



Case Western Reserve Law Review

Volume 15 | Issue 1

1963

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Recommended Citation

Paul A. Mancino, *Rights of the Unsuccessful Low Bidder on Government Contracts*, 15 W. Res. L. Rev. 208 (1963)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol15/iss1/14>

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Rights of the Unsuccessful Low Bidder on Government Contracts

INTRODUCTION

Today, public contracts are so significant that they have been characterized as "an institution playing a major part in the economic, social, and political life of the nation"¹ Federal, state, and local governments have an almost uniform policy of awarding public contracts on the basis of competitive bidding. Under this policy, the lowest monetary bid is not always the one that will be accepted. Generally, the competitive bidding statutes insert some qualifying term which takes the selection of a bid out of a mere tabulation of figures. The federal public advertising statutes provide that an "award shall be made . . . to that responsible bidder whose bid . . . will be the most advantageous to the Government, price and other factors considered."² States and municipalities likewise are authorized to award their public contracts to the "lowest responsible bidder,"³ "lowest and best bidder,"⁴ "lowest responsible and eligible,"⁵ or other similarly described contestants for bids.⁶ Thus, the ostensible low bidder is faced with the difficulty of meeting these other qualifications. This article will analyze the rights of the lowest unsuccessful bidder on public contracts.

ADMINISTRATIVE DISCRETION

An initial discussion of certain factors which influence the awarding of contracts is necessary before considering the rights of the unsuccessful low bidder. One of the threshold considerations deemed to be of prime importance by the courts is the discretion vested in awarding authorities by the law. As noted above, most public contract statutes provide that the award must be made to the lowest responsible or lowest and best bidder. Interjection of the terms "responsible" or "best" is done

1. Braucher, Book Review, 3 J. PUB. L. 247, 248 (1954).
2. 63 Stat. 395 (1949), as amended, 41 U.S.C. § 253(b) (1958); 70A Stat. 130 (1956), as amended, 10 U.S.C. § 2305(c) (1958).
3. ALA. CODE tit. 37, § 468 (1958); ARK. CONST. art. XIX, §§ 15, 16; CONN. GEN. STAT. ANN. § 4-144 (1960); DEL. CODE ANN. tit. 17, § 305 (1953); ILL. REV. STAT. ch. 24, § 8467a (1957); LA. REV. STAT. ANN. § 38:2211 (Supp. 1962); N.J. STAT. ANN. § 40:50-1 (Supp. 1962); OKLA. STAT. ANN. tit. 61, § 36 (Supp. 1962); W. VA. CONST. art. VI, § 34.
4. *E.g.*, IND. ANN. STAT. § 36-112 (1949); OHIO REV. CODE §§ 735.05, 1523.03, 5537.04.
5. MASS. ANN. LAWS ch. 149, § 44A (Supp. 1962).
6. The variety of terms used to describe the entity or person to whom the bid shall be awarded is evidenced by a perusal of the various Ohio competitive bidding statutes. OHIO REV. CODE §§ 755.33, 5559.12, 6131.40 (lowest responsible); §§ 735.05, 1523.03, 5537.04 (lowest and best); §§ 153.08, 153.43 (lowest price); §§ 6101.16, 6115.24 (lowest or best); §§ 5525.01, 5555.61 (lowest competent and responsible); §§ 153.08, 153.09, 153.43, 1523.18 (lowest bidder).

to discourage the practice of awarding the contract on a lowest-price basis regardless of other factors⁷ and to prevent judicial second-guessing of administrative decisions.⁸ Because government contracts often are used as a vehicle for carrying forward a legislature's social policy,⁹ a determination must be made as to which contractor is the most capable in effectuating these policies.

The discretionary nature of the awarding of public contracts is evident from the fact that, generally, the right to reject all bids is given to the awarding authority.¹⁰ One court has held the award of a contract to a non-bidder to be a reasonable exercise of discretion,¹¹ while another court has voided an award to a bidder whose bid was \$118.00 higher than the lowest one.¹²

The term responsible means "something more than pecuniary ability; it means also judgment, skill, ability, capacity and integrity."¹³ The breadth of this definition accordingly vests a large amount of discretion in the awarding authorities. Courts, however, still are able to wield some control over the disposition of public contracts. This control is used most frequently to avoid contracts of municipal officials.¹⁴ It is less effective on the state level¹⁵ and almost totally impotent on the federal level.¹⁶ If it appears that no effort was made to discover whether the rejected lowest bidder was in fact responsible, or if a higher

7. See S. REP. NO. 571, 80th Cong., 1st Sess. 2-3 (1947).

8. See *Walter P. Villere Co. v. Blum*, 156 F.2d 914 (5th Cir. 1946); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934). *But see* *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959). *Cf.* *Speidel, Exhaustion of Administrative Remedies in Government Contracts*, 38 N.Y.U.L. REV. 621 (1963).

9. See *Miller, Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); *Paisley, The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957).

10. See 63 Stat. 395 (1949), as amended, 41 U.S.C. § 253(b) (1958), wherein the federal government reserves the right to reject all bids "when the agency head determines that it is in the public interest to do so." See also DEL. CODE ANN. tit. 17, § 305 (1953); *Annot.*, 31 A.L.R.2d 469 (1953); *cf.* *Sheet Metal Employers' Ass'n v. Giordano*, 188 N.E.2d 329 (Ohio C.P. 1963) (implied authority).

11. *Peeples v. Byrd*, 98 Ga. 688, 25 S.E. 677 (1898); *cf.* *S. J. Groves & Sons Co. v. Oklahoma City*, 191 Okla. 276, 129 P.2d 185 (1942).

12. *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959).

13. *O'Brien v. Carney*, 6 F. Supp. 761, 762 (D. Mass. 1934).

14. *Adolphus v. Baskin*, 95 Fla. 603, 116 So. 225 (1916) (contract voided as an unreasonable exercise of discretionary power); *Seysler v. Mowery*, 29 Idaho 412, 160 Pac. 262 (1916) (voided where facts did not appear in the record to support other award); *Armitage v. Mayor & Council*, 86 N.J.L. 5, 99 Atl. 1035 (Sup. Ct. 1914) (voided where contract terms changed without advertisement); *Kratz v. City of Allentown*, 304 Pa. 51, 155 Atl. 116 (1931) (voided where adequate investigation of the low bid not made).

15. *Ellison v. Oliver*, 147 Ark. 252, 227 S.W. 586 (1921) (contract voided for gross irregularity in procedure); *Mulmix v. Mutual Benefit Life Ins. Co.*, 23 Colo. 71, 46 Pac. 123 (1896).

16. *Cf.* *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955) (lease voided for failure to follow statute). *But see* *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934).

bid was accepted without giving the lowest bidder an opportunity to offer proof of his responsibility, the contracts have been abrogated.¹⁷

Where the awarding authority is given this discretion, it is incumbent upon it to determine the lowest and best bid. Thus, on the state level, in *Dictophone Corp. v. O'Leary*,¹⁸ the court ordered the state commissioner to determine which of the two exact bids was the lowest responsible one. Correspondingly, the federal government is required to make an award to the lowest responsible bidder and, in the absence of a determination as to lack of responsibility, no authority exists to support an award to a higher bidder.¹⁹

There are several criteria for determining the lowest and best bid. A prime factor is the contractor's experience in the field. While experience in similar work can be a sufficient reason for awarding a contract to one not the lowest bidder,²⁰ the lowest bidder ordinarily will not be rejected because he lacks the skill and experience of his competitors.²¹ The search for experience and skill must be balanced against the desirability of obtaining the needed work or supplies at the lowest possible price.²² A contractor's prior performance of government contracts can be considered in determining the lowest responsible bidder,²³ but his prior poor performance based solely on his lack of capacity or credit is not sufficient to reject a bid.²⁴

A second important factor is the bidder's integrity. A low monetary bid may be rejected on the basis that the bidder does not possess the requisite integrity to faithfully perform the contract. Thus, a contractor's prior record of bribing officials has resulted in a rejection of his bid.²⁵ Also, a previous conviction of a bidder for a crime committed in per-

17. *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959); *American Water Corp. v. Mayor & Council*, 5 N.J. Misc. 969, 139 Atl. 169 (Sup. Ct. 1927); *Kelley v. Board of Chosen Freeholders*, 90 N.J.L. 411, 101 Atl. 422 (Sup. Ct. 1917).

18. 287 N.Y. 491, 41 N.E.2d 68 (1942).

19. 37 DECS. COMP. GEN. 51 (1957), *aff'd on reconsideration*, 37 DECS. COMP. GEN. 550 (1958).

20. *In re Kaelber*, 281 App. Div. 980, 120 N.Y.S.2d 566 (1953).

21. See 20 DECS. COMP. GEN. 862 (1941).

22. See 14 DECS. COMP. GEN. 305 (1934); 8 DECS. COMP. GEN. 252 (1928); 7 DECS. COMP. GEN. 181 (1927).

23. *Albro Contracting Corp. v. Department of Pub. Works*, 13 Misc. 2d 846, 181 N.Y.S.2d 402 (Sup Ct. 1958).

24. 38 DECS. COMP. GEN. 289 (1958); *Cf.* 25 DECS. COMP. GEN. 859 (1946). See 1A GOV'T CONT. REP. ¶ 52-103 (1954). See also *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959), where it was held unreasonable to require bidder to supply affidavits from 90% of his subcontractors on previous jobs.

25. *Arthur Venneri Co. v. Patterson Housing Authority*, 29 N.J. 392, 149 A.2d 228 (1959); *Kayfield Constr. Co. v. Morris*, 15 App. Div. 2d 373, 225 N.Y.S.2d 507 (1962); *cf. Caristo Constr. Corp. v. Rubin*, 30 Misc. 2d 185, 221 N.Y.S.2d 956 (Sup. Ct.), *modified*, 15 App. Div. 2d 561, 222 N.Y.S.2d 998 (1961), *aff'd*, 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962).

forming a government contract has supported a finding of lack of integrity.²⁶

A third factor to be considered is the contractor's financial ability. Although some courts will look solely at this factor,²⁷ lack of financial ability can be easily cured by requiring a performance bond²⁸ or government financing.²⁹

A fourth factor is labor relations. Obviously they may affect the ability of a contractor to conform with delivery or performance requirements. It has been held that the employment of non-union labor is not a sufficient reason for rejecting a low bid.³⁰ However, where labor disputes are imminent, the awarding officer will have to weigh the risks of nonperformance of the contract against the possible advantages of awarding it to a contractor who submitted the lowest bid, but is likely to be confronted with strikes because of his labor disputes.

A determination of responsibility may be dependent on the type and kind of work to be performed.³¹ Moreover, in some instances, this determination must be made in contemplation of effectuating certain policies of the legislatures. For example, ability to comply with the federal nondiscrimination clause has been listed as one factor to be considered in determining responsibility.³² Other statutes authorize that greater consideration be given to domestic products or labor,³³ small business,³⁴ or areas of chronic unemployment.³⁵

Thus, use of the term "responsible" has raised administrative deter-

26. 39 DECS. COMP. GEN. 468 (1959).

27. *Ross v. Board of Educ.*, 42 Ohio St. 374 (1884); *Norris v. Board of Educ.*, 12 Ohio L. Abs. 639 (Ct. App. 1932).

28. *Cf.* 13 DECS. COMP. GEN. 274 (1934); 6 DECS. COMP. GEN. 557 (1927).

29. See Small Business Act, 67 Stat. 233 (1953), 15 U.S.C. §§ 631-33 (1958); *Cary, Government Financing of Essential Contractors: The Reorganization of The Glenn L. Martin Company*, 66 HARV. L. REV. 834 (1953).

30. *Anthony P. Miller, Inc. v. Housing Authority*, 165 F. Supp. 275 (D. Del. 1958); *State ex rel. United Dist. Heating Co. v. State Office Bldg. Comm'n*, 124 Ohio St. 413, 179 N.E. 138 (1931); 31 DECS. COMP. GEN. 561 (1952); *cf.* 17 DECS. COMP. GEN. 37 (1937). Compare *Pallos v. Johnson*, 100 Colo. 449, 68 P.2d 559 (1937), wherein the low bid was rejected because of non-union labor in area of high unemployment and strong labor unions. See Annot., 110 A.L.R. 1403 (1937).

31. See *Bright v. Ball*, 138 Miss. 508, 103 So. 236 (1925), holding that a physically handicapped bus driver was not a responsible bidder for the transportation of school children to and from school. See also *People ex rel. Haecker Sterling Co. v. City of Buffalo*, 176 N.Y. Supp. 642 (Sup. Ct. 1919) (ability to furnish necessary repair parts may be considered when purchasing autos); *Hutto v. State Bd. of Educ.*, 165 S.C. 37, 162 S.E. 751 (1932).

32. 32 C.F.R. §§ 1.903-907 (1962); Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

33. Buy American Act, 47 Stat. 1530 (1933), 41 U.S.C. § 10(b) (1958); MISS. CODE ANN. § 8961 (1942). See *Lubiol Heat & Power Corp. v. Pleydell*, 178 Misc. 562, 34 N.Y.S.2d 587 (Sup. Ct. 1942).

34. 70A Stat. 127, 10 U.S.C. § 2301 (1958) ("It is the policy of Congress that a fair proportion of the purchases and contracts be placed with small business concerns.")

35. See Defense Manpower Policy No. 4, 17 Fed. Reg. 1195-96 (1952).

mination of the "lowest bidder" above the status of a mere perfunctory process of following directions. It has become a duty involving an irreducible minimum of discretion.³⁶ With all of the foregoing factors to be considered, there is a considerably wide range of discretion available to the awarding officers. It is not considered the court's function to be the omniscient overseer as to the awarding of all these contracts. Second-guessing administrative officials leads to a lack of confidence in them and a consequent lowering of morale. It is only where this discretion is abused that the courts should intervene.

STANDING TO SUE

The disappointed low bidder is met at the outset with the problem of lack of standing to contest the award of a contract to another. He cannot sue to have the contract awarded to him, enjoin the award to another, or have all bids rejected. The most commonly accepted rationale for this situation is that the competitive bidding statutes were enacted for the benefit of the public, and noncompliance yields no right to the lowest bidder. He can contest only through a taxpayer's action.³⁷ It is reasoned that the disappointed contractor merely is seeking enforcement of a personal right, whereas the taxpayer is seeking to enforce a right held in common with other taxpayers for their benefit.³⁸

The lack of standing is posited on the theory that contracting with the government is a privilege rather than a right.³⁹ Therefore, the plaintiff cannot allege that his legal injury is greater than the injury he experiences "in common with people generally."⁴⁰ The standing requirement assures that the controversy will be decided only if it is properly presented in an adverse manner.⁴¹ Consequently, in the absence of a personal interest, any adjudication would produce only judg-

36. See *United States Wood Preserving Co. v. Sundmaker*, 186 Fed. 678 (6th Cir. 1911); Rosenbaum, *Criteria for Awarding Public Contracts to the Lowest Responsible Bidder*, 28 CORNELL L.Q. 37 (1942).

37. *Peebles v. Byrd*, 98 Ga. 688, 25 S.E. 677 (1898); *Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N.W. 979 (1896); *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960). Cf. GA. CODE ANN. § 64-101 (1935); NEB. REV. STAT. § 73:103 (1943).

38. Compare *State ex rel. Skilton v. Miller*, 164 Ohio St. 163, 128 N.E.2d 47 (1955); *State ex rel. Lemon v. Langlie*, 45 Wash. 2d 82, 273 P.2d 464 (1954).

39. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

40. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937), where the court states that the injury must result from a wrong "which directly results in a violation of a legal right."

41. "These assumptions are reconciled with practical efficiency by the notion that courts are more apt to formulate or apply rules if the opposite sides are prevented from sitting around a table together in friendly conference. . . . Bitter partizanship in opposite directions is supposed to bring out the truth." Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 922 (1934).

ment in the abstract as to the legality of the action.⁴² The disappointed bidder may have irremediable damages; but his lack of standing precludes his suit because he cannot meet the legal right requirement. The rule requiring standing is so well established that there is a relative paucity of suits in the area of government contracts where standing based solely on competitive injury was used to meet the legal injury requirement.⁴³

The leading case holding that the competitive bidder has no standing to sue is *Perkins v. Lukens Steel Co.*⁴⁴ Plaintiffs sought to enjoin the Secretary of Labor from determining minimum wages provisions for certain industries. They asserted that such a determination would violate their right to bid and negotiate government contracts free from such an interference. The court held that the government, like a private individual, has an unfettered power "to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."⁴⁵ Just as the contract terms imposed by a private party are for his own benefit, the provisions of the competitive bidding statutes are for the government's benefit and confer no right upon private contractors. Absence of this right defeats the disappointed bidder's claim of standing to sue despite possible damage and loss of income.⁴⁶ With the *Perkins* case as binding precedent, subsequent decisions have denied unsuccessful bidders on government contracts any right to contest the award.⁴⁷ State courts have reached similar results.⁴⁸

This result has been rationalized on the basis that it would be im-

42. See *Associated Indus. v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943).

43. Compare *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955), where unsuccessful low bidder for airport concession had no standing to assert CAB's non-compliance with statutory bid procedure, with *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), where an unsuccessful bidder was permitted to assert non-compliance with applicable regulations in awarding a mineral lease without a discussion of standing, and *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950), where appellant challenged federal action favorable to a competitor on basis of violation of regulation and based standing on violation of contract right that was incorporated onto his lease. See *American President Lines, Ltd. v. Federal Maritime Bd.*, 112 F. Supp. 346 (D.D.C. 1953); *Davis, Unreviewable Administrative Action*, 15 F.R.D. 411 (1954).

44. 310 U.S. 113 (1940).

45. *Id.* at 127.

46. *Id.* at 125.

47. *United States v. Gray Line Water Tours*, 311 F.2d 779 (4th Cir. 1962); *Wooldrige Mfg. Co. v. United States*, 235 F.2d 513 (D.C. Cir. 1962), *cert. denied*, 351 U.S. 989 (1956); *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955); *Fulton Iron Co. v. Larson*, 171 F.2d 994 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 903 (1949); *Robert Hawthorne, Inc. v. Department of Interior*, 160 F. Supp. 417 (E.D. Pa. 1958); *Royal Sundries Corp. v. United States*, 112 F. Supp. 244 (E.D.N.Y. 1953); *Clement Martin, Inc. v. Dick Corp.*, 97 F. Supp. 961 (E.D. Pa. 1951). *But see McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

48. *E.g.*, *Peeples v. Byrd*, 98 Ga. 688, 25 S.E. 677 (1896); *Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N.W. 979 (1896); *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960).

practical to require an administrator to defend every act of discretion in a court room. Such a view appears to be justified in view of the great number of contractors with which the government deals. The disappointed ones, armed with such a weapon, obviously could make administrative efficiency almost nonexistent.⁴⁹ The Federal Administration Procedure Act,⁵⁰ while giving judicial review to any person adversely affected or aggrieved, "undoubtedly adds nothing to the law"⁵¹ in this area.

In contrast, the argument that a disappointed contractor should have standing to contest the award of a contract also presents cogent and compelling reasons. Competitive bidding statutes are designed to prevent favoritism and exorbitant prices. Without such a public letting, a contractor could be awarded a contract without competition. This would utterly flout the primary purpose of competitive bidding: to obtain the needed work and materials at prices which are most advantageous to the government.⁵²

The disappointed bidder has been allowed suit under alternate reasoning: as a taxpayer — this sometimes requires a demonstration of injury to the public — or as a private party showing injury different from that suffered by the public. Under the first theory, many courts state that the taxpayer is the proper party to challenge a contract award; hence the contractor cannot challenge such action unless he is also a taxpayer.⁵³ The courts often treat the motive of the taxpayer as irrelevant.⁵⁴ As a practical matter, he thus is likely to sue only if he can reap some pecuniary award such as recovering a percentage of the funds that his action has saved the public treasury.⁵⁵ Although the taxpayer's suit is

49. See *L. P. Steuart & Bros. v. Bowles*, 322 U.S. 398 (1944); *Perkins v. Lukens Steel Co.*, 310 U.S. 110, 131 (1940); *cf. Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 939 (1958).

50. 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1958).

51. Comment, 56 *YALE L.J.* 670, 690 (1947). See *Clement Martin, Inc. v. Dick Corp.*, 97 F. Supp. 961, 964 (W.D. Pa. 1951), "The Administrative Procedure Act did not create rights but confers jurisdiction to review discretionary acts of agencies which affected existing statutory rights. This plaintiff as a competitive bidder has not shown that he has any [such] rights. . . ." *But see* 66 Stat. 308 (1952), 41 U.S.C. § 43a(c) (1958); *George v. Mitchell*, 282 F.2d 486 (D.C. Cir. 1960); *Mitchell v. Covington Mills, Inc.* 229 F.2d 506 (D.C. Cir.), *cert. denied*, 350 U.S. 1002 (1956).

52. See *Boxwell v. Department of Highways*, 203 La. 759, 14 So. 2d 627 (1943).

53. See, *e.g.*, *Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N.W. 979 (1896); *State ex rel. Helena Allied Printing Council v. Mitchell*, 105 Mont. 326, 74 P.2d 417 (1937); *Times Publishing Co. v. City of Everett*, 9 Wash. 518, 37 Pac. 695 (1894).

54. *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 Pac. 826 (1899); *Turkovich v. Board of Trustees*, 11 Ill. 2d 460, 143 N.E.2d 229 (1957); *Stewart v. Stanley*, 199 La. 146, 5 So. 2d 531 (1941).

55. OKLA. STAT. ANN. tit. 62, § 373 (1963). Other states allow the successful taxpayer to recover his costs. ARIZ. REV. STAT. ANN. §§ 11-642, 35-213 (1956); ARK. STAT. ANN. § 84-1613 (1960); ILL. REV. STAT. ch. 162, §§ 14, 16 (1957); N.Y. MUNIC. LAW § 51; OHIO REV. CODE §§ 309.12-13. Some states allow recovery of attorney fees. ARIZ. REV.

sometimes limited by a necessity of showing a pecuniary loss to the public treasury,⁵⁶ often nothing more than a showing of an infinitesimal loss is required.⁵⁷ Arbitrary action on the part of the awarding authority has its greatest affect on the contractor's pocketbook. Consequently, the unsuccessful low bidder can show a greater loss to himself than to the public.

In these circumstances, a suit by a disappointed contractor accomplishes the same purposes as does the public action. It is more important to consider the nature of the alleged abuse than the party seeking to rectify it. It is the public who will be the ultimate beneficiaries of the suit.⁵⁸ This argument has been more persuasive on the local level, as the taxpayer can challenge municipal action in most states.⁵⁹ He has not been able to challenge state action as readily⁶⁰ and is virtually powerless against federal action.⁶¹ Furthermore, the taxpayer suit is only a means of rectifying illegal practices of the government, whose action would otherwise go unchecked. Suit by the disappointed contractor accomplishes the same result in this area.

The equities in favor of allowing the disappointed contractor to contest unfavorable government action are quite convincing. *Copper Plumbing & Heating Co. v. Campbell*⁶² reflects part of this new trend. Plaintiff contested the validity of an order which placed its name on the government's debarment list. This made it ineligible to receive government contracts for a period of three years. The court of appeals

STAT. ANN. §§ 11-642, 35-213 (1956); OHIO REV. CODE § 309.13; S.D. CODE § 33.1803-1 (Supp. 1960).

56. *E.g.*, *Bassett v. Desmond*, 140 Conn. 426, 101 A.2d 294 (1953); *Fristad v. Sherman*, 76 N.W.2d 903 (N.D. 1956); *McCarthy v. McAloon*, 79 R.I. 55, 83 A.2d 75 (1951).

57. See *Ellingham v. Dye*, 178 Ind. 336, 414, 99 N.E. 1, 29 (1912) where the court held: "The small proportionate sum of the cost of the election would fall upon appellee as a taxpayer is not of itself sufficient to destroy his competency to sue." See also *Baim v. Fleck*, 406 Ill. 193, 92 N.E.2d 770 (1950).

58. An example of how the public can lose considerable sums of money through a lack of means for contesting a letting of a contract is the recent award by the federal government for fighter planes. It was estimated that the award cost the government from \$91 million to \$415 million more than if it had been given to a competitor and that the competitor's designs were superior in nine out of ten aspects. See *Wall Street J.*, March 4, 1963, p. 11, col. 2.

59. *E.g.*, *Nuckols v. Lyle*, 8 Idaho 589, 70 Pac. 401 (1902); *Pierce v. Hagans*, 79 Ohio St. 9, 86 N.E. 519 (1908); *Barnett v. Lincoln*, 162 Wash. 613, 299 Pac. 392 (1931); *cf. Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937).

60. *E.g.*, *Turnipseed v. Blan*, 226 Ala. 549, 148 So. 116 (1933); *Spahr v. Brown*, 19 Ohio App. 107 (1925); *Bourne v. Cole*, 53 Wyo. 31, 77 P.2d 617 (1938). *Contra*, *Asplund v. Hannett*, 31 N.M. 641, 249 Pac. 1074 (1926); *Bull v. Stichman*, 273 App. Div. 311, 78 N.Y.S. 279, *aff'd*, 298 N.Y. 516, 80 N.E.2d 661 (1948).

61. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Taft Hotel Corp. v. Housing & Home Fin. Agency*, 162 F. Supp. 538 (D. Conn.), *aff'd per curiam*, 262 F.2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959); *Gart v. Cole*, 166 F. Supp. 129, 135 (S.D.N.Y. 1958); *cf. United States v. Butler*, 297 U.S. 1 (1936); *Franklin Township v. Tugwell*, 85 F.2d 208 (D.C. Cir. 1936). See *Davis, Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386-91 (1955); *Note*, 24 GEO. L.J. 974 (1936); *Note*, 37 HARV. L. REV. 750 (1924); *Comment*, 2 U.C.L.A.L. REV. 129 (1954).

62. 290 F.2d 368 (D.C. Cir. 1961).

held that while the plaintiff probably had no right to contest an award of a government contract it definitely had a right "not to be invalidly denied equal opportunity . . . to seek contracts on government projects."⁶³ Arbitrarily debarring a potential contractor is essentially no different from capriciously failing to award him a contract. In both situations he is denied that which in the normal course of events might have been his.

The potential harm that can result when a low bidder is arbitrarily denied an award is incalculable.⁶⁴ Inability to effectively lodge a protest certainly will tend to discourage a prospective bidder from expending considerable sums of money in preparation of his bid. His anticipation that he will not be accorded fair and equal treatment will dramatically emphasize the futility of spending time and energy to complete and submit a bid proposal. A further problem will arise where a contractor's only key to a credit standing is a government contract. Those dealing with him will have confidence that they will be paid for their work and be able to satisfy their creditors only when he is successful. An arbitrary denial of a contract in this situation may very easily sound the death knell for a budding concern, as well as wreak havoc on established ones.

Recognition of a minimal interest in the award would appear to be a workable solution. At least Louisiana and New Jersey have recognized that the lowest responsible bidder has a justifiable interest in the award and may sue upon it. It is reasoned that the bidder is entitled at least to proof of his own unfitness.⁶⁵

The application of the *Perkins* doctrine to deny standing to the frustrated low bidder often can result in gross inequities.⁶⁶ When im-

63. *Id.* at 370. Under the Walsh-Healy Act, a debarred contractor is now given standing as an "interested person" to contest a debarment order. 66 Stat. 308 (1952), 41 U.S.C. § 43a(c) (1958). This provision has been limited in its application solely to Walsh-Healy controversies. See *George v. Mitchell*, 282 F.2d 486 (D.C. Cir. 1960); *Mitchell v. Covington Mills, Inc.* 229 F.2d 506 (D.C. Cir.), *cert. denied*, 350 U.S. 1002 (1956).

64. An "applicant for . . . a government contract, whose financial well-being may be wholly dependent on the government grant . . . [should not be treated any differently from] one declared to be injured in his personal or property 'rights.'" SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW* 159 (1939). Cf. *ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE, DIVISION OF PUBLIC CONTRACTS* 4 (1939). ("Penalty of black-listing is so severe that its imposition may destroy a going business . . .")

65. *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959); *St. Landry Lumber Co. v. Town of Bunkie*, 155 La. 892, 99 So. 687 (1924); *Fourmy v. Town of Franklin*, 126 La. 151, 52 So. 249 (1910); *American Water Corp. v. Borough of Florham Park*, 5 N.J. Misc. 969, 139 Atl. 169 (Sup. Ct. 1927); *Maginnis v. City of Wildwood*, 94 N.J.L. 90, 108 Atl. 780 (Sup. Ct.) *rev'd on appeal*, 94 N.J.L. 425, 110 Atl. 820 (Ct. Err. & App. 1920).

66. Cf. *Nathanson, Central Issues of American Administrative Law*, 45 AM. POL. SCI. REV. 348, 373 (1951). "When the Government's purchases are so great that they dominate the entire economy, the implications of the *Perkins* decision with respect to unreviewable administrative power can hardly be overstated."

properly denied a contract, a bidder's major recourse will be to try to stop the award by working through political channels. Clearly, such a practice is unhealthy. Rather, a recognition of a cause of action by the low bidder would permit those most closely involved in the transaction to aid in effectuating the policy of the statute.⁶⁷ Due weight must be given to the fact that contractors must be protected from unauthorized and arbitrary government action.

Moreover, the quest for administrative efficiency should not adumbrate the low bidder's status. There appears to be no valid reason to award judicial review to one whose personal or property rights are being infringed and to deny the same relief to one whose economic livelihood is concentrated and dependent upon government contracts.⁶⁸ The overriding consideration of the standing doctrine in the administrative area is the attempt to create a workable environment for the administration of legislative policy.⁶⁹ But this should not be the all-controlling factor. While lack of standing can be justified where the petitioner is adequately represented by others,⁷⁰ where there is danger of multitudinous appeals,⁷¹ or where the public interest requires quick administrative action,⁷² there appears to be no valid reason to deny the low bidder standing. As discussed below, it would be better to base the low bidder's standing to sue on wrongful interference with his business relations⁷³ rather than on the actual damage in fact.

TORTIOUS ECONOMIC INJURY

One may be liable in tort for malicious interference with a right to secure a contract or interference with a prospective economic advantage. Such liability is based on the theory that a duty exists to avoid intentionally interfering with another's reasonable business expectations.⁷⁴

67. If the unsuccessful bidder is denied standing, "there is no one impelled by duty or self-interest to prevent the violation of an important provision . . . designed to protect the public . . ." *Molloy v. City of New Rochelle*, 198 N.Y. 402, 412, 92 N.E. 94, 98 (1919) (dissenting opinion). Oklahoma specifically authorizes an unsuccessful bidder to sue for an injunction if an award violates the competitive bidding statutes. OKLA. STAT. ANN. tit. 61, § 40 (1953).

68. See Schwartz, *A Decade of Administrative Law*, 51 MICH. L. REV. 775, 843 (1953).

69. See *Stark v. Wickard*, 321 U.S. 288, 311-12 (1944) (Frankfurter, J., dissenting).

70. See *Schenley Corp. v. United States*, 326 U.S. 432 (1945). But see *American Power & Light Co. v. Securities Exch. Comm'n*, 325 U.S. 385, 390 (1945).

71. *United States Sugar Refiners Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943).

72. *Algoma Coal Co. v. United States*, 11 F. Supp. 487 (E.D. Va. 1935).

73. Compare *American Can Co. v. Milk Control Bd.*, 313 Mass. 156, 46 N.E.2d 542 (1943) with *Circle Lounge & Grille, Inc. v. Board of Appeals*, 324 Mass. 427, 86 N.E.2d 920 (1949). Cf. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 304-05 (1961).

74. RESTATEMENT, TORTS § 766 comment *b* (1938); see *Sustick v. Slatina*, 48 N.J. Super. 134, 137 A.2d 54 (App. Div. 1957); *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759.

Recovery for breach of this duty generally will be the anticipated profits.⁷⁵ In some instances, punitive damages have been allowed.⁷⁶ The plaintiff must prove first that the defendant acted intentionally; second, that such acts were in absence of legal excuse or justification;⁷⁷ and third, that without the defendant's interference,⁷⁸ a reasonable degree of certainty existed that the plaintiff would have entered into the contract.⁷⁹ This conventional tort concept has been introduced into the public contract field by way of two recent decisions⁸⁰ which have given the disappointed low bidder additional remedies.

In *Highway Paving Co. v. Hausman*⁸¹ the plaintiff, who was low bidder, alleged that the awarding officials conspired to award the contract to another contractor, thereby maliciously interfering with his right to secure the contract. The court held such conduct to be an actionable wrong. Although the low bidder statutes would confer no right on the plaintiff to be awarded the contract or to enjoin its award to another, the defendant's conspiratorial activities gave rise to liability in tort. Furthermore, the defense of executive immunity for public officials does not extend to acts done "maliciously and with intent to injure."⁸² Consequently, the public officials and the successful contractor in this case would have to respond in damages.

Such a proposition is a relatively new concept. Several suits had been brought in tort by unsuccessful low bidders seeking lost anticipated profits for a malicious interference with the right to contract.⁸³ Yet only one

53 Atl. 230 (Ch. 1902); Annot., 26 A.L.R.2d 1227 (1952); Annot., 9 A.L.R.2d 228 (1950).

75. *E.g.*, *Lewis v. Bloede*, 202 Fed. 7 (4th Cir. 1912); 1 HARPER & JAMES, TORTS 510-26 (1956).

76. See *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332 (1908).

77. See *Lewis v. Bloede*, 202 Fed. 7 (4th Cir. 1912); *St. John v. Building Trades Council*, 76 Nev. 290, 352 P.2d 820 (1960); *Louis Schlesinger Co. v. Rice*, 4 N.J. 169, 72 A.2d 197 (1950).

78. *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 276 P.2d 671 (1954).

79. *Goldman v. Feinberg*, 130 Conn. 671, 37 A.2d 355 (1944); *McCue v. Deppert*, 21 N.J. Super. 591, 91 A.2d 503 (App. Div. 1952); *Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 189 N.E. 463 (1934); *Williams & Co. v. Collins, Tuttle & Co.*, 6 App. Div. 2d 302, 176 N.Y.S.2d 99 (1958).

80. *Highway Paving Co. v. Hausman*, 171 F. Supp. 768 (E.D. Pa. 1959); *Heyer Prods. Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956), *modified*, 177 F. Supp. 251 (Ct. Cl. 1959).

81. 171 F. Supp. 768, 769 (E.D. Pa. 1959).

82. *Id.* at 770. *Cf.* *Somers Constr. Co. v. Board of Educ.*, 198 F. Supp. 732 (D.N.J. 1961). In *Pedersen v. United States*, 191 F. Supp. 95 (D. Guam 1961), the government advertised for bids on obsolete ammunition. Plaintiff was the high bidder. He alleged that his bid was rejected because of derogatory statements circulated by defendant, the accepted bidder. Such conduct was held to be actionable.

83. *Lewis v. Bloede*, 202 Fed. 7 (4th Cir. 1912). See also *Zoby v. American Fid. Co.*, 143 F. Supp. 763 (E.D. Va. 1956), *aff'd*, 242 F.2d 76 (4th Cir. 1957); *Gales-Rojac Corp. v. Pennsylvania R.R.*, 2 Misc. 2d 613, 151 N.Y.S.2d 292 (Sup. Ct. 1956); *Neel v. Allegheny County Mem. Park*, 391 Pa. 354, 137 A.2d 785 (1958); *cf.* *East River Gas-Light Co. v.*

action had been successful prior to *Highway Paving*.⁸⁴ In denying relief, it was reasoned that the failure to make an award to the lowest responsible bidder, whether in good faith or otherwise, ordinarily did not subject the awarding authorities to liability for damages to such a bidder.⁸⁵

The holding in *Highway Paving* appears to be justifiable in view of the fact that it affords a low bidder some relief in an area where he would otherwise be remediless. His position is buttressed by the fact that low bidder statutes limit an otherwise unfettered discretion in awarding public contracts. Thus a reasonable degree of certainty is afforded in the award of the contract.⁸⁶ Those who would deny recovery would do so on the basis that since the plaintiff did not have an absolute right to the award, he lost nothing by defendant's tortious conduct.⁸⁷

Seemingly, a danger in this type of suit is that a determination of the low bidder necessarily involves at least a minimal amount of discretion. Public officials should be free to exercise that discretion without having to justify their decisions in court.⁸⁸ However, the allowance of this type of suit does contemplate the reasonable exercise of discretion. It affords a remedy only to the contractor who was maliciously deprived of a contract which in all probability would have been his but for the defendant's tortious interference.

A further criticism, which also does not withstand analysis, is that allowance of this type of suit will only increase the amount of the contractor's damages and the corresponding loss of public funds unless the contractor's interest coincides with that of the public.⁸⁹ But this type

Donnelly, 93 N.Y. 557 (1883) (action for damages). *But cf.* *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955) where there was no recovery despite the fact that contracting officer told a competitor the amount of plaintiff's bid. See also *Benton v. Kennedy-Van Saun Mfg. & Eng. Corp.*, 145 N.Y.S.2d 703 (Sup. Ct. 1955), *aff'd.*, 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1956).

84. *Lewis v. Bloede*, 202 Fed. 7 (4th Cir. 1912); *accord*, *Somers Constr. Co. v. Board of Educ.*, 198 F. Supp. 732 (D.N.J. 1961). See *Southwestern Publishing Co. v. Ney*, 227 Ark. 852, 302 S.W.2d 538 (1957); *Moore v. Bonbright & Co.*, 202 App. Div. 281, 195 N.Y. Supp. 854 (1922). *But see* *Malan Constr. Corp. v. Board of County Rd. Comm'rs*, 187 F. Supp. 937 (E.D. Mich. 1960) (alternative prayer for damages denied).

85. *Molloy v. City of New Rochelle*, 198 N.Y. 402, 92 N.E. 94 (1910); *American Artificial Stone Pavement Co. v. Wagner*, 139 Pa. 623, 21 Atl. 160 (1891). *Cf.* *Pfaff Constr. Co. v. Leonard*, 40 Ohio App. 246, 178 N.E. 328 (1931), where the court held that one entitled to contract cannot recover damages where enjoined from performing because of a taxpayer's suit.

86. Compare *Smith v. Christopherson*, 267 Wis. 150, 64 N.W.2d 744 (1954), where the failure to allege that the plaintiff could qualify for a federal commitment to secure a mortgage precluded recovery for malicious interference with economic advantage.

87. *Rees v. Board of Educ.*, 6 Utah 2d 196, 310 P.2d 387 (1957); see *Zimmerman v. Board of Educ.*, 38 N.J. 65, 183 A.2d 25 (1962).

88. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1944).

89. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (dictum), *cert. denied*, 339 U.S. 949 (1950).

of lawsuit is a means of deterring public officials from representing any other than the public interest.

Although a tort action presents a viable alternative to the bidder on government contracts, it is not without its practical shortcomings. A plaintiff can recover only for malicious interference and not for a negligent exercise of discretion in failing to award a contract.⁹⁰ The difficulty of producing the requisite quantum of evidence to support the allegations of malice is evident. Because of the clandestine nature of any conspiracy, a plaintiff may be able only to prove negligence at most and thus fail to recover at all.

A second difficulty is that the awarding officials generally are shielded from tort liability. Public officials usually are not liable for unintentional torts committed in the exercise of their discretionary functions.⁹¹ Personal liability, however, may attach to government officials for actions beyond their statutory authority.⁹² Both federal and state officials probably are immune from liability for intentional torts,⁹³ although the federal government may be liable under the Federal Tort Claims Act.⁹⁴ At most, a disappointed low bidder may have to be satisfied with a suit against non-governmental third parties who have deprived him of an economic opportunity.⁹⁵

A second remedy available to the disappointed low bidder is evidenced in *Heyer Prods. Co. v. United States*.⁹⁶ Plaintiff contended that the contract was not awarded to him out of retaliation for his testifying at a Senate hearing. The Court of Claims held that these allegations

90. *Somers Constr. Co. v. Board of Educ.*, 198 F. Supp. 732 (D.N.J. 1961); *cf.* *Wooldridge Mfg. Co. v. United States*, 235 F.2d 513 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956), where relief was denied for failure to supply pertinent information to enable plaintiff to make an intelligent bid.

91. See Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Davis, *Administrative Officers, Tort Liability*, 55 MICH. L. REV. 201 (1956); Note, 66 HARV. L. REV. 488 (1953).

92. See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 352-55 (4th ed. 1960). See also *Malone v. Bowdoin*, 369 U.S. 643 (1962). See generally Note, 55 COLUM. L. REV. 73 (1955); Comment, 8 STAN. L. REV. 683 (1956); Comment, 2 U.C.L.A.L. REV. 382 (1955).

93. In *Spalding v. Vilas*, 161 U.S. 483, 490 (1896), complainant alleged malice on the part of the Postmaster General, but the Court held the motive that impelled him to do that of which the plaintiff complains . . . is immaterial. *Wilson v. Hirst*, 67 Ariz. 197, 193 P.2d 461 (1948); *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952). *Contra*, *Highway Paving Co. v. Hausman*, 171 F. Supp. 768 (E.D. Pa. 1959) where state officials were held liable for acts done maliciously and with intent to injure. See also *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891); *Smith v. Christopherson*, 267 Wis. 150, 64 N.W.2d 744 (1954) (dictum).

94. 60 Stat. 845 (1945), codified in various parts of 28 U.S.C. (1958). See *Builders Corp. of America v. United States*, 259 F.2d 766 (9th Cir. 1958).

95. See *Lewis v. Bloede*, 202 Fed. 7 (4th Cir. 1912) (competitor); *Somers Constr. Co. v. Board of Educ.*, 198 F. Supp. 732 (D.N.J. 1961) (architects); *Pedersen v. United States*, 191 F. Supp. 95 (D. Guam 1961) (other bidder). See also *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962).

96. 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

stated an actionable claim, but recovery would be limited to expenses incurred in preparation of the bid.⁹⁷ By advertising for bids, the government had implicitly *promised* that each bid "would be honestly considered, and that the offer which, in the honest opinion of the contracting officer, was most advantageous to the Government would be accepted."⁹⁸

Previous cases held that all bids for government contracts were to be given fair consideration and not rejected arbitrarily.⁹⁹ It also had been intimated before *Heyer* that persons could be liable for interference with a prospective contractor's right to impartial treatment before a government agency.¹⁰⁰ The decision in *Heyer* appears justifiable in view of the fact that it is a policy of Congress to encourage bidding¹⁰¹ "to secure for the Government the benefits which arise from competition."¹⁰² Indeed, without a promise of impartial treatment in bidding procedures, many would hesitate to expend large sums of money to prepare their bids.

The court's treatment of two issues in the *Heyer* case appears to be questionable. First, considering the complaint as a contract action instead of tort is contrary to previous decisions. It has been held that a disappointed low bidder has no cause of action for breach of an implied contract to make an award in conformity with the competitive bidding statutes.¹⁰³ A claim for the traditional tort of deceit would more nearly approximate the action taken in *Heyer*, for the plaintiff had parted with money or property of value in reliance on false representations as to fair consideration implied in the advertisements for bids.¹⁰⁴ However, the federal government is precluded from liability for its agents' mis-

97. *But see* *Roseked v. Board of Comm'rs*, 88 Ind. 267 (1882), where the court held that an unsuccessful bidder for a contract to be awarded by competitive bidding cannot recover the costs of preparing for the bid.

98. *Hayer Prods. Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409, 412 (1956).

99. *United States v. Purcell Envelope Co.*, 249 U.S. 313, 318 (1919) ([Competitive bidding] is a provision . . . necessarily giving rights to both and placing obligations on both.); *Cooper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 370-71 (D.C. Cir. 1961) (a prospective contractor has a right "not to be invalidly denied equal opportunity . . . to seek contracts on government projects."); *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940) ("The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts."); *Royal Sundries Corp. v. United States*, 112 F. Supp. 244, 245 (E.D.N.Y. 1953) ("[T]here is implicit in the invitation to bid . . . an undertaking of good faith on the part of the agency of acquisition . . ."); *Refining Associates v. United States*, 109 F. Supp. 259, 262 (Ct. Cl. 1953) (bidder on government contract has right to have bid considered on merits).

100. *Clement Martin, Inc. v. Dick Corp.*, 97 F. Supp. 961 (W.D. Pa. 1951).

101. See S. REP. NO. 571, 80th Cong., 1st Sess. 2-3 (1947).

102. *United States v. Brookridge Farms Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

103. *Martin v. United States*, 61 Ct. Cl. 430 (1926). See *Royal Sundries Corp. v. United States*, 112 F. Supp. 224 (E.D.N.Y. 1953).

104. PROSSER, TORTS 522-23 (2d ed. 1955); see *Donovan v. Clifford*, 225 Mass. 435, 114 N.E. 681 (1917); *Swift v. Rounds*, 19 R.I. 527, 35 Atl. 45 (1896).

representations or deceit.¹⁰⁵ Alternatively, calling for a bid without intention of considering it could be a case of misrepresentation. Misrepresentation, although involved in contract actions, is treated as a tort.¹⁰⁶ And the type of tort that would follow from this action falls within the exceptions to liability under the Federal Tort Claims Act. Liability does not exist for either interference with contract rights under the act¹⁰⁷ or interference with economic advantage.¹⁰⁸ Furthermore, since the awarding of contracts is a discretionary function, an aggrieved plaintiff still may be precluded from recovery under the act.¹⁰⁹

The second questionable element in *Heyer* is that since the Court of Claims has jurisdiction only over contract actions,¹¹⁰ the nomenclature of a contract action assumedly was only an accommodating subterfuge to confer jurisdiction. Thus it is evident that calling this a contract action probably was necessary if the plaintiff was to receive any relief at all. Had the suit been in tort, recovery would not have been limited to bid preparation expenses. Loss of profits also could have been recovered.

Pursuant to the *Heyer* holding, recovery is predicated upon production of clear and convincing proof. Such stringent requirements obviously will deter the officious suit, but will in no way discourage those who have been unjustly discriminated against. Proof is the bidder's greatest obstacle, as is witnessed by the failure of the plaintiff to prove its allegation when the *Heyer* case was heard on the merits.¹¹¹

SPECIFIC RELIEF

An unsuccessful low bidder on a public contract can only benefit if he is given the specific relief of a chance to perform and make a profit. However, the task of securing specific relief is not an easy one. Gener-

105. 62 Stat. 984 (1948), 28 U.S.C. §§ 2680(a) (h) (1958). See *United States v. Neustadt* 366 U.S. 696 (1961); *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959).

106. PROSSER, TORTS 520-31 (2d ed. 1955).

107. 62 Stat. 984 (1948), 28 U.S.C. § 2680(h) (1958). See *Cafeteria & Restaurant Workers Union v. McElroy*, 284 F.2d 173 (D.C. Cir. 1960), *aff'd without a discussion of this point*, 367 U.S. 886, *rehearing denied*, 368 U.S. 869 (1961).

108. *Dupree v. United States*, 264 F.2d 140 (3d Cir.), *aff'd on rehearing*, 266 F.2d 373 (3d Cir. 1959), *cert. denied*, 361 U.S. 823 (1960); *Roxfort Holding Co. v. United States*, 176 F. Supp. 587 (D.N.J. 1959). *But cf.* *Builders Corp. of America v. United States*, 259 F.2d 766 (9th Cir. 1958) (government may be liable for refusal to execute order which would enable plaintiff's houses to be occupied by army personnel pursuant to agreement).

109. 60 Stat. 843 (1946), 28 U.S.C. § 2680(b) (1958). See *United States v. Waylyn Corp.*, 130 F. Supp. 783 (D.P.R. 1955), *aff'd on other grounds*, 231 F.2d 544 (1st Cir. 1956), *cert. denied*, 352 U.S. 827 (1957).

110. 24 Stat. 505 (1887), 28 U.S.C. § 1491 (1958). *But see* *Ottinger v. United States*, 116 Ct. Cl. 282, 88 F. Supp. 881 (1950).

111. *Heyer Prods. Co. v. United States*, 135 Ct. Cl. 63, 177 F. Supp. 251 (1959); *accord*, *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960).

ally, unsuccessful low bidders have been unable to secure review of the administrative action by certiorari,¹¹² unable to compel the award by mandamus,¹¹³ and unable to restrain the award to a higher bidder through an injunction;¹¹⁴ although such relief might be available if fraud or abuse of discretion were shown.¹¹⁵ In denying relief, the courts have emphasized the discretionary nature of making the award.¹¹⁶ This obviously is true where authority exists to reject all bids.¹¹⁷

Three specific remedies are available to the unsuccessful low bidder. First, review of the awarding of the contract by certiorari is available in limited instances. An unsuccessful low bidder has the right to have a bid declared illegal only if it appears that it was secured to the detriment of the public or if other substantial irregularities in its award existed.¹¹⁸ Relief is predicated on the theory that when the bid was received the lowest bidder had "a vested interest, subject only to being defeated if it was found that it was not the lowest responsible bidder"¹¹⁹

The remedy most frequently sought is a writ of mandamus. It has been held to lie where the award is arbitrary and in complete disregard of the law,¹²⁰ or where the awarding official has no discretion in making

112. *State ex rel. Hron Bros. v. City of Port Washington*, 265 Wis. 507, 62 N.W.2d 1 (1953); 10 MCQUILLIN, MUNICIPAL CORPORATIONS § 29.187 (1950). *Contra*, *Kingston Bituminous Prods. Co. v. Board of Comm'rs*, 134 N.J.L. 389, 48 A.2d 197 (Sup. Ct. 1946) (low bidder has right to have bid accepted); *Ianniello v. Town of Harrison*, 4 N.J. Misc. 111, 132 Atl. 78 (Sup. Ct. 1926) (low bidder prima facie entitled to receive contract).

113. *Madison v. Harbor Bd.*, 76 Md. 395, 25 Atl. 337 (1892); *Commonwealth ex rel. Snyder v. Mitchell*, 82 Pa. (1876). *But see* *People ex rel. Haecker Sterling Co. v. City of Buffalo*, 176 N.Y. Supp. 642 (Sup. Ct. 1919) (low bidder has standing for mandamus unless all bids are rejected).

114. *Colorado Paving Co. v. Murphy*, 78 Fed. 28 (8th Cir. 1897) *appeal dismissed*, 166 U.S. 719 (1897); *Joseph Rugo, Inc. v. Henson*, 190 F. Supp. 281 (D. Conn. 1960); *Barnes v. Scranton Poor Dist.*, 105 Pa. Super. 149, 160 Atl. 241 (1932). *Contra*, *Pittman Constr. Co. v. Housing Authority*, 167 F. Supp. 517 (W.D. La. 1958), *aff'd*, 264 F.2d 695 (5th Cir. 1959); OKLA. STAT. ANN. tit. 61, § 40 (Supp. 1962) (unsuccessful bidder may enjoin an award of a contract).

115. *E.g.*, *Leary v. City of Jackson*, 247 Mich. 447, 226 N.W. 214 (1929); *Arensmeyer-Warnack-Zarndt, Inc. v. Wray*, 118 Misc. 619, 194 N.Y. Supp. 398 (Sup. Ct. 1922).

116. *Van Antwerp v. Board of Comm'rs*, 217 Ala. 201, 115 So. 239 (1928); *State ex rel. State Journal Co. v. McGrath*, 91 Mo. 386, 2 S.W. 846 (1886). *But see* *Schuck v. School Dist.*, 296 Pa. 408, 146 Atl. 24 (1929) (contract to be awarded, if at all, to the lowest bidder).

117. *E.g.*, *United States Wood Preserving Co. v. Sundmaker*, 186 Fed. 678 (6th Cir. 1911); *Charles L. Harney, Inc. v. Durkee*, 107 Cal. App. 2d 570, 237 P.2d 561 (1951).

118. *Chick's Constr. Co. v. Wachusett Regional High School Dist.*, 343 Mass. 38, 175 N.E.2d 502 (1961). *Contra*, *Hron Bros. v. City of Port Washington*, 265 Wis. 507, 62 N.W.2d 1 (1953).

119. *Edward J. Rose, Inc. v. Board of Educ.*, 39 N.J. Super. 565, 568, 121 A.2d 549, 551 (Super. Ct. 1956); see *Sellitto v. Cedar Grove Twp.*, 133 N.J.L. 41, 42, 42 A.2d 383, 385 (Sup. Ct. 1945). ("Prosecutor's status as the lowest bidder, is not one of grace; it is one of right.")

120. *Brown v. City of Phoenix*, 77 Ariz. 368, 272 P.2d 358 (1954); *Delta Democrat Publishing Co. v. Board of Pub. Contracts*, 224 Miss. 848, 81 So. 2d 715 (1955); *Luboil Heat & Power Corp. v. Pleydell*, 172 Misc. 562, 34 N.Y.S.2d 587 (Sup. Ct. 1942).

the award.¹²¹ It thus has been held to be the proper remedy to compel a contracting officer to exercise his discretion. But it will not be used to control his ultimate decision as to who is the lowest responsible bidder.¹²² Issuance of the writ has been denied where other remedies exist.¹²³ Mandamus has been held to be the proper remedy when statutes require a potential bidder to prequalify as to his capabilities and responsibility.¹²⁴

Injunction is a third remedy. In fact, a court is more likely to enjoin the award of a contract than compel the awarding authority to enter into a contract with the low bidder. Some courts have interpreted low bidder statutes as authorizing an injunction to prevent an award to one other than the low bidder.¹²⁵ Obtaining performance at the lowest cost is the overriding consideration in most contract awards. Therefore, it would seem reasonable to consider the low bidder to be *prima facie* entitled to the award. He should be able to enjoin further progress until a determination of the lowest bid is made, price and other factors considered.

OTHER RELIEF

Relief may be available to a bidders on federal contracts through appeals to the Comptroller General. Federal authorities are required to make an award to the lowest responsible bidder and, in the absence of a determination as to lack of responsibility, no authority exists to support an award to a higher bidder.¹²⁶ The Comptroller General will make a determination as to the propriety of the rejection of a contractor's bid.¹²⁷

The small business concern has available still another remedy in certain instances. The federal government has promulgated the policy

121. *Cf.* *Magnotta v. Gerlach*, 275 App. Div. 854, 89 N.Y.S.2d 277 (1949) (property to be sold to the highest bidder).

122. *Dictaphone Corp. v. O'Leary*, 287 N.Y. 491, 41 N.E.2d 68 (1942).

123. *People ex rel. Lunney v. Campbell*, 72 N.Y. 497 (1878) (damages); *State ex rel. Al Monzo Constr. Co. v. Board of Control*, 172 Ohio St. 370, 176 N.E.2d 427 (1961) (mandamus will not lie where injunction or appeal is available); *State ex rel. Coteleur v. Board of Educ.*, 171 Ohio St. 335, 170 N.E.2d 845 (1960) (same); *State ex rel. DeRackin v. Allen*, 8 Wash. 168, 35 Pac. 609 (1894) (appeal). *But see Times Publishing Co. v. City of Everett*, 9 Wash. 518, 37 Pac. 695 (1894).

124. *State ex rel. Fischer Constr. Co. v. Linzell*, 101 Ohio App. 219, 137 N.E.2d 427 (1955).

125. *State ex rel. Roger J. Au & Son, Inc. v. Studebaker*, 175 Ohio St. 222, 193 N.E.2d 84 (1963) (*per curiam*). See *Housing Authority v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959); *Murdock Contracting Co. v. Borough of Verona*, 47 N.J. Super. 102, 135 A.2d 352 (Super. Ct. 1957); *Sellitto v. Cedar Grove Township*, 133 N.J.L. 41, 42 A.2d 383 (Sup. Ct. 1945). *Contra*, *Malan Constr. Co. v. Board of County Rd. Comm'rs*, 187 F. Supp. 937 (E.D. Mich. 1960).

126. 37 DECS. COMP. GEN. 51 (1957), *aff'd on reconsideration*, 37 DECS. COMP. GEN. 550 (1958).

127. See 32 DECS. COMP. GEN. 251 (1952); 16 DECS. COMP. GEN. 497 (1936).

of placing a fair proportion of its contracts with small business concerns.¹²⁸ Under the Small Business Act, a prospective government contractor can apply for a "certificate of competency."¹²⁹ Such a certificate means that the firm is able to meet the contract requirements. After the Small Business Administration concludes its investigation, it will issue the certificate if it finds that the applicant possesses the requisite capacity to successfully perform the contract. Such a determination is binding on the contracting officer.¹³⁰ The certificate, however, is valid only for the specific contract involved.¹³¹ Similar provisions under the Small Defense Plants Act,¹³² although seemingly all inclusive, have been held conclusive only insofar as the finding of a plant's capacity and credit. "It does not presume to certify that the plant *will* perform only that it *can*."¹³³ Furthermore, the language of the statute only "authorizes" an award; prior poor performance will justify a rejection of the bid despite the certificate. The Small Business Act, although incorporating the same language, does appear to carry a mandate that the contract shall be awarded to one who has the certificate of competency.¹³⁴ Moreover, such a certificate has been interpreted as conclusive of ability to perform, experience, skill, "know how," and technical knowledge.¹³⁵ It is not valid, however, as to moral character, which probably would be the sole basis of rejection left to the contracting officer.¹³⁶

At the state level, under the Ohio Administrative Procedure Act, for example, an unsuccessful low bidder can appeal a rejection of its bid to the Court of Common Pleas.¹³⁷ The court, however, is somewhat restricted as to what action it can take. It can only reverse, affirm, modify, or vacate if the order is found to be arbitrary, unreasonable, or capricious.¹³⁸ The more desirable specific remedies mentioned

128. See 75 Stat. 439, 23 U.S.C. § 304 (1958) (interstate highway system); 75 Stat. 439, 22 U.S.C. § 2352 (Supp. III, 1961) (foreign aid). See also 13 DECS. COMP. GEN. 315 (1934).

129. 72 Stat. 389, 15 U.S.C. § 637(b) (7) (1958). See 72 Stat. 389, 15 U.S.C. §§ 637 (a) (1)-(2), (d) (1) (1958).

130. *Ibid.*

131. *Ibid.*

132. 64 Stat. 821 (1950) 50 U.S.C. § 2163a(f) (1) (Supp. 1952).

133. *United States v. Thompson*, 168 F. Supp. 281, 289 (N.D. W. Va. 1958), *aff'd per curiam*, 268 F.2d 426 (4th Cir. 1959). See 37 DECS. COMP. GEN. 676 (1957).

134. 72 Stat. 395, 15 U.S.C. § 644 (1958).

135. 38 DECS. COMP. GEN. 864 (1959). A certificate can be rescinded if it is found that the applicant is not a small business. 34 DECS. COMP. GEN. 115 (1954); *cf.* 35 DECS. COMP. GEN. 233 (1955).

136. *Ibid.*

137. OHIO REV. CODE § 2505.01; *State ex rel. Al Monzo Constr. Co. v. Board of Control*, 172 Ohio St. 370, 176 N.E.2d 427 (1961); *cf.* *Columbus Blank Book Co. v. Maloon*, 116 Ohio App. 363, 188 N.E.2d 431 (1963).

138. See OHIO REV. CODE § 2506.04.

above are unavailable. Where there is a dispute as to the lowest bidder, the rejection of all bids and readvertising appears to be a substitute but an undesirable alternative. For the bidding on the second letting will tend to gravitate around the apparent low bid on the first letting. Accordingly, many of the advantages of competitive bidding will be lost. The apparent low bidder should not be rejected until after there has been a full and complete investigation of his qualifications and a determination that he lacks the equipment or facilities for the particular contract. The facts must justify a reasonable belief that he cannot perform.

CONCLUSION

An unsuccessful low bidder's lack of standing to sue diminishes the efficacy of the competitive bidding statutes. Unreviewable administrative discretion necessarily results in wasteful government spending. Being denied standing, the contractor has been forced to sue in tort. This remedy, however, becomes futile whenever the contractor's rights cease to coincide with those of the public. The result of such a policy is to require the government to accept the lowest responsible bid or respond in damages. While this does not tend to seriously handicap the discretionary area of contracting officials, the probability of an increased number of civil suits is apparent. This certainly would involve damaging results on the local level as in the contracts of small villages. Furthermore, such a recourse fails to rectify the injury done to the public by the wrongful action. A more workable and constructive solution would be to give the unsuccessful low bidder standing to contest the award and make available to him such specific relief as may be proper. Review should be allowed to determine whether the contracting officer has acted within the perimeter of his discretionary powers. Reviewable cases should be limited to situations where the apparent low bidder has not been awarded the contract. Although various remedies are now available, there is an open question as to what relief, if any, will be given in a particular case. As a practical matter, judicial reluctance to interfere seemingly is the greatest obstacle confronting the disappointed low bidder.

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