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Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?

The Federal Courts Improvement Act of 1982 (the Act)[1] granted the United States Claims Court jurisdiction to issue injunctions and declaratory judgments in bid protest actions.[2] When government treats a contract bidder unfairly or violates procurement regulations, the unsuccessful bidder can invoke the Claims Court's new jurisdiction to enjoin the contract award to a competitor.[3] Unfortunately, judicial interpretation of the Act has severely limited the court's jurisdiction and therefore its ability to enjoin contract awards.

Narrow interpretation of the Claims Court's jurisdiction in bid protest cases, although supported minimally in the Act's legislative history, is contrary to the basic purpose of the Act and ignores the gravity of government violations of its own regulations. Part I of this comment reviews the evolution of the Claims Court. Part II examines the restrictive standing requirements that generally precluded injunctive relief prior to 1970. Part III emphasizes how restrictive judicial interpretation and, to some extent, legislative history have effectively deterred unsuccessful bidders' suits under the Act. Finally, part IV proposes legislation designed to prevent summary disposition of bidders' claims by requiring the court to reach the merits in cases alleging government violations of procurement regulations.

I. The Evolution of the Claims Court

The Court of Claims was established in 1855 as a "Court for the Investigation of Claims against the United States."[4] The

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1. Pub. L. No. 97-164, § 127, 96 Stat. 25, 37 (1982) (codified at 28 U.S.C. § 1491 (1982)).

2. Disputes prior to contract award are popularly known as "bid protests." As used in this comment, "bid protests" may include disputes occurring after a contract is awarded.

3. H.R. Rep. No. 312, 97th Cong., 1st Sess. 25 (1981) (The Act "will permit the Claims Court to enjoin the award of contacts [sic] if, for example, illegal government conduct is involved.").

4. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; *see also* Wiecek, *The Origin of the United States Court of Claims*, 20 Ad. L. Rev. 387 (1968) (comprehensive history of the Claims Court).

court initially consisted of three judges who reviewed claims and submitted recommendations to Congress. By 1866 the court had power to enter binding judgments appealable to the Supreme Court. This power allowed citizens to bring suit against the government for money damages on contract claims.[5] As a result, the Court of Claims gradually became the single most important source of government contract law, deserving its informal title—"Keeper of the Nation's Conscience."[6] In 1925, the court was divided into trial and appellate divisions. The trial judges (formerly commissioners) issued recommended findings of fact and conclusions of law for review and final decision by the appellate division. This bifurcated system "was frequently criticized as an impediment to speedy and complete relief."[7]

The Federal Courts Improvement Act of 1982 replaced the Court of Claims and its dual system with two independent courts, the United States Claims Court and the Court of Appeals for the Federal Circuit. The Claims Court is a trial court on the same tier as federal district courts.[8] It has power to issue final judgments reviewable by the Court of Appeals for the Federal Circuit. Unlike other federal district courts and courts of appeals, the Claims Court and Court of Appeals for the Federal Circuit are national courts authorized to sit anywhere in the United States in order to minimize inconvenience and expense to litigants. Their jurisdiction is defined by subject matter, not geography.[9]

The Claims Court's subject matter jurisdiction is quite narrow. The court develops and applies its expertise in limited, well-defined categories of cases. At the time of its creation in 1982, twenty-five percent of the 2,031 cases pending before the court were government contract disputes.[10] Many parties assert-

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5. Act of Mar. 17, 1866, ch. 19, 14 Stat. 9; Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864).

6. 1A J. McBride, T. Touhey & B. McBride, Government Contracts § 6.10[19] (Supp. 1985).

7. Heise & Rhody, *An Overview for the Maryland Practitioner of Two New Federal Courts*, 68 Md. B.J., Sept. 1982, at 6, 10.

8. Schwartz, *Two New Federal Courts*, 68 A.B.A. J., Sept. 1982, at 1091, 1093.

9. The House Judiciary Committee stressed that convenience to litigants "is an important obligation and the Committee expects the Claims Court will take it seriously." H.R. Rep. No. 312, 97th Cong., 1st Sess. 25 (1981).

10. One-third of the cases were related to tax issues; one-fifth dealt with military and civilian employee salary claims against the government; one-eighth centered on alleged fifth amendment "takings" of private property by the federal government, patent infringements by the government, and Indian claims; and one-tenth were other matters.

ing contract claims seek injunctive relief under the court's new equitable jurisdiction.[11] The significance and popularity of the Claims Court's new injunctive authority is best understood hy first examining the erratic history[12] of the concept of standing in bid protest suits.

II. A Brief History of Standing in Bid Protest Suits

From 1940 to 1970, bid protesters were generally denied standing in suits alleging wrongdoing in government contract awards. In *Perkins v. Lukens Steel Co.*,[13] the United States Supreme Court held that statutes and regulations governing contract awards were intended to protect the government, not contract bidders. Thus, violation of those statutes and regulations did not impair an unsuccessful bidder's rights.[14] In the wake of *Perkins*, courts routinely denied standing to unsuccessful bidders alleging that the government had violated a procurement regulation or other statute concerning government contract awards.[15]

The scope of *Perkins* was slightly restricted in *Heyer Products Co. v. United States*.[16] In *Heyer*, the Court of Claims held that an aggrieved bidder was entitled to recover damages if he could demonstrate that his bid had been evaluated in bad faith.[17] However, damages were limited to the cost of preparing

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Kingdon, *Year-Old Claims Court Provides Cost-Effective Forum*, Legal Times, Dec. 12, 1983, at 14, col. 1.

11. Congress's delegation of injunctive authority to the Claims Court "was based on the desire to take advantage of the court's expertise in government contract law." Miller, *The New United States Claims Court*, 32 Clev. St. L. Rev. 7, 10 (1983); *see also* Feidelman & Ursini, *Contract Formation Jurisdiction of the United States Claims Court*, 32 Clev. St. L. Rev. 41, 44 (1983) (Claims Court combines effective relief with contract expertise).

12. *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970) (Standing is "one of the most amorphous concepts in the entire domain of the public law.").

13. 310 U.S. 113 (1940).

14. *Id.* at 126.

15. *See, e.g.*, Fulton Iron Co. v. Larsen, 171 F.2d 994 (D.C. Cir. 1948); Eastern States Petroleum & Chem. Corp. v. Seaton, 165 F. Supp. 363 (D.D.C. 1958); Hawthorne, Inc. v. United States Dept. of Interior, 160 F. Supp. 417 (E.D. Pa. 1958); Note, *The Federal Courts Improvement Act of 1982: No Relief for the Disappointed Bidder*, 11 J. Legis. 403, 412 n.52 (1984).

16. 140 F. Supp. 409 (Ct. Cl. 1956).

17. *Id.* at 414.

the bid—a mild remedy compared to enjoining the contract award.[18]

Thirty years after *Perkins*, in *Scanwell Laboratories, Inc. v. Shaffer*,[19] the Court of Appeals for the District of Columbia granted standing to unsuccessful bidders seeking to enjoin the award of a Federal Aviation Administration (FAA) contract. The plaintiff sought to set aside the contract award, alleging first that the FAA's action was arbitrary and capricious, and second that the successful bidder violated FAA regulations by not sufficiently testing its equipment prior to bid opening. After an unsuccessful bid protest to the comptroller general, the plaintiff challenged the award in district court, which dismissed the case for lack of standing.[20]

On appeal, the District of Columbia Circuit reversed, reasoning that unsuccessful bidders "have the incentive to bring suit" to compel "agencies [to] follow the regulations which control government contracting."[21] Thus, "[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated," the court held, "through a suit brought by one who suffers injury as a result of illegal activity . . . ."[22] Unsuccessful bidders were deemed to have suffered the requisite injury and were thus allowed to sue as "private attorneys general" to encourage agencies to comply with the laws governing contract awards.[23]

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18. Bid preparation costs are a "small degree of relief" to a bid protester because the litigation costs usually exceed the relief. *See* R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 963 n.2 (National Law Center Series in Public Law, 2d ed. 1969). The infrequent use of *Heyer* as precedent for obtaining bid preparation costs suggests that aggrieved bidders will not litigate their claims unless injunctive relief is available.

19. 424 F.2d 859 (D.C. Cir. 1970).

20. *Id.* at 860.

21. *Id.* at 865. The court relied on Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1978), Flast v. Cohen, 392 U.S. 83 (1968), and Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) to support its conclusion that the Supreme Court had liberalized standing requirements and broadened review of administrative decisions. *See also* Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1982) ("A person suffering a 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.").

22. *Scanwell*, 424 F.2d at 864.

23. For a discussion of the "*Scanwell* doctrine," see, *e.g.*, Yesner, Control Data Corp. v. Baldridge: *Restricting the Standing of Government Contractors to Challenge Administrative Procurement Actions*, 13 PUB. CONT. L.J. 346, 347 (1983).

III. Injunctive Relief in the United States Claims Court

When Congress established the new Claims Court it granted the court equitable jurisdiction in bid protest cases. Specifically, section 133(a) of the Federal Courts Improvement Act of 1982 stated:

> To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.[24]

The Senate Report accompanying section 133(a) explicitly endorsed the *Scanwell* approach to standing:

> By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the *Scanwell* doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left in tact [sic].[25]

Even though this portion of the Act's legislative history indicates Congressional approval of the *Scanwell* doctrine, courts have relied on other portions of the legislative history to narrowly construe the Claims Court's equitable jurisdiction. First, in *Ingersoll-Rand Co. v. United States*,[26] the Claims Court interpreted the phrase "on any contract claim" to require a contractual relationship between the protesting bidder and the government before the bidder may invoke the court's equitable jurisdiction (an implied-in-fact contract requirement). Second, in *United States v. John C. Grimberg Co.*,[27] the Federal Circuit established restrictive timing and filing requirements for bid protest actions. *Grimberg* defined section 133(a) claims as including only complaints filed in the Claims Court before a dis-

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24. 28 U.S.C. § 1491(a)(3) (Supp. 1985).

25. S. Rep. No. 275, 97th Cong., 2d. Sess. 23, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 33; *see also* Anthony & Smith, *The Federal Courts Improvement Act of 1982: Its Impact on the Resolution of Federal Contract Disputes*, 13 Pub. Cont. L.J. 201, 206 (1983) ("the legislative history *appears* to assume that the new Claims Court will grant relief in pre-award cases in the same circumstances in which the district courts have provided such relief in the past).

26. 2 Cl. Ct. 373 (1983).

27. 702 F.2d 1362 (Fed. Cir. 1983) (en banc).

puted contract is awarded. Under this construction of the Act, claims not filed separately with the Claims Court before the contract award are not subject to the Claims Court's jurisdiction. *Ingersoll-Rand*'s and *Grimberg*'s restrictions pose severe obstacles to bid protesters seeking to invoke the Claims Court's equitable jurisdiction.[28]

In addition to the problems created by *Ingersoll-Rand* and *Grimberg*, the statute itself arguably leaves open the question whether the Claims Court enjoys exclusive jurisdiction in pre-award cases or whether the district courts have concurrent jurisdiction.[29]

A. Ingersoll-Rand*'s Implied-in-Fact Contract Requirement*

The factual situation giving rise to *Ingersoll-Rand*'s requirement of an implied-in-fact contract was straightforward. Ingersoll-Rand alleged that navy personnel treated it unfairly by giving a competitor an advantage in the solicitation process.[30] On motion for summary judgment, Ingersoll-Rand's allegation of unfairness was dismissed because no implied-in-fact contract existed between the government and Ingersoll-Rand. The Claims Court held that a contractual relationship was required by the phrase in the Act, "on any *contract* claim."[31]

The court reasoned that the contractual requirement limited its equitable jurisdiction to situations where the plaintiff submitted a bid proposal conforming to the bid solicitation. According to the court, no implied contract of fair dealing between the government and a bidder existed until that submission.[32] Therefore, an aggrieved bidder could not "challenge the terms of the bid solicitation because the solicitation comes into existence before the implied contract and, in fact, forms the basis of that contract."[33]

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28. *See infra* notes 30-51 and accompanying text.

29. *See infra* notes 52-55 and accompanying text.

30. Ingersoll-Rand alleged that naval personnel were biased toward Atlas Copco, a producer of rotary air compressors, because the Request For Quotations was drafted to give rotary compressors an advantage over the centrifugal type of compressors that Ingersoll-Rand produced. *Ingersoll-Rand*, 2 Cl. Ct. at 374.

31. 2 Ct. Cl. 373, 376.

32. *Id.* at 375.

33. *Id.* at 376; *see also* Eagle Constr. Corp. v. United States, 4 Cl. Ct. 470 (1984) (equitable relief cannot be provided in suits challenging the terms, conditions, or requirements of a solicitation); Downtown Copy Center v. United States, 3 Cl. Ct. 80 (1983) (Claims Court lacks jurisdiction over plaintiff's claims asserting unfairness in the

Ingersoll-Rand's implied contract limitation on the Claims Court's jurisdiction is contrary to the "public interest"[34] expressed in *Scanwell* and approved by Congress when it enacted section 133(a).[35] There is nothing in *Scanwell* suggesting the requirement of an implied-in-fact contract. The central issue in *Scanwell* was whether an unsuccessful bidder for a government contract had standing to sue by alleging illegality in the contract award. The legislative history of the Federal Courts Improvement Act, as noted above, supports the analysis of *Scanwell*.[36] The Federal Circuit has also directed the Claims Court to use *Scanwell*'s analysis to define the jurisdictional limits of the Claims Court's new injunctive powers:

> The essence of "the Scanwell doctrine," which Congress intended 28 U.S.C. § 1491(a)(3) to make applicable to the Claims Court, is that an unsuccessful bidder has standing to challenge a proposed contract award on the ground that in awarding the contract the government violated statutory and procedural requirements.[37]

The jurisdictional analysis of bid protest suits should, therefore, focus on standing as defined in *Scanwell*, rather than on the existence of an implied-in-fact contract in the bidding process.

Ingersoll-Rand's "implied contract" requirement is contrary to the admonition of Congress and the Federal Circuit to follow *Scanwell* in bid protest cases. The *Scanwell* doctrine provides a "healthy check on governmental action"[38] by giving unsuccessful bidders standing to attack government noncompliance with regulations governing bid solicitation. *Scanwell* "favors review for those who are likely to be injured by illegal agency action in the context of government contracting."[39] Limiting jurisdiction to those submitting a bid in compliance with bid solicitation is un-

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solicitation itself because the government owes no *contractual* duty to bidders to comply with procurement regulations).

34. *See Scanwell*, 424 F.2d at 864.

35. *See id.*; CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1572 (Fed. Cir. 1983) (supporting application of *Scanwell* analysis to the Claims Court's jurisdiction).

36. S. REP. No. 275, 97th Cong., 2d Sess. 23 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 33.

37. CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1574 (Fed. Cir. 1983) (emphasis added).

38. *Scanwell*, 424 F.2d at 867.

39. *Id.* The House Judiciary report also states that the purpose of amending 28 U.S.C. § 1491(a)(3) is to make the government "respect the rule of law" in contract awards. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7, 10 (1983) (quoting H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981)).

reasonable because the government, in issuing the bid solicitation, impliedly promises or warrants to all qualified bidders that it is complying with all applicable statutes and regulations.[40] This promise becomes an integral part of the agreement and is relied on by bidders. Since the government has a duty to comply with applicable statutes and regulations, a responsive bidder should be able to seek relief for any breach of that duty. Equity demands that government abide by its own statutes and regulations.

B. Grimberg*'s Timing and Filing Requirements*

Another limitation on effective invocation of the Claims Court's equitable jurisdiction is the filing and timing requirements announced by the Federal Circuit in *United States v. John C. Grimberg Co.*.[41] In *Grimberg* two aggrieved bidders filed suit in the Claims Court seeking to enjoin a contract award. However, the bidders learned at the hearing for a temporary restraining order that the disputed contract had already been awarded. Since the award had been made, the Claims Court held that it lacked jurisdiction to grant equitable relief and therefore transferred the case to federal district court. The Federal Circuit affirmed the Claims Court's ruling.[42]

The Federal Circuit held that the Claims Court lacked jurisdiction in *Grimberg* because the unsuccessful bidders had not filed suit in the Claims Court until after the contract had been awarded. The court interpreted section 133(a) as granting the Claims Court equitable jurisdiction only over actions commenced in the Claims Court before the contract award. Under this construction of the Act, claims filed after a contract is awarded, and claims filed with the contracting officer or appealed to the Board of Contract Appeals do not fall within the jurisdiction of the Claims Court unless filed separately in that court.[43]

Grimberg's limitation on the Claims Court's equitable jurisdiction is illogical and inadequate for two reasons. First, an unsuccessful bidder is usually unaware of possible irregularities un-

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40. *See* Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984); CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Heyer Products Co. v. United States, 177 F. Supp. 251, 252 (Ct. Cl. 1959).

41. 702 F.2d 1362 (Fed. Cir. 1983) (en banc).

42. Affirmance was based on a seven to four vote.

43. 702 F.2d at 1374.

til after the contract is awarded. Ironically, if a bidder files a precautionary action, "he may end up having sued to enjoin an award to himself."[44] As Judge Nichols noted in his concurring opinion, the majority's interpretation of the statute achieves "an insignificant and absurd result."[45]

This bizarre result will have the greatest impact on negotiated procurements typical of large acquisition contracts with the Department of Defense. As Judge Kashiwa explained in his dissent:

> Since the government's negotiations with all bidders are secret, no bidder can possibly have knowledge or notice of irregularities to warrant filing a bid protest prior to award. If one is to follow the Government's reasoning, a negotiated-type bidder has no forum which can grant him injunctive relief.[46]

The *Grimberg* decision may preclude Claims Court jurisdiction over large military and civilian procurement. The court is thus prevented from reviewing awards in those contracts involving the most money, and those in which contractors would normally seek judicial intervention.

Second, although *Grimberg* limits the Claims Court's jurisdiction to pre-award claims, the district courts have jurisdiction in pre-award and post-award actions. In this situation, a plaintiff would be ill-advised to file in the Claims Court. *Grimberg*'s rationale for limiting jurisdiction to pre-award claims was Congress's concern[47] with judicial interference in contract administration.[48] If the court accurately discerned Congress's intent, however, it is illogical not to similarly limit district court jurisdiction in post-award actions. The purpose of granting the Claims Court equitable jurisdiction in bid protest suits was to take advantage of the court's expertise in the area of government contracts.[49] That purpose is frustrated if district courts have broader jurisdiction than the Claims Court over bid protest suits. As Judge Nichols accurately noted:

> There was surely nothing to show that intermeddling by the Claims Court would be more harmful than intermeddling by a

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44. *Id.* at 1379 (Nichols, J., concurring).
45. *Id.* at 1378.
46. *Id.* at 1379 n.1 (Kashiwa, J., dissenting).
47. *See* H.R. REP. No. 312, 97th Cong., 1st Sess. 30 n.33 (1981).
48. *Grimberg*, 702 F.2d at 1370.
49. *See supra* note 11.

> district judge, or that intermeddling by the former would be more harmful *after* award than intermeddling *before* award, or that intermeddling by a district judge, on the contrary, would be less harmful after award than before.[50]

C. *Exclusive Jurisdiction*

Adding to the confusion over pre-award and post-award jurisdiction is the language of section 133(a), which states that the Claims Court shall have "exclusive jurisdiction" over any claim brought before an award is made.[51] At least one district court has relied on the "plain language" of the statute to find that the Claims Court has exclusive jurisdiction over pre-award claims.[52] This reading of the Act would radically change the current system, which allows parties to seek relief in district courts. Instead, lawyers and litigants seeking pre-award equitable relief would be required to file claims in the Claims Court.

Fortunately, the Federal Circuit Court of Appeals has construed the Act as granting district courts concurrent jurisdiction over pre-award claims.[53] The court's decision is based squarely on the legislative history of the Act, which states that "[i]t is not the intent of the Committee to change existing case law as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action."[54]

IV. An Alternative Approach

One alternative to the troublesome implied-in-fact contract requirement of *Ingersoll-Rand* and the pre-award, post-award quandary of *Grimberg* is to amend 28 U.S.C. § 1491(a)(3). Congress anticipated changes in the equitable jurisdiction vested in the Claims Court:

> [F]or the time being, the Committee is satisfied by clothing the Claims Court with enlarged equitable powers not to the exclusion of the district courts. The dual question of whether these powers should even be broader and of whether they should be

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50. *Grimberg*, 702 F.2d at 1378, 1379 (Nichols, J., concurring) (emphasis added).
51. 28 U.S.C. § 1491(a)(3) (Supp. 1985).
52. *See* Opal Mfg. Co. v. UMC Indus., Inc., 553 F. Supp. 131 (D.D.C. 1982).
53. *Grimberg*, 702 F.2d 1362 (Fed. Cir. 1983) (en banc).
54. *See* H.R. Rep. No. 312, 97th Cong., 1st Sess. 43 (1981).

exclusive of the district courts will have to wait for a later date.[55]

In light of the unreasonably restrictive jurisdictional limitations on the Claims Court's equitable powers imposed by *Grimberg* and *Ingersoll-Rand*, Congress should ameliorate the status of bid protesters. Congress can do this by amending 28 U.S.C. § 1491(a)(3) as follows:

> To afford complete relief on *any claim, including a claim based upon violation of a statute or regulation during the procurement process, brought by an interested party relating to an existing or proposed contract,* the court shall have *concurrent jurisdiction with the United States district courts* to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the *court shall balance the gravity of government impropriety against judicial interference during the procurement process.* Moreover, the court shall give due regard to the interests of national defense and national security.[56]

This amendment would broaden the language of the statute from "contract" claimants to "an interested party relating to an existing or proposed contract" and eliminate *Ingersoll-Rand*'s vexatious prerequisite of an express or implied contract. Such a change would require the court to balance the merits of alleged government impropriety against court interference with government procurement, instead of focusing on the jurisdictional issue of whether an implied-in-fact contract exists between the government and the unsuccessful bidder. This change would conform to the underlying principle of the *Scanwell* doctrine allowing unsuccessful bidders to act as "private attorneys general" in challenging agency activity detrimental to the public interest.[57]

The amendment would also eliminate the jurisdictional conflict between the Claims Court and the district courts by giving

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55. H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981).

56. The italics reflect the author's changes in the section. *See* Dees, *Government Contract Disputes and Remedies: Corrective Legislation is Required*, 14 PUB. CONT. L.J. 201, 211-12 (1984) (proposed Amendment to Provide Concurrent Jurisdiction in the Claims Court and U.S. District Courts Over *Scanwell* actions); *see also* Younger, *Judicial Review of Public Contract Awards in New York: Recording the Effects of Dictaphone*, 13 PUB. CONT. L.J. 169, 191-96 (1982) (proposal for legislative change in New York's procurement policy).

57. *See Scanwell*, 424 F.2d at 864.

the courts concurrent jurisdiction over bid protests. The meaningless distinction of whether the claim was filed prior to or after the contract award would be avoided. Instead, the courts could concentrate on whether the government had dealt properly with the contractor. Public interest would best be served if the court balanced the illegal governmental action against judicial interference during the procurement process.

V. Conclusion

Congress's attempt to establish an alternative but effective bid protest forum has been thwarted by restrictive jurisdictional decisions regarding the scope of the Claims Court's injunctive authority. Legislative action could resolve the problems created by the present restrictive interpretations of the statute and help the new court maintain the reputation of its predecessor as "Keeper of the Nation's Conscience." The amendment proposed herein would further the purposes of the Federal Courts Improvement Act—to "enhance citizen access to justice" as part of a "comprehensive program designed to improve the quality of our Federal Court system."[58]

Steven R. Sumsion

58. S. Rep. No. 275, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 11.