actions are most capable of being known,\footnote{134} the Department of Justice may be

\footnote{132} Troff, supra note 124, at 121.
\footnote{133} See NPFTF White Paper, supra note 3.
\footnote{134} As noted earlier, the PIA provides for a range of remedies other than by criminal prosecution or bid protest. See supra notes 118-122 and accompanying text. However, considering the types of remedies, the precise number of cases involving the PIA is likely unknowable.

For instance, the Government does not make available the number of personnel actions taken or contracts it has cancelled as a result of PIA violations, nor does it typically publish the specific basis for suspension and debarment decisions. (Although the Excluded Parties List System shows which contractors and individuals have been suspended or debarred, it does not provide the specific basis. See generally \url{https://www.epls.gov/}) Moreover, although the Department of Justice notes the number of civil cases it prosecutes each year by general category, such as fraud, it does not identify which statutes in particular those cases involved.

However, even a cursory internet search reveals that the Department of Justice has obtained civil settlements under the PIA. For example, the first “significant” civil settlement occurred in 1995, when a government contractor, Management Sciences for Health, Inc., paid $400,000 to settle a PIA violation for
correct. So far it appears that the Department of Justice has prosecuted six criminal violations of the PIA. The GAO and the Court of Federal Claims have reviewed published protests alleging PIA violations. Thus, over the past twenty years, the procurement community has seen a criminal prosecution stemming from an alleged PIA violation approximately once every three years, and seven bid protests each year.

Although numbers tell only a part of the story – indeed, the few reported prosecutions and published bid protests could be the result of the resolution of PIA violations under the PIA’s other remedies – these numbers do not indicate frequent use of the PIA.

hiring a former government employee. U.S. to Receive $400,000 From Newton Company in First Major Civil Case Under Federal Integrity Law, U.S. Attorney Announces, PR NEWSWIRE (Oct. 3, 1995). The employee, a procurement official for the U.S. Agency for International Development (USAID) who was responsible for a multi-million dollar health care procurement, reportedly negotiated for employment with Management Sciences for Health, which was competing for the contract during the selection phase of the procurement without informing USAID or recusing himself. USAID predicted the result “will put some real bite into the Procurement Integrity Act.”

In 1996, the Department of Justice sought civil monetary penalties against Smith & Nephew Richards under the PIA for allegedly paying for trips, lodging, meals, entertainment, gratuities and/or other things of value to physicians and procurement officials at Brooke Army Medical Center. See United States v. Smith & Nephew Richards, 1997 U.S. Dist. LEXIS 22939 (W.D. Tex. Mar. 7, 1997). According to PACER, the case was dismissed because the parties settled the dispute. The terms of the settlement were not disclosed, or available on the Department of Justice’s website.

More recently, the Department of Justice settled with Boeing for multiple instances of procurement misconduct, to include Boeing’s missteps in the Air Force’s Evolved Expendable Launch Vehicles contract. See Settlement Agreement Between the United States of America and The Boeing Company at ¶ 1, available at http://www.corporatecrimereporter.com/documents/boeing_002.pdf; Press Release, U.S. Dep’t of Justice, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin (June 25, 2003) (noting that a former Lockheed Martin employee, Kenneth Branch, allegedly brought Lockheed’s proprietary documents with him when he went to work for Boeing); see Testimony of Paul J. McNulty before the Senate Armed Services Committee, Aug. 1, 2006, at 7; Major Jeffrey Branstetter, Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement, 34 PUB. CONT. L.J. 443 (2005). The terms of that agreement showed that the PIA was implicated by Boeing employees possessing Lockheed Martin’s confidential information. Id. ¶ 1 (suggesting that Boeing obtained Lockheed Martin’s information by hiring a former employee). The civil agreement provided that Boeing would pay $565 million in civil fines for a variety of statutes, but did not break down what part of that amount captured any PIA violations.


135 See infra notes 139-140 and accompanying text.
136 See infra notes 205-209 and accompanying text.
Nevertheless, a review of the reported cases may offer some insights as to why this “important statute” should be made a part of the mandatory disclosure rule.

A. Criminal Prosecutions

Congress’ almost immediate reaction to Operation Illwind, passing the PIA within five months of learning about the investigation and well before any prosecutions began, reflected a certain sense of urgency to cure a present evil. The Department of Justice’s response to the PIA, on the other hand, does not suggest a similar sense of urgency. The “first-ever trial of criminal PIA charges occurred in March 2003,” or approximately fifteen years after it became an available as a tool for law enforcement.137 Interestingly, five years earlier, the American Bar Association’s study on Criminal Code reform recognized that “[s]everal recently enacted federal statutes, championed by many because they have a claimed impact on crime, have hardly been used at all.”138 Whether by design or not, its report accurately reflected the PIA.

Figure 1: Number of PIA Convictions from 1998-2009

1. Methodology

The Department of Justice’s prosecution statistics do not specify the number of PIA prosecutions it has conducted. Accordingly, identifying its criminal enforcement activity of the PIA required a search of the Transactional Records Access Clearinghouse

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137 Thomas S. McConville, The Procurement Integrity Act: A Little-Used but Effective Statute in Criminal Prosecutions, PROCUREMENT LAW., Fall 2007, at 6 (discussing the prosecution of Richard Carlisle and Ronald Parrish); see also Department of Defense Standards of Conduct Office, Advisory No. 04-05 (May 13, 2004), available at http://www.dod.mil/dodgc-defense_ethics/2004_Advisories/ADV_0405.htm (hereinafter SOCO Advisory) (confirming that the prosecution of Parrish and Moran “for criminal violations of the PIA are the first obtained in the nation”).

TRAC, a database maintained by Syracuse University, for all records citing the PIA, 41 U.S.C. § 423.

2. The cases

i. United States v. Parrish

The first PIA prosecution, United States v. Parrish, concerned a scheme involving three individuals, Richard J. Moran, Richard Carlisle, and Ronald Parrish. Moran ultimately pleaded guilty to conspiracy and bribery charges. Carlisle and Parrish, on the other hand, were accused of a number of crimes, including the PIA, and pleaded not guilty. In fact, of the five convictions obtained by the Department of Justice, this first case involved the only not guilty plea.

139 See http://trac.syr.edu. TRAC’s mission is to provide the American people—and institutions of oversight such as Congress, news organizations, public interest groups, businesses, scholars and lawyers—with comprehensive information about staffing, spending, and enforcement activities of the federal government. An essential step in the process of providing this information to the public is TRAC’s systematic and informed use of the Freedom of Information Act (FOIA). TRAC continuously uses [FOIA] to obtain new data about government enforcement and regulatory activities. http://trac.syr.edu/aboutTRACgeneral.html.

The Project on Government Oversight (POGO) uses TRAC when analyzing trends with respect to particular criminal statutes. See Email from POGO General Counsel Scott Amey, Sept. 29, 2009 (on file with the author) (noting POGO used TRAC to “review conflict of interest and ethics violations from 18 USC [sic]”). According to the Public Integrity Center, “the Syracuse University-based Transactional Records Access Clearinghouse [is] a respected 20-year-old research center focusing on federal law enforcement staffing and spending.” See Nick Schwellenbach, Fraud Cases Fell While Pentagon Contracts Surged (Apr. 1, 2009), available at http://www.publicintegrity.org/articles/entry/1243.

140 From 1998 through the present, TRAC showed sixteen referrals, five convictions, and one acquittal. Moreover, a combined search of the Department of Justice’s website and LEXIS-NEXIS, using the search terms “Procurement Integrity Act,” “PIA” and “41 U.S.C. 423,” returned records containing the facts and dispositions of these five cases.

In the case, Army Colonel Moran and his Contract Support Division chief Parrish were stationed in Korea at United States Army Contract Command. In 2001, the command sought to award a contract for computer services. The contract was valued at $217,000. Carlisle worked for American Management Services (AMS), the incumbent.

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In July 2001, AMS submitted a bid, which included its cost and pricing information, to secure the follow-on contract. AMS also placed a legend on its proposal stating that the Government should not disclose its information. Parrish reviewed all of the proposed bids and forwarded AMS’s bid to Carlisle, who by that time owned his own company, Carlisle Consulting, and in September 2001, Carlisle Consulting submitted its own bid. Apparently, Carlisle had cut and pasted AMS’s proposal onto his, since both contained the same typographical errors.

Parrish had received training about the PIA. Although Parrish admitted at trial that he knew giving Carlisle the information conveyed a competitive advantage, his and Carlisle’s primary defenses were that AMS had already been rejected and that Carlisle did not obtain a benefit since he already knew how to perform the contract. The jury did not accept that defense, the defendants were found guilty, and Carlisle received a...

\[142\] McConville, supra note 137, at 4.
\[143\] Id.
\[144\] Id.
\[145\] Id.
\[146\] Id.
\[147\] Id.
\[148\] Id.
\[149\] Id.
\[150\] Id.
\[151\] Id.
prison sentence of twenty-four months, and Parrish eighteen.\textsuperscript{152} The facts did not indicate that money exchanged hands between Carlisle and Parrish.

ii. \textit{United States v. Lessner}

In September 2005, a federal district court judge convicted Barbara Lessner, consistent with her pleas, of wire fraud, obstruction of justice, and violating the PIA.\textsuperscript{153} Her path to prison began at a bar and with her meeting Scott Watanyar, a man with whom she would soon develop a close personal relationship.\textsuperscript{154} When Watanyar learned that Lessner was a contracting officer for the Defense Logistics Agency, he expressed interest in his small electronics company doing contract work with the federal government.\textsuperscript{155} Over the ensuing eight months, Lessner’s office awarded Watanyar’s company 163 contracts worth more than $3 million.\textsuperscript{156}

Lessner committed an assortment of misconduct during the award of these contracts. Sometimes she would forge contracting officer’s signatures to award the contract even though Watanyar was not the lowest bidder. Other times she committed PIA violations by providing Watanyar his competitors’ prices, identifying the price he should bid to receive a particular contract, or advising him to submit lower bids.\textsuperscript{157} However, no evidence suggested that Lessner received any money for doing so.\textsuperscript{158}

Following her plea, the court sentenced her to fifty-one months confinement and to make restitution in the amount of $938,965.59.\textsuperscript{159}

iii. \textit{United States v. Olson}

\textsuperscript{152} \textit{Id.} at 6.
\textsuperscript{153} \textit{United States v. Lessner}, 498 F.3d 185, 191 (3d Cir. 2007).
\textsuperscript{154} \textit{Id.} at 189, 191.
\textsuperscript{155} \textit{Id.} at 188-89.
\textsuperscript{156} \textit{Id.} at 189.
\textsuperscript{157} \textit{Id.} at 190.
\textsuperscript{158} \textit{See generally id.} at 187-92.
\textsuperscript{159} \textit{Id.} at 188.
An acquisition manager for the Federal Aviation Administration (FAA), Vicki Lynn Olson supervised FAA contracting officers and thus had access to source selection information and contractors’ bid and proposal information. Moreover, in her position, she oversaw the procurement for a $4.2 million contract for runway lighting at Seattle-Tacoma International Airport. The competition for the runway lighting project came down to two companies: Pacific Construction Services, Inc. (PCL) and Donald B. Murphy Contractors, Inc. (DBM). PCL ultimately won the contract, but only because Olson provided it with DMB’s pricing information.

Initially, PCL did not submit the lowest bid. As a result, Olson advised PCL that it needed to reduce its bid by $55,000. PCL did, and accordingly won the contract. It is unclear why Olson favored PCL over DMB, but the evidence, as with the other cases reviewed above, did not indicate that Olson received any money for her actions.

Olson pleaded guilty, and the district court sentenced her to three years’ probation and to perform 200 hours of community service. The Department of Justice did not charge PCL with criminal violations, but did settle a civil claim with the company for $1 million.

iv. *United States v. Ferrell*

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161 Id.
162 Id.
163 Id.
165 Id.

It was Ferrell who actually notified PCL to lower its bid.\footnote{Id.} PCL’s winning bid beat DMB by $4,300.\footnote{Id.} Although the evidence did not show that Ferrell received any money for providing PCL with sensitive procurement information, the evidence did reveal that PCL treated Ferrell to meals and golf outings.\footnote{Id.} Ferrell pleaded guilty and received the same sentence as Olson: three years’ probation and 200 hours of community service.\footnote{Id.}

As an interesting sidenote to Ferrell’s case, a number of FAA employees wrote letters on Ferrell’s behalf, drawing the ire of the sentencing judge.\footnote{Id.} She said she was “appalled” at the employees for writing such letters, finding that the “whole agency [has] run afoul of what their duty is as a government agency. . . . I am sad to see that there are still people in the office that think there was nothing wrong.”\footnote{Id.} She also said that “FAA employees shouldn’t be taking a cup of coffee from anyone who is bidding on these contracts.”\footnote{Id.} Based on her comments, the Department of Justice sent a transcript of the sentencing hearing to FAA leadership.\footnote{Id.}

\begin{flushright}
\textit{v. United States v. Honbo}
\end{flushright}

\footnotesize
\begin{itemize}
\item \footnote{Id.}
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\item \footnote{Id.}
\item \footnote{Carter, supra note 134.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
David Honbo, a civilian employee for the United States Army Corps of Engineers (Corps) in Seoul, South Korea, worked as a Quality Management Representative on a government contract to relocate the Army base in Yongsan, South Korea.\footnote{Plea agreement, \textit{United States v. Honbo}, No. 08-177 (D.D.C. July 22, 2008) at ¶¶ 1-3; PACER 1:08-cr-00177-RMC} Although Honbo’s plea agreement did not specify the value of the contract, it did state that the contract was a “multi-billion dollar” one.\footnote{\textit{Id.} at ¶¶ 4, 7.}

Honbo served as the recorder and project manager of the selection board during the Corps’ evaluation of proposals.\footnote{\textit{Id.} at ¶¶ 4, 7.} Thus, he had access to the Corps’ source selection information and bidders’ proposal information, which he ultimately shared with a former colleague who now worked for one of the contractors seeking the relocation contract.\footnote{\textit{Id.} at ¶¶ 7–8.} Honbo pleaded guilty to violating the PIA, and in doing so, admitted that he shared the information of the board’s deliberations for the purpose of giving his former colleague’s company a competitive advantage.\footnote{\textit{Id.} at ¶ 9.} However, the evidence did not show that Honbo received any monetary or other economic benefit for sharing the information.

On October 31, 2008, the District Court for the District of Columbia sentenced Honbo to thirty-six months of probation, 150 hours of community service, and a fine of $2,500. In addition, the Government barred him from working for the United States government for a period of three years.\footnote{See \textit{Report to Congress: The Activities and Operations of the Public Integrity Section for 2008, Public Integrity Section of the United States Department of Justice} 32 (2008), \textit{available at} http://www.justice.gov/criminal/pin/docs/arpt-2008.pdf.}

2. Insights and Observations

\textsuperscript{175} Plea agreement, \textit{United States v. Honbo}, No. 08-177 (D.D.C. July 22, 2008) at ¶¶ 1-3; PACER 1:08-cr-00177-RMC  
\textsuperscript{176} \textit{Id.} at ¶¶ 4, 7.  
\textsuperscript{177} \textit{Id.} at ¶¶ 4, 7.  
\textsuperscript{178} \textit{Id.} at ¶¶ 7–8.  
\textsuperscript{179} \textit{Id.} at ¶ 9.  
Five cases may not establish any concrete or meaningful trends. Moreover, there may be additional cases in which the Department of Justice could have charged a violation of the PIA, but disposed of the case, for example, through pleas to more serious or different charges under other federal statutes. Nevertheless, the five reported cases do offer some important insights.

First, each case so far has been a prosecution of an individual and no firm has been charged as a criminal defendant. This fact, though, does not necessarily mean that the firms were without fault. An employee is more likely and able to commit a PIA

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181 In one recent case, the Department of Justice obtained guilty pleas to bribery when it appeared that the defendants had also committed a PIA violation. In United States v. Heinrich, No. 08-128 (E.D. La. 2008) (PACER 2:08-cr-00128-CJB-DEK), a case concerning Hurricane Katrina reconstruction efforts, Durwanda Heinrich, a government contractor, offered Kern Wilson, an Army Corps of Engineers contract consultant, $300,000 in exchange for the technical evaluation of a competitor’s proposal. See Indictment, United States v. Heinrich, No. 08-128 (May 15, 2008) at ¶¶ 4, 5, 8.e., 10, 22, 23, 43, 47, available at http://www.justice.gov/atr/cases/f233700/233761.htm (providing further that the defendants conspired to obtain “confidential bid, proposal, and source selection information to attempt to obtain contracts to provide goods and services of [the Army Corps of Engineer’s] Hurricane Katrina Protection Project”).

Heinrich had signed a “PIA statement” detailing that he would not “knowingly disclose contractor bid or proposal information or source selection information before the award of a federal agency procurement contract.” Id. at ¶ 10. Heinrich’s and Kern’s conduct clearly fell within the criminal provisions of the PIA, as Kern knowingly disclosed and Heinrich knowingly received confidential source selection information in exchange for something of value, see 41 U.S.C. § 423(e)(1)(A), but prosecutors pressed only the bribery charges. Ultimately, the defendants were convicted for their scheme and were sentenced to 5 years and 70 months in prison respectively. Press Release, U.S. Dep’t of Justice, Former Sand and Gravel Subcontractor Sentenced to 5 Years in Prison After Conspiracy and Bribery Conviction in Connection With a Levee Reconstruction Project, Justice Department Documents and Publications (Aug. 26, 2009).

Additional examples of prosecutors foregoing PIA charges in favor of other statutes exist. For example, the now-infamous case involving Darleen Druyun, the principal deputy assistant secretary of the Air Force for acquisition and management, who notoriously negotiated with Boeing for a job for when after she left the Air Force while at the same time negotiating an Air Force contract with Boeing, and was hired by Boeing at $250,000 per year. See Branstetter, supra note 134, at 444–45 & nn.8–10. Druyun also admitted to providing Boeing with a European rival bidder’s proprietary pricing information related to the same procurement, but was never charged for a PIA violation. Renae Merle & Jerry Markon, Ex-Air Force Official Gets Prison Time: Boeing Received Special Treatment in Procurement, WASH. POST, Oct. 2, 2004, at A1. Furthermore, in United States v. Edgemon, 1997 U.S. Dist. LEXIS 23820, 33–34 (E.D. Tenn. Aug. 18, 1997), the Department of Justice charged a contracting official who had falsely signed a procurement integrity certificate with bribery and making a false official statement in violation of the false statements act, 18 U.S.C. § 1001. The contracting official, in claiming no PIA violation, had nonetheless accepted money, loans, and football tickets from a competing contractor in a coal supply contract seeking bid prices of his competitors.

182 As a general matter, a firm may be criminally responsible for its employee’s crimes where those crimes furthered the firm’s interests and were not solely for the employee’s benefit. See United States v. International Brotherhood of Teamsters, 141 F.3d 405, 409 (2d Cir. N.Y. 1998).
violation where the firm does not train the employee to abide by relevant rules or monitor the employee’s conduct. In other words, firms that do not promote an environment that encourages ethical behavior and a commitment to compliance with the law will enable some employees’ PIA violations, and will consequently likely increase the firm’s exposure to criminal liability.  

A mandatory disclosure requirement for PIA violations therefore should incentivize a firm to develop a comprehensive internal control system designed to encourage its employees to comply with all relevant laws, including the PIA. Importantly, however, while mandatory disclosure may lessen the likelihood of criminal charges against the firm, the Government certainly would still pursue the PIA’s noncriminal remedies against the firm. Firms cannot, and should not, expect to profit, in the form of receiving a government contract, as a result their employees’ misconduct.

Not only was each of the above prosecutions just of an individual, but, with one exception, all prosecutions were of Government employees. Although contractor employees, consultants, and other non-governmental actors might want their competitors’

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183 The Department of Justice’s Corporate Charging Guidelines indicate that a firm may improve its chances of avoiding criminal liability if it has a compliance program that is designed to prevent and detect misconduct in the first place and which is reviewed and monitored on a regular basis for effectiveness. See U.S. Dep’t of Justice, CORPORATE CHARGING GUIDELINES § 9-28.760, available at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf (hereinafter Charging Guidelines) (instructing prosecutors to determine “whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation’s employees and agents or to mitigate charges or sanctions against the corporation”). And when Congress passed the PIA, it intended the PIA’s corporate criminal penalties to apply in situations where management officials knew or should have known of the PIA violation. See CONG. REC. S17074 (daily ed. Oct. 20, 1988).

184 According to the FAR Council, “[e]xisting [Department of Justice] guidelines addressing corporate prosecution standards, while certainly not providing amnesty, suggest that if a company discloses such violations, the prosecution will be of the individuals responsible for the violation, not the entire organization.” 73 Fed. Reg. 67,064, 67,071. The Department of Justice’s Charging Guidelines do emphasize that a firm’s decision to disclose its employees’ crimes is a factor prosecutors consider in deciding whether to criminally charge the firm. See Charging Guidelines, supra note 183, at § 9-28.750.

185 In the Olson and Ferrell cases, for example, see supra notes 160-174 and accompanying text, the Department of Justice did not prosecute Pacific Construction Services, Inc., for its participation in the scheme to obtain Donald B. Murphy Contractors, Inc.’s bidding information in the construction contract at the Seattle-Tacoma Airport; instead, the Department of Justice entered into a civil settlement with the firm for $1 million. See Carter, supra note 134.
confidential procurement information and go to great lengths trying to obtain it, the Department of Justice may target Government employees in particular considering the well-established principle that public officials must not use confidential information acquired in their official capacities for anyone’s personal economic benefit.\textsuperscript{186} True, a contractor could certainly try to break into their competitor’s office space or hack into the Government’s computer system to steal the information,\textsuperscript{187} but more likely, it will obtain the information directly from the Government employee himself.

The public expects more from Government employees. As President Theodore Roosevelt once famously declared: “[T]here can be no greater offense against the government than a breach of trust on the part of a public official or the dishonest management of his office and, of course, every effort must be exerted to bring such offenders punishment by the utmost vigor of the law.”\textsuperscript{188} Since much more often than not sensitive procurement information cannot fall into the wrong hands without a Government employee’s participation, Government employees should be the primary targets of a PIA case. Thus, a rule requiring a contractor to disclose its PIA violations will also help the Government identify the potential misconduct of its own employees.

Another insight from the prosecutions discussed above is that each involved smaller contractors than those involved during Operation Illwind, such as Boeing,

\textsuperscript{186} Petrowitz, supra note 129, at 197; Perkins, supra note 89, at 1121–22.
\textsuperscript{187} See Settlement Agreement Between the United States of America and The Boeing Company, supra note 134, at ¶ 1 (suggesting that Boeing obtained Lockheed Martin’s information by hiring an employee); Press Release, U.S. Dep’t of Justice, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin (June 25, 2003) (noting that Kenneth Branch was a former Lockheed Martin employee who allegedly brought Lockheed’s proprietary documents with him when he went to work for Boeing); Computer Technology Associates, Inc., B-288622, Nov. 7 2001 (explaining that a Computer Technology Associates help desk operator hacked into the General Services Administration’s email system to obtain a competitor’s proposal information).
Northrop Grumman, General Dynamics, or Lockheed Martin. This fact should serve as a strong incentive for such smaller and mid-size contractors to invest in some form of internal control system. Their small size will not immunize their employees’ conduct from scrutiny. As Eric Feldman, the senior advisor to the director of the National Reconnaissance Office for Procurement Integrity, has said, the new FAR rules regarding mandatory disclosure “may greatly impact those midsize companies that do not have a mature business ethics and compliance program.”\(^{189}\)

Notably, money never exchanged hands in these five cases – or at least the evidence did not suggest that it did. While the Government employees had relationships with the contractors with whom they shared the information, the evidence did not suggest that the Government employees were motivated by economic benefits. This fact contrasts sharply with the Operation Illwind cases, where inside information was almost always bought and sold. This is not to say that there were not any monetary or economic incentives at play in any of these cases. But, particularly in cases like Lessner and Honbo, the motivation could merely have been to help out a close friend or former colleague. A rule requiring contractors to disclose their procurement-related misconduct thus must ensure that it captures both the situation in which contractors obtain confidential procurement information in exchange for money as well as in the situation in which another, non-monetary motive may be involved. Indeed, both situations negatively impact the procurement process equally. As currently written, however, the mandatory disclosure rule may not adequately require disclosure of instances that do not involve the exchange of confidential information for money.\(^{190}\)

\(^{189}\) Cracking Down, *supra* note 13.
\(^{190}\) See *infra* notes 339-340 and accompanying text.
Interestingly, every prosecution so far involving the PIA has occurred following the onset of the Global War on Terror, when Government spending on procurement began soaring. While this fact could be a coincidence or indicate that law enforcement had become comfortable with the PIA’s reach and application, it certainly seems relevant in light of observations that the Government is now increasing its efforts to detect procurement irregularities. Since Operation Illwind exploded as a result, in part, of the Government’s massive spending for defense purposes, it should not be surprising that Illwind-like cases have resurfaced during a similar uptick in spending. The procurement community would therefore benefit from a rule such as mandatory disclosure. Such a rule would seek to prevent the type of misconduct that occurred during the last spending surge from recurring.

Still another observation of these cases is the wide range in value of the contracts involved. On one end of the spectrum, the Department of Justice prosecuted a PIA violation in Parrish that involved a $217,000 contract; on the other end of the spectrum, in Honbo, the contract was a “multi-billion dollar” one. Government employees and contractors who operate under the misguided belief that the Department of Justice will use the PIA only in large money contracts most likely will be sorely mistaken. The PIA

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192 Eric Leonard, Working With Government Agencies in Government Contracts Law, ASPATORE, 2009 WL 1008508, *17 (2009) (stating “[t]here is little doubt that the era of enforcement has once again emerged in the government contracting industry, and that federal contractors need to be aware of this increased level of scrutiny”). Perhaps the greatest sign of the realization that procurement fraud plagues the operation of the national government in a palpable way is the Department of Justice’s NPFTF. Since its inception in 2006, the NPFTF has prosecuted more than 400 cases, resulting in more than 300 convictions and the recovery of more than $362 million in civil settlements and judgments. U.S. DEP’T OF JUSTICE, NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT 3, 4 (2008).
applies “to every procurement conduct by Federal agencies regardless of dollar value,” and sometimes cancellation of a contract simply is an insufficient remedy. Having prosecuted small money contracts, the Department of Justice has thus confirmed that no contract is too small for criminal enforcement with the PIA. And as a result, that should make the PIA a more effective deterrent. After all, a statute can clearly prohibit certain conduct and prescribe significant penalties for violations, but if the Government never enforces the law, it is no more effective than if the law did not exist.

On the other hand, no defendant received a particularly harsh sentence. This fact could undermine the deterrent effect of the Act’s criminal penalties. The unscrupulous, the desperate, and even the overzealous simply may be more tempted to trade confidential procurement information because the reward may exceed the risk of going to prison. Judge Pechman’s comments when she sentenced Ferrell seem less compelling in light of the punishment she ultimately imposed. Although a criminal conviction may stigmatize an individual and lead to adverse collateral consequences, the general deterrent effect of such a conviction loses some force when the likelihood of going to prison is very low. The “traditional criminal justice response has been arrest, prosecution, and incarceration,” not arrest, prosecution, and no incarceration.

194 Contractors faced with the possibility of losing out on lucrative Government contracts during economic downturns “may be more likely to view the rewards of an illegitimate or fraudulent act as greater than the risk of being caught and their desire to act ethically.” Cracking Down, supra note 13, at 23.  
195 See supra text accompanying notes 170-174 (noting that the judge sentenced Ferrell to three years’ probation and 200 hours of community service).  
196 See, e.g., United States v. Warren, 612 F.2d 887, 893 (5th Cir. 1980) (noting collateral consequences of a conviction to include social “[s]tigma,” possible forfeiture of property, limitation on employment opportunities, and loss of some civil rights).  
Furthermore, in addition to the possibility that the PIA’s criminal penalties might not serve as a significant deterrent, a criminal prosecution presents challenges for the Government that are not present when pursuing some of the PIA’s other possible penalties. A criminal prosecution entitles a defendant to the right against self-incrimination, the right to a speedy trial, the right of compulsory process of obtaining favorable witnesses, the right against unreasonable searches and seizure, the right to counsel, and a due process right to discovery. As such, the Government might be able to more easily and more efficiently accomplish its retributive, penal, and compensatory goals through, for example, a civil settlement or suspension or debarment – proceedings in which the putative party does not have the same rights.

But to do so, the Government must still know of the violation in the first place. A mandatory disclosure rule would certainly help the Government identify violations. Importantly, such a rule of mandatory disclosure must cover any PIA violation, not just its criminal prohibitions, since violations of the PIA’s noncriminal provisions would have the same anti-competitive effect as a criminal violation of the PIA. Moreover, the possibility that the deterrent effect of the PIA’s criminal penalties may not be that significant as well as the challenges associated with criminal cases may make the PIA’s

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199 See id. (noting “civil remedies offer speedy solutions”); Cheh, supra note 197, at 1325 (noting a “tendency for the government to punish antisocial behavior with civil remedies”). Although the FAR expressly states that suspension and debarment are not punishment, see FAR 9.402(b), suspending or debarring an individual or entire firm from contracting with the Federal Government nevertheless could be devastating. Brian D. Shannon, Debarment and Suspension Revisited: Fewer Eggs in the Basket?, 44 CATH. U.L. REV. 363, 364 (1995) (asserting that contractors “may fear a debarment or suspension far more than criminal or civil sanctions because of the potentially adverse economic effect on their operations”).
noncriminal provisions a more preferable enforcement mechanism. For these reasons as well, any mandatory disclosure requirement for PIA violations should include noncriminal violations of the PIA.

B. Bid protests

If criminal prosecution makes up a part of the “impressive array of enforcement mechanisms at the Government’s disposal” to police the procurement system, the bid protest system is a tool for contractors to enforce an honest and fair procurement system. A contractor can choose from one of three fora in which to protest the award of a contract: the procuring agency, GAO, or the Court of Federal Claims.

It is difficult to determine the precise number of protests that have involved the PIA. Federal agencies, GAO, and the Court of Federal Claims do not track protests by basis. Moreover, while GAO receives approximately 1,500 protests per year, it reviews and issues decisions in only 22% of those cases; the remainder are dismissed, withdrawn, settled, or otherwise disposed without plenary review. Thus, there may be

200 See Pikes Peak Family Housing, LLC v. United States, 40 Fed. Cl. 673, 681 n.16 (Ct. Fed. Cl. 1998).
202 See supra note 124 and accompanying text.
203 U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS 11 (2009) (hereinafter GAO Bid Protest report); see also email from then-Acting GAO General Counsel Daniel I. Gordon, Nov. 18, 2009 (on file with the author). Notwithstanding the fact that GAO does not track protests by basis, anecdotal evidence indicates that PIA-based protests are not that common. Instead, one analysis offered the four most common protest grounds as: 1. the procuring agency’s failure to maintain adequate documentation; 2. the procuring agency’s improper discussions with offerors; 3. improper cost evaluations by the procuring agency; and 4. the procuring agency’s failure to adhere to the stated evaluation criteria. See GAO Bid Protest report, supra, at 11.
204 See MOSHE SCHWARTZ & KATE M. MANUEL, CONG. RESEARCH SERV., REPORT NO. R40227, GAO BID PROTESTS: TRENDS, ANALYSIS, AND OPTIONS FOR CONGRESS 2 (FEB. 2, 2009) (noting that although “the
many cases raising a PIA violation in which a competent authority never reaches the merits of the issue. Similarly, as discussed below, procuring agencies may remedy potential violations through informal mechanisms before the issue reaches GAO or the court.

1. Methodology

GAO and the federal courts have published 201 cases involving some reference to the PIA. They fall into one of the following seven categories:

Figure 2: Distribution of Cases Citing PIA

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. PIA issue sustained</td>
<td>8</td>
</tr>
<tr>
<td>2. PIA issue denied</td>
<td>56</td>
</tr>
<tr>
<td>3. Nonresponsive for lack of PIA certificate</td>
<td>51</td>
</tr>
<tr>
<td>4. Case dismissed as untimely</td>
<td>7</td>
</tr>
<tr>
<td>5. Case deferred due to agency investigation</td>
<td>9</td>
</tr>
<tr>
<td>6. Protestor challenges the agency’s decision to disqualify the</td>
<td>6</td>
</tr>
<tr>
<td>protestor based on the agency finding of a PIA violation</td>
<td></td>
</tr>
</tbody>
</table>

number of bid protests increased steadily from approximately 1,150 in Fiscal Year (FY) 2001 to over 1,550 in FY2008,” “[s]ince FY2001, on average, GAO issued an opinion on only 22% of bid protests”). A search was conducted of LEXIS’s “Public Contracts Decs From Comptroller General, BCAs, All Federal Courts” database (from January 1, 1988, through January 9, 2010) and GAO’s website, using search criteria “PIA” and (41 w/3 u.s.c. w/3 423!), which returned 201 responsive cases. The author is grateful to Mr. Gordon for recommending this method for ascertaining the data for this section’s discussion. See Gordon email, supra note 203.

205 The original PIA that Congress passed in 1988 required contractors and contracting officers to certify, in writing, that no PIA violation had occurred during the procurement or that if one had, all known information regarding the violation had been disclosed. Pub. L. No. 100-679, § 27(d)(1), 102 Stat. 4063 (1988) (codified at 41 U.S.C. § 423(d)(1) (1988)). The 1996 amendments jettisoned this requirement, much to the relief of contractors and contracting officers alike. Donald P. Arnavas, The Procurement Integrity Act/Edition II, 97-12 BRIEFING PAPERS 1, 9 (1997) (stating that “[a]ll those involved in the procurement process have welcomed the elimination from the new Act of both contractor and Government certifications”).

207 A contractor may not file a protest at GAO alleging a PIA violation unless it first reports the possible violation to the procuring agency within 14 days of discovering the violation. 41 U.S.C. § 423(g).
Thus, discounting the sixty-four cases that did not adjudicate a PIA issue, GAO and the courts have reviewed a total of 137 cases. As Figure 3 below depicts, ninety-eight were filed after Congress passed the PIA and before it amended it as part of the Clinger-Cohen Act in 1996. Figure 4 below, then, shows that after Congress amended the law in 1996, contractors brought thirty-nine bid protests alleging a violation of the PIA.

Figure 3: Number of PIA Protests Between 1990-1996

Cases falling into this category include, for example, those that merely cited the PIA for comparison purposes, see, e.g., Novell, Inc. v. United States, 46 Fed. Cl. 601, 612 (Fed. Cl. 2000), Freedom of Information Act cases, see, e.g., Legal & Safety Emplr. Research Inc. v. United States Dep’t of the Army, 2001 U.S. Dist. LEXIS 26278 (E.D. Cal. 2001), or cases where the protestor expressly stated it was not asserting a violation of the PIA, see, e.g., Lockheed Missiles & Space Co., Inc., B-266225.6, Apr. 15, 1996, 96-1 CPD ¶ 199.

See supra note 108.
2. Insights and Observations

As the foregoing demonstrates, fifty-one bid protests – more than a third of all protests – challenged the agency’s rejection of the bid as being nonresponsive for failing to include the “draconian” PIA certificate.\(^{210}\) Not coincidentally, once Congress removed

\(^{210}\) McMaster Constr., Inc. v. United States, 23 Cl. Ct. 679, 686 (Cl. Ct. 1991) (opining that having to reject bids that did not contain the required certificate as nonresponsive was “admittedly draconian”); see also Arnavas, supra note 206, at 9 (stating that the “contractor certification requirements were especially
that requirement, bid protests declined significantly, as Professors Nash and Cibinic accurately predicted. Indeed, prior to the amendments, they noted that the number of PIA protests averaged twelve per year. Following the 1996 amendments, the number of protests has declined to approximately three per year.

Interestingly, the procurement integrity certificate actually provided a protestor its best chance of succeeding in a bid protest. Of the eight protests that GAO and the court sustained, six concerned the validity of the procurement integrity certificate. This fact seems ironic given the ultimate purpose of the PIA: to prevent the “trade of favors and information” that provides “competing contractors with an unfair advantage over their more scrupulous competitors.” If GAO or a court were to sustain a bid protest for a violation of the PIA, one might expect the violation to be of one of the Act’s substantive prohibitions, not a procedural paperwork problem.

Neither GAO nor the court has yet to sustain a protest on the ground that a contractor knowingly obtained, or a Government employee knowingly disclosed,

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211 See Ralph C. Nash & John Cibinic, The New Procurement Integrity Rules, 3 NASH & CIBINIC REP. ¶ 12, Mar. 1997 (hereinafter Nash & Cibinic, The New Procurement Integrity Rules) (stating that the “deletion of the certification requirements will undoubtedly also contribute to this reduction of protests”).
212 See id. (stating that PIA protests “have been averaging approximately 12 per year”). Figure 3, supra, supports this number.
213 Compare, e.g., M.R. Dillard Construction, B-271518.2, Jun. 28, 1996, 96-2 CPD ¶ 154 (sustaining protest, finding agency improperly rejected protestor’s offer for lack of signature on the bid form because the integrity certificate did have a signature) and B.C. Enterprises, Inc., B-252484, June 25, 1993, 93-1 CPD ¶ 495 (sustaining protest because agency improperly rejected the protestor’s procurement integrity certificate) and Shifa Services, Inc., B-242686, May 20, 1991 91-1 CPD ¶ 483 (sustaining protest, finding solicitation confusing regarding number of signatures required on procurement integrity certificate), with LBM, Inc., B-243505, Apr. 12, 1991, 91-1 CPD ¶ 372 (finding lack of procurement certificate rendered bid nonresponsive).
confidential procurement information.\textsuperscript{215} The two “substantive” cases in which GAO sustained a PIA bid protest concerned the Act’s revolving door provision.

In the first case, \textit{Express One International, Inc. v. United States Postal Service},\textsuperscript{216} the D.C. District Court concluded that the United States Postal Service (USPS) violated the PIA because it allowed a consultant who had engaged in employment discussions with a contractor competing for the contract to continue working on that procurement. Mr. Cole served as a USPS consultant on a pending mail delivery contract for which American International Airways, Inc. (AIA) was a competitor.\textsuperscript{217} During the procurement, AIA’s CEO contacted Mr. Cole about a possible employment opportunity.\textsuperscript{218} When Mr. Cole informed the USPS about the offer, it replied that he must “affirmatively reject” the offer or be removed from the procurement.\textsuperscript{219} When AIA followed up with Mr. Cole about the job offer, Mr. Cole indicated that he could not discuss the opportunity until a later date.\textsuperscript{220} He informed the USPS about the second contact with AIA and his response, and the USPS nonetheless allowed him to continue consulting on the procurement.\textsuperscript{221} Subsequently, Mr. Cole began help with evaluating offers for the mail delivery contract, where he was a “key player” in the award of the contract, by drafting the evaluation standards and scoring system.\textsuperscript{222} AIA ultimately won the contract.\textsuperscript{223} Because Mr. Cole had left open the possibility of future employment with AIA rather than affirmatively reject the offer pursuant to the USPS’s original direction,

\textsuperscript{215} Cf. Arnavas, supra note 206, at 9 (observing that prior to the Clinger-Cohen Act, all protests alleging improprieties with respect to confidential procurement information, though “frequent,” had been denied).
\textsuperscript{217} \textit{Id.} at 95.
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 96.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} 814 F. Supp. at 96.
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.} at 95.
the Court found a PIA violation. It explained that “the evil that must be avoided is the appearance of favorable treatment by the government employee . . . in order to receive a better job offer.”

In the second case involving an FBI procurement of bulletproof vests, Guardian Technologies alleged that that the awardee company’s president, as a former FBI employee, had access to confidential information concerning the procurement. Although the president, who indeed had worked on the procurement while employed with the FBI, ultimately recused himself from the procurement, he failed to respond to GAO’s request for further information regarding his former position. GAO sustained the protest, concluding that the president’s overall inside knowledge, late recusal, and failure to respond to GAO’s request for more information indicated that the awardee firm had gained an unfair competitive advantage. GAO never found that the president had actually used confidential procurement information to his new company’s advantage.

The foregoing statistics and results do not appear to bode well for contractors believing they have been a victim of a PIA violation, and raise questions as to the effectiveness of GAO in particular as an anti-corruption tool. With such a remote chance of success, contractors may be discouraged from even pursuing relief from GAO or the court. True, the likelihood of obtaining a favorable result at GAO in general is low. Of the 22% of cases in which GAO issues an opinion, it sustained the protest approximately 20% of the time. But in PIA cases, the sustain rate is even lower. Counting all

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224 Id. at 98, 99, 102.
225 Id. at 98
227 Id.
228 GAO Bid Protest Report, supra note 203, at 3.
sustained cases, including the procurement integrity certificate protests, the sustained rate of the 137 issued opinions is approximately 6%. Not counting those “technical” violations involving the certificate, the sustain rate drops to 1.5%. These numbers are more consistent with GAO’s overall sustain rate of all cases filed, including those in which it does not issue a decision: 5%.229 At least two reasons may explain the low sustain rate of PIA protests.

First, GAO may be unable to adequately investigate the complaint. Indeed, GAO will ordinarily defer to the agency’s own determination regarding the matter.230 Similarly, as Figure 2 above shows, GAO has frequently declined to review a case because of a pending agency investigation, or outright “remanded” it to the agency for investigation rather than conduct its own investigation.231 Thus, until GAO obtains more

229 Id.
230 Cf. Caelum Research Corp. v. Dep’t of Transp., GSBCA No. 13139-P, 95-2 BCA ¶ 27,733 (noting that “an agency’s conclusion that no procurement integrity violation existed [is a ] . . . decision[,] to which the Comptroller General affords deference”). See John Bransby Productions, Ltd., B-246210.2, July 15, 1992, 92-2 CPD ¶ 22 (declining to disturb agency’s conclusion that awardee had improperly obtained protestor’s proprietary information); FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366 (finding agency’s investigation conclusions that awardee’s employee, who had participated in drafting the performance work statement for the procurement, did not give awardee a competitive advantage “reasonable”); Lockheed Martin Maritime Systems & Sensors, B-299766; B-299766.2, Aug. 10, 2007, 2007 U.S. Comp. Gen. LEXIS 255 (noting that contracting officer had found a PIA violation based on agency’s disclosure of Lockheed Martin’s product test results to competitor, but that the disclosure had no impact on the procurement and GAO agreed). The Court of Federal Claims has recently indicated a similar position in bid protest cases of deferring to an agency’s investigation into an alleged PIA violation. In DCMS-ISA, Inc. v. United States, 84 Fed. Cl. 501, 506 n.13 (Fed. Cl. 2008), the Court said because the agency’s “ongoing investigation” into a potential PIA violation had “determined that the procurement could have proceeded despite the potential PIA violation,” “the court [sic] need not consider that potential violation.”
231 See also, e.g., Career Training Concepts, Inc.-Advisory Opinion, B-311429; B-311429.2, June 27, 2008, 2008 U.S. Comp. Gen. LEXIS 231 (declining to consider PIA challenge that awardee’s proposed program manager had obtained protestor’s proprietary information from attending a class protestor conducted, since the procuring agency had “initiated a formal investigation into [the] allegations”); Population Health Services, Inc., B-292858, Dec. 1, 2003, 2003 CPD ¶ 217 (declining to consider PIA protest because the procuring agency “is investigating the protestor’s allegations”); Hernandez Engineering, Inc.; ASR International Corporation, B-286336; B-286336.2; B-286336.3; B-286336.4, Jan. 2, 2001, 2001 CPD ¶ 89 (declining to consider PIA challenge because agency’s investigation was “still ongoing”); Oceaneering International, Inc., B-278126; B-278126.2, Dec. 31, 1997, 98-1 CPD ¶ 133 (declining to consider PIA protest that the awardee had obtained the protestor’s proposal information in that the protestor’s employees had also, unbeknownst to protestor, helped awardee’s proposal, as the procuring agency was “actively
significant independent fact-finding powers, an aggrieved contractor will most likely be at the mercy of the procuring agency’s conclusions.\textsuperscript{232}

Second, a contractor must do more than merely prove a violation of the PIA before GAO will sustain its bid protest. The protesting contractor must also demonstrate competitive prejudice, i.e., that, but for the PIA violation, it would have had a substantial chance of receiving the award.\textsuperscript{233} As GAO said in \textit{Motorola, Inc.},\textsuperscript{234} “Although the disclosure to unauthorized persons during the conduct of a federal procurement of proprietary or source selection information is improper, . . . where no prejudice is shown or is otherwise evident from the record, our Office will not sustain a protest.” Thus, in \textit{Gentex Corporation-Western Operations},\textsuperscript{235} an Air Force contracting official released the Air Force’s evaluation of Gentex’s initial proposal to its competitor, Scott. Gentex asserted this disclosure “gave Scott a ‘huge advantage’ by enabling that firm to beef up its proposal and discussion responses.” GAO denied the protest despite the disclosure because it did not find that Scott had changed its proposal based on the information that

\textsuperscript{232}GAO’s deference to procuring agency’s conclusions may create at least an appearance problem “of a lack of independence and impartiality. . . . Protesting vendors may fear that the contracting agency will not be willing to admit that the procurement was not handled properly.” \textit{Cf.} Daniel I. Gordon, \textit{Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make}, 35 PUB. CONT. L.J. 427, 433 (2006) (discussing agency bid protest forum).


\textsuperscript{234}B-2247937, Sept. 9, 1992, 92-2 CPD ¶ 334.

\textsuperscript{235}\textit{Gentex Corporation-Western Operations}, B-291793, B-291793.2, B-291793.3, Mar. 25, 2003, CPD ¶ 66
had been disclosed.\(^{236}\) Accordingly, at GAO Procurement Integrity Act violations can conceivably go without sanction.

Still, there is no denying the important functions that GAO and the Court of Federal Claims play. The possibility of a bid protest arguably makes most procurement professionals more vigilant in complying with their responsibilities to the law. One commentator has opined that the PIA protests filed at GAO and the court demonstrate “sensitivity that exists in this area.”\(^{237}\)

C. Conclusion

Considering the scope of Operation Illwind, it would be understandable if many people expected the Procurement Integrity Act to become a commonly-used statute in procurement matters. The number of reported cases involving the statute since its enactment, however, seem to show that this expectation has not materialized. A number of very valid reasons could explain the apparent “underuse” of the PIA.

For example, the mere existence of the statute itself could be an effective deterrent. This may be true not only because of the potential penalties for violating the PIA, but also because the PIA did not radically change procurement law. On the contrary, it largely codified existing norms. The confidential procurement information on which the PIA conferred statutory protection had enjoyed a long history of protection by regulations. For example, at the time Congress passed the PIA, the FAR already prohibited contracting personnel and “other Government personnel” from 1) disclosing

\(^{236}\) See also Ocean Services, LLC, B-292511.2, Nov. 6, 2003, CPD ¶ 206 (finding no competitive advantage gained by agency’s PIA violation of disclosing protestor’s price information).

\(^{237}\) Arnava, supra note 206, at 9 & nn.99–109 (discussing such allegations as an agency official’s wife working for an eventual awardee, an awardee’s representatives and an agency official spending time together at a trade show, and an agency engineer meeting with a bidder’s employee on multiple occasions). Indeed, in Accent Services Co., Inc., B-299888, Sept. 14, 2007, CPD ¶ 169, incumbent Accent Services claimed a violation of the PIA where the agency official escorted a potential competitor to Accent’s work site and disclosed Accent’s staffing, even though that information was publicly available.
technical solutions to help an offeror; 2) advising an offeror its standing as to price related to other offerors; and 3) furnishing offerors information about other offerors’ prices.\textsuperscript{238} The FAR’s predecessors,\textsuperscript{239} the Defense Acquisition, Federal Procurement, and NASA Regulations, also set forth very similar guidance.\textsuperscript{240} Thus, contractors and procuring agencies had a number of options available to them when competitors had obtained confidential procurement information.\textsuperscript{241} In addition to the potential contractual and administrative consequences, the penal code provided criminal penalties for the improper use of disclosing and obtaining bid, proposal, or source selection information.\textsuperscript{242}

The PIA may also not be that commonly used because the type of misconduct it targets is not as widespread as people may fear. Operation Illwind may have considered almost 1500 individuals as possible suspects, counted sixteen of the top twenty defense contractors as engaging in procurement fraud, and resulted in more than ninety criminal

\textsuperscript{238} FAR 15.612(d) (1984); see also FAR 15.413-2(d) (recognizing that release of confidential procurement information, pricing information, and the like prior to contract award “would seriously disrupt the Government’s decision-making process and undermine the integrity of the competitive acquisition process”).

\textsuperscript{239} The FAR went into effect on April 1, 1984, and “establish[ed] (a) a single regulation for use by all Executive agencies in their acquisition of supplies and services with appropriated funds . . . . The FAR, together with agency supplemental regulations, replace[d] the current Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation.” 48 Fed. Reg. 42,102 (1983).

\textsuperscript{240} See, e.g., 41 C.F.R. § 1-3.103(4)(c)(1) (1984) (providing that “in no event will an offeror’s cost breakdown, profit, overhead rates, trade secrets, or other confidential business information be disclosed to any other offeror”); 41 C.F.R. § 14-3.153(d)(1) (1984) (explaining that trade secret information or confidential commercial and financial information shall be used by the Government only for the purpose of evaluating the proposal); 32 C.F.R. § 3-507.2(a) (1984) (prohibiting the disclosure of a proposal’s contents to anyone not having a legitimate interest in it).

\textsuperscript{241} See, e.g., AT&T Communications, Inc., GSBCA No. 9252-P, 88-2 BCA ¶ 20,805 (sustaining protest because a GSA procurement official had shared proprietary AT&T pricing information with Bell South, a competitor); To McGown, Godfrey, Decker, McMackin, Shipman & McClane, B-176764, 52 Comp. Gen. 773 (1973) (concluding that the Comptroller General can recommend cancellation of a solicitation which wrongfully discloses a protester’s proprietary data or trade secrets); see also Metric Syst. Corp. v. United States, 13 Cl. Ct. 504, 505 (Cl. Ct. 1987) (noting that an agency cannot provide information “to a prospective contractor if, alone or together with other information, it may afford the prospective contractor an advantage over others”).

\textsuperscript{242} See, e.g., United States v. McAusland, 979 F.2d 970, 972-76 & n.1 (4th Cir. 1992).
convictions. Those numbers signify a serious problem to be sure, but they arguably represented a small percentage of the total number of individuals involved with Government procurement.

Even in the 1980s, the number of Government acquisition personnel and contractor employees was substantial.\(^{243}\) In fiscal year 1990, or shortly after Operation Illwind broke, the Department of Defense’s acquisition workforce alone, as defined by Congress, totaled 460,516.\(^{244}\) Based solely on this number, the percentage of individuals involved in possible wrongdoing during the investigation’s peak was a mere .3%. When one adds to the Department of Defense’s workforce the rest of the federal government as well as the employees at large contractors such as Boeing, Northrop Grumman, Lockheed Martin, and General Dynamics, to name just a few, that percentage is infinitesimal.

Thus, Professors Nash and Cibinic accurately opined:

\[\text{To imply or state, as some have, that the entire system is rife with fraud and dishonesty does a great disservice to the vast majority of Government and contractor employees . . . . It is certainly time to identify, weed out and prosecute the crooks. But it is also time to stop smearing innocent personnel and contractors with innuendos and reckless, sweeping charges.}\]\(^{245}\)


\(^{244}\) Schwellenbach, \textit{supra} note 140. Historically, the federal government has been unable to provide an accurate number of its acquisition workforce, so the Department of Defense’s number is susceptible to some challenge. \textit{See REPORT OF ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 343–48} (2007) (hereinafter Acquisition Panel report) (discussing “at least three different ways of counting the Defense Department portion of the acquisition workforce”). Nevertheless, certainly most would agree that the number of people involved in federal acquisition – to include both contractor and Government personnel – has historically been and continues to be substantial in size.

\(^{245}\) Ralph C. Nash & John Cibinic, \textit{Defense Procurement Fraud: Setting the Record Straight},” \textit{2 NASH & CIBINIC REP.} ¶ 54, Sept. 1988, at 1 (responding to the notion that Congress should enact new laws in the aftermath of Operation Illwind by stating that “we don’t need any new statutes” because the “illegal activity [that Operation Illwind revealed] was relatively simple and well covered by existing law.”).
These comments apply with equal force today, such that the PIA, by codifying well-established norms, has further galvanized procurement professionals against the misuse of confidential procurement information. The Federal Acquisition Institute issued a survey indicating that the civilian agency acquisition workforce consists of approximately 19,623 professionals. Add to that number the 206,653 at the Department of Defense and the employees of the 85,000 defense contractors who do business with the Government, and the number of procurement misconduct incidents is fairly small in general and PIA violations no doubt even smaller. Thus, the few PIA prosecutions and bid protests could be because the problem simply is not that pervasive.

Yet a third reason that may explain why there have been few PIA prosecutions and bid protests may be because PIA violations are handled by other means. Under FAR 3.104-7, procuring agencies have a number of options available to them upon learning of a potential PIA violation, including initiating an investigation, canceling the procurement, disqualifying an offeror, or rescinding an awarded contract. Although no concrete data shows how often procuring agencies avail themselves of these less formal means of disposing of PIA violations, anecdotal evidence would suggest it is fairly common.

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247 Schwellenbach, supra note 140 (citing Department of Defense statistics for fiscal year 2004).
248 See GAO Ethics report, supra note 76, at 1.
249 Cf. 73 Fed. Reg. 67,064, 67,070 (acknowledging without conceding that it may be “true that there are comparatively fewer [procurement fraud] violations now than 20 years ago”).
250 FAR 3.104-7(b), (c), (d).
251 See, e.g., Leonard, supra note 192, at *17 (naming the Procurement Integrity Act as one of “the types of disputes we typically encounter”); Superlative Technologies, Inc., Comp. Gen. B-310489.4, Jun. 3, 2008, CPD ¶ 123 (noting agency had canceled solicitation following discovery that official had provided awardee with confidential information to prepare proposal); Kellogg Brown & Root Services, Inc., B-400787.2, et al., Feb. 23, 2009, 2009 U.S. Comp. Gen. LEXIS 47 (approving of agency’s decision to disqualify contractor after it had received and potentially used competitors’ confidential proposal information); Computer Tech. Assocs., Inc., B-288622, Nov. 7, 2001, 2001 CPD ¶ 187 (same); Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 (same); Compliance Corp., B-239252, Aug.
After all, the statute requires a contractor to give notice to the procuring agency before filing a protest, a requirement GAO has expressly recognized as providing the agency an opportunity to conduct an investigation into the matter and take remedial action if appropriate.\textsuperscript{252} Accordingly, some cases simply may not warrant criminal prosecution or a bid protest, or can be more effectively handled by some other means.

Finally, the apparent “underuse” of the PIA may be the result of the fact that violations go undetected. No one can seriously say that the Government is aware of every PIA violation when it occurs. And as a result, this possible reason for any “underuse” raises the question of why the mandatory disclosure rule does not include the PIA. It would seem that a rule like the mandatory disclosure rule, which requires contractors to help the Government identify and discover misconduct in connection with a procurement, would necessarily include a procurement-specific rule such as the PIA.

What makes this question particularly interesting is that it was the Department of Justice that suggested the need for the mandatory disclosure rule.\textsuperscript{253} Rather than suggest the PIA’s inclusion in the mandatory disclosure rule, however, the Department of Justice recommended changing the PIA’s remedies provisions as a way to cure its “underuse.”\textsuperscript{254}

However, changing the PIA’s remedies is unlikely to result in more use of the PIA. On

\begin{footnotes}
\footnotetext[15]{15, 1990, 90-2 CPD ¶ 126 (finding agency’s decision to disqualify offeror reasonable where based on offeror improperly obtaining or attempting to obtain competitor’s proprietary information); Universal Automation Labs, Inc. v. Dep’t of Transp., GSBCA No. 12370-P, 94-1 BCA ¶ 26,475 (finding a PIA violation can be ameliorated in ways short of canceling an acquisition). “The Government is specifically authorized to void and rescind contracts when contractors violate statutes designed to protect the integrity of the procurement process.” Claude P. Goddard, Jr., \textit{Business Ethics in Government Contracting-Part II}, 03-07 BRIEFING PAPERS 1, 12 (2003) (noting that this rule applies regardless of “any actual corruption or loss to the Government”).}
\footnotetext[252]{SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42.}
\footnotetext[254]{See NPFTF, \textit{supra} note 3 (stating that the NPFTF was “examining the Procurement Integrity Act, 41 U.S.C. § 423, for possible changes – particularly with respect to its remedies provisions”). The NPFTF White Paper, however, did not explain what possible changes the NPFTF was considering.}
\end{footnotes}
the other hand, not only will adding the PIA to the mandatory disclosure rule likely lead to an increase in its use, it will, as set out in Part V below, improve the statute’s effectiveness in the fight against procurement-related misconduct.

V. THE MANDATORY DISCLOSURE RULE

The mandatory disclosure rule requires contractors to report credible evidence to the relevant inspector general and contracting officer of violations of Federal criminal law found in Title 18 of the United States Code, violations of the civil False Claims Act, and significant overpayments. Contractors that fail to make a required disclosure risk suspension and debarment from future government contract opportunities. This rule represents a fundamental change for the procurement system. Prior to the FAR Council promulgating the mandatory disclosure rule, the procurement system operated under a regime that merely recommended and encouraged contractors to make voluntary disclosures of any wrongdoing that they may have committed in connection with a federal procurement. Thus, although the Government has long recognized the need for contractors’ help in detecting procurement improprieties, the Government has only recently determined that it is necessary to require that help. Still, the rule that the Government has issued does not appear comprehensive. It does not include the Procurement Integrity Act, and any argument that it does is misplaced.

255 See 73 Fed. Reg. 67,064, 67,065. The propriety of the mandatory disclosure rule goes beyond the scope of this paper, as this paper instead focuses on the mandatory disclosure rule as it relates to the Procurement Integrity Act. Thus, this section will not discuss many aspects of the mandatory disclosure rule that have received significant comment elsewhere. For a general overview of the many potential issues with the mandatory disclosure rule, see generally ABA MDR Guide, supra note 7; Kathuria, supra note 7; West et al., supra note 15; Karen L. Manos, Complying with the New Mandatory Disclosure Rule, GOV’T CONT. COSTS PRICING & ACCT. REP. (Jan. 2009).


257 See Allen & Burd, supra note 15, at 443 (finding that the mandatory disclosure rule was “ushering in a new paradigm for the public-private relationship that contractors enjoy with their federal customers”).

258 See infra notes 260-275 and accompanying text.
A. The Voluntary Disclosure Program

The new mandatory disclosure rule largely replaces a program that encouraged voluntary disclosure of procurement-related misconduct. In 1986, the Department of Defense instituted its voluntary disclosure program in response to the recommendations of President Reagan’s Blue Ribbon Panel on Defense Management, also known as the Packard Commission.259 President Reagan established the Packard Commission, in part, as a result of the public perception that private contractors placed profits above legal and ethical obligations and consequently routinely engaged in corrupt practices.260 Notwithstanding the misconduct uncovered by Operation Illwind, the media had reported other instances of potentially fraudulent conduct, such as the military paying $600 for hammers or $400 for toilet seats.261 Stories such as these did little to inspire the public’s confidence in Government procurement, the Government’s ability to wisely spend taxpayer money, or those companies that did business with the Government.

Accordingly, the Packard Commission set out to make findings and recommendations concerning the budget process, procurement system, and relationships between Government and industry so as to assure the integrity of the contracting process.262

259 See West et al., supra note 255, at 1, 2.
260 See Blue Ribbon report, supra note 68, at xxvii. The report stated that public distrust of the contracting process is “deeply disturbing” because “the public is almost certainly mistaken about the extent of corruption in industry and waste in the Department [of Defense].” Id. at 77. The Packard Commission released its final report on June 30, 1986, three months before Operation Illwind began uncovering corruption on a large scale.
261 See Thomas C. Modeszt, The Department of Defense’s Section 845 Authority: An Exception for Prototypes or a Prototype for a Revised Government Procurement System?, 34 PUB. CONTR. L.J. 211, 216 n.16 (2005); see also Reforming the Pentagon, L.A. TIMES, Jan. 23, 1989, at B4 (reporting that the Packard Commission was “appointed during a flood of cases involving the Pentagon's paying $600 for toilet seats and $900 for cargo-plane coffee pots”). Notably, while the President may have formed the Packard Commission because of spending abuses, the commission found these abuses to be rather infrequent and thus instead concentrated on the procurement system and budget process as a whole. See Eleanor Clift, Arms-Buying Czar Proposed; Official Would Control All Military Purchasing, L.A. TIMES, Apr.3, 1986, at A1.
262 See Blue Ribbon report, supra note 68, at xi, xiii.
The Packard Commission believed that contractors doing business with the government must perform at a higher level than their commercial counterparts.\(^{263}\) Contractors must do so, the Commission reasoned, because otherwise the public’s lack of confidence in defense contractors could result in a lack of public support for much needed defense programs.\(^{264}\) This lack of support in turn would negatively impact national security.\(^{265}\) As a result, the Packard Commission emphasized the importance of the contractor community taking responsibility for reducing and eliminating procurement-related misconduct.

Thus, the Packard Commission recommended that contractors implement corporate self-governance programs.\(^{266}\) It recommended contractors adopt such practices as written codes of conduct, training for employees regarding their legal and ethical obligations, encouraging employees to report misconduct when it occurs, and instituting internal audit programs to monitor compliance with relevant laws.\(^{267}\) Most importantly, though, the Commission recommended that the Government establish a program that encouraged contractors to make voluntary disclosures to the Government of procurement-related misconduct.\(^{268}\) Citing “repeated allegations of fraudulent industry activity,” the Packard Commission concluded that “no conceivable number of . . . federal auditors, inspectors, investigators, and prosecutors can police [the procurement process] fully.”\(^{269}\)

\(^{263}\) Id. at 77.

\(^{264}\) Id. at 77.

\(^{265}\) Id.

\(^{266}\) Id. at 79; see also id. at 80-89 (recommending such programs as codes of conduct, internal audits, reporting procedures for misconduct, and ethics training).

\(^{267}\) Id. at 78.

\(^{268}\) Id. at 110.

\(^{269}\) See id. at 75-77 & n.2 (noting further that at the time of the Packard Commission report, there were 131 separate investigations pending against 45 of the Defense Department’s 100 largest contractors).
The Department of Defense accepted the Commission’s recommendation and established the Department of Defense Voluntary Disclosure Program in 1986. This program sought to encourage contractors to adopt policies and procedures to voluntarily disclose potential civil or criminal fraud activity that affected their contractual relationship with the Government. Contractors who decided to participate in the program would not receive immunity for their disclosures, but could obtain some benefits nonetheless, such as a greater possibility of reduced liability, likely deferment of any suspension from contracting until investigation into the disclosure was complete, coordination of any settlement to ensure inclusion of all government agencies, and the assurance of confidentiality of the information disclosed. The program required contractors that opted to make a disclosure to provide a description of the potential fraud and the contract(s) involved, the military agencies affected by the potential fraud, the estimated financial impact, the time period involved, and any proposed remedy. Additionally, to qualify for any benefits of the program, the contractor had to prove it was in fact a volunteer and not making the disclosure because of a concern that the


271 See DoD Voluntary Disclosure Program, supra note 270, at 1.

272 Id. at Foreword.


274 DoD Voluntary Disclosure Program, supra note 270, at 6.
Government had prior knowledge of the potential fraud or was about to initiate its own investigation.\textsuperscript{275} 

How successful the Department of Defense’s voluntary disclosure program was remains the subject of some debate. The Government received more than 470 disclosures and did recover over $462 million between 1986 and 2007.\textsuperscript{276} However, most of the money that the Government recovered and most of the disclosures that contractors made occurred during the first 10 years of the program.\textsuperscript{277} The Department of Justice specifically noted the drop in voluntary disclosures that the Department of Defense’s program had received when it recommended mandatory disclosure.\textsuperscript{278} Proponents point out that any decrease in voluntary disclosures could, for example, actually indicate the strength of internal compliance programs and corporate self-governance; thus, voluntary disclosure has been a success.\textsuperscript{279} Of course, in the twelve years following Operation Illwind and during the voluntary disclosure era, forty-three of the Government’s top federal contractors paid $3.4 billion in fines, penalties, and settlements as a result of procurement improprieties.\textsuperscript{280} Surely in at least some of those cases, the contractor decided not to make a voluntary disclosure despite having information of potential

\textsuperscript{275} \textit{Id.}


\textsuperscript{277} See West, et al, \textit{supra} note 255, at 3 (noting that approximately 80% of the disclosures made and 80% of the $462 million recovered occurred by the close of fiscal year 1997). GAO, citing the DoD Contractor Disclosure Program manager, reported that the DoD Voluntary Disclosure Program “had been largely ignored by contractors for the past 10 years.” See GAO Ethics report, \textit{supra} note 76, at 21. During the first ten years of the program, GAO relayed that disclosures averaged approximately 40 to 60 per year; however, in 2007 and 2008, the program received only 3 and 9 disclosures, respectively. \textit{See id.} \& n.27.

\textsuperscript{278} \textit{See infra} notes 288-290 and accompanying text.

\textsuperscript{279} \textit{See} 73 Fed. Reg. 67064, 67069 (citing one critic of mandatory disclosure who said that “there may be fewer voluntary disclosures because self-governance is working to prevent and detect . . . fraud, such that “[r]eduction in the rate of voluntary disclosures would be an expected byproduct of improved internal processes, enhanced training, better internal controls, and an improved culture of ethics and compliance”).

wrongdoing. Nevertheless, regardless of the merits of either side of the debate, the voluntary disclosure program is no longer the primary means by which the Government expects to use the contractor community to detect procurement-related misconduct.281 Correctly or not, the new primary tool the Government will use to involve contractors in identifying such misconduct is mandatory disclosure.282

B. The Mandatory Disclosure Rule – The First Proposed Rule

The mandatory disclosure rule came about as a result of the FAR Council’s decision to propose new contracting rules that would serve to ensure that contractors conduct themselves with integrity and honesty. The Council believed such rules were necessary due to the fear of an increase in procurement fraud and war profiteering.283 Thus, in February 2007, the FAR Council determined that contractors with contracts in excess of $5 million and with performance periods more than 120 days must implement a written code of ethics and business conduct.284 The proposed rule suggested that such a code should include timely reporting of any suspected violations of law to the Government, but the proposed rule did not require contractors to make such disclosures.285 Accordingly, the Department of Justice responded to the proposed rule by asking the FAR Council to add a requirement that contractors “notify contracting officers

281 As a result of the new mandatory disclosure rule, the Department of Defense replaced its Voluntary Disclosure Program with its Contractor Disclosure Program. See Contractor Accountability: GAO Report Says Improvements Needed in Oversight of Contractor Ethics Programs, 92 Fed. Cont. Rep. (BNA) 218 (Sep. 29, 2009). However, the Department of Defense still encourages voluntary disclosures as part of the Contractor Disclosure Program. See id.
282 See 73 Fed. Reg. 67,064, 67,070 (noting that at least one executive agency inspector general’s office has said that “mandatory [disclosure] may be the most effective way for the Government to monitor its vendors”)
284 See 72 Fed. Reg. 7,588, 7,590 (Feb. 16, 2007). For more information on the ethics compliance code promulgated by the FAR Council, see generally Kathuria, supra note 7.
without delay whenever they become aware of a contract overpayment or fraud, rather than wait for its discovery by the Government.”

The Department of Justice pointed out that self-governance in the banking, security, and healthcare industries all required mandatory disclosure to the Government of violations of relevant laws, and therefore asserted that the Government should hold contractors to the same standards. Moreover, the Department of Justice emphasized that few contractors had participated in the Department of Defense’s voluntary disclosure program. Citing five disclosures made in calendar year 2006 and two disclosures in calendar year 2007, the Department of Justice noted its caseload suggested far more procurement-related misconduct was occurring than contractors were willing to admit themselves; hence the Department’s “unprecedented request to add a new section entitled ‘Contractor Integrity Reporting’ to the FAR.” According to the Department of Justice, requiring mandatory disclosure “would serve to emphasize the critical importance of integrity in contracting.”

The Department of Justice thus recommended that the FAR Council include language in its proposed rule requiring contractors to notify the contracting officer in writing whenever the contractor has reasonable grounds to believe an officer, director, employee, agent, or

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286 See Fisher letter, supra note 253.
287 See id.
289 See 73 Fed. Reg. 67,064, 67,070 (stating that “there are still significant numbers of violations occurring and being prosecuted that have not been self-disclosed”). Interestingly, the Department of Justice received at least one referral from the Court of Federal Claims. In Naplesyacht.com, Inc. v. United States, 60 Fed. Cl. 459 (Fed. Cl. 2004), Judge Braden denied Naplesyacht.com’s bid protest alleging that the Navy had improperly evaluated its proposal. Id. at 462. However, she also expressed concern over whether one of Naplesyacht.com’s competitors “had pre-bid knowledge” of its proposal, and accordingly provided a copy of its order denying the protest to “the Antitrust Division of the Department of Justice . . . for a preliminary action and such further action as it may deem appropriate.” Id. at 472 n.9.
290 Angela B. Styles, The Department of Justice’s Call for Integrity: Will Federal Contractors Answer, 89 FED. CONT. REP. (BNA) 136, 136–37 (Feb. 5, 2008).
291 See Fisher letter, supra note 253.
subcontractor of the contractor may have committed a violation of federal criminal law in connection with the award or performance of any government contract or subcontract.\textsuperscript{292}

The FAR Council responded favorably to the Department of Justice’s request. The FAR Council modified its proposed rule and required contractors to notify the affected agency’s inspector general and contracting officer, “whenever the contractor has reasonable grounds to believe that a violation of criminal law has been committed in connection with the award or performance of the contract or any subcontract thereunder.”\textsuperscript{293} As this broad language demonstrates, this proposed mandatory disclosure rule would have included the Procurement Integrity Act, since that federal statute contains criminal penalties for certain violations. However, this broad language also triggered significant objections from the contracting community and resulted in a change that now almost certainly excludes the Procurement Integrity Act.

\textbf{C. The Mandatory Disclosure Rule – The Final Rule}

The public comments to the proposed mandatory disclosure rule raised a number of concerns. These concerns included, among others, infringement on attorney-client confidentiality, the lack of a showing that voluntary disclosure was insufficient, the meaning of “reasonable grounds,” and vagueness as to what criminal law violations required disclosure.\textsuperscript{294} As for the concern about vagueness, some of the public’s comments argued that the proposed mandatory disclosure rule included non-procurement offenses. For example, the proposed rule conceivably would have required disclosure of tax law violations or Occupational Safety and Health law violations merely because they

\textsuperscript{292} Id.
\textsuperscript{293} 72 Fed. Reg. 64,019, 64,020.
\textsuperscript{294} See, e.g., ABA MDR Guide, supra note 7, at 24-25; West et al., supra note 255, at 5; see generally 73 Fed. Reg. 67,064. See also supra note 15.
occurred during the performance of a government contract. The FAR Council questioned the propriety of such a situation, especially given that the affected agency’s inspector general would not have jurisdiction over such offenses. The Department of Justice agreed that the language of the proposed rule was too broad, and therefore recommended limiting the mandatory disclosure rule’s reach to crimes involving fraud, conflict of interest, bribery, or gratuity in violation of Title 18 of the United States Code.

Accordingly, the FAR Council amended the mandatory disclosure rule to read as it does today. And, the language of the rule does not require disclosure of Procurement Integrity Act violations. As a statute lodged in Title 41 of the U.S. Code, the Procurement Integrity Act is not a Title 18 statute and therefore not within the scope of the mandatory disclosure rule. Indeed, the American Bar Association Public Contract Law section apparently has recognized this fact. Noting that the mandatory disclosure rule expressly requires reports of violations of Title 18, the Public Contract Law section explicitly cited the Procurement Integrity Act as one statute that, notwithstanding its importance to Government contractors, is not a Title 18 statute and therefore not within the definition of criminal conduct set out in the rule. Despite this fact, however, some

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295 See 73 Fed. Reg. 67,064, 67,075 (noting further the possibility of a traffic offense occurring while performing a Government contract may qualify as a reportable offense).
296 See id.
297 See ABA MDR Guide, supra note 7, at 23. The Department of Justice also recommended amending the rule to include mandatory disclosure of overpayments and violations of the Civil False Claims Act. See id.
298 See id. at 44-45 (recognizing the Procurement Integrity Act, the Foreign Corrupt Practices Act, the Arms Export Control Act, the Trade Agreements Act, and the Buy American Act as examples of statutes of “particular relevance to Government contractors” that are not in Title 18 “and therefore outside the express definition of criminal conduct warranting mandatory disclosure”).
within the procurement community may nevertheless contend that contractors still must report PIA violations to the Government.\footnote{Cf. Louis D. Victorino & John W. Chierichella, The FAR’s “Contractor Business Ethics Compliance Program and Disclosure Requirements” Require Significant Changes for All Government Contractors and Subcontractors, Gov’t CON., Dec. 17, 2008, ¶ 439 (arguing that the mandatory disclosure rule “practically requires” a contractor to conduct an internal investigation if it suspects its personnel has committed any misconduct in connection with a procurement).} In the end, such an argument must fail.

**D. A Loophole Still Exists**

When the FAR Council published the first version of the mandatory disclosure rule, the rule applied only to contracts performed within the United States.\footnote{See 72 Fed. Reg. 64,019, 64,020.} Congressman Peter Welch asserted that a mandatory disclosure applicable only to contracts performed within the United States despite the many contracts being performed outside the United States created a “loophole . . . so outrageous that once exposed in the light of day it was simply indefensible. . . . We need to protect taxpayer dollars and our troops serving overseas by closing this loophole with the force of law.”\footnote{Matthew Weigelt, Contracting Reform Bills Make it Through House, WASH. TECHNOLOGY, Apr. 24, 2008, at 1.} On June 30, 2008, Congress therefore passed the Close the Contractor Fraud Loophole Act, which required the FAR Council to amend the Federal Acquisition Regulation to include provisions that required “timely notification by Federal contractors of violations of Federal criminal law,” and applied regardless of where the contract was to be performed.\footnote{Pub. L. 110-252, Title VI, Chapter 1, § 6102 (June 30, 2008).}
However, a loophole still exists. Despite applying to procurement-related misconduct, the mandatory disclosure rule does not include the procurement-specific Procurement Integrity Act. It seems intuitive that this particular statute should be included in a rule requiring disclosure of violations of law in connection with a procurement. Ironically, then, in attempting to comply with the congressional mandate to close one loophole, the FAR Council created another one. Contractors not wishing to disclose their PIA violations do not appear to have an obligation to do so. Indeed, basic statutory interpretation principles support such a conclusion.  

First, the plain language of the mandatory disclosure rule does not require a contractor to report its PIA violations. As discussed previously, the rule applies to only Title 18 offenses, which a PIA violation is not. Thus, because the rule’s language is clear and unambiguous that only Title 18 violations must be disclosed, a contractor that discovers that it has committed a PIA violation need not disclose that violation.  

Second, notwithstanding the purpose of the mandatory disclosure rule, the language of the rule does not support that purpose insofar as the PIA is concerned. As a general matter, rules and statutes should be construed to effectuate the drafter’s “overriding purpose.” The mandatory disclosure rule’s purpose is to require disclosure of criminal conduct in connection with the award, performance, or closeout of a Government contract. Thus, some may contend that contractors must disclose their PIA violations since such violations occur only in connection with the award of a

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304 See Dodd v. United States, 545 U.S. 353, 359 (2005) (stating that “when [a] statute’s language is plain, the sole function . . . is to enforce it according to its terms”); Consumer Product Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (instructing that the plain language of a statute “must ordinarily be regarded as conclusive”).
306 See ABA MDR Guide, supra note 7, at 45.
Government contract. But arguing the purpose of a rule as indicative of the rule’s meaning is compelling only if the rule’s language is consistent with that purpose. The plain language of the mandatory disclosure rule is not consistent with a purpose to require disclosure of criminal violations in connection with a procurement. On the contrary, the plain language communicates a purpose that contractors must disclose only Title 18 violations. Thus, as currently written, violations most likely requiring disclosure include false, fictitious, or fraudulent claims; major fraud against the United States; compensation to members of Congress, officers, and others in matters affecting the Government; activities of officers and employees in claims against and other matters affecting the Government; restrictions on former officers, employees, and elected officials of the executive and legislative branches; acts affecting a personal financial interest; bribery; and gratuities. Finally, the FAR Council’s change of the original mandatory disclosure rule to its current form by adding the limiting language to Title 18 offenses is significant. Since the first mandatory disclosure rule that the FAR Council proposed required disclosure of any criminal law in connection with a Government contract, that language would have required disclosure of PIA criminal violations. The final rule that limited disclosure to only Title 18 offenses, however, clearly changed a contractor’s disclosure obligations. Even though titled Crimes and Procedure, Title 18 does not contain every Federal criminal law statute. In fact, a vast majority of Federal criminal law are not even in Title

307 Cf. United States v. Union Oil Co., 343 F.2d 29, 33 (9th Cir. 1965) (explaining that in order for the purpose of statute to govern its meaning, the language of the statute must bear that interpretation “in order to overcome the obvious force of a normal reading of the disputed provision”).

18. A 2003 Federalist Society study noted that there are more than 4,000 federal crimes, with approximately 1,200 found in Title 18 and the remaining 2,800 “scattered throughout the remaining 49 titles of the United States Code.” By limiting the mandatory disclosure rule to Title 18 offenses, the FAR Council precluded the rule’s application to other “criminal” laws. When the final version of a rule deletes language from an earlier draft, rules of statutory construction treat such a deletion as intentional.

Thus, it does not appear that a convincing argument exists that the mandatory disclosure rule requires disclosure of PIA violations. Some contractors may decide nonetheless to report such violations out of an abundance of caution. A contractor may find that making the disclosure at the very least can help establish, improve, or maintain its business relationship with the Government. In general, however, certainly many contractors will not disclose their PIA violations, especially if they can find a reason not to. The language of the rule provides such a reason. In the absence of a clear requirement for disclosure, other contractors are likely to err on the side of nondisclosure when it comes to the PIA. So although “[n]ondisclosure of a known criminal violation . . . may be unwise . . ., even where the violation is not expressly included in the FAR’s mandatory disclosure rule,” “[m]ore inclusive language removes any ambiguity (and loopholes) about what should be revealed to the Government.”

In the end, the FAR Council promulgated a rule designed to require disclosure of misconduct occurring in connection with a procurement. Debates may rage as to precisely what misconduct truly requires disclosure. However, as far as the PIA is

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310 *See* In re Town & Country Home Nursing Services, Inc., 963 F.2d 1146, 1151 (9th Cir. 1992).
concerned, there should be no debate. It is a procurement-centric statute that if violated is violated only in connection with a procurement. The mandatory disclosure rule therefore contains a loophole. The FAR Council should close it.

V. FOUR REASONS TO INCLUDE THE PROCUREMENT INTEGRITY ACT IN THE MANDATORY DISCLOSURE RULE

Even the American Bar Association of Public Contract Law section has observed that the Procurement Integrity Act is one statute that has special significance to contractors, yet does not appear to be a part of the mandatory disclosure rule.\(^{313}\) It should. At least four reasons support adding the PIA to the mandatory disclosure rule. First, adding the PIA to the mandatory disclosure rule will lead to the discovery of more violations. Second, it will enhance the deterrent effect of the PIA. Third, the PIA logically complements the statutes listed in the mandatory disclosure rule. And fourth, the PIA and mandatory disclosure rule share the same purpose of promoting procurement integrity.

A. Detecting Procurement Integrity Act Violations

The PIA does not exist to discover violations. So notwithstanding the PIA’s “impressive array of enforcement mechanisms,” the enforcement mechanisms do “not provide evidence to prosecute fraud suspects.”\(^{314}\) Regardless of the number of criminal prosecutions, civil suits, bid protests, suspensions and debarments, rescinded contracts, and agency investigations that have occurred as a result of the PIA, no one can seriously say that those actions reflect every instance of PIA violations. Rather, most would agree that more misconduct occurs than is discovered.\(^{315}\) Thus, the most obvious result of

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\(^{313}\) See ABA MDR Guide, \textit{supra} note 7, at 21.


\(^{315}\) Kathuria, \textit{supra} note 7, at 805.
adding the PIA to the mandatory disclosure rule will be to close that gap and to allow the
discovery of more violations.

The need to discover PIA violations may be more important now than ever before. Indeed, some observers have predicted that Procurement Integrity Act violations may be on the rise.\textsuperscript{316} The main reason for this prediction is the significant sums the Government spends on procurement. In fiscal year 2008 alone, the United States government spent $527 billion on contracts.\textsuperscript{317} That is enough money to give every person in the world approximately $78.\textsuperscript{318} It is enough money to fund a 4-year college education at a public university for 18,767,806 Americans.\textsuperscript{319} And it is more than enough to buy 6,773,778 2010 Porsche 911 Carreras – or about 45 such cars for every American.\textsuperscript{320} Not surprisingly, then, the Department of Defense Inspector General recently reported to Congress that the Department of Defense’s massive budget has made it more vulnerable to procurement irregularities\textsuperscript{321} such as PIA violations. Sadly, there are Government employees and contractor personnel willing to risk exchanging sensitive procurement information or engaging in impermissible employment negotiations in order to obtain some of the billions of dollars involved with government contracting.

Identifying when that disclosure or receipt occurs may be quite difficult, however. By its very nature, a PIA violation is clandestine. Absent a whistleblower or other eyewitness, the Government or a competing contractor may never find out about

\textsuperscript{316} See, e.g., Levy & Bouquet, supra note 99, at 6 (stating that “[i]n our view, in the coming wave of procurement fraud investigations contractors face greatest risk of prosecution for . . . violation of the Procurement Integrity Act.”).

\textsuperscript{317} See http://www.fedspending.org/fpds/chart_total.php.

\textsuperscript{318} See http://www.census.gov (estimating world population to be 6,807,679,886).

\textsuperscript{319} See http://www.collegeboard.com/student/pay/add-it-up/4494.html (estimating public university tuition to be $7,020 per year).

\textsuperscript{320} See http://www.porsche.com/usa/models/911/ (estimating price for a 2010 911 Carrera to be $77,800); http://www.census.gov (estimating U.S. population to be 308,841,886).

\textsuperscript{321} See DoD IG report, supra note 191, at 5.
exchanges of sensitive procurement information. A significant bank deposit around the
time offers are due, an otherwise inexplicable change in a bid or proposal price following
the submission of an initial offer, or amendments to an offer that precisely match an
evaluation board’s determination could raise suspicions, but do not directly demonstrate a
PIA violation. Sometimes investigators may be relegated to comparing proposals side-
by-side to find similarities that can only be explained by one contractor having prepared
its proposal with the benefit of the other’s information.\textsuperscript{322} Recall that in \textit{United States v. Parrish}, the Government could show that the defendant Carlisle had cut and pasted
AMS’s proposal information by pointing out both contained the same typographical
errors.\textsuperscript{323} Such cases would seem rare though. Alternatively, with the benefit of
technology, an aggrieved contractor could show through metadata or other forensic
information technology how a competitor obtained its proprietary data. But even then,
the chances of successfully showing the illicit activity may still be low.\textsuperscript{324} As technology
improves, Government spending increases, and with more money is at stake, the less
scrupulous will find new and different ways to engage in the exchange of confidential
procurement information. A tool such as mandatory disclosure would help the
Government identify when those exchanges occur.

In addition to the clandestine nature of PIA violations, the Government may lack
the necessary resources to detect violations when they occur. No one would dispute the
notion that the lack of manpower, for example, poses a significant challenge for the

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323 See supra notes 146-149 and accompanying text.
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324 See Applied Management Sciences, Inc., B-184654, Feb. 18, 1976, 76-1 CPD ¶ 111 (denying protest
despite remarkable similarities between proposals as protestor could not show awardee’s was in fact based
on access to protestor’s proprietary information).
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Government in detecting procurement misconduct such as PIA violations. Indeed, the investigative force is not what it once was. Although the Department of Defense Criminal Investigative Service’s workforce has remained constant between 313 and 385 personnel during the past thirteen years, the staff in 1993 had substantially fewer contracts to look into, with significantly less money at stake. 325

Similarly, the acquisition workforce has not kept pace with the increase in contracting. GAO recently reported that the federal Government’s acquisition workforce has not increased since fiscal year 2000, but the number of contracts and their value have increased nearly twofold. 326 This fact is important, if for no other reason than contracting personnel are in the best position to detect and report potentially fraudulent conduct. 327 Without a fully capable acquisition workforce, the Government will not be able to adequately prevent misconduct throughout the procurement system. 328

Statistics seem to confirm the fear that current resources are inadequate to identify procurement-related misconduct. Between 1993 and 2008, Defense Department referrals of procurement misconduct cases decreased by 76%, while the FBI’s number of referrals for government-wide corruption matters, including procurement fraud, declined by

325 Schwellenbach, supra note 140 (noting further that the FBI had referred 213 Defense Department procurement fraud matters to the Department of Justice for prosecution in 2001, but only 86 in 2008).
326 See GAO FWA report, supra note 248, at 7–8 (noting also 38% decrease in federal acquisition workforce from the mid-1990s to 2001); see also Schooner, supra note 201, at 651, 672 (writing that “the data suggests that Congress’ relentless campaign to reduce the size of the acquisition workforce has unduly burdened, over-extended, and exhausted the government’s buyers” and that there is a “trend toward continued downsizing of the acquisition workforce”); Acquisition Panel report, supra note 244, at 19 (concluding that the acquisition workforce has remained stable since 2000 despite a 75% increase in government purchasing); Steven L. Schooner, Keeping Up with Procurement, Gov’t EXECUTIVE, July 1, 2006, at 74, available at http://www.govexec.com/features/0706-01/0706-01advp.htm (writing that “it should be obvious that the federal government lacks a sufficient acquisition workforce to obtain the best value for the money it spends”).
55%. These statistics are alarming, especially since the number of procurements and the federal expenditures on those procurements have increased dramatically over the same time period.

The PIA cannot effectively “punish illegal activities swiftly” when and if they do occur without evidence of those illegal activities. The mandatory disclosure rule can assist law enforcement and Government agencies by “enhanc[ing] [the] ability to detect” those illegal activities. This potential benefit seems necessary. Rapid, full disclosure is essential. Special Agent Richard Wade, one of the lead Operation Illwind investigators, believed that without Mr. X, the Government may never have found the corrupt schemes that it did. Even if the inside trading of confidential procurement information does not exist to the extent that it did during Operation Illwind, the procurement community needs a 21st century Mr. X. Mandatory disclosure may be the next best alternative. In addition, contractors should bear some responsibility for rooting out procurement misconduct such as PIA violations if they want to benefit from potentially lucrative Government contracts.

B. Enhancing the Procurement Integrity Act’s Deterrent Effect

Requiring contractors to report their violations of the PIA will also enhance the statute’s deterrent effect. Regardless of any weaknesses with the PIA’s criminal

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329 Id.
331 134 CONG. REC. 32,156 (Oct. 20, 1988).
333 Pasztor, supra note 10, at 318; see also Jansson, supra note 21, at 250 (noting the illegal behavior revealed by Operation Illwind “might have gone undetected had not ‘Mr. X’” reported Marlowe’s attempted bribe).
334 Cf. 73 Fed. Reg. 67,064, 67,070 (acknowledging without conceding that it may be “true that there are comparatively fewer [procurement fraud] violations now than 20 years ago”).
The penalties alone may serve to encourage contractors to act ethically. And the risk of suspension and debarment under the mandatory disclosure rule for failing to report a PIA violation would only strengthen the PIA’s other penalties. No statute will prevent every individual from committing the evil that the statute targets merely because of the possibility of significant adverse consequences. But requiring a contractor to risk suspension and debarment for failing to report a PIA violation should provide a significant motivation for contractors to develop a culture of compliance, and to identify rogue employees willing to break the law. The mandatory disclosure rule “practically requires” a company to conduct an internal investigation if it suspects its personnel has committed any misconduct in connection with a procurement. 336 To minimize the expense and inconvenience of such internal investigations, contractors may be more vigilant in preventing violations from occurring in the first place if a rule required disclosure of PIA violations.

Suspension or debarment is a significant penalty and can be the deathknell for a contractor that depends on Government contracts for its livelihood. This is not to say that contractors will willingly develop the systems and programs it needs to in order to detect PIA violations. 337 Making PIA violations subject to mandatory disclosure, and threatening suspension or debarment if no disclosure is made, should though tip the

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335 See supra notes 194-197 and accompanying text.
337 Eric Feldman, co-chairman of the Private Sector Outreach Committee of the Task Force and the senior advisor to the director of the National Reconnaissance Office for Procurement Integrity has asserted that many large contractors have established internal control programs that “place[] form over substance and the spirit in which these programs were originally intended” such that they “may be ‘paper tigers’ that operate without the benefit of adequate numbers of trained, experienced personnel conducting internal investigations and training the workforce.” Cracking Down, supra note 13, at 13.
balance in favor of integrity. Mandatory disclosure will increase costs, but those “costs should be preferable . . . to the potential alternatives of investigation, suspension from contracting, civil penalties, and prosecution.”

C. The Procurement Integrity Act Complements Currently Listed Statutes

A third reason for including the PIA in the mandatory disclosure rule is because it appears to be a natural and logical complement to a number of the statutes that the rule already lists. The PIA captures misconduct, though, not covered by the statutes already listed in the mandatory disclosure rule. At the very least, the PIA may provide a clearer and more comprehensive definition of prohibited conduct than the currently listed statutes. Such clarity will assist contractors as they attempt to comply with the mandatory disclosure rule.

1. 18 U.S.C. § 201

First, the PIA ably complements the anti-bribery statute, which is already listed in the mandatory disclosure rule. 18 U.S.C. § 201 prohibits an individual from giving and a public official from seeking “anything of value” in exchange for the performance of an official act or as a result of an official act. Bribery represents “such a flagrant violation of public trust that it was understandably the first aspect of” official corruption “to be positively outlawed.”

The bribery statute does not, of course, capture some of the most destructive behavior. While the exchange of confidential information often occurs for something of value, sometimes the evidence may not show that money was involved. For example,

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338 See Kathuria, supra note 7, at 814.
340 Petrowitz, supra note 129, at 196–97 & n.2 (noting the first general bribery statute to have been enacted in 1853).
neither United States v. Lessner nor United States v. Honbo, discussed above, suggested that the defendants disclosed sensitive procurement information for money. On the contrary, those cases indicated that personal relationships were the motivating cause. And it is doubtful that Lessner or Honbo are aberrations. In cases like these, then, if the firm could not find any “credible evidence” of an exchange of something of value, the bribery statute would not apply and no disclosure would occur. The PIA, however, would apply even in the absence of evidence of money changing hands.

2. 18 U.S.C. §§ 207 and 208

18 U.S.C. § 207 and § 208 contain revolving door provisions not unlike the PIA’s. Section 207 limits a former Government employee from working on matters on which the employee participated personally and substantially while with the Government.\(^{341}\) Section 208 bars a Government employee from acting personally and substantially on matters that may affect the employee’s or a relative’s financial interests.\(^{342}\) These two statutes, then, cover much of the same conduct that the PIA also addresses. In fact, Professors Nash and Cibinic once took issue with the “considerable overlap” between the PIA and sections 207 and 208.\(^{343}\) They would have “preferred total omission of these

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\(^{341}\) 18 U.S.C. § 207 bars 1) former executive and legislative branch officers and employees permanently from influencing matters “in which the United States . . . is a party or has a direct and substantial interest . . . [the employee] participated personally and substantially . . . [and] which involved a specific party or specific parties at the time of such participation”; 2) former executive branch officers and employees for two years from attempting to influence officers or employees of other agencies after termination of the officer’s employment with the Government; and 3) former executive branch officers and employees for one year from providing advice or aid to persons involved in ongoing trade or treaty negotiations in which the employee personally and substantially participated as a Government employee.

\(^{342}\) 18 U.S.C. § 208 prohibits executive branch officers and employees from participating “personally and substantially . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.”

\(^{343}\) Nash & Cibinic, The New Procurement Integrity Rules, supra note 211, at 1.
‘revolving door’ rules from the new [PIA] – leaving the area governed by the criminal statutes [sections 207 and 208].”\textsuperscript{344}

Although it targets very similar bad acts, the PIA fills in many gaps left open by sections 207 and 208. First, it covers more employees.\textsuperscript{345} Second, it “goes much further in many of these [post-government employment] areas both to define violations and to outline civil and criminal penalties for them.”\textsuperscript{346} As one commentator has said, “protective measures are addressed much more directly in the [PIA] than in [at least] 18 U.S.C. § 208, which is rather vague in comparison.”\textsuperscript{347} And finally, the PIA offers a harsher civil penalty.\textsuperscript{348} Even though the PIA’s revolving door provisions do not provide for criminal penalties, it can still apply in situations where sections 207 and 208 might not. As a result, including sections 207 and 208 in the mandatory disclosure rule and not the PIA makes little sense.

The revolving door issue is not likely to subside anytime soon. A recent report noted that the “imbalance between supply and demand is exacerbated by the strong

\textsuperscript{344} Id.
\textsuperscript{347} Branstetter, \textit{supra} note 134, at 458. Congress considered eliminating the PIA’s conflict of interest provisions in 1990 during the suspension of the PIA, noting the Act (and other statutes) were “duplicitive in purpose of the general conflict of interest statutes, 18 U.S.C. §§ 201, 207, and 208.” 136 CONG.REC. S8546 (daily ed. June 21, 1990). But Congress ultimately rejected making this change.
\textsuperscript{348} \textit{Compare} 18 U.S.C. § 216(b) (providing civil penalty for violation of Sections 207 and 208 as “not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater”), with 41 U.S.C. § 423(e)(2) (providing a civil penalty of “not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct”).
competition that the private sector offers the government in trying to recruit the shrinking pool of talented procurement professionals. The government is losing this competition.\textsuperscript{349} This imbalance in the marketplace – and pressure for public servants to flee to the private sector – increases the opportunities for trading inside information. The mandatory disclosure rule would benefit, therefore, from including all relevant statutes dealing with the revolving door. The PIA is such a statute.

3. 18 U.S.C. § 641

The PIA may complement the criminal conversion statute, 18 U.S.C. § 641, as well. Section 641 prohibits selling, conveying or disposing “any record, voucher, money, or thing of value of the United States.”\textsuperscript{350} The Department of Justice used section 641 to convict many defendants identified during Operation Illwind who had exchanged confidential procurement information.\textsuperscript{351} But section 641 suffers from at least two potential weaknesses that the PIA may be able to overcome.

First, while section 641 may cover Government-produced confidential procurement information, i.e., source selection information, it may not cover a contractor’s bid or proposal information. Only one district court has expressly held that the statute does cover privately generated information.\textsuperscript{352} In \textit{United States v. Berlin},\textsuperscript{353} the district court observed that previous section 641 convictions had all resulted from

\textsuperscript{349} Acquisition Panel report, \textit{supra} note 244, at 363.
\textsuperscript{351} When deliberating the need for the PIA, Congress recognized stating that “the Justice Department [was] successful in obtaining convictions using statutes such as the . . . conversion statute[] that ha[s] long been on the books.” 136 \textit{CONG. REC.} S8522 (June 21, 1990). The Fourth Circuit noted in a case involving Section 641 as a result of the defendant obtaining bid and source selection information, “[t]he conduct giving rise to the convictions occurred prior to the passage of the Procurement Integrity Act. 41 U.S.C.A. § 423.” \textit{United States v. McAusland}, 979 F.2d 970, 972–76 & n.1 (4th Cir. 1992). The Fourth Circuit, of course, was the situs for most of the prosecutions brought about as a result of Operation Illwind.
\textsuperscript{352} \textit{See, e.g., United States v. Matzkin}, 14 F.3d 1014, 1018–20 (4th Cir. 1994) (rejecting argument that competitor’s bid pricing information was the property of the competitor and thus not subject to prosecution under 18 U.S.C. § 641).
theft of “information generated by the government.” The district court conceded that “there have been no cases involving information generated by a private party and submitted to the government temporarily.” Nevertheless, the court found that section 641 covered such information, relying on a case that upheld a section 641 conviction for theft of tangible personal property from the temporary custody of the Government.

Section 641’s language, however, seems to suggest it would not apply to a contractor’s bid or proposal information, as it applies only to “any record, voucher, money, or thing of value of the United States.” It would seem that a contractor’s confidential information—that which it develops and proposes for the United States’ consideration—is not “of the United States,” but rather of the contractor. Other circuits have used language that appears to contradict the district court’s reading of section 641. In United States v. Gordon, for example, the Fifth Circuit found that the “word ‘of’ necessarily implies ownership. Things ‘of’ the Government, in the sense of [641], are property of the Government.” Moreover, the very title of the statute suggests the United States owns the property: Public money, property, or records. Public property and public records likely do not include property and records created and owned by a private contractor, even if possessed by the Government. Additionally, even those courts that have suggested section 641 does not require absolute ownership, they nevertheless find that the Government must exercise virtually complete control over the property for

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354 Id. at 839.
355 Id.
356 Id. at 839–40.
357 638 F.2d 886, 889 (5th Cir. 1981).
358 Should the issue come down to an ambiguity in the statute’s language, a court will read the “section heading enacted by Congress in conjunction with the statutory text to ‘come up with the statute’s clear and total meaning.’” United States v. Holmes, 822 F.2d 481, 494 n. 22 (5th Cir. 1987) (quoting House v. C.I.R., 453 F.2d 982, 987 (5th Cir. 1972)).
section 641 to apply, a fact that might not necessarily be true with respect to a contractor’s bid information. Thus, depending on the facts, a contractor that has wrongfully come into possession of another’s bid or proposal information may be unsure whether it has violated section 641, and may thus question whether it needs to disclose the possible violation under the mandatory disclosure rule. Moreover, those contractors looking for a reason to avoid having to make a mandatory disclosure could seek to interpret section 641 in a way that does not favor disclosure.

The second possible weakness with section 641 is that a conflict exists among the federal courts as to whether the Government must prove that an accused had knowledge that the property he embezzled, stole, purloined, or knowingly converted to his own use or to the use of another was property owned by the United States. In a jurisdiction that required such proof, the evidence to support such a finding might be lacking, and a contractor could potentially avoid mandatory disclosure.

With the PIA, however, these issues are irrelevant. The PIA covers specified proposal information submitted by a contractor and does not require knowledge of ownership. Thus, although section 641 may apply to many situations involving the misuse of confidential procurement information, the PIA generally provides a clearer definition for contractors to apply. As a more precise statute, the PIA may eliminate confusion and uncertainty as to whether a disclosure must be made and thus provide a useful complement to Title 18’s conversion statute.

4. 18 U.S.C. § 1905

Another statute that deals with confidential procurement information that the PIA may complement is the Trade Secrets Act. The Trade Secrets Act prohibits the release of “trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” The PIA complements the Trade Secrets Act in that the PIA applies in situations where the Trade Secrets Act might not and also covers additional confidential information that the Trade Secrets Act does not.

First, the Trade Secrets Act expressly applies to Government personnel only. As such, a contractor might not have to report situations where its employee receives protected information. Indeed, the mandatory disclosure rule does not discuss accomplice liability. So, a violation of the Trade Secrets Act may not be a reportable offense where a Government employee inadvertently discloses confidential procurement information to a contractor employee who nonetheless appropriates it to his advantage. Such a situation would not prevent use of the PIA, and so a contractor that discovered it had obtained and appropriated Trade Secret Act information would have to disclose that conduct because of the PIA.

362 Id.; see also St. Mary’s Hospital, Inc. v. Califano, 462 F. Supp. 315, 318 (S.D. Fla. 1978) (explaining that “18 U.S.C. § 1905 is a criminal statute designed solely to prevent government employees from surreptitiously divulging privileged information”).
363 See, e.g., infra note 370 (discussing an actual case involving a Government employee’s inadvertent transmission of sensitive procurement information to a contractor who allegedly used it to his firm’s advantage).
Second, the Trade Secrets Act does not protect the information not specifically listed in it.\textsuperscript{364} As such, a contractor could avoid mandatory disclosure if the wrongfully used information did not qualify as “trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” The Trade Secrets Act would not, therefore, likely cover the bid pricing information exchanged in the Olson, Ferrell, Parrish, and Lessner cases discussed above, nor the board evaluation information traded in Honbo.\textsuperscript{365} As previously discussed, the PIA covers a much more specific and precise list of protected material and likely affords more flexibility. It would therefore apply where the Trade Secrets Act would not, and apply in situations where the Government undoubtedly would want mandatory disclosure.


Finally, in addressing the fact that the mandatory disclosure rule may not apply to violations of the PIA because it is not a part of Title 18, the American Bar Association points out that nonetheless, an “act made unlawful by statutes other than Title 18 could easily involve a conspiracy under 18 U.S.C. § 371.”\textsuperscript{366} As such, the conspiracy violation, as a Title 18 offense, would be reportable under the mandatory disclosure rule. But this argument may not work in every instance involving the PIA.

18 U.S.C. § 371 applies to an “agreement whereby a federal employee will act to promote private benefit in breach of his duty . . . if the proper functioning of the

\textsuperscript{364} Westinghouse Electric Corporation v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976).
\textsuperscript{366} ABA MDR Guide, \textit{supra} note 7, at 45.
Government is significantly affected thereby. "  

Such a statute seems logical on its face, as most cases likely involve an offeror of the information and a recipient. Indeed, in order to obtain information, someone must have disclosed it.

For a contractor, the conspiracy statute has an obvious potential gap, however, because it requires an agreement to defraud between two or more parties. Proof of a conspiratorial agreement may present a significant challenge, and this may in effect quash the contractor’s sense of obligation to disclose. The PIA, in contrast, allows the contractor to find that an impropriety has occurred without finding that the wrongdoer had acted in concert with anyone else. Including the PIA in the mandatory disclosure rule, therefore, is necessary to ensure that where the evidence does not support a finding of a conspiracy, contractors would still have to report the misuse of confidential information.

D. The Procurement Integrity Act and Mandatory Disclosure Rule Both Exist to Promote Procurement Integrity

Simply stated, adding the PIA to the mandatory disclosure rule makes sense. In fact, no good reason militates against including it. Rather, both the PIA and the

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367 United States v. Peltz, 433 F.2d 48, 51-52 (2d Cir. 1970). “The statute is broad enough to include any agreement, the purpose of which is to impair, obstruct, or defeat the proper function of any department of the Government. . . . [A]ny conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of [the Government’s] operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States.” Haas v. Henkel, 216 U.S. 462, 479-80 (1910).

368 But see Computer Technology Associates, Inc., B-288622, Nov. 7 2001 (noting that awardee firm’s help desk operator had hacked into the General Services Administration’s email system to obtain competitors’ bid information).

369 As the Fourth Circuit recently stated, “[a]greement between conspirators often presents difficult proof problems.” United States v. Abu Ali, 528 F.3d 210, 238 (4th Cir. 2008).

370 A bid protest case, Kellogg Brown & Root Services, Inc. , B-400787.2, et al., Feb. 23, 2009, 2009 U.S. Comp. Gen. LEXIS 47, illustrates this issue. There, the contracting officer sent an email to Kellogg Brown & Root’s (KBR) program manager regarding adverse past performance information, but inadvertently attached a file containing source selection information, proprietary information of KBR’s competitors. The KBR program manager subsequently used the information to his company’s competitive advantage. He certainly never entered into any agreement with the contracting officer to defraud the Government, and a prosecutor may have had a difficult time proving that the program manager discussed the information with anyone at KBR and then agreed to use it in a way to defraud the United States.
mandatory disclosure rule promote integrity in the procurement process. Amending the mandatory disclosure rule to include the PIA would not be a gratuitous act, but instead a recognition of its logical connection to the purpose of the rule.

When Congress passed the PIA in 1988, it intended to make the “ethics guidelines indelibly clear” for the procurement community so as to restore the public’s confidence in the procurement system. More than twenty years later, the Department of Justice proposed the mandatory disclosure rule for very similar reasons: “to emphasize the critical importance of integrity in contracting.” Thus, although the mandatory disclosure rule’s drafters had to make choices regarding which of the more than thirty statutes in the United States Code that relate to procurement integrity in some form or another belonged in the mandatory disclosure rule, it seems curious they excluded the one statute that actually includes procurement integrity in its title.

Additionally, both the PIA and mandatory disclosure rule exist specifically in order to improve the procurement system. While the mandatory disclosure rule does so by citing Title 18 and the Civil False Claims Act, both can apply to conduct outside of the procurement system. They are thus laws of general application. The PIA, on the other hand, will apply only to a procurement. In working with a mandatory disclosure requirement, then, a contractor would be more familiar with the PIA than with the litany of Title 18 laws because it presents rules specifically designed to apply to his everyday activities.

The PIA and the mandatory disclosure rule thus apply to the same sphere of activity. Importantly, the mandatory disclosure rule does not require disclosure to law enforcement, but rather to agency inspectors general and contracting officers, i.e., individuals who have a particularly heightened interest in procurement matters\(^{374}\) and who have the responsibility for interpreting the PIA.\(^{375}\) The law and the rule accordingly complement each other quite logically.

At first glance, limiting the application of the mandatory disclosure rule to crimes found in Title 18 seems reasonable. The initial rule, in requiring disclosure of violations of federal criminal law, did not specify Title 18, and so criticism arose that the “lack of specificity regarding a ‘criminal violation’ will be difficult to apply.”\(^{376}\) This is so because Title 18 of the U.S. Code, although designated “Crimes and Criminal Procedure,” is not a comprehensive criminal code.\(^{377}\) “So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.”\(^{378}\) Accordingly, limiting the mandatory disclosure rule to Title 18 offenses will make it easier for contractors to know precisely what laws the mandatory disclosure rule covers. However, the decision to make the mandatory disclosure rule’s coverage limited

\(^{374}\) See, e.g., AR 20-1, Inspector General Activities and Procedures, ¶ 4-4.b.1 (Feb. 1, 2007) (noting role of Army inspector general in procurement fraud matters); SECNAVINST 5430.92B, Assignment of Responsibilities to Counteract Acquisition, Fraud, Waste, and Related Improperities Within the Department of the Navy, ¶ 6.h. (Dec. 30, 2005) (noting role of Navy inspector general in procurement fraud matters); AFI 90-301, Inspector General Complaints Resolution, ¶ 1.2 (May 15, 2008) (noting role of Air Force inspector general in procurement fraud matters); FAR 33.204 (explaining that “the Government’s policy . . . to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level”).

\(^{375}\) Cf. Day & Zimmermann Pantex Corporation, B-286016 et al., Nov. 9, 2000, CPD ¶ 96 (noting that procuring agencies, not GAO, have the responsibility of interpreting and enforcing conflict of interest statutes).

\(^{376}\) See Styles, supra note 290, at 136-37.


\(^{378}\) Strazella, supra note 138, at 20.
to Title 18 does not compellingly justify excluding the PIA. Falling outside Title 18 status should not prevent the PIA, a procurement-centric statute, from being an anti-corruption tool worthy of inclusion in the procurement-centric mandatory disclosure rule.

VI. CONCLUSION

The PIA should be made a part of the mandatory disclosure rule. In fact, not including the PIA in the mandatory disclosure rule undermines a claim that the PIA is an “important” statute governing the procurement process. If mandatory disclosure is to be a part of the future of procurement regulation, then it should incorporate those laws that govern procurement professionals’ every day conduct. The PIA is one of those laws.

The PIA may be a fairly recent addition to the U.S. Code, but it has come a long way. Congress passed it, in part, out of a concern that the existing laws did not adequately protect the procurement system; it thus saw the PIA as necessary to address new types of procurement irregularities. Now, with the mandatory disclosure rule the FAR Council has determined Government procurement has changed sufficiently enough to require another rule to further procurement integrity. This new rule requiring disclosure to protect the procurement system’s integrity and the PIA belong together.

The PIA has served to limit contracting improprieties by setting forth explicit prohibitions against disclosing and receiving confidential procurement information, and by barring specified interactions with contractors. The PIA would become a more effective anti-corruption device were the FAR Council to amend the mandatory disclosure rule to incorporate the PIA. Given recent concerns about the possibility of an increase in potential PIA violations, making such a change appears timely. All forms of procurement irregularity are harmful, and one is not more sinister than another. Any rule

that can minimize procurement misconduct, in any of its forms, should be as inclusive as possible.

And, changing the rule would not be complicated. The FAR Council needs to add only seven words so that the mandatory disclosure rule would call for disclosure of: “violations found in Title 18 of the United States Code; a violation of the Procurement Integrity Act; or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).”

Including the PIA in the mandatory disclosure rule is desirable not because it will lead to more criminal prosecutions, civil judgments, bid protests, and suspensions and debarments, even if that will be a likely short-term result. Rather, it is desirable because in the long-term, requiring contractors to self-report PIA violations will help create a more honest procurement system, one where contractors be confident that their competitors will honor the rules, and if not, that the proper authorities will be made aware of any violation. The competitive process will improve as a result, since a contractor is more likely to participate in a system where its competitors will be forced to reveal their misconduct. Because of that enhanced competition, the Government will obtain the best value for the taxpayers’ money, perhaps the most important overall objective for any procurement system.

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380 As this suggested change demonstrates, the mandatory disclosure rule should include any violation of the PIA, not only violations of its criminal provisions.