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Kenneth B. Davis Jr.

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NOTE

The Private Rights of a Bidder in the Award of a Government Contract: A Step Beyond Scanwell

Traditionally, bidders on federal government contracts have been held to possess no enforceable rights against the procuring agency. Though they had a substantial economic stake in receiving the contract, bidders lacked standing to contest an award to a competitor. In the last three years, United States Courts of Appeals in two circuits have held that the bidder has standing as a representative of the public interest in proper procurement. The author examines these recent developments and concludes they disclose an increased judicial awareness of the need to protect the bidder's economic interests. After discussing several reasons why the no-private-rights rule is no longer suitable for defining contemporary procurement relationships, he asserts that the true reason for this longstanding rule is a judicial reluctance either to interfere with contracting officer discretion or to risk obstructing the vital procurement function. Concluding that these considerations do not justify ignoring the interests of the bidder, the author proposes a solution for recognizing the bidder's rights without jeopardizing the public's interest in efficient procurement.

I. INTRODUCTION

SINCE 1940, bidders on federal government contracts have been denied access to the courts for challenging awards made to competing bidders. Although a plethora of guidelines, derived from statutes and regulations, exist to govern the procedure for awarding a contract, under the Supreme Court's holding in *Perkins v. Lukens Steel Co.*¹ the bidder has no standing to enforce them.

In *Lukens*, against a backdrop of an intensified military buildup, the Court was confronted with deciding whether a supplier of iron and steel to the government could enjoin federal officials from implementing a minimum wage program. The Court of Appeals for the District of Columbia Circuit had held for the company by ruling that the Secretary of Labor's interpretation of her powers under the Walsh-Healy Act² was unwarranted and defeated the purpose of the Act.³ As a result the implementation of the Act's minimum wage requirements had been enjoined for over a year. The Supreme Court voted to reverse, but never reached the merits. De-

¹ 310 U.S. 113 (1940).

² 41 U.S.C. §§ 35-45 (1970).

³ *Lukens Steel Co. v. Perkins*, 107 F.2d 627 (D.C. Cir. 1939).

termining that the laws regulating the procurement process were not enacted to protect private bidders on government contracts, the Court held the bidder had no litigable rights to enforce.⁴ Under the conventional notions of that time, no enforceable rights meant no standing to sue.

For thirty years, the standing obstacle created by *Lukens* kept aggrieved bidders out of all federal courts. Then the Court of Appeals for the District of Columbia Circuit opened the door in *Scanwell Laboratories, Inc. v. Shaffer*.⁵ Even though bidders may now have standing to sue, the specter of *Lukens* is still very apparent. The Court's characterization in *Lukens* of the overall system of contracting-out — the interests that procurement laws were intended to protect, the discretion accorded contracting officers, and the primary focus on efficient and unhindered procurement — continues to have a significant impact on the reasoning of the courts. They have repeatedly adhered to the essence of the *Lukens* doctrine: an enterprise enjoys no legal rights of its own when competing for a contract award.⁶

Even if the unwillingness of the Court in *Lukens* to interfere with the procurement process made sense in the prewar atmosphere of 1940, such judicial reluctance has little merit today. The economic repercussions of government procurement decisions pervade the private sector;⁷ many firms and communities depend for their existence on receiving contract awards from the government. This

⁴ 310 U.S. at 126.

⁵ 424 F.2d 859 (D.C. Cir. 1970). Because substantially all of the procurement controversies arise in the District of Columbia, most of the case law has evolved in that circuit's court of appeals. Only one other circuit to date has explicitly followed *Scanwell* and held that bidders possess standing. *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir. 1973). Two circuits have left the question open. *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452 (9th Cir. 1971). In a subsequent case, however, the Fifth Circuit held that a potential bidder had standing to litigate particular issues. *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973). But because this decision was premised, at least in part, on a congressional design to protect the plaintiffs' interests under the Small Business Act, it is doubtful that the Fifth Circuit's holding on the standing issue extends to all bidders.

The Supreme Court has made no attempt to resolve the question. Its last decision on a bidder's standing was *Lukens*. Recently the Court has denied certiorari in two cases. *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 950 (1971). In lieu of any statement from the Supreme Court, *Scanwell* remains the principal authority for granting the bidder standing.

⁶ *E.g.*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

⁷ For fiscal 1972, it is estimated that the federal government contracted-out for a total of \$57.5 billion of goods and services. Department of Defense procurements alone amounted to \$39.4 billion. 1 REPORT OF THE COMM'N GOVERNMENT PROCUREMENT 3 (1972) [hereinafter cited as PROCUREMENT REP.].

acute potential for widespread economic injury is accompanied by a growing recognition that citizens enjoy a right to expect and demand fair treatment when dealing with their government. When the government wields economic power this vast, its actions must be subject to some degree of judicial scrutiny.⁸ Furthermore, the impact of procurement on private individuals is intensified by the expanded use of the government contract as a tool for accomplishing nonprocurement social and economic objectives.⁹

In view of this pervasive influence, it is curious that the actions of government contracting officers remained immune from judicial intervention for so long. Even a critic of the *Scanwell* decision noted that the tremendous economic and social effects made judicial review of the procurement process virtually inevitable.¹⁰ Conceptually, the selection of a government contractor is no different from other agency determinations which, under the traditional tenets of administrative law, have been reviewable whenever the administrator abuses his discretion or exceeds his statutory authority. It is the clear directive of Congress, under the Administrative Procedure Act (APA), that the courts are to set aside any agency action that is arbitrary or unlawful.¹¹ This Note will explore the policies that have been invoked for shielding contracting decisions from judicial review and examine whether they are of sufficient import to justify treating procurement activity differently from other areas of administrative action.

The procedures governing the award of government contracts to private businesses were established by Congress under the Armed Services Procurement Act of 1947¹² (ASPA) for awards by the military and by the National Aeronautics and Space Administration, and under Title III of the Federal Property and Administrative Services Act of 1949¹³ (FPASA) for awards by most other civilian agencies. Pursuant to these statutes comprehensive procurement regulations

⁸ Speech by Judge Harold Leventhal, Government Contracts Seminar, Charlottesville, Virginia, May 9, 1969. 274 BNA FED. CONT. REP. A-1 (1969).

⁹ An example is the program developed under section 8(a) of the Small Business Act of 1953, 15 U.S.C. § 637(a) (1970), whereby the Small Business Administration makes noncompetitive subcontract awards to minority-owned businesses.

¹⁰ Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. IND. & COM. L. REV. 1, 41 (1970).

¹¹ APA § 10(c)(2)(A), 5 U.S.C. § 706(2)(A) (1970).

¹² 10 U.S.C. §§ 2013-14 (1970).

¹³ 41 U.S.C. §§ 251-60 (1970).

have been promulgated.¹⁴ These laws provide two general methods for awarding contracts to private businesses: formal advertising and negotiation.

Under formal advertising (or competitive bidding) prospective contractors are invited to submit sealed bids in response to specifications contained in the invitation. The award is then made to the responsible bidder whose offer is "most advantageous" to the government.¹⁵ Generally this means the lowest bidder.¹⁶ Formal advertising is the preferred method for making awards; the statutes provide it is to be used whenever feasible and practicable.¹⁷ But if certain specified conditions are met, award by negotiation is authorized.¹⁸

Through negotiated procurement the government has wider latitude in selecting a contractor and determining a contract price. The procuring authority typically does not rely on the initial proposals submitted, but holds discussions with the potential contractors to bargain for the best terms. In contrast to formal advertising, where price is the sole determinant of who receives the award, negotiation involves "tradeoffs" between price and quality or other considerations that must be weighed by the contracting officer. Nevertheless, even in negotiated procurement, price is usually an important and often critical factor in determining the most advantageous proposal.¹⁹ And even when negotiation is authorized, some degree of competition is required. For example, on negotiated armed services awards in excess of \$2,500 the government must solicit proposals from the maximum number of qualified sources feasible and then hold discussions with all offerors whose proposals are within

¹⁴ Armed Services Procurement Regulations, 32 C.F.R. §§ 1.100 to 30.9 (1972) [hereinafter cited as ASPR]; Federal Procurement Regulations, 41 C.F.R. §§ 1-1.000 to 1-30.710 (1972) [hereinafter cited as FPR]. In addition, individual agencies have supplemented the ASPR and FPR with procurement regulations of their own. *E.g.*, Atomic Energy Commission Procurement Regulations, 41 C.F.R. §§ 9-1.101 to 9-59.006 (1972); National Aeronautics and Space Administration Procurement Regulations, 41 C.F.R. §§ 18-1.100 to 18-52.508 (1972).

¹⁵ Section 3(b) of the ASPA, 10 U.S.C. § 2305(c) (1970), provides in part: "Awards shall be made . . . to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered." The language of the comparable provision in the FPASA is similar. 41 U.S.C. § 253(b) (1970).

¹⁶ See notes 195-97 *infra* & accompanying text.

¹⁷ 10 U.S.C. § 2304(a) (1970); *see* 41 U.S.C. § 252(c) (1970).

¹⁸ 10 U.S.C. §§ 2304(a)(1)-(17) (1970); 41 U.S.C. §§ 252(c)(1)-(15) (1970).

¹⁹ 1 PROCUREMENT REP., *supra* note 7, at 19.

a competitive range.²⁰ The procurement system thus encourages some competition among prospective contractors, whichever method is used.²¹

Until recently the bidder who believed that a contract was unjustifiably awarded to one of his competitors had only two routes for obtaining redress. He could protest the award to the contracting officer who made it,²² or he could seek review by the General Accounting Office (GAO).²³ Within the last few years, courts aware of the bidder's plight have developed judicial remedies to supplement these protests to administrative agencies. First the Court of Claims began to fashion a right to recover the expenses incurred in preparing a bid that was not given fair and honest consideration.²⁴ Then *Scanwell* authorized the bidder to sue for injunctive relief.

Once the District of Columbia Circuit lifted the standing bar in *Scanwell*, the courts were forced for the first time to delve deeply into the substance of *Lukens*, to determine the degree to which the laws regulating procurement placed enforceable restrictions on the award of government contracts. The decisions after *Scanwell* have attempted to articulate guidelines for judicial interference with procurement. In *Page Communications Engineers, Inc. v. Resor*,²⁵ the court of appeals outlined the criteria for granting the bidder a preliminary injunction: In addition to considering the bidder's likelihood of success on the merits and the harm he stood to incur, the district courts were to accord prominence to the strong public interest in unimpeded procurement.²⁶ The proper scope of judicial re-

²⁰ 10 U.S.C. § 2304(g) (1970). This requirement was added to the ASPA in 1962. Act of Sept. 10, 1962, Pub. L. No. 87-653, § 1(c), 76 Stat. 528. There is no equivalent provision in the FPASA. That statute permits negotiations of any type that the agency head believes "will promote the best interests of the Government." 41 U.S.C. § 254(a) (1970). This includes noncompetitive "sole-source" negotiations. But both the ASPR and the FPR mandate that negotiations must be competitive unless certain exceptions are satisfied. 32 C.F.R. § 3.101 (1972); 41 C.F.R. § 1-3.101(c) (1972). Among these exceptions is the proviso to section 2304(g) that permits acceptance of an initial proposal without conducting discussions when it is clearly demonstrated that the proposal would result in fair and reasonable prices. 10 U.S.C. § 2304(g) (1970).

²¹ In fiscal year 1970 only 13.8 percent of the dollar amount of military contracts was awarded by formal advertising; the other 86.2 percent was negotiated. But 43 percent of the total was awarded under some competitive method. See *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1313 n.6 (D.C. Cir. 1971).

²² See, e.g., 32 C.F.R. § 2.407-8 (1972).

²³ The rules governing these protests are set out at 4 C.F.R. §§ 20.1-.12 (1973).

²⁴ *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956).

²⁵ 15 CCH Cont. Cas. F. ¶ 84,154 (D.C. Cir. 1970).

²⁶ *Id.* at 89,999-16.

view was considered in *M. Steinthal & Co. v. Seaman*,²⁷ where the court held that a contracting officer's decision should be set aside only if no rational basis for it exists. And in *Wheelabrator Corp. v. Chafee*,²⁸ the court discussed favorably the availability of bid protest review by the GAO and suggested that many procurement issues may be within that office's primary jurisdiction.

The tenor of these post-*Scanwell* decisions is that the policy of the federal courts should be to minimize the extent of judicial intervention into the procurement process.²⁹ Most of the commentary on these cases has construed them as severely constricting the bidder's opportunity for judicial review, in effect negating the inroads made by *Scanwell*.³⁰ This Note will consider whether these cases do manifest an effort to retract the review granted bidders in the *Scanwell* case. The conclusion reached is that, to the contrary, the courts have become increasingly aware of the need to protect the bidder's private interest in fair competition for contract awards. Although the progeny of *Scanwell* do articulate finite limitations on judicial scrutiny, these limitations are nothing more than an attempt to balance this private interest against the well-entrenched public interests in administrative discretion and unhindered procurement. These public values have until recently been deemed of sufficient import to shield procurement from any judicial intervention whatsoever. This Note concludes that they should be secured, not by refusing to recognize or enforce the bidder's private interests, but rather by developing more accommodating procedures and remedies for redressing the bidder's economic injuries.

II. THOSE SEPARATE BUT CONFUSED QUESTIONS OF STANDING, THE MERITS, AND ENFORCEABLE INTERESTS

A. *The Development of Bidder's Standing from Lukens to Scanwell*

The reasons why, until 1970, the courts were completely closed

²⁷ 455 F.2d 1289 (D.C. Cir. 1971).

²⁸ 455 F.2d 1306 (D.C. Cir. 1971).

²⁹ E.g., *M. Steinthal & Co. v. Seaman*, 455 F.2d 1289, 1300 (D.C. Cir. 1971).

³⁰ E.g., Note, *Judicial Review and Remedies for the Unsuccessful Bidder on Federal Government Contracts*, 47 N.Y.U.L. REV. 496, 517 (1972) ("... unsuccessful bidders will, in the future, experience great difficulty in successfully challenging procurement decisions through actions for injunctive relief."); Comment, *Judicial Review for Disappointed Bidders on Federal Government Contracts*, 26 SW. L.J. 384, 398 (1972) (characterizing *Wheelabrator* and *Steinthal* as "... a drastic, if not complete, retreat from the judicial intervention made possible by *Scanwell*."); see Comment, *The Role of GAO and Courts in Government Contract "Bid Protests": An Analysis of Post-Scanwell Remedies*, 1972 DUKE L.J. 745, 767-69.

to the only private party with a sufficient interest to undertake challenging an erroneous contract award are difficult to pinpoint. The explanation articulated by the *Lukens* Court, that the procurement laws conferred no legally protected rights on private bidders,³¹ might derive from some perceived distinction between the regulatory and proprietary activities of government. Under this view, duties placed upon the government acting in a regulatory capacity may be owed to the regulated party, but those restricting proprietary functions are for the government's internal control only. The contractor deals with the government not as the sovereign, but merely as another customer. According to the Court in *Lukens*, when the government acts in a purely proprietary capacity, acquiring goods and services, it should be held only to the customary standards of the business world, notwithstanding the existence of laws imposing more rigorous restraints.³² The bidder should obtain no special advantages solely because the other party to the transaction is the federal government.

This proprietary-regulatory distinction has been given substantive effect in various contexts. Matters relating to public contracts are specifically exempted from the rule-making provisions of the APA.³³ There is also some indication that the Act was never intended to reach the government's proprietary activities in the first place.³⁴ On the other hand, commentators have suggested that restrictions on agency activity should be given the same force and effect no matter which the capacity. For example, Professor Kenneth Culp Davis interprets Supreme Court decisions after *Lukens* as establishing that the federal government "does not enjoy 'unrestricted power' in its contractual relations; the government is still the government *even when it acts in a proprietary capacity . . .*"³⁵ And four years before the District of Columbia Circuit decided *Scanwell*, Judge Leventhal of that court stressed the similarities between federal regula-

³¹ "[The statute regulating procurement] requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. . . . The duty [imposed upon contracting officers] is owing to the Government and to no one else." 310 U.S. at 126 (footnotes omitted).

³² "Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

³³ APA § 4(a)(2), 5 U.S.C. § 553(a)(2) (1970).

³⁴ Pierson, *supra* note 10, at 13 n.67.

³⁵ 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.04, at 219 (1958) (emphasis added). As authority for this statement Davis cites *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), which dealt with the constitutional rights of federal employees.

tory programs and procurement activities, and argued for increased application of administrative law concepts in the procurement area.³⁶ But the fact that these scholars advocate minimizing the difference in treatment demonstrates that a distinction is well embedded in judicial thinking.³⁷

While this proprietary activity concept was significant enough to furnish a theoretical justification for barring bidders' suits at the time of *Lukens*, the commentators cited indicate its importance is waning. There is a growing recognition that an individual has a right to expect fair treatment when he deals with his government in any capacity.³⁸ But some of the more pragmatic reasons for the *Lukens* barrier to judicial intervention live on. These are considerations of public policy that can be broken down into two principal interests: (1) the need for broad contracting officer discretion in the selection of a bidder and (2) the need for the procurement function to operate unobstructed by judicial interference. The latter is particularly compelling in military procurements, where the delays attendant to protracted litigation may jeopardize some program vital to the national defense. Both of these public interests were advanced by the Supreme Court in *Lukens*³⁹ and have played a prominent role in the subsequent development of the law.⁴⁰

Notwithstanding the vitality of these interests, it is doubtful that they are of sufficient weight to warrant treating procurement as distinct from all other administrative decisionmaking, traditionally reviewable for abuse of discretion, and shielding it completely

This decision is narrower than the proposition for which it is cited. While there may be no difference between proprietary and regulatory functions for the purposes of constitutional restrictions on governmental power, the distinction may continue to have import for others.

³⁶ Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35 (1966). Judge Leventhal authored the majority opinions in many of the recent procurement decisions by the District of Columbia court, including *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), and *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971).

³⁷ Even the strongest proponents of limiting governmental powers have seen some special feature in proprietary activities. Charles Reich, in arguing for increased protection of individual rights to government largess, conceded that "Government contracts might seem the best possible example of a type of valuable which no one has any right to receive, and which represents only the government's managerial function." Reich, *The New Property*, 73 YALE L.J. 733, 743 (1964).

³⁸ See notes 117-26 *infra* & accompanying text.

³⁹ 310 U.S. at 127 (government discretion); *id.* at 130-31 (unhindered procurement).

⁴⁰ See, e.g., *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301-02 (D.C. Cir. 1971). The protection of these two public interests by the court in *Steinthal* is discussed at notes 172-77 *infra* & accompanying text.

from judicial scrutiny. A certain sense of exigency may exist where, for example, the Defense Department is attempting to obtain weaponry for immediate use in Vietnam,⁴¹ a situation that weighs in favor of giving a wide berth to the procuring agency. This factor is absent, though, in the vast majority of procurements where the government is purchasing more mundane commodities, such as ballpoint pens⁴² or air conditioning.⁴³ But the legacy of *Lukens* appears to be a blanket reluctance to risk judicial involvement in any procurement activity. Although in many instances the courts could enforce the bidder's private interests without sacrificing the interests of the general public, the Supreme Court in *Lukens* was unwilling to take the chance. The prospect of judges halting urgent procurement to second guess the judgment of the contracting officer proved too great to permit recognition of enforceable rights in the bidder.

A major analytical problem with the *Lukens* decision is the Court's technique of treating these various considerations under the one rubric of standing. Instead of segmenting the problem into issues of reviewability, scope of review, and propriety of remedy, the Court invoked the one holding "bidders lack standing" to deal with the myriad of policies for keeping the bidder out of court. This fusion of distinct doctrines of administrative law⁴⁴ had two undesirable consequences. First, for thirty years, it foreclosed separate consideration of the individual public and private interests at stake in each particular case by imposing an across-the-board barrier to any bidder's challenge. Then, once *Scanwell* was decided, because these various concerns had previously been amalgamated un-

⁴¹ *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

⁴² *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 950 (1971).

⁴³ *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970).

⁴⁴ This problem of confusing and obscuring separate questions of administrative law was discussed by Mr. Justice Brennan in his concurring and dissenting opinion in *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 159, 176 (1970):

[I]njury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk what is at issue in a given case, and thus to risk uniformed, poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing." The books are full of opinions that dismiss a plaintiff for lack of "standing" when dismissal, if proper at all, actually rested upon the plaintiff's failure to prove on the merits the existence of the legally protected interest that he claimed, or on his failure to prove that the challenged agency action was reviewable at his instance.

(footnotes omitted).

der a single heading, the courts faced difficulties in delineating the interests that merited protection in a given case.

Properly viewed, the real issue in *Lukens* was not one of standing at all. It was more akin to justiciability or its administrative law counterpart, reviewability. The correct focus of standing, as the Supreme Court has recently pointed out, goes not to the merits of the issue being adjudicated but to whether the litigant is the proper party to adjudicate it.⁴⁵ This question in turn depends on whether he has alleged a sufficient personal stake in the outcome of the controversy to assure that the litigation will possess concrete adverse-ness and vigorous advocacy.⁴⁶ The question decided in *Lukens* was not the propriety of the individual litigants. It went beyond the particular parties to whether the restrictions on contract awards were to be accorded any legally binding effect enforceable against the contracting officer, or, as the Court posed the issue, whether the duties created by the procurement laws are owed to any one other than the government.⁴⁷ The resolution of these issues has nothing to do with the personal stake of the party bringing the suit.⁴⁸

The Supreme Court's readiness to treat the entire problem in terms of standing is understandable for 1940. At that time, six years before the enactment of the APA, the only way to challenge administrative action successfully was to prove that it invaded a personal "legal right." Under the Court's opinion in *Tennessee Electric*

⁴⁵ *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968).

⁴⁶ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁴⁷ See note 31 *supra*. If the duties were established for the benefit of the government only, private citizens would be precluded from enforcing them against the government. This does not mean, however, that the procurement restrictions would have no substantive effect whatsoever. They could still be asserted by the government by way of defense. This phenomenon occurs when the government cancels an existing contract and the contractor sues for damages. If the government can show that the award was for some reason invalid, then the contract is void, and the contractor's remedy is limited to quantum meruit for the fair value of goods and services received and used by the government. *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969) (violation of FPR requirements that price quotations be solicited from eligible offerors); *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963) (bid failed to conform to the essential requirements of the invitation).

⁴⁸ One commentator has recently contended, however, that the standing doctrine serves important purposes beyond the adversity of interests rationale articulated in *Flast* and *Baker v. Carr*. Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973). He labels these additional considerations as (1) access standing, focusing on whether the nature and extent of harm suffered by the plaintiff are such as to warrant the expenditure of scarce judicial resources on deciding his case, *id.* at 670; and (2) decision standing, dealing with the allocation of policy-making responsibility among the three branches, *id.* at 683. The author believes that *Lukens* came under the second rationale: the Court denied standing because it was unwilling to interfere with the executive branch in administering war-related production. *Id.* at 685.

Power Co. v. TVA,⁴⁹ the questions of standing and a legal right on the merits were coextensive. Unless the injured litigant possessed some right existing under common law or one "founded on a statute which confers a privilege," he had no standing to contest the invasion.⁵⁰ The *Lukens* Court's conclusion that the procurement statutes were not intended to confer a cause of action upon private bidders disposed of all the relevant questions at once. It was not until this somewhat theoretical view of the nature of administrative authority had been replaced by the more practical approach of the APA, and the law of standing had been liberalized, that the distinction between standing and the merits became significant.

It was this liberalization that spawned the *Scanwell* court's "solution" to bidders' suits. In approaching the problem its reasoning must have been as follows: (1) *Lukens* provides the obstacle to bidders' securing judicial review of procurement decisions; (2) *Lukens* is phrased in terms of "bidders lack standing"; (3) therefore find some way to provide bidders standing and the *Lukens* doctrine will be overcome. But as has just been discussed, *Lukens* stood for a good deal more than no standing to sue. Instead of investigating the viability of the "no privately enforceable rights against the government" dimension of the *Lukens* decision, the *Scanwell* court found standing in spite of it. The problem with this collateral ap-

⁴⁹ 306 U.S. 118 (1939).

⁵⁰ *Id.* at 137-38. Certainly in establishing agency authority Congress could create legal rights for the parties involved, the invasion of which would give them standing. *S. v. D.*, 410 U.S. 614 (1973). But under the *Tennessee Electric* reasoning, unless it clearly did so, statutory restrictions on agency authority were not enforceable by private parties. The theoretical support for this doctrine is best explained by judge Frank in *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). In his view, the sole effect of congressional grants of authority to agencies was to displace duties existing at common law. The authorizing statute established a zone of privilege, wiping out old legal rights within its perimeters, but creating no new ones. The only way the scope of authority or discretion would come into issue is if the administrative officer were sued for invading some common law right and asserted his authorization as a defense. *Id.* at 700. Thus, unless the litigant relied upon some common law right, he had no basis for challenging the agency action.

Judge Frank's explanation of the theoretical principles governing the right to challenge administrative action appears to represent the view possessed by Mr. Justice Frankfurter:

A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute. But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (citations omitted).

proach to *Lukens* is that once bidders get into court under *Scanwell* there may be nothing for them to enforce. The policies that led the *Lukens* court to erect the standing barrier may now halt bidders on the merits.

The technique used by the District of Columbia Circuit to circumvent *Lukens* was twofold. First, the court relied upon cases decided in the early 1940's for the proposition that private litigants could secure standing without private legal rights when they sue to vindicate the public interest.⁵¹ They function as "private attorneys general" and therefore need no legally protected interest of their own. The *Scanwell* court held the plaintiff-bidder possessed standing as representative of the public's interest in forcing contracting officers to comply with the procurement statutes and regulations.⁵² Second, the court found a direct authorization for the plaintiff's standing in the language of the APA;⁵³ it construed the Act to grant standing to anyone suffering injury in fact as a result of agency action.⁵⁴ The economic injury sustained by the bidder in losing a contract to a competitor clearly satisfied this requirement.

⁵¹ Judge Tamm, writing for the court in *Scanwell*, discussed at length the historical development of the law of standing. The first departure from the *Tennessee Electric* doctrine came in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). In *Sanders* the Court upheld the plaintiff's standing even though it lacked a legal right, since Congress had made a specific grant of standing under the Communications Act. Next came the cases of *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) and *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), articulating the theory of the private attorney general.

⁵² 424 F.2d at 864.

⁵³ APA § 10(a), 5 U.S.C. § 702 (1970) provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."

The uncodified version of the Act contained slightly different language: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." APA § 10(a), 60 Stat. 243 (1946).

⁵⁴ 424 F.2d at 870-73. The court in *Scanwell* noted that the Supreme Court had not yet chosen to read the Act to confer standing upon any person adversely affected by the action of an agency, but it decided nonetheless that its interpretation of the Act was the correct one. *Id.* at 872. One month later the Supreme Court once again rejected the opportunity to hold that injury in fact was the only requirement for standing under the APA. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). For a discussion of *Scanwell* standing in light of these cases see notes 77-95 *infra* & accompanying text. It appears, however, that the view of the court in *Scanwell* is probably the correct one. Professor Davis makes a compelling argument, based on the legislative history of the APA, that the Act was intended to give standing to all those aggrieved in fact. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-68 (1970). Professor Scott, on the other hand, believes that Davis's legislative history argument is too weak to support the "revolution" in administrative law that would result if all individuals injured in fact were given standing to sue. Scott, *supra* note 48, at 658-59.

By thus invoking a liberal construction of the APA, bolstered by the fiction of a private attorney general enforcing a public cause of action, *Scanwell* got the disappointed bidder into the federal courts.⁵⁵

B. *Is Something More Than Scanwell Standing Necessary?*

Since early 1970, the law in the District of Columbia Circuit has been that bidders have standing.⁵⁶ The question then is whether this standing under *Scanwell* is enough to secure adequately the interests of the bidder. If the bidder now enjoys a sufficient enforceable interest to set aside an unlawful contract award, it is unnecessary to consider whether his interest amounts to a "personal legal right" in the traditional *Tennessee Electric* sense. On the other hand, if the bidder needs something more than *Scanwell* standing to obtain relief against the government, the *Lukens* holding that bidders have no enforceable rights of their own must be confronted directly.

In broader compass, the issue is the extent to which the recently developed law of judicial review of administrative action has rendered the traditional concept of a legal right obsolete. In effect, a bidder's interest vis-a-vis the contracting officer may indeed amount to an enforceable right. The contracting officer is under certain enumerated duties in the making of awards. Under *Scanwell* and

⁵⁵ In its subsequent opinion in *Steinthal*, the District of Columbia Circuit interpreted *Scanwell* as grounding standing on "two interrelated principles": (1) the judicial review provisions of section 10(a) of the APA and (2) the notion of a "private attorney general." 455 F.2d at 1291 n.2. It seems more proper to characterize the *Scanwell* decision as holding that section 10(a) explicitly gives the plaintiff standing to sue, while the private attorney general theory provides the policy rationale for Congress's allowing him to do so. Clearly Congress has the power, subject to certain constitutional limitations discussed at note 64 *infra*, to grant standing to any litigant it chooses. This was the import of *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), discussed at note 51 *supra*.

⁵⁶ Soon after it decided *Scanwell*, the District of Columbia Circuit reaffirmed its holding and applied it in slightly different contexts. *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). In *Scanwell* the plaintiff was the second lowest bidder contesting the award to the lowest bidder on the ground that the latter's bid was non-responsive to the invitation. *Ballerina* involved a potential supplier challenging the government's decision to exempt pen procurements from the requirements of competitive bidding so that pens could be procured from National Industries for the Blind. And in the *Blackhawk* case the plaintiff, low bidder for the job, was declared ineligible for the award because he failed to qualify as a responsible contractor. In both these cases the plaintiffs had standing on the basis of *Scanwell*. Since these initial decisions, the District of Columbia courts have consistently held that a bidder on government contracts has standing under the APA. *E.g.*, *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1291 (D.C. Cir. 1971).

the APA, the bidder possesses a sufficient relationship to the contracting officer to sue for violations of those duties when he stands to be injured. In Hohfeldian terminology this capacity to sue to enforce the duty gives the bidder the jural correlative of a duty — a right.⁵⁷ The bidder and the contracting officer stand in a right-duty jural relation. This analysis assumes, however, that the APA grant of standing to seek judicial review also provides the litigant with what amounts to a cause of action against the government on the merits. And this assumption may be unwarranted.⁵⁸ Throughout the discussion that follows the term “traditional right” will be used to designate a legal right in the customary sense, a benefit or protection existing at common law or created by Congress for the purpose of securing the interests of the class of persons protected. In contrast to the traditional right, there exists the expanded conception of an enforceable interest created by the APA, a duty placed upon an administrative official plus standing in some individual to seek judicial review of alleged violations of that duty. This will be referred to as an “incidental right,” because protection of the interests of the individual plaintiff may be incidental to the purpose for establishing the administrative duty.

The *Scanwell* decision held that bidders possess incidental rights against the government. Two questions follow. First, is the standing granted to bidders in *Scanwell* valid in light of recent Supreme Court decisions interpreting the APA? Second, if *Scanwell* is correct on the question of standing, do the bidder's incidental rights entitle him to prevail on the merits if he can prove the award was unlawfully made, or must he still possess a traditional substantive right of his own? To answer these questions it is necessary to assess the present state of the law of standing to challenge administrative action.

1. *The Current Law of Standing*

Notwithstanding six major Supreme Court opinions on the subject in the last five years,⁵⁹ the law of standing to seek judicial review

⁵⁷ See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-32 (1913).

⁵⁸ See notes 96-109 *infra* & accompanying text.

⁵⁹ *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).

of agency action in the federal courts remains an intricate problem.⁶⁰ *Association of Data Processing Service Organizations v. Camp* contains the most recent enumeration of the requirements for standing under section 10(a) of the APA.⁶¹ The Court explicitly rejected the idea that a traditional right is the prerequisite for standing; it stated that the legal interest test of *Tennessee Electric* "goes to the merits."⁶² Under *Data Processing*, the plaintiff has standing when (1) the action challenged caused him injury in fact, economic or otherwise;⁶³ (2) the interest he seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question;"⁶⁴ and (3) judicial review of the decision challenged is not precluded by Congress.⁶⁵

The *Data Processing* decision is also significant from the standpoint of the standing tests the Court chose not to adopt. It refused to make injury in fact the only criterion, an approach advocated by many. Professor Davis, for example, has long argued that any person suffering substantial injury as a result of administrative action

⁶⁰ See Davis, *supra* note 54, at 450: "The law of standing, which the Supreme Court has called a 'complicated specialty of federal jurisdiction,' has long been too complex; and the recent developments have increased the complexity rather than reducing it."

⁶¹ 5 U.S.C. § 702 (1970). See note 53 *supra*.

⁶² 397 U.S. at 153.

⁶³ *Id.* at 152. It is open to question whether this part of the standing test is necessary to fulfill the case or controversy requirement of article III. U.S. CONST. art. III, § 2, cl. 1. Both Mr. Justice Douglas, in the majority opinion, 397 U.S. at 153, and Mr. Justice Brennan, concurring in result, *id.* at 176-77, appear to believe that the injury in fact requirement is of constitutional dimension. One noted commentator, on the other hand, has thought it not constitutionally necessary that the plaintiff have a personal interest. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 517 (1965). See generally Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). After reviewing both sides of the issue, Professor Scott concludes there is considerable support for the proposition that "some minimum personal interest" is required by the Constitution. Scott, *supra* note 48, at 657-58.

⁶⁴ 397 U.S. at 153. The Court implies that this standard is necessary to satisfy the section 10(a) requirement that the plaintiff be "aggrieved by agency action within the meaning of a relevant statute." *Id.*

⁶⁵ *Id.* APA § 10, 5 U.S.C. § 701(a) (1970), provides in part: "This chapter applies . . . except to the extent that — (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Thus any right to review and therefore any congressional grant of standing under the Act is made subject to these two exceptions.

In view of the healthy presumption in favor of judicial review, this third branch of the *Data Processing* test is not likely to pose a serious obstacle to judicial scrutiny. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), the Court stated that ". . . judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." More recently the Court has held that the "committed to agency discretion" doctrine is a very narrow exception and will not preclude review unless there is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

should possess the requisite standing to challenge it.⁶⁶ Mr. Justice Brennan adopts this position in his separate opinion in *Data Processing* and *Barlow*.⁶⁷ As he points out, denying standing to an individual palpably injured, because the interest he asserts falls outside the statutory zone, is inconsistent with the Court's earlier holding in *Flast v. Cohen*.⁶⁸ In *Flast*, a suit by federal taxpayers contesting the constitutionality of a federal spending program, the Court implied that the standing requirement was satisfied whenever the plaintiff alleged a sufficient stake in the outcome of the controversy to guarantee the concrete adverseness required by article III.⁶⁹ Requiring that the litigant suffer substantial injury as a result of the challenged governmental action assures this personal stake. Whether the litigant bases his challenge on the validity of the authorizing statute as in *Flast* or the validity of the agency action taken pursuant to it as in *Data Processing*,⁷⁰ injury in fact should be the sole criterion for standing. The Court in *Data Processing*, however, refused to go this far. The "zone of interests" test it imposed represents a middle ground between granting standing to every party aggrieved in fact and requiring a traditional legal right.⁷¹

Another approach to standing which the Court could have followed in *Data Processing* is Professor Jaffe's scheme of characterizing suits against administrative agencies as public actions or private ones.⁷² The former category comprises actions typically brought by taxpayers, consumers, or citizens where the interests of the named plaintiff are affected no differently from those of the public at large.⁷³ *Data Processing* and *Scanwell*, on the other hand, qualify

⁶⁶ 3 K. DAVIS, *supra* note 35, § 22.02; see note 54 *supra*.

⁶⁷ 397 U.S. at 170-72.

⁶⁸ 392 U.S. 83 (1968).

⁶⁹ *Id.* at 99-101.

⁷⁰ This is not to say that the considerations present in providing judicial review over administrative action do not differ from those involved in determining the constitutional validity of a statute on its face. But the differences should be treated under the appropriate doctrines of administrative law, such as reviewability or scope of review, instead of being lumped together under the rubric of standing. See Davis, *supra* note 54, at 469.

⁷¹ In its application the "zone of interests" test may not depart significantly from a pure injury in fact standard. Professor Scott believes that under *Data Processing* and *Barlow v. Collins* a mere congressional awareness of the plaintiff's interests might be sufficient to satisfy it. Moreover, he interprets the Court's recent decisions in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971), and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), as weakening the test further, to permit standing wherever the statute relied upon has an identifiable protective effect. Scott, *supra* note 48, at 663-66.

⁷² See generally L. JAFFE, *supra* note 63, at 459-545.

⁷³ *Id.* at 460. Examples of public actions include *Flast* and *Sierra Club v. Morton*,

as private actions. The plaintiffs there were damaged in some appreciable and particular fashion, apart from the harm suffered by the public in general; to use Professor Jaffe's label, they are Hohfeldian plaintiffs.⁷⁴

This conceptual framework allows for a three-tier classification of challenges to government action. *Type I* represents the classic form of civil action. The litigant asserts a legally protected private interest, a traditional right, the invasion of which has caused him individual harm. An example is *United Public Workers v. Mitchell*,⁷⁵ where a federal employee contended that the government violated his constitutionally protected right to engage in political activities. In a *Type II* action, for example, the bidder's suit as viewed by the *Scanwell* court, the right enforced is the public's, but the plaintiff has a particular personal stake in the outcome. Though only the public interest is accorded legal protection, the private plaintiff enforcing it is still Hohfeldian. The *Type III* suit is *Flast*, Professor Jaffe's public action.

No standing problem exists as to the *Type I* plaintiff; his personal legal right satisfies even the *Tennessee Electric* criteria. In the other two classes, however, the theory of the cause of action is that it is the public's right being enforced. If any distinction is to be recognized between the standing requirements for private litigants in the two classes, the restrictions on the *Type III* plaintiff should be the more rigorous. Adequate representation of the public interest is more assured in the *Type II* situation, where the plaintiff is Hohfeldian, with a stake in the outcome comparable to that of the litigants in the traditional private lawsuit. The standing cases decided to date, however, have not chosen to recognize such a distinction.⁷⁶

405 U.S. 727 (1972), where the club brought suit as representative of the public to enjoin official approval of a proposed skiing development alleging the development was detrimental to aesthetic and ecological interests. The Court held the club lacked standing since it failed to allege that it would itself suffer injury if the project were approved. *Id.* at 734-35.

⁷⁴ Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033-36 (1968); cf. *Flast v. Cohen*, 392 U.S. 83, 117-20 (1968) (Harlan, J., dissenting).

⁷⁵ 330 U.S. 75 (1947), discussed at note 35 *supra*.

⁷⁶ Although the public-action private-action dichotomy has been discussed by the Court, see, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 736 (1972), it has never been made the basis for granting or denying standing. Instead the *Type III* plaintiff's standing has turned on whether he alleged a sufficient personal stake as in *Flast* or injury in fact under the APA as in *Sierra Club*.

2. *Ramifications for Bidders' Suits*

The questions remaining after *Scanwell* and *Data Processing* disclose a need to determine whether a bidder possesses traditional legal rights against the government. First, in view of the *Data Processing* decision, the *Scanwell* court may have been overly ambitious in granting standing to bidders under the APA. Second, even if a bidder now has standing and incidental rights, this interest may not be enough to provide him with a cause of action against the government on the merits.

a. *Bidder's Standing Under Data Processing*.— The *Scanwell* court correctly anticipated the first and the third parts of the test for standing established one month later in *Data Processing*.⁷⁷ It found no preclusion of judicial review either by congressional mandate⁷⁸ or under the doctrine of nonreviewable administrative discretion.⁷⁹ And throughout its opinion the court emphasized that *Scanwell* had suffered injury in fact by losing the contract to a competitor.⁸⁰ Only in regard to the "zone of interests" requirement of *Data Processing* was the court's analysis in *Scanwell* deficient. The court of appeals believed that injury in fact should be the sole requirement for standing under the APA.⁸¹ Because the bidder served as a private attorney general representing the general public interest, the court found it unnecessary to determine whether his individual interests were protected as well.

Decisions by the District of Columbia Circuit after *Data Processing* attempted to integrate the Supreme Court's standards into the *Scanwell* test.⁸² But a close reading of these opinions indicates

⁷⁷ *Scanwell* was decided on February 13, 1970; *Data Processing*, on March 3. In light of the Supreme Court's decision, the government petitioned for a rehearing in *Scanwell*. This petition was denied on May 7. 424 F.2d at 859.

⁷⁸ *Id.* at 865-66.

⁷⁹ *Id.* at 874-75.

⁸⁰ *E.g., id.* at 872. The economic injury resulting from the loss of potential business has been consistently recognized as sufficient to make the plaintiff "aggrieved in fact." *E.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

⁸¹ 424 F.2d at 872. The court admitted that no decision of the Supreme Court had yet authorized standing for every party aggrieved in fact, but felt such a result was the clear intent of the APA. *Id.*

⁸² *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 950 (1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). In *Ballerina*, the court held that the bidder had standing if (1) the challenged action caused him injury in fact; (2) there was no clear and convincing indication of legislative intent to withhold review; and (3) "the agency has acted arbitrarily, capriciously, or in excess of its statutory authority, so as to injure an interest that 'is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" 433 F.2d at 1207.

that the "arguably within" test was not rigidly applied; the court appears to presume that the requirement is met whenever a prima facie showing of arbitrariness is made.⁸³ Commentators suggested that the court of appeals was too lax in applying *Data Processing* to the bidders,⁸⁴ and in a subsequent opinion the court admitted that some of its earlier decisions had allowed injury in fact to suffice for standing.⁸⁵

The next attempt to forge an acceptable basis for bidder's standing was made by the Third Circuit in *Merriam v. Kunzig*.⁸⁶ Although truer to the standards of *Data Processing*, the court's approach was basically the same as that taken in *Scanwell*. The suit concerned a lease for office space awarded by the General Services Administration (GSA). The plaintiff, owner of an existing office building, alleged that by leasing a building to be constructed in the future the GSA violated restrictions contained in its annual appropriations.⁸⁷ The district court dismissed for lack of standing.⁸⁸ It determined that because the sole purpose of the restrictions was to economize on federal spending, the interest asserted by the plaintiff failed to come within the protected zone.⁸⁹

The Third Circuit reversed. Its treatment of the standing issue is somewhat confusing. First, the court cited *Scanwell* and *Sierra Club v. Morton*⁹⁰ to establish that a private plaintiff may assert the public's interest and implied that, inasmuch as these public interests are within the statutory zone, the plaintiff should have standing.⁹¹

⁸³ Under Professor Scott's interpretation of the post-*Data Processing* standing decisions, this may be enough to satisfy the "zone of interests" test. See note 71 *supra*. Clearly a statute that prohibits administrative arbitrariness injurious to the bidder has the protective effect he deems as sufficient.

⁸⁴ See, e.g., Pierson, *supra* note 10, at 21-22.

⁸⁵ *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972).

⁸⁶ 476 F.2d 1233 (3d Cir. 1973).

⁸⁷ See, e.g., Independent Offices Appropriation Act, 1963, Pub. L. No. 87-741, tit. I, 76 Stat. 728 (1962).

⁸⁸ 347 F. Supp. 713 (E.D. Pa. 1972).

⁸⁹ *Id.* at 721.

⁹⁰ 405 U.S. 727 (1972).

⁹¹ On this point the court stated:

Merriam meets the standing test adopted by the District of Columbia Circuit. Assuming for the moment, as the Government contends, that both the Independent Offices Appropriations Act and the Public Buildings Amendments of 1972 were designed to protect no zone of interest within which he falls, Merriam may nevertheless assert the public interest provided he has suffered injury in fact.

476 F.2d at 1241.

The court then went on to determine that the plaintiff's private interests were within the zone as well. To do so, it impliedly rejected *Lukens* and held that the ASPA and FPASA are intended to secure not only the interests of the government but also the interests of those who offer to do business with it.⁹² To support this holding, the court pointed out that the GAO has consistently acknowledged the bidder to be inside the zone.⁹³ This conclusion is troublesome. The fact that the GAO, to foster sound procurement policy, hears a bidder's contention that a particular award is invalid does not necessarily imply the GAO views the bidder as an intended beneficiary of the procurement statutes. The office may merely believe that the bidder's protest is a worthwhile mechanism for exposing unlawful contracts. Nonetheless, the Third Circuit in *Merriam* was of the opinion that the zone of congressionally protected interests should be measured by the scope of the GAO's protest review.⁹⁴

A question raised by *Merriam*, which had not previously arisen in the District of Columbia line of cases, was which statute should determine the zone. The district court had thought it was the Independent Offices Appropriations Act (IOAA). The Third Circuit correctly held it was the FPASA, which prohibits the acceptance of a bid that does not conform to the invitation.⁹⁵ Because the plaintiff's status as a bidder is the basis for his standing, the inquiry whether his interests are protected must focus on the statutes regulating the bidding process. Statutes restricting government purchasing, such as the IOAA, benefit him only as they are embodied in the rules governing permissible awards.

Whether or not the Third Circuit correctly defined the protected zone, the *Merriam* approach is the one courts will have to follow if they are to satisfy *Data Processing*.^{95a} They must find some congres-

⁹² *Id.* at 1242.

⁹³ *Id.* at 1242-43.

⁹⁴ The GAO permits an interim bid protest to be filed by any "interested party." 4 C.F.R. § 20.1 (1973).

⁹⁵ 41 U.S.C. § 253(b) (1970).

^{95a} The defendant's subsequent petition for rehearing en banc was denied by the Third Circuit over a dissent by Judge Adams. The approach he took is rather interesting. He reasoned it was not sufficient to hold that the plaintiff had standing, since, in view of cases like *Flast*, this may mean only that he suffered injury in fact, and therefore might not possess a sufficient interest to meet the standards of *Data Processing*. According to Judge Adams, the court must additionally determine that Congress intended to protect the interests of the litigant — in essence, intended to supply him with a cause of action to redress the injuries he received. He believed that the majority had not made a sufficient inquiry into the purposes and legislative history of the statute and had permitted the plaintiff judicial review upon determining only that the statute

sional purpose to protect the economic interests of bidders. In the face of *Lukens* this is no easy task. The *Data Processing* test is a useful one where Congress fashions restrictions on agency authority in an effort to strike an equitable balance among the interests of various classes. In these situations no single group predominates as the focal point of congressional concern; instead, the interests of say, business, labor, and consumers are all arguably protected. Procurement, however, does not fit this mold. Under *Lukens* the procurement statutes evince no intent to protect the interests of bidders. So long as this holding survives, the economic interests of a bidder cannot be included within the *Data Processing* zone. Thus, the *Scanwell* ploy to circumvent *Lukens* was futile. The only way to secure standing for bidders under the APA is to overrule the *Lukens* decision directly.

b. *Prevailing on the Merits*.— There is language in the *Data Processing* opinion to imply that, although a litigant no longer needs a traditional right to have standing, such a right is still necessary to succeed on the merits. At one point the majority opinion comments that the legal interest test of *Tennessee Electric* “goes to the merits,”⁹⁶ and later it adds, “[whether the relevant Acts give] petitioners a ‘legal interest’ that protects them against violations of these Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.”⁹⁷ Mr. Justice Brennan, concurring in the result, also suggests that the invasion of a legally protected interest is necessary to recover on the merits.⁹⁸

In subsequent cases, the government has argued that *Data Processing* requires something akin to a traditional right before a plaintiff challenging administrative action can obtain relief on the

had a protective effect. 476 F.2d at 1248-49. He contrasted this approach with that of the District of Columbia Circuit which, he contended, granted standing “only after examining the legislative history and purpose of the relevant statutes involved in each case,” citing *Constructores*, *Ballerina*, and *Scanwell*. 476 F.2d 1249 n.27. This choice of examples is puzzling, since it is these decisions that have been criticized as overly lax in applying the zone of interests requirement. See notes 82-85 *supra* & accompanying text.

⁹⁶ 397 U.S. at 153.

⁹⁷ *Id.* at 158.

⁹⁸ Justice Brennan points out that in *Flast* the court separated the question of standing from “whether, on the merits, the plaintiff has a legally protected interest that the defendant’s action invaded.” *Id.* at 171. His opinion goes on to discuss the proper segregation of issues involved in a challenge to agency action and states that after resolving the questions of standing and reviewability a court should proceed to the merits, to “whether the specific legal interest claimed by the plaintiff is protected by the statute and to whether the protested agency action invaded that interest.” *Id.* at 175.

merits.⁹⁹ Raising this contention in bidder's suits, the procuring agency succeeded in one case,¹⁰⁰ but lost in another, *Lombard Corp. v. Resor*.¹⁰¹ In *Lombard*, the district court dismissed the government's contention by observing that it would be anomalous to grant the plaintiff standing and then to effectively revoke it by holding that he lacks a legally protected interest.¹⁰² This answer ignores the separate nature of the two inquiries. Standing is a threshold question, going to the court's judicial power under article III and its specific jurisdiction under the APA. To overcome this initial hurdle to review, a litigant need not make the same showing as that required to prevail once the case has been fully adjudicated.¹⁰³

It is unlikely that the government's position will ultimately prevail. While the Supreme Court has not confronted the question directly, dictum in *Sierra Club v. Morton*¹⁰⁴ indicates that the Court does not view a traditional right as necessary to prevail on the merits. Mr. Justice Stewart, writing for the majority, read the private attorney general line of cases^{104a} as requiring some sort of personal economic interest before the plaintiff can get into court. But once he has standing, and judicial review is otherwise proper, he can assert the rights of the public in support of his claims.¹⁰⁵ Under this analysis, the legal interest problem becomes a question of *ius tertii*: whether the private plaintiff will be allowed to raise the rights

⁹⁹ This assertion was among the grounds advanced by the government in its petition for rehearing in *Scanwell*. See note 77 *supra*. It argued that because the plaintiff did not possess a legal right, its claim must be rejected on the merits. Appellee's Petition for Rehearing at 3, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

¹⁰⁰ *Gary Aircraft Corp. v. United States*, 342 F. Supp. 473, 477 (W.D. Tex. 1972).

¹⁰¹ 321 F. Supp. 687 (D.D.C. 1970).

¹⁰² *Id.* at 692.

¹⁰³ An analogous situation is presented by *Bell v. Hood*, 327 U.S. 678 (1946). The plaintiff in *Bell* sought federal jurisdiction over his claims for damages resulting from violations of his constitutional rights as a case "arising under" the laws of the United States. 28 U.S.C. § 1331 (1970). Determining that the plaintiff failed to state a cause of action, the district court dismissed for lack of federal jurisdiction. The Supreme Court held that it was not necessary to allege a cause of action to secure "federal question" jurisdiction and reversed, stating:

... failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

327 U.S. at 682.

¹⁰⁴ 405 U.S. 727 (1972).

^{104a} Justice Stewart cited, *inter alia*, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), 405 U.S. at 736-37. These authorities are discussed at note 51 *supra* & accompanying text.

¹⁰⁵ *Id.* at 737 & n.12.

of a third party or the general public.¹⁰⁶ And the private attorney general doctrine provides a sufficient reason for authorizing the plaintiff to litigate the public's rights. As a result, he can obtain relief without a traditional private right of his own.¹⁰⁷

This result would also seem mandated by the APA. By making judicial remedies widely available to those injured by administrative arbitrariness, the Act replaced the narrow "zone of privilege" view of agency authority described by Judge Frank.¹⁰⁸ The Act authorizes the courts to set aside unlawful agency action regardless of whether that action cuts into an area of private legal rights. The only restriction on individuals who can obtain this relief is the aggrieved person provision in section 10(a),¹⁰⁹ which the *Data Processing* Court held was satisfied whenever the litigant's interests were arguably within the protected zone. Any plaintiff meeting this criterion is entitled to the full scope of judicial remedies available under the Act. Nowhere in the APA is there imposed the additional requirement of a traditional right.

The issues of standing and the merits are not the only reasons for investigating whether a bidder should possess private traditional rights. Even if courts in the future will be willing to (1) overrule *Lukens*, (2) find the bidder's interest within the zone of protection created by procurement laws, and (3) acknowledge that his personal economic interests coupled with the interest of the general public are sufficient to entitle the bidder to relief on the merits, the question of traditional rights against the procuring authority will remain an important one.

First, since the APA has no provision for monetary relief, the liberalized incidental rights available under it are of no benefit to bidders seeking damages. For them, a traditional right is still necessary. Second, the recognition of private legal rights is critical in fo-

¹⁰⁶ For example, in *Barrows v. Jackson*, 346 U.S. 249 (1953), a white defendant was permitted to litigate the constitutional rights of a black in contesting the validity of a restrictive covenant. See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

¹⁰⁷ The Court's opinion in *Sierra Club* might be read narrowly to permit the plaintiff to raise the public's interest only as an additional factor to support his claim for injunctive relief. Under this view he would still have to establish a private cause of action before he could prevail. If, however, as the Court implies in *Sierra Club*, 405 U.S. at 737-38, the purpose of the plaintiff's standing in *Data Processing*-type cases is to vindicate the public interest, it makes little sense to require that the plaintiff possess a private cause of action of his own.

¹⁰⁸ See note 50 *supra*.

¹⁰⁹ See note 53 *supra*.

curring the court's attention on which interests, among the complex of competing public and private considerations, should weigh most heavily. The *Scanwell* decision was phrased in terms of enforcing the public's interest in compliance with procurement laws.¹¹⁰ But the cases after *Scanwell* subordinated this interest to the competing public concerns for broad discretion and unhindered procurement.¹¹¹ Acknowledging that the bidder's personal interests warrant legal protection for their own sake would limit this judicial tendency to make net public welfare the sole test for judicial relief. For these reasons it is necessary to determine whether bidders should possess traditional rights against the government.

III. THE EVOLVING JUDICIAL RECOGNITION OF A BIDDER'S PURPOSEFUL RIGHTS

A. *Rationales for Enforcing a Bidder's Interests*

The inquiry into whether bidders enjoy traditional legal rights against the government must commence with the procurement statutes themselves. While Congress could have explicitly conferred enforceable rights upon bidders, it did not do so. Nothing in either the provisions of the ASPA or the FPASA or in their legislative history¹¹² indicates whether Congress contemplated granting or withholding legal rights to bidders.¹¹³ These procurement statutes established the *primary* obligations controlling the award of government contracts but created no *remedial* law to enforce them.¹¹⁴ The task of developing remedies was left to subsequent legislation or to the courts.

The principal source of legislative remedies for wrongful administrative action is the APA. It represents a general reservoir of remedial law to complement the primary duties created by Congress in the individual agency statutes. The APA can thus supply

¹¹⁰ See note 52 *supra* & accompanying text.

¹¹¹ This development is discussed at note 153 *infra* & accompanying text.

¹¹² E.g., S. REP. NO. 571, 80th Cong., 1st Sess. (1947).

¹¹³ Contrast this congressional reticence with the position taken by the Commission on Government Procurement. The Commission was established in 1969 to make a comprehensive study of procurement statutes, policies, regulations, and practices. Act of Nov. 26, 1969, Pub. L. No. 91-129, 83 Stat. 269. In its final report, the Commission stresses the value of judicial review of award protests and recommends that Congress consider clarifying the statutory basis for court jurisdiction over bidders' suits. 4 PROCUREMENT REP., *supra* note 7, at 47-48.

¹¹⁴ This distinction between primary and remedial law is discussed in H. M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 487-89 (tent. ed. 1958).

the bidder with an incidental right to enjoin the contracting officer from exceeding his statutory authority or acting arbitrarily. Any traditional right, however, will have to be judicially developed.

In determining whether a bidder's rights should be recognized and enforced by the courts, the first place to look is the general statutory scheme Congress created to award contracts. One principal index of congressional concern for securing the interests of private bidders is the degree to which pure competitive bidding was incorporated into the system to bestow on each private businessman an equal opportunity to vie for contract awards. It could be argued that inasmuch as many procurements are exempted from competition, some other interests, such as the public's interest in efficient acquisition of government supplies, predominates. Examples of exemptions are all negotiated procurements, especially those made pursuant to the ASPA provision that permits the government to accept an initial proposal without first holding discussions with other offerors.¹¹⁵

These provisions indicate that Congress was frequently more impressed with fostering expeditious procurement than with guaranteeing fair and equal treatment of all bidders. They do not, however, warrant the conclusion that bidders have no legal rights under the many other provisions which assist the bidder in competing for an award. No single interest, public or private, is the polestar of procurement law. The public concern for efficient procurement often gives way to various social and economic nonprocurement objectives.¹¹⁶ In fashioning the primary duties placed upon contracting officers Congress must balance these conflicting interests and determine which should be secured in a given situation. Thus the individual interest in an opportunity to compete for contracts may occasionally be outweighed by the public interest in procurement efficiency. But in other situations, where Congress has mandated that some competition must be employed, the private bidder should be entitled to enforce the prevailing interest in effective competition.

Pervading the case law on administrative action is the idea that when one deals with the government he has some essential right to expect fair treatment in return, especially when he confers some benefit upon the government in the process.¹¹⁷ When the govern-

¹¹⁵ See note 20 *supra* & accompanying text.

¹¹⁶ See Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171, 252-53 (1971).

¹¹⁷ In the context of bidders' suits the benefit conferred is the power to bind the bidder to a contract. See *Merriam v. Kunzig*, 476 F.2d 1233, 1242 n.7 (3d Cir. 1973).

ment sets out to use the advantages of the marketplace, it owes businessmen the duty of fair and honest dealing.¹¹⁸ This inherent right to governmental fair play supplements the APA's blanket prohibition of arbitrary, capricious, and illegal agency action.¹¹⁹ Because this is a traditional legal right, it avoids the problems of standing and incidental rights encountered under the APA. The best examples of this development with respect to potential government contractors are two pre-*Scanwell* decisions by the District of Columbia Circuit on the issue of debarring a bidder from participating in future contract awards.¹²⁰ The plaintiff in *Copper Plumbing & Heating Co. v. Campbell* sued to have declared unlawful a Department of Labor regulation authorizing debarment for any contractor who willfully violated the 8-hour laws. The court, in testing the contractor's standing under the *Tennessee Electric* legal right test, held that the company enjoyed a right "not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects."¹²¹

The District of Columbia Circuit subsequently held that this traditional right was invaded when debarment was imposed without notice of the charges, hearings, or specific findings in *Gonzalez v. Freeman*.¹²² Judge Burger, writing for the court in *Gonzalez*, emphasized that bidders have a legally protected right "not to be debarred except in an authorized and procedurally fair manner . . ." ¹²³ He relied on the Supreme Court's opinion in *Greene v. McElroy*¹²⁴ for the proposition that this right to fair treatment could not be restricted without the most explicit legislative or executive authorization, and held that, under this standard, the debarment action lacked

¹¹⁸ Grossbaum, *supra* note 116, at 237.

¹¹⁹ APA § 10(e), 5 U.S.C. § 706 (1970) provides in part:

The reviewing court shall —

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law; . . .

¹²⁰ *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961).

¹²¹ 290 F.2d at 371.

¹²² 334 F.2d 570 (D.C. Cir. 1964).

¹²³ *Id.* at 576 (footnote omitted).

¹²⁴ 360 U.S. 474, 507-08 (1959).

sufficient procedural safeguards.¹²⁵ Cases like *Gonzalez* and *Greene v. McElroy* mark the obsolescence of any right-privilege dichotomy in classifying relationships with the government.¹²⁶ They establish that the individual has some core right to administrative fair play, over and above his constitutional right to procedural due process, which can be retracted only by a clear and specific directive from the legislature.

The case for recognizing a bidder's traditional right to be treated fairly, in accordance with procurement statutes and regulations, is intensified by the prospect of serious economic injury he stands to suffer if denied the contract. He might stand to lose 35 million dollars of business as did the bidder in *General Electric Co. v. Seamans*.¹²⁷ The Court in *Lukens* was correct in its statement that the potential for economic loss alone does not create a legal right, but the bidder's financial vulnerability cuts heavily in favor of permitting him to enforce whatever restrictions do exist on procurement action.¹²⁸

These two factors, a right to fair treatment by the government and the prospect of serious economic harm, coalesce to create a substantial individual interest in the prospective contractor, necessitating full legal protection. Furthermore, conferring traditional rights upon bidders is warranted as a means of securing significant public interests. This concept must be distinguished from the theory of the private attorney general who lacks enforceable interests of his own. His cause of action against the government emanates only from his status as champion of the public's rights.

But the courts could further secure these public interests by granting the private plaintiff rights and privileges of his own. This does not require that the litigant's personal interest be the primary

¹²⁵ 334 F.2d at 579.

¹²⁶ As Professor Speidel aptly put it, "As in other areas of governmental operations, the reality of dependence [of business concerns upon government spending] has eroded the traditional right-privilege distinction . . ." Speidel, *Judicial and Administrative Review of Government Contract Awards*, 37 LAW & CONTEMP. PROB. 63, 66 (1972). See generally Reich, *supra* note 37; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹²⁷ 18 CCH Cont. Cas. F. ¶ 81,805 (D.C. Cir. June 16, 1972), *dismissed as moot*, 18 CCH Cont. Cas. F. ¶ 81,810 (D.C. Cir. Nov. 2, 1972). The facts of this case are discussed in 420 BNA FED. CONT. REP. A-24 (1972).

¹²⁸ Cf. *Greene v. McElroy*, 360 U.S. 474, 490 (1959). In *Gonzalez* Judge Burger suggested that the severity of economic injury was probably the dispositive factor in *Greene* and might explain the difference between that decision and the Court's holding in *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961). 334 F.2d at 579-80.

focus of the court's concern. The law can confer a particular capacity¹²⁹ on a private litigant as a means of securing some public interest or private interest of a third party. The litigant's self-interest will induce him to enforce the capacity conferred, thereby assuring protection of the secured interest. An example is the qualified privilege granted to those criticizing the official conduct of a public officer in *New York Times Co. v. Sullivan*.¹³⁰ The Court's emphasis in the *Times* case was on protecting the public's interest in spirited and uninhibited commentary on public issues.¹³¹ To safeguard this value the private publisher was granted a privilege which far exceeded the protection that his individual interests alone deserved.¹³²

Two particular aspects of the public interest can be secured by granting purposeful rights to the private bidder: (1) the interest in vigorous competition among potential contractors and (2) the interests embodied in contracting-out to private business in general. In obtaining contract terms the government seeks the benefits of economic rivalry. When competition among bidders is conducted in a fair and honest manner, with the broadest bidder participation possible, the resulting contract should be the most favorable to the government.¹³³ Any special advantages granted to one bidder or

¹²⁹ This terminology is adopted from Dean Pound's theory of jurisprudence and juristic relationships. Under his view the function of the law is to secure various interests, individual, public, and social. These interests are secured by conferring certain capacities on private parties and public institutions. The capacities are the traditional Hohfeldian relations: rights and duties, privileges and no-rights, powers and liabilities, and immunities and disabilities. See 3 R. POUND, JURISPRUDENCE § 101 (1959); Hohfeld, *supra* note 57, at 30.

¹³⁰ 376 U.S. 254 (1964). This privilege has since been extended to all matters of public or general concern, at least those that somehow involve official actions by public servants. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

¹³¹ For example, the Court stated, "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

¹³² The Court in *Times v. Sullivan* believed the common law defense of truth was insufficient to protect freedom of expression. Requiring a critic of official conduct to guarantee the truth of his assertions may lead to self-censorship, for the critic will tend to steer far wide of the unlawful zone. *Id.* at 279. For this reason the Court held that a public official must prove "actual malice" — knowledge of the statement's falsity or reckless disregard of whether it is false or not — to recover damages. *Id.* at 279-80. This standard protects the publisher from liability for defamatory statements that he would have known were untrue but for his own negligence. It is difficult to see how any aspect of the publisher's individual interests could require this immunization of negligent conduct. Consequently it must be the public's interest that mandates this personal privilege.

¹³³ Congress' policy in favor of full competition is codified throughout the procure-

any departures from the regular statutory procedure detract from the overall quality of the contract terms. And if the award procedure is dishonest, potential contractors will be deterred from venturing the sums necessary to prepare and submit bids.¹³⁴ Because the benefit the government derives from competitive procurement is dependent upon the integrity of the bidding process, bidders should possess the interest necessary to insure their fair and impartial treatment. Recognizing the bidder's traditional rights will not only enhance his faith in the rectitude of the process, but will also assure that the proposal eventually selected is indeed the most advantageous to the government.

Granting a bidder's interest legal protection is also supported by the contemporary character of the contracting-out relationship between private business and government. The present system of procurement was not predestined. The view of the Supreme Court in *Lukens*, that procurement was a purely proprietary function, originating solely from the government's efforts to fulfill its needs for goods and services in the most economical manner, begins one step too late. It assumes there must be two distinct and closed systems — the government and private enterprise — engaging jointly in commercial transactions to supply the government's requirements. But the government could have decided originally to manufacture materials, hire labor, and undertake research itself instead of purchasing these commodities from the private sector. Any true model of procurement must include the idea that contracting-out manifests the conscious decision to have production and research carried out by private industry and not by the government.¹³⁵

Legal relationships in the procurement process should therefore be drawn to reflect the purposes for having governmental research and production performed by the private sector. It is possible that the system is nothing more than the most efficient means of satisfying the government's needs. This was the unarticulated premise in *Lukens*. But there are alternative explanations for con-

ment statutes. For example, the formal advertising requirements of the ASPA, 10 U.S.C. § 2305(a) (1970) provide in part: "The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned."

¹³⁴ See *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 412-13 (Ct. Cl. 1956), discussed at notes 179-83 *infra* & accompanying text.

¹³⁵ Commentators have noted the growing use of contracting-out to accomplish such functions as research, management, and decisionmaking. Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies with other Governmental Policies*, 29 LAW & CONTEMP. PROB. 277, 287 (1964); Stover, *The Government Contract System as a Problem in Public Policy*, 32 GEO. WASH. L. REV. 701, 707-10 (1964).

tracting-out. One is that private business and labor leaders viewed procurement as an opportunity for industry to share profits and risks with the government, and that the present system developed through their political support.¹³⁶ Under this theory, since the purpose of the procurement laws is to benefit and protect private economic interests, private businessmen are clearly entitled to enforce them.

Another hypothesis is that contracting-out resulted from a policy of decentralization, an attempt to limit the power and influence of government by providing that many public functions be carried out by private enterprise. In its implementation this policy has backfired. As private organizations do more and more of the public's business, they become increasingly dependent upon the government for their livelihoods and thus more vulnerable to its control. Contracting-out has enabled the government to exert control over practices of private industry that it would lack the power to regulate. For example, the government can mandate the hiring practices¹³⁷ and prescribe the labor conditions¹³⁸ to be implemented by the businesses that seek to contract with it. It can direct the methods of livestock slaughter¹³⁹ and prohibit the emission of air pollutants in excess of certain state and federal standards.¹⁴⁰ As a practical matter, many of these procurement restrictions, although limited by their terms to persons employed in producing materials used in the performance of government contracts,¹⁴¹ may encompass a sufficient number of employees to dictate the labor practices for an entire firm and to set rates of compensation throughout its wage structure.¹⁴²

¹³⁶ See Stover, *supra* note 135, at 704-05.

¹³⁷ Under authority of Exec. Order No. 11,246, the Department of Labor has issued regulations requiring bidders on federally-assisted construction contracts to submit acceptable "affirmative action" programs for utilizing minority manpower. Exec. Order No. 11,246, 3 C.F.R. 418 (1973), 42 U.S.C. § 2000e (1970). One such regulation, commonly referred to as the "Philadelphia Plan," was upheld in *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

¹³⁸ A series of federal statutes regulate the minimum wages, work hours, and overtime pay of laborers employed in the production of goods and services sold to the government. *E.g.*, Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1970); Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-32 (1970); Walsh-Healy Act, 41 U.S.C. §§ 35-45 (1970).

¹³⁹ 7 U.S.C. §§ 1901-06 (1970).

¹⁴⁰ Clean Air Act § 306, 42 U.S.C. § 1877h-4 (1970).

¹⁴¹ *E.g.*, Walsh-Healy Act § 1, 41 U.S.C. § 35 (1970).

¹⁴² See H. MERTON, PUBLIC CONTRACTS AND PRIVATE WAGES 103 (1965). Data from the Bureau of Labor Statistics indicate that in the 19 industries for which Walsh-Healey minimum wage determinations were issued during fiscal years 1961-64, over 65 percent of the total workers employed were covered by the Act. *Id.* at 92.

These statutory developments have shifted procurement from a strictly proprietary function to a significant device for social and economic regulation. A system originally created to restrict governmental power has become a vehicle for expanding it. As private enterprise becomes increasingly locked into the performance of public functions and the attainment of national social and economic goals, the line between public and private fades.¹⁴³ If the autonomy of these private enterprises is to be secured, they must be entitled to enforce their individual interests against the government. While Congress will still possess the legislative power to require formally that those who contract with the United States implement certain social and economic programs, granting legal protection to the bidder should diminish the multifaceted collection of informal pressures that the government can exert over the private businesses that depend on it for their financial survival.¹⁴⁴ His economic interests secured by traditional rights, the bidder can then function as an independent business entity operating out of economic self-interest and can pose a check on the spreading governmental influence.

The current nonproprietary function of procurement as a tool for implementing social and economic policies provides one further rationale for protecting the bidder's interests. The *Lukens* view that bidders were only the incidental beneficiaries of a system established to assure expeditious supply acquisition is no longer tenable. Contemporary procurement is replete with instances where economic efficiency is sacrificed in the interest of conferring special advantages upon a particular class of bidders.¹⁴⁵ Congress's desire to prefer one bidder over another is so significant that it overrides the general policy of maximizing efficiency.¹⁴⁶ Examples include the

¹⁴³ Miller & Pierson, *supra* note 135, at 287-91.

¹⁴⁴ The potency of these pressures is illustrated by the 1962 success of the Kennedy administration in forcing the nation's largest steel corporations to rescind a price increase, partially because of the threat of losing government contracts. Reich cites this incident to demonstrate how the independence of private business may be eroded by what he terms "the public interest state." Reich, *supra* note 37, at 756.

¹⁴⁵ See Grossbaum, *supra* note 116, at 252-53.

¹⁴⁶ This phenomenon of placing social and economic policy above procurement efficiency is also apparent in the situations where the government refuses to deal with businesses that fail to adhere to certain social standards, as in the programs discussed at notes 137-42 *supra* & accompanying text. Requiring all government contractors to implement various social programs increases the costs, and therefore, the price of government business and limits the number of firms from which the government may select. As a result, procurement thrift is sacrificed. But the beneficiaries of these governmental programs are not the bidders themselves, but the bidders' employees or the surrounding

Buy American Act,¹⁴⁷ requiring the purchase of products made in the United States whenever possible; the Small Business Act,¹⁴⁸ providing that certain awards be set aside for small business concerns; and the section 8(a) program,¹⁴⁹ authorizing the award of contracts to the Small Business Administration to be subcontracted to minority-owned businesses.¹⁵⁰ In structuring these programs the government has determined that the quantity of awards a particular group would receive through the normal processes of competitive bidding in insufficient, and because of some interest in the economic success of these groups, has exempted them from the rigors of competition. Since the designated bidders were granted these award preferences for their own economic welfare, they possess the sort of privilege conferred by statute which the Court in *Tennessee Electric* recognized as a source of traditional rights in 1938. Accordingly bidders should be entitled to enforce these advantages the government has conferred.¹⁵¹

B. *The Increased Judicial Attention to Protecting the Interests of the Bidder*

1. *Early Cases in the District of Columbia Circuit*

The *Scanwell* decision produced a confusing rule for the district courts to follow. They were instructed to hear challenges to procurement decisions brought by disappointed bidders, but were cautioned that the bidder's only purpose in court was to vindicate

community. The present discussion is limited to the government's policy of restricting awards to a particular group of suppliers in an effort to bolster their economic welfare. Here the intended beneficiaries are the bidders.

¹⁴⁷ 41 U.S.C. § 10a-10d (1970).

¹⁴⁸ 5 U.S.C. §§ 631-47 (1970).

¹⁴⁹ Small Business Act § 8(a), 15 U.S.C. § 637(a) (1970).

¹⁵⁰ This program was recently upheld over contentions: (1) that it infringed upon the plaintiff's constitutional right to equal protection of the laws, and (2) that the plaintiff had some statutory right to competitive bidding which was being violated. *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973).

¹⁵¹ The courts to date, in determining the bidder's standing and legal rights, have not given substantive effect to the distinction between the traditional sort of restrictions on contract awards designed to assure economical procurement and the more recent sort of restrictions created to attain some nonprocurement goal. Both have been treated under the *Lukens* theory that procurement statutes are not enacted for the benefit of the bidder, even though that theory appears clearly inapplicable to the latter class of restrictions. But the courts have recognized the distinction in other contexts. For example, in *Northeast Constr. Co. v. Romney*, 18 CCH Cont. Cas. F. ¶ 82,066 (D.C. Cir. March 6, 1973), Judge Leventhal states that the difference should be taken into account in assessing the contracting officer's discretion to treat the bidder's nonresponsiveness as immaterial. *Id.* at 87,281-82. This case is discussed at notes 204-09 *infra* & accompanying text.

the public interest. Because the court in *Scanwell* viewed the principal public interest as assuring compliance with the laws regulating procurement, the salient public interest conveniently paralleled the bidder's private interest in enjoying a fair opportunity to compete for the award by being treated in accordance with the statutes and regulations. But under the *Scanwell* theory, the plaintiff-bidder was only the windfall beneficiary of a public cause of action.

Commentators quickly recognized that the bidder's suit, though characterized as a vehicle for enforcing a public interest, was in reality a very private sort of litigation.¹⁵² The bidder's sole concerns were his personal economic desires. Nonetheless many trial courts took the private attorney general fiction seriously and allowed an amorphous notion of the net public interest to be the ultimate touchstone of whether the bidder should prevail on the merits.¹⁵³

Whether the public's total welfare will actually be benefitted by allowing the bidder to litigate the validity of contract awards is questionable. The central public concern is expeditious procurement, fulfilling the government's supply needs in the most efficient manner. Once the contract has been awarded to an acceptable enterprise the public gains little from the cancellation and resolicitation required because the original award was technically improper. Any benefit received by enhancing the attractiveness of the contract terms is more than offset by the burdensome delay and expense of protracted litigation and a second solicitation.¹⁵⁴ The public interest

¹⁵² Grossbaum, *supra* note 116, at 244-45; Pierson, *supra* note 10, at 14-15.

¹⁵³ One example is *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970), where the court denied the plaintiff's request for a preliminary injunction upon determining that any benefits derived from enforcement by a private attorney general were outweighed by the inconvenience and liabilities that the government would incur. In *National Cash Register Co. v. Richardson*, 324 F. Supp. 920 (D.D.C. 1971), the court admitted the contracting practices in question were "sloppy," but held that the plaintiff failed to show the "flagrant disregard for the regularity of contracting procedures and other factors bearing on the public interest which would justify extraordinary relief by way of injunction." *Id.* at 921.

¹⁵⁴ An insight into the harmful delay the public may incur is provided by *General Elec. Co. v. Seamans*. Philco-Ford Corporation was awarded an Air Force contract for the operation and maintenance of six remote satellite tracking stations. General Electric, which had submitted a lower offer, filed a bid protest with the GAO in early 1972, and then obtained a preliminary injunction prohibiting Philco from taking any action to implement the award pending the GAO decision. 340 F. Supp. 636 (D.D.C. 1972). Ultimately the GAO denied General Electric's protest, Dec. Comp. Gen. B-175004 (Oct. 12, 1972) (unpublished), and the District of Columbia Circuit permitted the injunction to lapse. 18 CCH Cont. Cas. F. ¶ 81,810 (D.C. Cir. Nov. 2, 1972). This occurred, however, only after 11 months of litigation, during which the question of who was to operate the stations was in doubt, and neither side was permitted to take any part in managing them.

is jeopardized further by the fact that the bidder is frequently suing to compel the government to accept a more expensive contract.¹⁵⁵ And cancelling a contract, even if required by a court order, may subject the government to liability for the value of performance rendered under the contract, including a reasonable allowance for profits.¹⁵⁶

What may result from opening the courtrooms to disappointed bidders is illustrated by *Allen M. Campbell Co. v. Lloyd Wood Construction Co.*¹⁵⁷ *Campbell* involved a housing construction contract set aside for award to small businesses only. Lloyd Wood, an indefatigable competitor for the contract, determined to challenge the initial award proposal. Its first step was a protest to the Size Appeals Board of the Small Business Administration (SBA) to challenge the "small business" eligibility of the two firms that had submitted lower bids than its own. The Board disqualified the lowest bidder but upheld the size status of Campbell, making Campbell the lowest responsive bidder. Next, Lloyd Wood went to district court, seeking injunctive and declaratory relief to reverse the size determination and enjoin the award. The Air Force, apparently unfazed by Lloyd Wood's valiant efforts to obtain the contract, mailed a Notice of Award to Campbell. The district court then restrained the Air Force from executing a formal contract with Campbell, and in a subsequent opinion overturned the SBA size determination and held Campbell ineligible.¹⁵⁸ The court stated, however, that it was without the necessary power to order the Air

¹⁵⁵ Cf. *Pullman, Inc. v. Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971). A suit by one bidder to cancel an existing award and compel acceptance of a higher bid was the very situation presented by *Scanwell*.

¹⁵⁶ See *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). In *Reiner* the GAO ruled improper the award originally made to the plaintiff and the contract was cancelled. The Court of Claims held that although the award might have been properly cancelled or withdrawn as a matter of sound procurement policy, it was not so patently illegal as to render it a nullity. Accordingly the cancellation was treated as a termination for the convenience of the government and the plaintiff was entitled to recover damages under the termination clause. *Reiner* was a pre-*Scanwell* decision dealing with cancellation ordered by the GAO. The Court of Claims believed the contractor should be entitled to recover for his performance so long as the award evinced a minimal measure of legality. Still open to question is whether this test is coextensive with the *Steinthal* "rational basis" standard for court ordered cancellation. See note 176 *infra* & accompanying text. Also left to be decided is whether a district court decision to cancel in a *Scanwell*-type suit should be given collateral estoppel effect by the Court of Claims to preclude the contractor from recovering damages for his performance. For another context in which the question of collateral estoppel between the district court and the Court of Claims may arise see note 255 *infra*.

¹⁵⁷ 446 F.2d 261 (5th Cir. 1971).

¹⁵⁸ *Lloyd Wood Constr. Co. v. Sandoval*, 318 F. Supp. 1167 (N.D. Ala. 1970).

Force to award the contract to Lloyd Wood.¹⁵⁹ But by then the Air Force had become more obliging. As a result of the district court's decision on the eligibility question, it rescinded the Notice of Award to Campbell and awarded the contract to Lloyd Wood.

Unfortunately for the interests of judicial economy, Campbell proved to be every bit as litigious as Lloyd Wood had been. It first protested to the GAO, which ruled that it could give Campbell no relief, since the Air Force had designated the award as urgent.¹⁶⁰ Campbell's appeal to the Court of Appeals for the Fifth Circuit was equally fruitless. That court held that the SBA's size determination was reasonable and that the district court therefore erred in reversing it. But because the contract was close to completion, the court of appeals did not interfere with the award.¹⁶¹ Still undaunted, Campbell turned to the Court of Claims, where it finally met with some success. The Court of Claims ruled that the contracting officer was authorized to award the contract to Campbell upon receipt of the SBA's size determination, and that the Notice of Award subsequently mailed therefore created a binding contract. As a consequence the cancellation was treated as a termination for convenience under the *Reiner* case¹⁶² and Campbell was allowed to recover damages as provided by the termination clause.¹⁶³

When the smoke finally cleared in the *Campbell* litigation, it was apparent that the biggest loser was the federal government. It was forced to undertake two and one-half years of litigation and endure a shortage in military housing while the construction project was delayed. In all, three courts and two federal agencies had been brought into the controversy. When it was all over, not only was the government forced to pay \$77,000 more than the price sought by the original contractor, but it was also liable to that original contractor in damages for awarding the contract to a higher bidder. If a benefit to the public is lurking somewhere in this proceeding, it is well camouflaged.

The chain of events in *Campbell* presents an extreme case but it is still representative of the sort of price the public must pay for allowing the bidder to enforce his interests. Adjudicating the

¹⁵⁹ *Id.* at 1171-72.

¹⁶⁰ Dec. Comp. Gen. B-170746 (Sept. 11, 1970) (unpublished).

¹⁶¹ *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 263-64 (5th Cir. 1971).

¹⁶² See note 156 *supra*.

¹⁶³ *Allen M. Campbell Co. v. United States*, 467 F.2d 931 (Ct. Cl. 1972).

validity of an award in court is generally going to be costly, and in government contracting extended delays attendant to such litigation are particularly detrimental. Admittedly, there can be some public benefits from bidders' suits. One is the deterrent effect mentioned by the court in the *Steinthal* case.¹⁶⁴ Even if only a few suits result in actual court intervention, the mere prospect of judicial scrutiny should cause contracting officers to be more diligent. Because a principal purpose of the procurement laws is to assure that the contract selected is the most advantageous to the government, the effect of enjoining violations and inducing increased compliance by procuring agencies should be to enhance the overall economy of public purchasing.

It is doubtful, however, that the benefits to the public from greater adherence to procurement rules are sufficient to outweigh the many detriments of judicial review. The implication from this is that if the dominant concern of the District of Columbia Circuit were really the public's interests, it would never have given the bidder access to the courts. The real focus of the *Scanwell* court's attention must have been the private interests of the bidder. This observation is corroborated by the Third Circuit's analysis in *Merriam*, which held that the procurement statutes were intended to protect private interests as well as public ones.¹⁶⁵ But by describing the

¹⁶⁴ 455 F.2d at 1301.

¹⁶⁵ See note 92 *supra*.

An appropriate inquiry at this juncture is to determine the success of disappointed bidders in obtaining injunctive relief from the courts. The argument could be made that if the courts were actually concentrating on protecting the bidder's private interests the bidder's would have fared better than they have. In only a handful of the cases litigated to date have the bidders been successful in securing preliminary or final injunctive relief that survived appeal. The current scorecard is as follows:

Preliminary injunctions:

1. General Elec. Co. v. Seamans, 18 CCH Cont. Cas. F. § 81,805 (D.C. Cir. June 16, 1972), *dismissed as moot*, 18 CCH Cont. Cas. F. § 81,810 (D.C. Cir. Nov. 2, 1972) (preliminary injunction pending decision by GAO).
2. Hayes Int'l Corp. v. Seamans, No. 71-381 (N.D. Ala. Sept. 30, 1971).
3. Aerojet Gen. Corp. v. Thiokol Chem. Corp., No. C-70 1493-LHB (N.D. Cal. July 15, 1970).
4. Big Four Mechanical Contractors, Inc. v. SBA, No. 70-312 (W.D. Okla. June 25, 1970).

Final injunctions:

1. Henry Spen & Co. v. Laird, 354 F. Supp. 586 (D.D.C. 1973) (ordered contracting officer to allow offeror to correct his bid).
2. Rudolph F. Matzer & Associates, Inc. v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972) (ordered cancellation of illegal award).
3. Blount-Barfell-Dennehy, Inc. v. United States, No. 70-392 (W.D. Okla. Aug. 6, 1970) (ordered government to accept plaintiff's bidder's bond).

This difficulty in obtaining injunctive relief should not be viewed as an index of the unwillingness of courts to recognize the bidder's interests as warranting legal protection.

bidder as a private attorney general asserting the interest of the public, the *Scanwell* court invoked a fiction that many of the district courts mistook for substance. As a consequence these courts forced all the competing considerations of public and private interest onto a common scale, somehow balanced them against each other, and reached a decision based on the net public benefit. The separate questions of legality of the award and propriety of the remedy sought were treated as one, and no attempt was made to distinguish and isolate the various interests to be secured.¹⁶⁶ These steps would not be taken until the Court of Appeals for the District of Columbia Circuit decided *M. Steinthal & Co. v. Seamans*.

Like all other equitable relief, an injunction is an extraordinary remedy. Although recognizing that the damages remedy available in the Court of Claims may not represent an adequate remedy at law, many courts have viewed its availability as a sufficient basis for denying injunctive relief because of the countervailing considerations. See, e.g., *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301-02 (D.C. Cir. 1971). The strong public interest in unhindered implementation of governmental programs makes the burden on a bidder seeking injunctive relief particularly onerous. See *Page Communications Eng'rs, Inc. v. Resor*, 15 CCH Cont. Cas. F. ¶ 84,154, at 89,999-16 (D.C. Cir. 1970). Nevertheless, the use of the preliminary injunction, when properly limited, was specifically authorized by the court in *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1316-17 (D.C. Cir. 1971). In light of the compelling reasons for withholding injunctive relief, the occasional situations where injunctions are awarded, like the *General Electric* case, clearly exhibit the courts' concern for the interests of the bidder.

A case that probably should be included in the first list is *International Eng'r Co. v. Richardson*, No. 927-73 (D.D.C. July 10, 1973), where the court ordered the contracting officer to state reasons why he had notified a contractor submitting technical data to the government to strike from the data report a clause which limited the government's use of the data. This case could be distinguished from the bidder cases, since there existed a contractual relationship between the parties, and the plaintiff therefore had traditional rights under the contract. Further, the ASPR provisions which deal with the government's rights in technical data, 32 C.F.R. §§ 9.202-2 to -3 (1972), could arguably have been promulgated for the purpose of protecting the interests of the contractor, see 32 C.F.R. § 9.202-1(b) (1972), and as such might serve as an independent source of traditional rights. Nonetheless, the district court apparently thought that *Scanwell* controlled on the questions of standing and jurisdiction. Also, to the extent that the salient consideration in the bidder cases is the courts' unwillingness to interfere with the procurement process by substituting judicial judgment for that of the contracting officer, *International Engineering* is quite relevant, for the court is in effect requiring the contracting officer to show cause why his decision was the proper one.

¹⁶⁶ One notable exception is Judge Gesell's opinion in *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970). The court held that award of the contract to anyone other than the plaintiff would be illegal, but invoked its discretion to withhold injunctive relief, since it believed that a declaration of the plaintiff's rights and its opportunity to recover damages was sufficient. *Id.* at 687-88. This action by the court in *Simpson* may be incorrect in view of later decisions by the District of Columbia Circuit on the limited power of the courts to deny an injunctive remedy. Notwithstanding this, Judge Gesell's views on the proper role of courts in granting relief to bidders are well reasoned and represent the direction in which the courts should move. They are discussed more fully at notes 223-27 *infra* and accompanying text.

2. *A Voice from Above: The Steinthal Delineation*

As was discussed previously, the reason that procurement was for so long treated differently from other administrative decision-making and effectively shielded from judicial review at the behest of private parties centers on two policies — unhindered procurement and broad contracting officer discretion.¹⁶⁷ Lifting the standing bar in *Scanwell* did not dilute the potency of these policy considerations. Instead of precluding the bidder's recovery on jurisdictional grounds, they now produced dismissals on the merits.¹⁶⁸ Though these policies are admittedly valid, it is clear that if used to prohibit all judicial review of procurement they sweep far too broadly. While there may exist a genuine need for some agency discretion, there must also be clearly defined boundaries to contain it.¹⁶⁹ The volumes of regulations governing the award of contracts, held to have the force and effect of law,¹⁷⁰ demonstrate that objective standards do exist by which to measure the propriety of a contracting officer's decision. And while some contracts are so closely tied to the national welfare that they should go unhindered, in most cases this compelling public interest in judicial forbearance is missing.¹⁷¹

When applied to the public-interest/private-interest confusion created by *Scanwell*, this analysis provides the framework for understanding the *Steinthal* opinion. By the time the District of Columbia Circuit decided that case, it had had one and one-half years of experience in adjudicating bidders' suits. It had thus developed the expertise necessary to define precisely which private and public interests were at stake and to sharpen the criteria for injunctive relief to secure them more effectively. It is therefore incorrect to view *Steinthal* as the drastic retreat from *Scanwell* claimed by some ob-

¹⁶⁷ See notes 39-43 *supra* & accompanying text.

¹⁶⁸ Typical are the cases discussed at note 153 *supra*.

¹⁶⁹ In *Scanwell* Judge Tamm stated:

[I]t is incontestable that many areas of government contracting are properly left to administrative discretion; the courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeters thereof. Contracting officers can exercise discretion upon a broad range of issues confronting them; they may not, however, opt to act illegally. When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.

424 F.2d at 874 (footnotes omitted).

¹⁷⁰ *Paul v. United States*, 371 U.S. 245 (1963); *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969); *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

¹⁷¹ See text accompanying notes 41-43 *supra*.

servers.¹⁷² Properly interpreted, *Scanwell* first opened the courtroom door to suits by bidders; *Steinthal* merely adjusted the width it should be kept ajar. All the court held was that reasonable limitations exist on the scope of review to be exercised by courts in surveying a contract award, limitations that had been implicit in the *Scanwell* decision.¹⁷³

In shaping the test for injunctive relief the *Steinthal* court was faced with three interests to accommodate. There were those two traditional sources of public concern — broad discretion and unobstructed procurement.¹⁷⁴ Juxtaposed to them was the interest in assuring compliance with the procurement laws. The latter had been labeled a public interest by the *Scanwell* court, but can also be viewed as the private bidder's interest in receiving a fair opportunity to compete for the award in accordance with the regulations.¹⁷⁵ To secure these countervailing interests the court in *Steinthal* developed a two-fold test for awarding injunctive relief. The first part, designed to accord contracting officers the discretion granted them by statute, requires that the award be upheld whenever there is a rational basis for making it.¹⁷⁶ Otherwise it is illegal. At this point the compliance interest predominates, no matter how strong the considerations of public policy. The public interest in unimpeded procurement is protected by the second part of the test, which authorizes the courts to withhold injunctive relief on equitable grounds when some overriding public policy so requires. The court made clear that this exercise of equitable discretion was proper only in certain "urgent" situations which should not arise often.¹⁷⁷

What *Steinthal* did therefore was to give specific definition to the situations where the private and public interests in compliance

¹⁷² See note 30 *supra*.

¹⁷³ The *Scanwell* court predicated judicial review upon the plaintiff's establishing a *prima facie* case that the administrative action was arbitrary, capricious, or otherwise illegal. 424 F.2d at 866-67, 875.

¹⁷⁴ See text accompanying note 167 *supra*.

¹⁷⁵ See text preceding note 152 *supra*. The *Steinthal* court's labeling of public and private interests is discussed in Speidel, *supra* note 126, at 87 n.84.

¹⁷⁶ 455 F.2d at 1301. The rational basis standard utilized by the *Steinthal* court is the longstanding measure of the scope of judicial review of administrative decision-making where agency discretion and expertise are involved. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 207-09 (1947); *Gray v. Powell*, 314 U.S. 402, 411-12 (1941); see generally 4 K. DAVIS, *supra* note 35, §§ 30.05-30.10.

¹⁷⁷ 455 F.2d at 1301-02. The court of appeals elaborated upon this exception in *Serv-Air, Inc. v. Seamans*, 473 F.2d 158 (D.C. Cir. 1972). It pointed out that the denial of injunctive relief, which would remit the wronged bidder to a damages remedy for his bid preparation expenses only, should be applied "only in extreme situations, as where relief would delay or interfere with supply of items urgently needed in military opera-

controlled and injunctive relief was warranted. These guidelines replaced the ad hoc net public interest approach of the initial post-*Scanwell* cases, for the first bidders possessed concrete enforceable limitations on the power of contracting officers to interfere with their private interests.

3. *Contemporaneous Developments in the Court of Claims*

While some public benefit might arguably result from enjoining an illegal award, little can flow from allowing the illegal award to stand but requiring the government to pay damages to the injured bidder.¹⁷⁸ Thus the Court of Claims decisions recognizing a bidder's right to damages provide strong indication that the courts now view violations of procurement law as an invasion of a private interest, not just a public one, and believe this private injury is entitled to compensation.

This cause of action for damages originated in a 1956 decision, *Heyer Products Co. v. United States*,¹⁷⁹ predating *Scanwell* by 14 years. It was based not on the interests in compliance with procurement rules per se, but on the idea that bidders must be treated with fairness to assure their continued participation in the procurement process. The court in *Heyer Products* was loyal to *Lukens* and stated that the procurement statutes themselves conferred no enforceable rights on the bidder. But it held there was an implied condition on the government's solicitation of offers that each bid would be fairly and honestly considered. The Court of Claims believed that no businessman would be willing to undertake the expense of preparing a bid unless he thought it would be

tions." *Id.* at 160. This makes it clear that the grounds for refusing to enjoin an award that has been adjudicated illegal, at least in a pre-procurement context, are quite narrow.

A decision by the Court of Appeals for the Sixth Circuit presents an example of such a situation. In the only bidder's suit apparently brought in that circuit, the court held that the district court had abused its discretion by refusing to vacate an order restraining the Army from awarding a contract for shells to be used in Vietnam. After the district court issued a restraining order, the Secretary of the Army supplied affidavits certifying that the national interest involved in the award was of overriding importance and stood to be materially affected by the injunction. *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

¹⁷⁸ Injunctive relief at least assures the public that the contract will ultimately be performed by the bidder most advantageous to the government. See text accompanying note 164 *supra*. No such benefit follows from a monetary recovery. The *Campbell* case illustrates this. Also, even the deterrent effect of liability for damages is weak. Money judgments by the Court of Claims are not charged to the procuring agency's appropriations. Pierson, *supra* note 10, at 46 & n.213.

¹⁷⁹ 140 F. Supp. 409 (Ct. Cl. 1956).

honestly assessed. As a result, it held that submitting a bid constitutes the acceptance of an offer whereby the government promises to give that bid a fair evaluation.¹⁸⁰ When this implied contract is breached the bidder is entitled to recover damages from the government under the Tucker Act.¹⁸¹ The damages recoverable are limited, however, to the bidder's expenses in preparing his offer. He can receive no anticipated profits.

The grounds for relief in *Heyer Products* were narrow.¹⁸² The court phrased the bidder's cause of action in terms of a "fraudulent inducement for bids," and held that to recover he must show by clear and convincing evidence that his bid was solicited by the government with a prior intent to disregard it no matter how favorable it was.¹⁸³ Subsequent decisions have reduced the burden on the bidder. In *Keco Industries, Inc. v. United States*¹⁸⁴ (decided after *Scanwell* and citing it favorably), the Court of Claims held that the bidder need not prove bad faith or intentional fraud; damages were available under the *Heyer Products* doctrine any time the bid was not "honestly considered."¹⁸⁵ And in *Continental Business Enterprises, Inc. v. United States*,¹⁸⁶ the Court of Claims caught up with the District of Columbia Circuit. Chief Judge Cowen, writing for a unanimous court, held that the bidder's right to an honest evaluation of his bid was violated any time there was no reasonable basis for the award,¹⁸⁷ citing *M. Steinthal & Co. v. Seamans*.

These decisions by the Court of Claims provide an excellent model for analyzing the expanding judicial awareness of the need for legally protecting the bidder's private interests. The initial concern is for providing some minimal level of fairness out of inherent notions of fair play and the need to assure the integrity of the bidding process. Next, the procurement process is increasingly viewed as being subject to rule of law, and the bidder's interests deemed worthy of protection in their own right. The final result is a single objective standard of legality, governing the

¹⁸⁰ *Id.* at 412-13.

¹⁸¹ 28 U.S.C. § 1491 (1970).

¹⁸² Apparently they were too narrow for the *Heyer Products Co.* In a subsequent opinion the court dismissed the company's petition upon finding a legally sufficient basis to justify the government's rejection of its bid. *Heyer Prods. Co. v. United States*, 177 F. Supp. 251 (Ct. Cl. 1959).

¹⁸³ 140 F. Supp. at 414.

¹⁸⁴ 428 F.2d 1233 (Ct. Cl. 1970).

¹⁸⁵ *Id.* at 1237.

¹⁸⁶ 452 F.2d 1016 (Ct. Cl. 1971).

¹⁸⁷ *Id.* at 1021-22.

availability both of injunctive relief in the district courts and of damages in the Court of Claims. If a violation of this standard entitles the bidder to a personal monetary recovery it is difficult to see how what is being protected is anything other than his private interests. He now possesses a traditional right against the government.^{187a}

IV. THE BIDDER'S TRADITIONAL RIGHTS UNDER THE RATIONAL BASIS TEST

The extent to which a court will intervene and oversee the decisions made by an administrative agency is typically captioned, to use the words of Professor Davis, "Scope of Review of Application of Legal Concepts to Facts."¹⁸⁸ Because this Note examines the problem from the standpoint of the individual bidder, the topic is here framed in terms of the scope of the bidder's traditional rights against the government. This characterization makes it clear that the degree of judicial interference with administrative discretion is also the degree of legal protection of the bidder's interests. The present inquiry is to assess the scope of this protected area.

To define the role of the courts in overseeing procurement, the court of appeals in *Steinthal* invoked the traditional doctrine for judicial review over areas of agency discretion: the court is not to decide the issue as an original proposition and substitute its judgment for that of the administrator. Instead it is to uphold the agency decision so long as there exists a rational basis for making it.¹⁸⁹ More an admonishment to respect the judgments of the administrator than a precise legal standard, the rational basis guideline leaves considerable room for the courts to determine what is reasonable.¹⁹⁰

^{187a} As a postscript to this discussion it should be pointed out that while the Court of Claims has been willing to expand the bidder's cause of action, as of yet, no bidder has succeeded in recovering damages under it.

¹⁸⁸ 4 K. DAVIS, *supra* note 35, § 30.

¹⁸⁹ 455 F.2d at 1301-02; *see* authorities cited at note 176 *supra*.

¹⁹⁰ As an initial proposition there exists a spectrum of possible levels of judicial protection. At one end point there is full-scale review, a complete substitution of judgment approach. *See* 4 K. DAVIS, *supra* note 35, § 30.06. With plenary review there would no longer be administrative discretion to choose between arguably equivalent bids. The individual bidder could prove a set of facts that would entitle him to the award. At the other endpoint there is no judicial protection whatsoever. Administrative discretion is unfettered, and the bidder is bound by whatever decision the agency makes. The latter is essentially the "committed to agency discretion" doctrine codified in the APA, 5 U.S.C. § 701(a)(2) (1970). In between these points is a range of possibilities where the bidder has no clear right to the award itself but is not completely subject to administrative whim. The use of the "rational basis" test merely indicates that

Conceptually the rational basis test produces what might be thought of as a class of permissible decisions for the administrator to make.¹⁹¹ These permissible decisions translate into a pool of acceptable contractors. Each contractor in the pool possesses a combination of attributes that would make him the most advantageous offeror under some reasonable system of evaluation. Excluded from the pool are the bidders who cannot demonstrate such a set of qualifications. Each of these is clearly inferior to at least one of the bidders included in the permissible-contractor pool. The contracting officer has complete and unbounded freedom to select among the bidders in the pool but is prohibited from choosing anyone outside of it. The enforceable interest of the individual bidder amounts to a traditional right to be included in the pool when he is so entitled.

Several technical problems arise from utilizing this limited review model as the determinant of the bidder's enforceable rights against the government. Their source is the gap between the benefits to which the bidder has a legally protected right and the benefits he actually seeks. While the bidder's only right is to be included in the pool, no payoff attaches until the bidder is selected and allowed to perform the contract. The disappointed bidder has two grounds upon which to demonstrate an award is invalid as to him: (1) he was included in the pool but the award was made to someone outside of it; or (2) he was entitled to be in the pool, but for some reason was excluded.¹⁹² The problem arises once the bidder has proven one of these bases and seeks legal or equitable relief. He is not entitled to the award itself, for it could have

the courts will take a stance somewhere in this middle ground. The precise point along the spectrum is left to be decided on a case-by-case approach.

¹⁹¹ Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 973 (1969).

¹⁹² It is unclear whether the plaintiff can invalidate the award if he was wrongfully excluded, but the award was subsequently made to someone in the pool. There may have been no rational basis for excluding the plaintiff but there was a rational basis for selecting the bidder chosen. The issue is whether the rational basis test is to be applied only to the final outcome of the process or to every decision made along the way. The language in *Steinthal* implies that every decision in the procedure is subject to the test. 455 F.2d at 1301-02. This result coincides with what occurs in practice. Frequently a bidder will contest his exclusion as nonresponsive or not responsible before any award is made. See, e.g., *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). Furthermore, the pool membership of each bidder, X, is dependent upon which other bidders are included. Once there exists a bidder Y whose bid is superior to X's under all reasonable evaluation criteria, there is no longer a rational basis for awarding the contract to X. If Y's bid is rejected as nonresponsive, X can get into the pool. If that determination is reversed, however, X is no longer a permissible contractor. Consequently, whether a particular bidder belongs in the pool and therefore whether an award to him is legal cannot be ascertained until the qualifications of every other bidder have been properly evaluated.

been made to any other bidder in the pool. Since he might not have received the contract anyway, the total anticipated profits under the contract overstate his loss. At the same time the bid preparation remedy will usually understate it. He would not have bid for the contract unless he believed that the expected value of future profits exceeded the costs of submitting a bid. The amount to which the bidder is properly entitled is the value of his right to be included in the permissible contractor pool. It is this value that the courts should estimate in giving the bidder monetary relief.

The problem is complicated further because, even if a bidder can prove he is the only permissible member of the pool, he still is not entitled to the contract or its anticipated profits. First, the contracting officer is not required to accept any of the bids received in a given solicitation. He has the statutory authority to reject all bids if the head of the agency certifies that such action is in the public interest.¹⁹³ Also, procurement law departs from the traditional common law view that once the contract is formed each party is entitled to the full prospective benefit of his bargain. Under the standard termination for convenience clause required in every government contract, the government possesses the power to terminate the contract at any time it chooses before performance is completed.¹⁹⁴ When this power is exercised, the contractor's recovery is limited to payment for any work performed prior to termination. Because the bidder can never be guaranteed receipt of the contract profits until he has been awarded the contract and performed the work, and since whether he will be allowed to do so is contingent upon the exercise of administrative discretion, potential profits are a highly speculative measure of the damage a bidder suffers when the contract is wrongfully awarded to another.

These contingencies have long been advanced to support the theory that no bidder has a legally protected right to a contract award. But in practice the areas of administrative discretion may not be that broad. In formal advertising, for example, the permissible contractor pool may frequently consist of only one bidder. Admittedly the statutory criterion "most advantageous to the United States"¹⁹⁵

¹⁹³ 10 U.S.C. § 2305(c) (1970); 41 U.S.C. § 253(b) (1970).

¹⁹⁴ See 32 C.F.R. §§ 8.700 to .706 (1972); 41 C.F.R. §§ 1-8.700 to .706 (1972). Even if the clause is omitted from the express terms of the contract, it is included as a matter of law. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Cr. Cl.), *cert. denied*, 375 U.S. 954 (1963).

¹⁹⁵ 10 U.S.C. § 2305(c) (1970).

is broadly phrased, and the courts have recognized that factors other than price may be weighed by the contracting officer.¹⁹⁶ Nonetheless, the actual selection tends to be rather mechanical: all bidders not responsible and responsive to the invitation for bids are excluded; then the award is made to the remaining bidder who offers the lowest price. Price is typically the sole determinant.¹⁹⁷

The government's powers to reject and terminate are also more limited in their actual implementation than in theory. Contracting officers are unlikely to reject a bidder who stands ready to perform an important government contract and has offered to do so on the most advantageous terms, especially since the officer has already subjected the government to the expense of soliciting a number of competing proposals. Consequently, rejection and termination should be invoked only in special situations.¹⁹⁸ If used extensively, they would cause bidders to be reluctant to undertake the expense necessary to bid because of the probability that no contract would ultimately be awarded. In view of these considerations, there is no reason why rejection and termination should be exempted from the rational basis requirement. The *Steinthal* decision itself dealt with the reasonableness of a contracting officer's determination to cancel

¹⁹⁶ See, e.g., *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970).

¹⁹⁷ Professors Nash and Cibinic conclude:

Although the statute and regulations appear to grant a broad discretion to the contracting officer, in practice if the low bidder is responsible and responsive it is difficult to overcome the requirement of award to that bidder, 37 COMP. GEN. 51 (1957). If any basis for evaluation other than price is to be used, the relative weights to be accorded various factors must be specified in the invitation, 36 COMP. GEN. 380 (1956).

R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 262 (2d ed. 1969). Awarding the contract to the lowest bidder in all but exceptional situations appears to have been the intent of Congress in drafting the Armed Services Procurement Act. The Senate Report provides:

Section 3(b) [10 U.S.C. § 2305(c) (1970)] states that contracts shall be awarded to the lowest responsible bidder whose bid will be most advantageous to the Government, price and other factors considered, and that the Government may reject all bids when such action is deemed advisable. . . . In virtually all cases this will result in an award to the lowest responsible bidder. However it will also provide for situations where the public interest dictates an award to someone other than the lowest responsible bidder.

S. REP. NO. 571, 80th Cong., 1st Sess. 16 (1947).

¹⁹⁸ Nash and Cibinic point out that not only does rejection entail the expense and delay of resolicitation, it also operates to compromise the competitive system. Opening, and making, public bids without an award permits each bidder to learn the amounts quoted by his competitors. As a result, rejection and cancellation should not be authorized without compelling reasons. R. NASH & J. CIBINIC, *supra* note 197, at 262-63; see *Massman Constr. Co. v. United States*, 60 F. Supp. 635, 643 (Ct. Cl. 1945); 40 COMP. GEN. 671, 674 (1961).

the invitation and reject all bids after they had been opened.¹⁹⁹ The application of the test to termination decisions, however, is less clear.²⁰⁰

The bidder should enjoy a traditional right to a fair and reasonable evaluation of his bid and to be included in the permissible contractor pool if he is so entitled. Rarely exercised administrative discretion should not serve to limit the bidder's legal protection. The courts should look to general procurement practices as the source for sound limits on the procuring agency's freedom of selection. From these practices, presumptions as to the unreasonableness of certain actions can be developed to make the bidder's rights more meaningful. For example, in advertised procurement the lowest bidder should have a right to the award unless the government can supply compelling reasons for making some other factor determinative. Similarly, any rejection of bids after opening, at least when the bidder can show that the general level of prices offered was reasonable, should be closely scrutinized. In this manner the courts can expand and clarify the guidelines for what constitutes a rational basis. As a result, the breadth of the permissible contractor pool will be narrowed, and the right to pool membership will bring with it an increased probability of ultimately receiving the contract profits.

From the cases decided to date it is difficult to determine how far along the judicial-review/administrative-discretion spectrum²⁰¹ the courts will choose to operate. The language used by the *Steinthal* court in outlining the rational basis test manifested a view that the role of the courts should be minimal: that they should confine their interventions to a relatively few clear cases.²⁰² But this language should not necessarily be taken at face value. First, as will

¹⁹⁹ 455 F.2d 1299-1300.

²⁰⁰ The contracting officer's powers under the clause are broad. In dictum the Court of Claims has stated that the clause may grant the government a right to terminate "at will," but the court goes on to imply that the right may not encompass bad faith or a clear abuse of discretion. *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). The bad faith ground has been asserted by some contractors, *see, e.g.*, *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959), but most of these cases have failed on the proof. A decision by the Comptroller General indicates that termination for the purpose of obtaining lower prices from a competitor of the incumbent contractor may be permissible. Dec. Comp. Gen. B-125486 (Dec. 6, 1963) (unpublished). Nash and Cibinic question whether most courts would go along with this view. R. NASH & J. CIBINIC, *supra* note 197, at 759.

²⁰¹ See note 190 *supra*.

²⁰² See 455 F.2d at 1300-01. The author of the *Steinthal* opinion, Judge Leventhal, reiterated this viewpoint in an address delivered in August 1972. He stated that in only a very small number of cases can the courts render meaningful decisions and described judicial intervention as "extreme medicine, not daily bread." 443 BNA & FED. CONTR. REP. A-10 to A-11 (1972).

be discussed,²⁰³ most of the court's arguments for narrow review were directed at granting the injunctive remedy only and not at judicial review of administrative decisionmaking generally. Second, as the term "rational basis" provides such a nebulous criterion for the reviewing courts, the content of the standard must be discerned from the facts of each case. And the particular facts of the *Steinthal* litigation did not present a very compelling case for holding that the procurement decision in question was arbitrary.²⁰⁴ The court of appeals' determination to reverse can not therefore be read as a significant restriction on the breadth of judicial review. It may have been

²⁰³ See notes 219-21 *infra* & accompanying text.

²⁰⁴ *Steinthal* involved a contract for the production of Air Force parachutes. Two suppliers, *Steinthal* and *Pioneer*, submitted bids that conformed to the specifications in the invitation. *Steinthal*'s bid was the lower of the two. The litigation arose over the meaning of the delivery schedule requirement. Originally the invitation stated that the first shipment was to be received in 140 days, but further provided that "in no event shall the bidder's delivery schedule extend beyond 30 days after completion date on each increment." This was later amended by reducing the time for the first shipment to 120 days and deleting the phrase "extend beyond 30 days" in the slippage clause. The latter modification was intended to convert the desired delivery schedule to a mandatory one, but, since too many words had been deleted, what resulted was the nonsensical phrase "in no event shall the bidder's delivery schedule after completion date on each increment." *Pioneer* gave the amendment the interpretation intended by the contracting authority. *Steinthal*, on the other hand, concluded that the schedule was merely precatory and submitted a bid guaranteeing delivery within 150 days. When the Air Force proposed an award to *Steinthal*, *Pioneer* protested on the ground that *Steinthal*'s bid was not responsive to the required delivery schedule.

Pioneer contested the award to the contracting officer involved pursuant to the procedure discussed at note 22 *supra*. In his decision rejecting *Pioneer*'s challenge, the contracting officer admitted that the amended invitation was subject to differing interpretations, but concluded that it should be construed to provide for a desired schedule only, with delivery required within a reasonable time after the desired dates. He determined that rejection and readvertisement would be overly prejudicial to *Steinthal* and recommended that the contract be awarded to it. 455 F.2d at 1293-94 & nn.8-9. This opinion was submitted to the Air Force Logistics Command Headquarters, which returned a list of comments criticizing the contracting officer's findings. The contracting officer then reevaluated his findings and decided to cancel the invitation under 32 C.F.R. § 2.404-1(b)(1) (1972), which lists inadequate or ambiguous specifications as one of the grounds for cancelling an invitation after bid opening. *Pioneer* appealed this decision to another contracting officer who also determined that the invitation was ambiguous and upheld the cancellation.

Next, both *Steinthal* and *Pioneer* filed protests with the GAO. Both were denied. Dec. Comp. Gen. B-170174 (Aug. 14, 1970) (unpublished). *Steinthal* then commenced an action in district court alleging the cancellation was arbitrary and capricious. That court issued a permanent injunction against opening the new bids and awarding the contract to anyone other than *Steinthal*. No. 2422-70 (D.D.C. Sept. 3, 1970).

This was the decision under review by the court of appeals. The language contained in the delivery schedule, after the amendments, was meaningless. The amended clause had been interpreted in two different ways by the two bidders, and the contracting authority's construction of the language upon reviewing it was the opposite of the meaning it intended originally. Four different reviewing bodies had viewed the invitation as sufficiently ambiguous to warrant cancellation. There is little in this factual situation to indicate that the decision to cancel because of the ambiguity was unreasonable.

little more than a stern admonishment to the district courts not to substitute their judgment for that of the procuring agency.

A more recent insight into the District of Columbia Circuit's idea of the proper scope of judicial review is provided by *Northeast Construction Co. v. Romney*.²⁰⁵ At issue in *Northeast* was the propriety of the contracting officer's decision that the bidder's failure to specify his goals for employing minority manpower, as required by the Department of Labor, rendered his bid nonresponsive.²⁰⁶ The district court granted the plaintiff injunctive relief, and held that the bidder's omission of the required information constituted a minor irregularity because the bidder had committed himself to employ the minimum percentage of minority workmen by signing the bid. The omission should therefore have been waived by the contracting officer.²⁰⁷

The court of appeals reversed, but did not base its holding on the narrow scope of judicial review. Rather it determined that the district court had proceeded on an erroneous legal premise concerning the binding effect of the contractor's failure to specify his goals, and added that there is a serious question whether a contracting officer possesses the power to exempt a bidder from the Labor Department's mandate.²⁰⁸ This was the view of Judges Tamm and Leventhal.²⁰⁹ Chief Judge Bazelon dissented, stating that the bidder's omission should have been classified as a minor irregularity.²¹⁰ The result was that two judges implied that for the contracting officer to resolve the issue in any other way would have been unsupported, while the third member of the panel stated that the decision the officer made was invalid. Although the majority upheld the contracting officer's determination, the approach of the entire court was more along the lines of substitution of judicial judgment than of deference to administrative discretion.

These decisions disclose no pervasive judicial plan to stretch the

²⁰⁵ 18 CCH Cont. Cas. F. ¶ 82,065 (D.C. Cir. March 6, 1973).

²⁰⁶ Under the Washington Plan, similar to the Philadelphia Plan discussed at note 137 *supra*, prospective contractors must attach an appendix to their bid estimating their total employment of minorities in certain trades under the contract. Submission of the appendix is made a prerequisite for eligibility on certain federal construction projects pursuant to regulations issued by the Secretary of Labor, 41 C.F.R. § 60-5 (1972).

²⁰⁷ 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. 1971). The contracting officer is authorized to waive or permit correction of a "minor informality or irregularity" that is a matter of form and not substance under 41 C.F.R. § 1-2.405 (1972).

²⁰⁸ 18 CCH Cont. Cas. F. at 87,278-80.

²⁰⁹ Judge Tamm had dissented in the *Steimthal* decision.

²¹⁰ 18 CCH Cont. Cas. F. at 87,282-84.

bounds of the permissible contractor pool and give the agencies free reign in bidder selection. Many of the traditional policies favoring broad administrative discretion do not apply to the contemporary procurement systems. The availability of bid protest review by the GAO makes it unlikely that limiting the role of the judiciary would result in a significant reduction in the amount of outside interference with the agency's decisions. Moreover, GAO review would appear less desirable from the standpoint of the procuring agency than judicial intervention. The review exercised by the Comptroller General tends to be plenary: it covers matters of sound procurement policy, as well as technical compliance with the procurement statutes and regulations.²¹¹ The primary effect of restricting judicial review is therefore not to leave more decisions to the discretion of the contracting officer but to rely more upon the judgment of the GAO.

The relative expertise argument²¹² for relying on review by the GAO instead of by the courts is tenuous. First, although the GAO has developed considerable experience in interpreting the procurement laws, it lacks any capacity to make the sort of technical and scientific judgments which procurement litigation frequently requires.²¹³ These issues can be resolved only by the courts through the use of scientific experts. Even if issues of procurement law are particularly esoteric, as the court implied in *Steinthal*,²¹⁴ many of

²¹¹ *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). In *Reiner* the court contrasted the standard of review applied by the courts to that of the GAO and concluded:

Because of his general concern with the proper operation of competitive bidding in government procurement, [the Comptroller General] can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies.

Id. at 440 (footnote omitted).

These statements touched off some controversy over the actual scope of GAO review. The Comptroller has asserted that he lacks the broad powers attributed to him by the Court of Claims. R. NASH & J. CIBINIC, *supra* note 197, at 67-68. Leading commentators have nonetheless concluded that GAO review is indeed quite broad, often involving substitution of its judgment for that of the agency. Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 380-83 (1969).

²¹² This argument was stressed by the court in *Wheelabrator*. 455 F.2d at 1316.

²¹³ See, e.g., *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971), where the GAO had earlier rejected the plaintiff's protest because it required technical judgments beyond the competence of the GAO. *Id.* at 1019. The GAO decision is reported at 48 COMP. GEN. 314 (1968).

²¹⁴ 455 F.2d at 1301 & nn.35-38.

the federal courts have attained the necessary competence to address them. The prime example is the Court of Claims, a principal forum for contract cases.²¹⁵ It has frequently adjudicated the question of award legality when raised by the government as a defense to a contractor's suit for damages resulting from wrongful cancellation.²¹⁶ Also, new adjudicative boards could be established that would combine the expertise in procurement issues currently available in the GAO with more extensive factfinding powers.²¹⁷

V. PROBLEMS WITH ENFORCING THE BIDDER'S RIGHTS

A. *Searching for the Palatable Remedy*

Many of the arguments frequently advanced for restricting, in the context of review of procurement decisions, the federal courts' traditional role of watchdog over administrative arbitrariness²¹⁸ do not result from the propriety of review per se. Rather they reflect a distaste for the remedies consequential to that review, especially injunctive relief.^{218a} The courts have been unwilling to recognize that the bidder possesses the sort of interest that would permit him to come into court and bring the procurement process to a halt. This concern was quite apparent in the *Steinthal* decision, where the court viewed the award process as the source of numerous technical ob-

²¹⁵ The Court of Claims' jurisdiction extends to "any claim against the United States founded . . . upon any express or implied contract with the United States . . ." 28 U.S.C. § 1491 (1970). The standard disputes clause required in every government contract provides that contract appeals boards are to hear questions of fact arising under the contract, and that these decisions are to be final. *E.g.*, 32 C.F.R. §§ 7.103-12 (1972); 41 C.F.R. §§ 7.101-12 (1972). But under the Wunderlich Act, 41 U.S.C. §§ 321-22 (1970), the Court of Claims has review over any questions of law. Also, all breach of contract claims based on actions or omissions by the government beyond the scope of the contract can be brought in the Court of Claims.

²¹⁶ See authorities discussed at note 47 *supra*. If the Court of Claims upholds the award the contractor can recover termination damages under *Reiner*. See note 156 *supra*. But when an award has been illegally made, the bidder's remedy is limited to quantum meruit for the value of tangible benefits actually received by the government. *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963).

²¹⁷ Commentators have suggested numerous alternatives to the current bid protest review by the GAO. Among them are the Nash and Cibinic "bid board" approach combining bid protests and contracts disputes into one giant board of review, 267 BNA FED. CONT. REP. A-10 (1969), and the new agency advocated by Eldon Crowell, a District of Columbia practitioner, that would have both injunctive and damages remedies at its disposal, 423 BNA FED. CONT. REP. A-14 (1972).

²¹⁸ Berger concludes that judicial review of administrative action that is arbitrary or in excess of statutory authority is more than "traditional." He points out that it existed long before the APA was enacted and may even be of constitutional import. See Berger, *supra* note 191, at 980-82.

^{218a} See Speidel, *supra* note 126, at 74-75.

jections that the bidder could raise to get himself before the courts. Even though the vast majority of these decisions are destined to fail on the merits, the resulting litigation would bog down procurement significantly.²¹⁹ The *Steinthal* court further believed that the emergency nature of actions to enjoin awards rendered it improbable that the courts could consider the close and complex issues inherent in procurement litigation with the necessary depth and certainty. Because of the resulting possibility of judicial error, the court should deny issuing an injunction unless a clear showing of illegality is made.²²⁰ The court added that in the more relaxed atmosphere of an action for damages, there was a better opportunity for the court to handle the case with sufficient depth.²²¹

If these problems in adjudicating claims for injunctive relief were the true concern in *Steinthal*, the court's two-fold test should be restructured. The court viewed the judicial discretion to deny injunctive relief once an award has been adjudged illegal as limited to the most urgent cases.²²² The result is that the bidder must bear a heavy burden in showing the proposed award is invalid, but once that showing has been made the burden shifts to the government to show an overriding public interest for withholding the injunction. This test emphasizes the wrong issue. The award should be held invalid any time the contracting officer abuses his discretion or violates a procurement regulation. If the possibility for impeded procurement and emergency litigation is so undesirable, the court should have been less willing to authorize final injunctions in *Steinthal* and preliminary ones in *Wheelabrator*. But these considerations do not justify narrowing the scope of judicial review. Injunctive remedies should be reserved for those special cases where the contract is so important to the proper bidder that no monetary remedy can make him whole or so important to the public that it should be performed by the rightful bidder. This is essentially the view advanced by Judge Gesell in one of the first post-*Scanwell* decisions, *Simpson Electric Co. v. Seamans*.²²³

The court in *Simpson*, after determining that the contracting officer acted arbitrarily in excluding the plaintiff's bid modification as not timely, proceeded to the question of the appropriate remedy.

²¹⁹ 455 F.2d at 1301-02.

²²⁰ *Id.* at 1303.

²²¹ *Id.*

²²² See note 154 *supra* & accompanying text.

²²³ 317 F. Supp. 684 (D.D.C. 1970).

The plaintiff argued that because he was the lowest bidder the court should issue a mandatory injunction awarding him the contract. As authority he cited the District of Columbia Circuit's decision in *Superior Oil Co. v. Udall*,²²⁴ where the court affirmed a district court order compelling the Secretary of the Interior to issue a long-term lease to the plaintiff-bidder.²²⁵ Stressing the discretionary nature of injunctive relief, the *Simpson* court distinguished *Superior Oil* on two grounds: (1) the lease at issue there called for long-term performance involving millions of dollars; and (2) performance under the lease had not begun, while in *Simpson* it had.²²⁶ The *Simpson* court believed that in routine short-term procurements like the one at bar it was sufficient to enter a declaratory judgment for the plaintiff. Such a procedure gives the government the option to (1) cancel the contract and award it to the proper party, (2) resolve the dispute through negotiation, or (3) allow the declaratory judgment winner to sue for damages in the Court of Claims.²²⁷ This solution supplies the government with the discretion it needs to keep the procurement function unimpeded, but it does so without subtracting from the bidder's right to a reasonable consideration of his bid.

If courts are to follow the *Simpson* approach and exercise broad discretion in denying injunctive relief, the alternate remedy at law must be made more attractive.²²⁸ The bidder should be able to recoup some of the profits he would have earned but for having been wrongfully deprived of the contract. Some have advocated permitting a bidder to recover anticipated profits if he can prove that he would have received the award had proper procurement procedures been followed.²²⁹ But this remedy is not particularly palatable either. Even though the governmental agency was at fault, the pub-

²²⁴ 409 F.2d 1115 (D.C. Cir. 1969).

²²⁵ The *Superior Oil* case was decided one year before *Scanwell*, yet *Superior's* standing as a bidder was never challenged by the court. Also, the propriety of one aspect of the *Superior Oil* holding, that courts possess the power to order an award, is doubtful in view of language in *Scanwell* and subsequent decisions. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

²²⁶ 317 F. Supp. at 688.

²²⁷ *Id.*

²²⁸ The courts have been unwilling to hold that the present remedy of bid preparation expenses constitutes an adequate remedy at law. See *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301-02 (D.C. Cir. 1971); *Gould, Inc. v. Chafee*, 450 F.2d 667, 669 (D.C. Cir. 1971).

²²⁹ See, e.g., Pierson, *supra* note 10, at 46. Professor Speidel believes that the bidder should receive the "net gains" he lost by being wrongfully denied the award. He supports this approach by citing several recent decisions finding liability where reliance has been induced or expectations of profits created but no enforceable agreement has yet

lic purse should not be used to pay two or more bidders the profits for the same contract, especially since none of them incurred any actual loss. Moreover, the existence of government discretion would make it difficult for most bidders, even if their bids appear more favorable than the competition's, to prove they would have received the contract.

To recompense the losses the bidder realistically suffered requires an alternative damages formula. If the bidder's only enforceable interest is to be included in the permissible contractor pool, this is the interest that should be remedied. The amount of damages the bidder should recover is the expected value of his right to pool membership. While determining this value is admittedly rather speculative, the problem is similar to the one frequently confronted by courts in valuing a contract right where the promised performance is conditional upon the occurrence of some fortuitous event in the future.²³⁰ The court must estimate the amount of profits likely to be earned ultimately under the contract and multiply this figure by the probability that the plaintiff's bid would have been selected over those of the other bidders in the pool. Perhaps some simplified formula could be developed that would divide the total profits available by the number of bidders who have anything close to a .5 probability of receiving the award. In practice, the problem will typically involve no more than two or three responsive and permissible bidders, and the court's task will be to estimate, for example, whether the plaintiff who can make delivery in 50 days for a price of \$3,000 has a probability of being selected that is roughly equivalent to that possessed by a competitor who can deliver in 35 days but asks \$3200. The ultimate burden of proving

come into existence under traditional contract law. Speidel, *supra* note 126, at 92 & n. 99. One author would go so far as to remedy an illegal award by allowing the bidder who should have received the contract to recover expected profits and allowing every other bidder to recover bid preparation expenses. See Comment, *Government Contract Bid Protests: Judicial Review and the Role of the Court of Claims*, 39 U. CHI. L. REV. 814, 833 (1972).

²³⁰ See generally 5 A. CORBIN, CONTRACTS § 1030 (1964). Professor Corbin uses the example of valuing the right of a horse owner, *A*, against *B* who had previously offered a prize to the winner of a race in which *A*'s horse is entered, but then prohibits the horse from running in the race. *Id.* at 182-83. *A*'s plight is analogous to that of the disappointed bidder. Since it can never be known for certain whether *A*'s horse would have won, *A* is clearly not entitled to the entire prize. But allowing *A* to recover only the consideration he paid, his entry fees, would be equivalent to the bid preparation expenses remedy of *Heyer Products* and would tend to understate his probable loss. Corbin cites several cases where the courts have been willing to grant the plaintiff damages equal to the estimated "market value of the conditional right at the time of the breach . . ." (The quoted language is taken from RESTATEMENT OF CONTRACTS § 332 (1932), which adopts this rule.)

this estimated probability will always be on the plaintiff. And though his task is a difficult one, he should prefer it to having his recovery limited to bid preparation expenses. Moreover, it should be remembered that the forum that will be making these estimates is the Court of Claims, a body with considerable experience in government contracts. This expertise should help assure that the approximations arrived at are realistic ones.^{230a}

The other problem inherent in awarding the bidder damages is who will ultimately pay the judgment. One solution is to permit the contracting agency to deduct it from payments to the incumbent contractor who was wrongfully selected. Had the contract been awarded lawfully, he would have received nothing; under this set-off theory he is at least allowed some portion of the profits on the contract work. Unfortunately, this reasoning breaks down in cases where the bidder was wrongfully excluded as nonresponsive or not responsible, but the incumbent contractor belonged in the permissible bidder pool nonetheless.²³¹ In these situations, the present contractor may have been selected even if the plaintiff had been treated fairly. On the theory that he should not be penalized for the government's mistake, the government should be precluded from recouping the damages from him. The argument can be made, however, that because it is impossible to determine who would have received the award had the plaintiff's bid been evaluated properly, the parties should be returned to their status quo before the award. And under this view, the only amount to which each bidder is entitled is the expected value of his pool membership at the start of the award process. A set-off against the incumbent contractor would leave him with no less than this amount.

There exists at present ample authority for developing a damages remedy for the bidder. Although one commentator has suggested that such a remedy would require amendment to the APA to waive sovereign immunity from liability for damages,²³² an

^{230a} The position of the Court of Claims in deciding these issues will be somewhat similar to that enjoyed by the Tax Court, which has often made approximations of exact monetary sums that involve questions lying within its area of expertise. For example, in *Cohan v. Commissioner*, 39 F.2d 540, 543-44 (2d Cir. 1930), the Second Circuit instructed the Board of Tax Appeals to estimate a federal taxpayer's travel and entertainment expenses over a 3-year period. The rationale inherent in *Cohan*, that, even though the amount to which a litigant is entitled cannot be determined with absolute certainty, it is better to allow him a sum which is admittedly somewhat speculative than to allow him nothing at all, is equally applicable in the present context.

²³¹ See note 192 *supra*.

²³² Pierson, *supra* note 10, at 43-44.

amendment seems unnecessary in view of the present case law in the Court of Claims. If the implied contract theory of *Heyer Products* can support the recovery of reliance damages like bid preparation costs, it should be adequate to support expectation damages like prospective profits. The underlying contract in either case is the same. And there is some indication that the Court of Claims would be amenable to fashioning such a remedy. In a recent decision, Chief Judge Cowen noted that the difficulties encountered by the district courts in handling *Scanwell* had intensified the need for an alternative remedy in damages.²³³ Thus, both the District of Columbia Circuit and the Court of Claims appear to agree that the public harm caused by enjoining the procurement process makes money damages the most realistic remedy in routine award controversies.

B. *The Proper Forum*

The only remaining question is which forum, court or agency, is better equipped to decide bid protest issues. In *Wheelabrator Corp. v. Chafee*, the court of appeals emphasized the expertise of the GAO and stated that many procurement questions may be within its primary jurisdiction.²³⁴ This review by the Comptroller General has two principal advantages—it is quick and it is inexpensive.²³⁵ It provides the bidder with a prompt determination of his protest, often while the award is still pending. There are several drawbacks, however. First, the constitutional²³⁶ and statutory²³⁷ authority of the

²³³ *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016, 1022 (Ct. Cl. 1971).

²³⁴ 455 F.2d at 1313-17.

²³⁵ See 4 PROCUREMENT REP., *supra* note 7, at 44.

²³⁶ The GAO is an organ of the legislative branch. Some contend that awarding contracts is strictly an executive function and intervention by the GAO raises questions of separation of powers. See, e.g., Letter from John Mitchell, Attorney General, to Hon. Elmer B. Staats, Comptroller General, June 14, 1971.

²³⁷ The Comptroller's ultimate source of authority is his statutory power to disallow payments on contracts awarded in contravention of law. 31 U.S.C. §§ 71, 74 (1970). Because he can hold contracting officers personally liable for these illegal awards, 31 U.S.C. § 492 (1970), they generally heed his advance opinions. *Cibinic & Lasken*, *supra* note 211, at 358-59. In practical effect, therefore, these opinions are binding upon the contracting officers. *Id.* at 375, 378. While the statutes authorize the Comptroller to render advance opinions at the request of certain governmental officers, 31 U.S.C. §§ 74, 82d (1970), there is no provision for review at the behest of bidders. It is thus doubtful that the GAO possesses the authority to hear bid protests. *Cibinic & Lasken*, *supra* note 211, at 376-77. But Congress' failure to take any action to limit the GAO's protest review has been interpreted as an acquiescence in the GAO's jurisdiction. 4 PROCUREMENT REP., *supra* note 7, at 41.

Comptroller General is questionable and the subject of frequent controversy. Second, the procedural fairness of GAO factfinding is open to criticism. Often the GAO, using *ex parte* communications, denies the parties an opportunity to confront and cross-examine witnesses and to engage in discovery.²³⁸ When the facts are in dispute, the GAO presumes the government's version is the correct one.²³⁹ Third, the GAO lacks injunctive power to compel an agency to withhold an award while it decides a protest. It must rely on the cooperation of the procuring agency.²⁴⁰ Fourth, if the agency decides to make the award and the contractor begins performance, protesting to the GAO will typically be futile.²⁴¹ Even if the GAO believes the award was improper, it is very reluctant to interfere once performance under the contract has commenced.²⁴²

Notwithstanding these difficulties with GAO review, the Commission on Government Procurement has recommended the continuance of the GAO as a forum for resolving award protests.²⁴³ The Commission's endorsement was based on different considerations from those advanced by the District of Columbia Circuit arguing for GAO primary jurisdiction in *Wheelabrator*.²⁴⁴ Instead of emphasizing the GAO's specialized knowledge in the procurement area, the Commission thought it desirable to give the bidder a choice of forums. The GAO would allow the bidder expedited review without the formality of full due process procedures. For more complicated or important protests, he has access to the fed-

²³⁸ 4 PROCUREMENT REP., *supra* note 7, at 44.

²³⁹ *Id.* at 43-44; *see, e.g.*, Dec. Comp. Gen. B-176593 (Nov. 17, 1972) (unpublished). For a more complete discussion of this problem see Speidel, *supra* note 126, at 72 n.33.

²⁴⁰ The GAO's regulations request that agencies postpone making awards while protests are pending unless delay will be especially harmful. 4 C.F.R. § 204 (1973). Both the ASPR and the FPR adopt this scheme in substantial part. 32 C.F.R. §§ 2.407 to .408 (1972); 41 C.F.R. §§ 1-2.407 to .408 (1972). Nonetheless, the contracting officer will frequently decide not to suspend the award. When this occurs performance of the contract is typically well underway by the time the GAO decision is eventually handed down. *See* Speidel, *supra* note 126, at 73 nn. 35-36.

²⁴¹ Notwithstanding this phenomenon post-award protests continue to be filed. In fiscal 1972, 55 percent of all protests decided by the GAO had been filed after award. 4 PROCUREMENT REP., *supra* note 7, at 45 n.61.

²⁴² R. NASH & J. CIBINIC, *supra* note 197, at 964; *see, e.g.*, 48 COMP. GEN. 663, 668 (1969). The Commission on Government Procurement notes, however, that in several recent decisions the GAO has recommended that an improperly awarded contract be terminated for convenience. 4 PROCUREMENT REP., *supra* note 7, at 45 & n.62; *see, e.g.*, 51 COMP. GEN. 423 (1971).

²⁴³ 4 PROCUREMENT REP., *supra* note 7, at 40 (Recommendation 14).

²⁴⁴ *See* note 233 *supra*.

eral courts.²⁴⁵ The task now confronting the courts is to develop a protest procedure and allocation of jurisdiction that makes the best use of the relative advantages of the three forums involved — the district court, the Court of Claims, and the GAO. The focus of the Commission makes clear that the primary concern should be the interests of the protesting bidder.

In addition to providing the bidder with a convenient first forum, the GAO serves an important screening function for the federal courts. Denial of a bid protest may be sufficient to convince a bidder that his challenge lacks merit and that invoking the judicial process would prove futile. If the bidder does seek judicial review, the GAO's opinion on the protest will have sharpened the issues to ease the job of the reviewing court. And if the GAO upholds the protest, because contracting officers tend to follow the Comptroller's advance opinions voluntarily,²⁴⁶ resort to compulsive judicial remedies will be forestalled.²⁴⁷

Nonetheless, the court's review function, even where the GAO has previously decided the merits of the protest, must be a healthy one. The standards of legality invoked by the GAO with a purpose of promoting good contract policy may differ significantly from those applied by the courts in enforcing a bidder's purposeful legal rights.²⁴⁸ Also the "exigencies of expedited procurement" criticism, made in *Steinthal* with respect to cases in the district courts,²⁴⁹ applies with special force to opinions by the GAO, for it frequently hears protests in a rushed preprocurement context. If the GAO is to have primary jurisdiction over some procurement questions, the

²⁴⁵ 4 PROCUREMENT REP., *supra* note 7, at 44.

Still another view on the benefit derived from GAO review is that advanced by Professor Speidel. He believes that the GAO's primary impact has been to improve the ongoing award system rather than to protect the interests of individual bidders. Speidel, *supra* note 126, at 74. Consistent with this theory he advocates confining the GAO's role to systematically reviewing groups of award decisions instead of deciding particular bid protests. *Id.* at 90.

²⁴⁶ See note 237 *supra*.

²⁴⁷ This is not to say that the bidder who originally receives the award, after losing in the GAO, will not go to court to secure injunctive relief. But one of the requirements for obtaining a preliminary injunction is a showing that a strong probability exists that the complaining party will prevail on the merits. See note 253 *infra*. Interposing the GAO as a preliminary forum increases the probability that the contract will be awarded to the proper party by the time the case gets to court. Consequently, the probability that the party challenging the award will prevail is reduced. Moreover, in view of the deference shown to the expertise of the Comptroller General in cases like *Wheelabrator*, it is unlikely that a bidder who failed to persuade the GAO can make the requisite showing.

²⁴⁸ See note 211 *supra*.

²⁴⁹ See notes 219-20 *supra* & accompanying text.

courts must be cautious in defining the expanse of it. The Comptroller's experience in resolving bid protests should make him competent to interpret the language contained in bids and solicitations or to handle questions of standard contract practice. But current procurement involves many issues beyond the Comptroller General's narrow expertise. Questions of congressional policy in attaining nonprocurement objectives are a prime example. The GAO simply does not possess the qualifications to decide cases like the validity of the Philadelphia Plan under the Civil Rights Act of 1964.²⁵⁰ And when a bidder has been remitted to the Comptroller's primary jurisdiction on a question the Comptroller is competent to decide, the limited fact-finding resources and the lack of full due process safeguards available in the GAO require that its decision be closely scrutinized by the reviewing court. As was stated in *Wheelabrator*, it is the courts that must have the "last word."²⁵¹

Given these priorities, the optimal procedure for adjudicating a bidder's protest would operate roughly as follows: The bidder, depending upon the issues involved in his protest and the amount of resources he is willing to expend, will file his claim in either a district court or with the GAO.²⁵² In either event, he can request a preliminary injunction from the district court to halt the award or further performance under the contract. To obtain this relief, the bidder must not only show that his case meets the special circumstances where final injunctions are proper but also demonstrate that he has a strong probability of succeeding on the merits.²⁵³ This requirement assures that technical objections will not be permitted to halt the procurement process.²⁵⁴ Regardless of whether the bidder

²⁵⁰ The Comptroller held that an early version of the plan violated the principles of competitive bidding and possibly was inconsistent with title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), and was therefore invalid. 48 COMP. GEN. 326 (1968). For discussions of this incident see *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 163 n.7, 165 n.10 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Cibinic & Lasken*, *supra* note 211, at 378-80 nn. 138-44.

²⁵¹ 455 F.2d at 1316. This statement was applied by the District of Columbia Circuit in a subsequent decision reversing a district court order that conditioned the award of a contract on the GAO's decision. *General Elec. Co. v. Seaman*, 18 CCH Cont. Cas. F. § 81,805 (D.C. Cir. June 16, 1972), *dismissed as moot*, 18 CCH Cont. Cas. F. § 81,810 (D.C. Cir. Nov. 2, 1972).

²⁵² This is the procedure that the bidder will follow when the award has been proposed and is still pending. Once the award has been made, the bidder, aware of the difficulties in obtaining injunctive relief after performance has begun, may prefer to go directly to the Court of Claims and bring an action for damages.

²⁵³ *Page Communications Eng'rs, Inc. v. Resor*, 15 CCH Cont. Cas. F. § 84,154 (D.C. Cir. 1970); *Limbach Co. v. McCormick*, No. 973-73 (D.D.C. May 24, 1973).

²⁵⁴ See note 219 *supra* & accompanying text.

obtains injunctive relief, the court or the GAO should proceed to the merits of the bidder's protest at an ordinary pace and not rush its deliberation to give the bidder a quick pre-award decision. If the award is found to be illegal, the reviewing body should determine, in light of circumstances existing at the time of its decision, whether this situation meets the special requirements for final injunctive relief. If it does not the court should grant a declaratory judgment to the bidder and remit him to other remedies. Perhaps the government will decide to award him the contract voluntarily. Otherwise the bidder can invoke his declaratory judgment in the Court of Claims to obtain monetary damages.²⁵⁵

VI. CONCLUSION

Government contracting has become very big business. A legal model that views a contract award as a windfall conferred upon some fortunate business enterprise is no longer adequate. In recent years a larger and larger part of the national economy has been appropriated by the government and contracted out to private businesses.²⁵⁶ Because of their significant economic stake, these firms should be guaranteed the same fair opportunity to compete for this public business as they possessed, by operation of the marketplace, for the private business it replaced.

²⁵⁵ An important question is whether a district court's decision that an award is invalid should be given collateral estoppel effect by the Court of Claims in a subsequent action for damages. In *Continental Business Enterprises* the Court of Claims implied that the same standard of legality now applies in both courts. See note 187 *supra* & accompanying text. And if the district courts are to deny injunctive relief upon equitable grounds, they should have some assurance that a legal remedy is available. The problem with this solution, however, is that it gives the principal review function to the district court, and makes its judgment binding upon a court with more experience in the procurement subject matter, the Court of Claims. In practice, though, this problem should not be significant. While the Court of Claims would be bound by the district court's finding that some decision in the award process lacked a rational basis, it still can exercise wide discretion in estimating the bidder's probability of receiving the award. It is in this latter decision that the most expertise is needed.

Professor Speidel, on the other hand, views the issuance of a declaratory judgment by a district court followed by an award of damages in the Court of Claims as an "unrealistic" solution. He would combine the injunctive and damages remedies in a single court. Speidel, *supra* note 126, at 92. It is difficult to see how this proposal could be beneficially accomplished. Making the district courts the exclusive forum ignores the need for centralized expertise which the Court of Claims can provide. And making the Court of Claims the lone forum would require a complete overhaul of that court's jurisdiction since it presently lacks the power to issue equitable relief. *United States v. King*, 395 U.S. 1 (1969).

²⁵⁶ In 1940, the year of the *Lukens* decision, purchases of goods and services by federal, state, and local governments comprised 14.8 percent of the gross national product. By 1970, this figure had risen to 22.5 percent. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1972, 312 (1972).

The substantial economic impact of procurement upon the private sector is not the only factor favoring recognition of legal rights in the bidder. Subjecting procurement to the rule of law not only assures fair and honest consideration of bids by the government, but also enhances the probability that the public purpose underlying the procurement laws — selection of the contract most advantageous to the government — will be achieved. The expansive use of government contracts to confer special benefits upon disadvantaged groups provides an additional reason why the *Lukens* view of procurement should be rejected. The courts must acknowledge in its stead that a bidder's interests warrant legal protection in their own right.

In protecting these interests the courts must be careful to keep separate the questions of legality and remedy. Recent experience has demonstrated that the problems inherent in injunctive relief have caused the courts to articulate too narrow a scope of judicial review. This result is unfortunate. The courts involved possess both the expertise and the guidelines necessary to exercise wide-scale scrutiny over procurement decisionmaking. The important task now confronting the federal courts is to develop remedies and procedures that will permit them to provide this broad review and thereby afford full legal protection to the rights of bidders, without jeopardizing the public's need for unhindered procurement.

KENNETH B. DAVIS, JR.