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David S. Sullivan  
*University of Kentucky*

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# Disappointed Bidder Standing to Challenge a Government Contract Award: A Proposal for Change in Kentucky Procurement Law

BY DAVID S. SULLIVAN\*

## INTRODUCTION

Given the modern prevalence of government contracting and projects, bid protest actions are increasingly being brought at the state and local level.<sup>1</sup> Some possible reasons for such developments include increased competition among potential contractors, heightened bidder awareness of their enforceable legal rights, or a mixture of these and other factors.<sup>2</sup> As contractual bidding with the government represents a highly involved process with serious implications,<sup>3</sup> it is important that contractors be aware of the right to, and requirements of, a bid protest action. This Note deals with one of these requirements, namely the standing of a disappointed bidder to challenge a government contract awarded to another party. Current Kentucky case law denies standing to an unsuccessful bidder in many circumstances,<sup>4</sup> and is in need of reformation.

Typically, both state and local entities have mandatory statutory competitive bidding procedures for awarding public contracts. Kentucky is no different, in that "every expenditure of public funds by [the]

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\* J.D. expected 2000, University of Kentucky.

<sup>1</sup> See David E. Rosengren & Thomas G. Librizzi, *Bid Protests: Substance and Procedure on Publicly Funded Construction Projects*, CONSTRUCTION LAW., Jan. 1987, at 1.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946 (Ky. 1985) (rejecting disappointed bidder standing in the absence of fraud, collusion, or dishonesty).

Commonwealth under any contract or business agreement”<sup>5</sup> must comply with the various provisions of the Kentucky Model Procurement Code (“KMPC”).<sup>6</sup> This Note is not concerned with specific KMPC requirements, but rather with the remedies and judicial recourse available to a disappointed bidder acting within the ambit of the Code.

KMPC section 45A.285 permits contractor protests, on which the decision of the secretary of the Finance and Administration Cabinet is final.<sup>7</sup> This provision has been interpreted to mean “‘final and conclusive’ for administrative purposes, not as a barrier against judicial review”<sup>8</sup> Such “judicial review” would be implicated in those situations in which a contractor/bidder is denied a government contract by the awarding agency, files a timely protest under KMPC section 45A.285, receives an unfavorable decision, and seeks redress in a judicial forum after having exhausted all available administrative remedies. In terms of scope, this Note and its consideration of standing and other relevant issues applies primarily to those disappointed bidders who are not taxpayers within the state of Kentucky.<sup>9</sup>

In light of the contractual, proprietary, public, and other interests relating to the government/competitive bidding process, this Note calls for a change in Kentucky law to allow unsuccessful bidders standing to challenge a public contract award for a variety of grievances. While Kentucky courts allow bid protest suits where fraudulent, collusive, or dishonest circumstances are involved,<sup>10</sup> such limited grants of standing are not enough to adequately protect either private contractor or public interests. Part I gives a background discussion of both the competitive bidding process and standing doctrine.<sup>11</sup> Part II discusses the current state of Kentucky procurement law as it applies to government contracts and notes the law of other states whose courts have denied the existence of standing within the disappointed bidder context.<sup>12</sup> Various policy arguments for unsuccessful bidder standing are given in Part III.<sup>13</sup> Parts IV and

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<sup>5</sup> KY. REV. STAT. ANN. [hereinafter K.R.S.] § 45A.020(1) (Michie 1997 & Supp. 1998).

<sup>6</sup> See K.R.S. § 45A (Michie 1997 & Supp. 1998).

<sup>7</sup> See *id.* § 45A.285.

<sup>8</sup> *Pendleton Bros. Vending, Inc. v. Kentucky Fin. & Admin. Cabinet*, 758 S.W.2d 24, 28 (Ky. 1988).

<sup>9</sup> See *infra* note 45.

<sup>10</sup> See *Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985).

<sup>11</sup> See *infra* notes 16-35 and accompanying text.

<sup>12</sup> See *infra* notes 36-46 and accompanying text.

<sup>13</sup> See *infra* notes 47-73 and accompanying text.

V, respectively, detail the legal (based upon contractual and proprietary theories) and residual arguments for generalized standing, as well as possible theories under which such a cause of action may properly be brought.<sup>14</sup> Part VI concludes that the aforementioned arguments collectively require a change in Kentucky law, after which disappointed bidders would be uniformly granted the requisite standing to seek judicial review of government bidding procedures and/or contract awards.<sup>15</sup>

## I. BACKGROUND DISCUSSION OF BIDDING AND STANDING

### A. *The Competitive Bidding Process*

Generally stated, competitive bidding procedure is governed by statutory law requiring that public or government contracts be awarded to the lowest (or highest, for purchasing and other acquisition contracts) responsible bidder submitting a responsive bid proposal.<sup>16</sup> In order to grasp this assertion fully, the meaning of its constituent terms must be explored. A "responsive" bid is one that purports to do exactly what is specified in the bidding request; it is improper to give a government job to one whose bid *materially* varies from the requirements of the bid invitation.<sup>17</sup> Insignificant discrepancies usually do not bring about bid rejection.<sup>18</sup> Furthermore, a "responsible" bidder is "one who can or will be able to perform as promised"<sup>19</sup> within his bid figure. A responsibility determination involves consideration of the bidder's financial condition, reputation, efficiency, experience, resources, facilities, and judgment.<sup>20</sup> The competitive bidding process is intended to provide the general public with low-priced, high-quality projects,<sup>21</sup> and the statutory requirements of responsiveness and responsibility help state and local governments achieve that goal.<sup>22</sup>

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<sup>14</sup> See *infra* notes 74-142 and accompanying text.

<sup>15</sup> See *infra* Part VI and accompanying text.

<sup>16</sup> See Kenneth M. Cushman et al., *Contractor's Rights and Duties: Bid Disputes and Associated Problems, Differing Site Conditions and Site Inspection Clauses, Change Orders, and Contract Technical Defenses*, 391 PRACTICING LAW INST./REAL EST. LAW & PRAC. COURSE HANDBOOK SERIES 61, 63 (1993).

<sup>17</sup> See *id.* at 64-65.

<sup>18</sup> See *id.* at 65.

<sup>19</sup> *Id.* at 67.

<sup>20</sup> See *id.*

<sup>21</sup> See Rosengren & Librizzi, *supra* note 1, at 10.

<sup>22</sup> See K.R.S. § 45A (Michie 1997 & Supp. 1998). The KMPC provides a good example of state competitive bidding statutes generally, and of responsiveness and

In terms of procedure, competitive bidding involves several different steps. Initially, the project owner or agency publishes a bid advertisement giving notice of whatever service is required, including working specifications and conditions, as well as bidder qualifications.<sup>23</sup> Additionally, the published advertisement sets forth a time table for bid submissions, identifies the location of necessary contractual documents, and provides bidder instructions (explaining how the required forms must be completed).<sup>24</sup> Following the submission of these documents to the appropriate public authority (per statutory mandate), and in accordance with the aforementioned advertisement, all bids are simultaneously considered and the low bidder identified.<sup>25</sup> Subsequently, the requesting agency decides upon the lowest (or highest, where appropriate) responsive bid and responsible bidder,<sup>26</sup> to whom the contract is ultimately awarded.<sup>27</sup> These steps of the competitive bidding process provide checkpoints at which the conduct of both the government entities and contractors may be evaluated.<sup>28</sup> Furthermore, such procedures effectively use competition among bidders to prevent governmental favoritism and secure the best work at the lowest possible price.<sup>29</sup> Given the importance of the policies served by the competitive bidding system, procedural or other irregularities at any stage should be sufficient to support the standing of a disappointed bidder to judicially challenge such impropriety.

### B. Standing

Summarily defined, “[s]tanding is a judge-made doctrine used to determine whether a party is entitled to judicial relief.”<sup>30</sup> Standing requires a court to decide “whether the party has a sufficiently personal stake in the

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responsibility requirements in particular.

<sup>23</sup> See DAVID A. MCCARTHY, JR., *LOCAL GOVERNMENT LAW IN A NUTSHELL* 261 (4th ed. 1995).

<sup>24</sup> See Rosengren & Librizzi, *supra* note 1, at 1.

<sup>25</sup> See *id.*

<sup>26</sup> See *supra* notes 16-22 and accompanying text.

<sup>27</sup> See Rosengren & Librizzi, *supra* note 1, at 1.

<sup>28</sup> See MCCARTHY, *supra* note 23, at 261.

<sup>29</sup> See 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29.29 (3d ed. 1999). McQuillin's multi-volume work provides an in-depth, comprehensive consideration of municipal and government corporate law.

<sup>30</sup> *Metropolitan Air Research Testing Auth. v. Metropolitan Gov't*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992) (citing *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)).

outcome of the controversy to warrant the exercise of the court's power on its behalf."<sup>31</sup> In determining whether the proper party is bringing a particular claim, courts generally act in accordance with the following requirements:

To have standing, a party must have a sufficient interest in the controversy to assure an adversary presentation. a party must have an interest in the alleged wrong other than that of a member of the general public; and a party must show that his legal rights or privileges have been invaded.<sup>32</sup>

The Supreme Court of Kentucky has expressly adopted this rule.<sup>33</sup> Within the present context, only the second and third aspects—interest in the alleged wrong and invasion of legal rights or privileges—are at issue. Clearly, a disappointed bidder represents a party sufficiently “adverse” to an awarding entity for standing purposes. Conversely, whether an unsuccessful bidder can prove a sufficient interest that has been wrongfully invaded presents a difficult question (and one susceptible to various answers). While Kentucky courts have uniformly responded in the negative,<sup>34</sup> this Note maintains that such an interest should be recognized for both policy and legal reasons.<sup>35</sup>

## II. KENTUCKY AND OTHER LAW REJECTING STANDING WITHIN THE DISAPPOINTED BIDDER CONTEXT

Assuming the administrative protest remedies of the Kentucky Model Procurement Code have been exhausted (or are otherwise inapplicable),<sup>36</sup>

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<sup>31</sup> *Id.* at 615 (citing *Browning-Ferris Indus. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn. Ct. App. 1982)).

<sup>32</sup> Jean F Rydstrom, Annotation, *Who is Entitled to Attack Urban Renewal Projects Undertaken Pursuant to Federal Housing Act of 1949, as Amended* (42 U.S.C. §§ 1441-1469), 8 A.L.R. FED. 415, 427 (1971).

<sup>33</sup> See *Carrico v. City of Owensboro*, 511 S.W.2d 677, 679 (Ky. 1974) (quoting and adopting the view taken by Rydstrom, *supra* note 32, at 427, within the context of a complainant seeking to challenge a local urban renewal project).

<sup>34</sup> See *Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985).

<sup>35</sup> See generally MCCARTHY, *supra* note 23, at 422-30 (discussing the rationale, purposes, and policies of standing within the local government context).

<sup>36</sup> See K.R.S. § 45A.285 (Michie 1997 & Supp. 1998); see also *id.* § 45A.343 (providing that a local public agency “may” adopt the KMPC, making the Act

the current position of Kentucky law is clearly stated in *Healthamerica Corp. v. Humana Health Plan, Inc.*<sup>37</sup> In denying a local health insurance corporation's action to prevent the granting of a state employee contract to another organization, the *Healthamerica* court held that "absent a showing of fraud, collusion, or dishonesty, a disappointed bidder has no standing to judicially challenge the award of a public contract to another bidder."<sup>38</sup> In support of this ruling, the court noted that for purposes of standing, an unsuccessful bidder lacks a sufficient legal interest in a contract entered into by the government with a competitor.<sup>39</sup>

In *Ohio River Conversions, Inc. v. City of Owensboro*,<sup>40</sup> a similar case involving competitive bidding for a city-owned boat dock, the Kentucky Court of Appeals elaborated upon the legal basis for denying disappointed bidder standing. The Court found that government solicitation of offers, alone, does not impose any contractual obligations.<sup>41</sup> Consequently, an unsuccessful bidder in Kentucky lacks standing to challenge an award pursuant thereto vis-à-vis either the government, the relevant agency, or a fellow competitor.<sup>42</sup>

Behind such legal decisions looms the policy supporting them. A non-Kentucky case, *Gannett Co. v. Delaware*,<sup>43</sup> best states the policy rationale of the majority rule denying standing to disappointed bidders within the government contract context. In striking down a challenge to the award of a public contract to another bidder, the Delaware court relied upon the overwhelmingly accepted notion that competitive bidding laws and practices are primarily intended to protect the taxpaying public and not individual bidders.<sup>44</sup> Consequently, taxpaying members of the public, and

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inapplicable in certain situations).

<sup>37</sup> *Healthamerica*, 697 S.W.2d at 946.

<sup>38</sup> *Id.* at 948. *But see* *Pendleton Bros. Vending, Inc. v. Kentucky Fin. & Admin. Cabinet*, 758 S.W.2d 24, 25-26 (Ky. 1988) (discussing the purposes and policies of the KMPC and recognizing a cause of action and specific exception to the *Healthamerica* rule under facts indicating that certain KMPC statutory procedures were disregarded for reasons of political patronage).

<sup>39</sup> *See Healthamerica*, 697 S.W.2d at 948.

<sup>40</sup> *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759 (Ky. Ct. App. 1984).

<sup>41</sup> *See id.* at 761.

<sup>42</sup> *See id.* (citing *R.G. Wilmott Coal Co. v. State Purchasing Comm'n*, 54 S.W.2d 634, 636 (Ky. 1932)).

<sup>43</sup> *Gannett Co. v. Delaware*, No. CIV.A. 12815, 1993 WL 19714, at \*1 (Del. Ch. Jan. 11, 1993).

<sup>44</sup> *See id.* at \*3.

only such persons, should have standing to challenge an improperly awarded government contract.<sup>45</sup> The majority of other jurisdictions are in accord with the Kentucky and Delaware views.<sup>46</sup> While *Healthamerica*, *Ohio River*, and *Gannett* collectively paint a grim picture from the viewpoint of a Kentucky contractor, other states and courts have recognized both policy and legal grounds for allowing a disappointed bidder standing to maintain a bid protest cause of action.

### III. POLICY ARGUMENTS IN FAVOR OF DISAPPOINTED BIDDER STANDING TO CHALLENGE A GOVERNMENT CONTRACT AWARD

When considered in their entirety, the most persuasive arguments for a change in Kentucky law that would grant disappointed bidders standing to sue on public contract awards are based upon public policy. Standing is a malleable doctrine created and used by courts to ensure that the proper party is bringing an asserted claim.<sup>47</sup> It may be argued that within the context of government contracts, the principles of standing should facilitate

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<sup>45</sup> See *id.* Taxpayer standing to challenge government/municipal contract awards is uniformly recognized. See also *Federal Elec. Corp. v. Fasi*, 527 P.2d 1284 (Haw. 1974); *American Totalisator Co. v. Seligman*, 414 A.2d 1037 (Pa. 1980); *Pioneer Co. v. Hutchinson*, 220 S.E.2d 894 (W. Va. 1975), *overruled on other grounds by State ex rel. E.D.S. Fed. Corp. v. Ginsberg*, 259 S.E.2d 618 (W. Va. 1979). Consequently, a Kentucky corporate (or other) bidder who is also a *taxpayer* will ordinarily have the requisite standing to bring a disappointed bidder cause of action.

<sup>46</sup> For other states and cases following the Kentucky (and majority) rule against disappointed bidder standing in the government contract context, see, for example, *Communications Sys., Inc. v. City of Danville*, 880 F.2d 887, 891 (6th Cir. 1989) (recognizing the Kentucky rule that contracts awarded by a municipality cannot be set aside without a showing of fraud, collusion, or dishonesty); *Sowell's Meats & Servs., Inc. v. McSwain*, 788 F.2d 226, 229 (4th Cir. 1986) (holding that an unsuccessful bidder lacks standing to question the awarding of state contracts under both the majority rule and South Carolina law); *Apcoa, Inc. v. City of New Haven*, No. CV9503702205, 1995 WL 155434, \*1 (Conn. Super. Ct. Mar. 30, 1995) (stating that absent fraud, corruption, or favoritism an unsuccessful bidder lacks standing to challenge the award of a public contract); *State ex rel. Mid-Missouri Limestone, Inc. v. County of Calloway*, 962 S.W.2d 438, 441 (Mo. Ct. App. 1998) (holding that a disappointed bidder has no legal interest and therefore no legal standing to assert a cause of action); *I.S.C. Distribs., Inc. v. Trevor*, 903 P.2d 170, 178 (Mont. 1995) (noting Montana case law holding that unsuccessful bidders lack standing to challenge the award of a government contract).

<sup>47</sup> See *supra* notes 30-35 and accompanying text.



rather than hinder suits that further the public interest. In accordance with this notion, the following cases and opinions, taken from various states, endorse an unsuccessful bidder as the proper party to institute a bid protest action. Generally stated, the decisions and holdings outlined below were handed down in jurisdictions operating under a statutory competitive bidding scheme. Consequently, their rationales directly relate to the issue currently being considered.

Examining the award of a local government vehicle inspection and maintenance contract, the Tennessee Court of Appeals in *Metropolitan Air Research Testing Authority v. Metropolitan Government*<sup>48</sup> noted that an increasing number of courts have permitted suits by disappointed bidders, and held accordingly. After recognizing the existence and significance of both bidder and public interests in fair bidding procedures, the court stated that “[u]nsuccessful bidders are *most* likely to have an incentive to bring suit to compel agencies to comply with the requirements controlling government contracts.”<sup>49</sup> Such an assertion is logical in that a taxpaying member of the general public may have a legal interest in the expenditure of government funds sufficient to support standing,<sup>50</sup> but such an individual ordinarily has neither the time, nor the inclination, nor the resources to challenge a government contract awarded to an improper bidder or in violation of competitive bidding requirements. A disappointed contractor bidding on a public job is more willing and able to bring a bid protest action and, consequently, should be legally recognized in Kentucky as possessing sufficient standing to do so.

Particularly relevant to the present issue is the court’s holding that an unsuccessful bidder on a government contract need not prove fraud or that it would have been awarded the contract but for the challenged conduct of the agency.<sup>51</sup> Assuming the presence of bids that are both responsive and actively considered, “unsuccessful bidders [should] have standing to vindicate the public’s interest in competitive bidding.”<sup>52</sup> This rationale and conclusion, emanating from the court of a neighboring state, persuasively supports an expansion of Kentucky law that would generally give standing to disappointed bidders questioning the propriety of a public contract award.

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<sup>48</sup> *Metropolitan Air Research Testing Auth. v. Metropolitan Gov’t*, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

<sup>49</sup> *Id.* at 617 (emphasis added).

<sup>50</sup> See *supra* note 45 and cases cited therein.

<sup>51</sup> See *Metropolitan*, 842 S.W.2d at 617

<sup>52</sup> *Id.*

In relation to the expenditure of government funds, it may be conceded that competitive bidding requirements indirectly (with the awarding agency as an intermediary) involve the interests of, and benefit, state and local taxpayers. However, the state of Illinois recognizes that the public procurement scheme *directly* affects contractors bidding thereunder. In *Cardinal Glass Co. v. Board of Education*,<sup>53</sup> the court considered a local statutory requirement that a government contract be awarded to the lowest (or highest, where appropriate) responsible bidder and recognized that a disappointed low (or high) bidder has standing to bring an appropriate bid protest action. Similar to, and in corroboration with Tennessee's views, the *Cardinal Glass* court supported its position by stating that:

As a practical matter, securing compliance with the statute, and thereby the benefits to taxpayers, will be more effectively handled by unsuccessful bidders, who for the most part have a greater stake in such matters, and greater resources, than an individual taxpayer. In the long run, permitting such suits by bidders will work to advance the public interest by securing the goal of tax savings.<sup>54</sup>

In light of this rationale, and in accordance with traditional standing principles,<sup>55</sup> the court held that "unsuccessful lowest responsible bidders are within the zone of protection"<sup>56</sup> of the competitive bidding statute at issue and have standing to challenge a violation of relevant regulatory notice requirements. With respect to whether Kentucky common law should be modified to grant standing to disappointed bidders within the context of government contract awards, even in the absence of fraud, collusion, or dishonesty,<sup>57</sup> *Cardinal Glass* provides an unqualified, affirmative response.

Overruling a long line of contrary case law, the court in *Walt Bennett Ford, Inc. v. Pulaski County Special School District*<sup>58</sup> allowed a disappointed bidder on a public school bus contract to sue for alleged wrongs occurring within the competitive bidding process. In accordance with the

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<sup>53</sup> *Cardinal Glass Co. v. Board of Educ.*, 447 N.E.2d 546 (Ill. App. Ct. 1983).

<sup>54</sup> *Id.* at 549.

<sup>55</sup> See *supra* notes 30-35 and accompanying text.

<sup>56</sup> *Cardinal Glass*, 447 N.E.2d at 549.

<sup>57</sup> See *supra* notes 37-38 and accompanying text.

<sup>58</sup> *Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist.*, 624 S.W.2d 426 (Ark. 1981).

previously discussed decisions,<sup>59</sup> the Arkansas Supreme Court dismissed the notion that competitive bidding requirements should be judicially enforced by taxpayers only, and asserted that “the most practical way to protect the public interest is to allow unsuccessful bidders to seek judicial review of any alleged wrong in the [public] contracting procedure.”<sup>60</sup> While *Walt Bennett Ford*'s holding and rationale supporting unsuccessful bidder standing to challenge government contract awards are important, the most significant aspect of the case for purposes of this Note involves the Arkansas court's broad characterization of the possible grounds for such a suit. Under Arkansas law, a disappointed contractor bidding for a government project may assert a cause of action based upon *any* impropriety in the contractual awarding process.<sup>61</sup> In other words, allowing unsuccessful bidders to bring an appropriate protest action for reasons other than fraud, collusion, or dishonesty<sup>62</sup> better serves both public taxpayer and contractor interests in cost-effective government contracts.<sup>63</sup> The majority view that competitive bidding statutes are intended to benefit the public generally and not private contractors ignores the fact that such contractors stand in the best position to defend and protect the public interest, as well as their own. In light of these arguments and observations, Kentucky law should be modified to embrace a more permissive approach to disappointed bidder standing.<sup>64</sup>

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<sup>59</sup> See *supra* notes 47-57 and accompanying text.

<sup>60</sup> *Walt Bennett Ford*, 624 S.W.2d at 428.

<sup>61</sup> See *id.* (granting standing to sue for “alleged wrongs” in furtherance of the public interest).

<sup>62</sup> See *supra* notes 37-38 and accompanying text (discussing the limitations of the Kentucky rule).

<sup>63</sup> See *supra* note 21 and accompanying text. Low cost to the public represents one of the primary goals of the competitive bidding system.

<sup>64</sup> For additional states and cases upholding the standing of an unsuccessful bidder to challenge a government contract on policy and public interest grounds, see, for example, *Metropolitan Express Servs., Inc. v. City of Kansas City*, 23 F.3d 1367, 1371 (8th Cir. 1994) (holding that a disappointed bidder has standing to challenge the award of a contract not fairly bid); *AT/COMM, Inc. v. Illinois State Toll Highway Auth.*, No. 96C6961, 1997 WL 222875, at \*3 (N.D. Ill. Apr. 24, 1997) (recognizing standing to sue the government for failure to comply with the legal requirements of the bidding process); *M.A. Stephen Constr. Co. v. Borough of Rumson*, 308 A.2d 380, 384 (N.J. Super. Ct. 1973) (stating that suits by disappointed bidders claiming entitlement to a government contract award serve the public interest); *In re HHM Assocs. v. Appleton*, 597 N.Y.S.2d 894, 896 (Sup.

The foregoing cases from Tennessee, Illinois, and Arkansas<sup>65</sup> show that other jurisdictions readily allow an unsuccessful bidder on a government contract to sue the awarding authority on grounds other than "fraud, collusion, or dishonesty,"<sup>66</sup> and do so for legitimate policy reasons. Clearly, a disappointed contractor represents the most ready, willing, and able party to bring such suits, and is therefore better able to protect the public interests in both low-priced government projects<sup>67</sup> and fair bidding generally.<sup>68</sup> Specifically, protest actions were allowed in the previously considered cases for alleged violations of statutory bidding requirements,<sup>69</sup> unfair bidding practices that favor one bidder over another,<sup>70</sup> a cognizable economic injury traceable to a government action,<sup>71</sup> and illegal official actions within the competitive bidding process.<sup>72</sup> Such decisions, including the grounds for suit recognized within them and the policy rationales underlying them, strongly support a relaxation of Kentucky common law in this area.<sup>73</sup>

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Ct. 1993) (finding that standing to challenge an improper bidding process serves to protect the public interest); *Albert Elia Bldg. Co. v. New York State Urban Dev Corp.*, 388 N.Y.S.2d 462, 466 (App. Div. 1976) (holding that allowing disappointed bidder standing to attack an illegal official action furthers the public interest); *Browning-Ferris Indus. v. City of Oak Ridge*, 644 S.W.2d 400, 402-03 (Tenn. Ct. App. 1982) (asserting that an economic injury traceable to the public authority supports standing, even in the absence of bad faith or fraud).

<sup>65</sup> See *supra* notes 48-64 and accompanying text.

<sup>66</sup> See *supra* notes 37-38 and accompanying text.

<sup>67</sup> See *In re HHM Assocs. v. Appleton*, 597 N.Y.S.2d 894, 896 (Sup. Ct. 1993) (holding that a process that treats bidders unfairly adversely affects the public by discouraging bidders from participating in the process, thereby decreasing competition and raising prices).

<sup>68</sup> See *Metropolitan Air Research Testing Auth. v. Metropolitan Gov't*, 842 S.W.2d 611, 617 (Tenn. Ct. App. 1992); see also quotation at *supra* note 54.

<sup>69</sup> See *Metropolitan*, 842 S.W.2d at 618.

<sup>70</sup> See *Metropolitan Express Servs., Inc. v. City of Kansas City*, 23 F.3d 1367, 1371 (8th Cir. 1994).

<sup>71</sup> See *Browning-Ferris Indus. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn. Ct. App. 1983).

<sup>72</sup> See *Albert Elia Bldg. Co. v. New York State Urban Dev Corp.*, 388 N.Y.S.2d 462, 465-66 (App. Div. 1976).

<sup>73</sup> See *Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist.*, 624 S.W.2d 426 (Ark. 1981); *Cardinal Glass Co. v. Board of Educ.*, 447 N.E.2d 546 (Ill. App. Ct. 1983); *Metropolitan*, 842 S.W.2d at 611. See also *supra* note 64 for additional cases involving unsuccessful bidder suits.

IV OTHER JURISDICTIONS' LEGAL ARGUMENTS IN FAVOR OF  
DISAPPOINTED BIDDER STANDING TO CHALLENGE  
A GOVERNMENT CONTRACT AWARD

A. *Existence of a Contractual Interest or Injury*

Kentucky law is clear that a government bid advertisement alone does not contractually bind the requesting public authority.<sup>74</sup> This position represents the majority view that "[a] notice of intention to receive bids does not constitute an offer but rather a mere solicitation of offers. Thus a notice does not, in and of itself, impose any contractual obligation."<sup>75</sup> Despite this lack of legally enforceable contractual rights, numerous jurisdictions have held that a disappointed bidder has a sufficient legal, equitable, or economic interest in an improperly awarded public contract to maintain a suit against the relevant granting agency.<sup>76</sup> These decisions generally arise under a statutory competitive bidding system,<sup>77</sup> and therefore are directly applicable to the issues presently under consideration.

After contemplating the possible economic consequences of wrongfully losing a government contract, the Sixth Circuit Court of Appeals in *Owen of Georgia, Inc. v. Shelby County*<sup>78</sup> held that the disappointed bidder at issue had a "special pecuniary interest"<sup>79</sup> in an awarded public contract. This interest gave the bidder standing to challenge the contractual grant in question as illegal under local statutory competitive bidding procedures.<sup>80</sup> As stated by the court, "a prospective low bidder clearly has economic interests at stake which give it standing."<sup>81</sup> A bidder's "economic interests" arguably include both loss of business and profits.<sup>82</sup> Stated in different but related terms, the *Metropolitan* court wrote "the loss of an opportunity to receive or to compete for a public contract is a distinct injury sufficient to provide a disappointed bidder with standing."<sup>83</sup> Considering that *Owen* was heard and decided by the Sixth Circuit, its arguments stand out as both persuasive and

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<sup>74</sup> See *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. Ct. App. 1984); *supra* notes 40-42 and accompanying text.

<sup>75</sup> 72 C.I.S. Supp. *Public Contracts* § 11 (1975).

<sup>76</sup> See *supra* Part III.

<sup>77</sup> See *Metropolitan*, 842 S.W.2d at 617; *Cardinal Glass*, 447 N.E.2d at 548.

<sup>78</sup> *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6th Cir. 1981).

<sup>79</sup> *Id.* at 1089.

<sup>80</sup> See *id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *id.*

<sup>83</sup> *Metropolitan Air Research Testing Auth. v. Metropolitan Gov't*, 842 S.W.2d 611, 617 (Tenn. Ct. App. 1992).

relevant for proposing changes to Kentucky law. *Owen's* holding provides both economic and contractual grounds for expanding Kentucky's standing rules to include a disappointed bidder seeking to attack a particular public contract award or procedure.

In considering a state competitive bidding law requiring that public contracts be let to the lowest (or highest) responsible bidder, the Supreme Court of Georgia in *Hilton Construction Co. v. Rockdale County Board of Education*<sup>84</sup> found that a lowest qualified bidder asserting a violation of relevant fair bidding regulations had a legally protected interest in the public contract at issue.<sup>85</sup> A similar conclusion should follow from the KMPC and its lowest responsible bidder provisions,<sup>86</sup> which are analogous to those of Georgia<sup>87</sup> and other states.<sup>88</sup> Despite the majority view that a responsive bid fails to form an enforceable contract per se,<sup>89</sup> an unsuccessful bidder's loss of present (and perhaps future) business, profits, and other economic benefits collectively provide enough to support that party's standing to bring a bid protest claim. Other jurisdictions have so held,<sup>90</sup> and current Kentucky law should be changed accordingly.

#### *B. Recognition of a Constitutional or Property Interest Sufficient to Support Standing*

As an alternative to the previous contractual interest argument, a disappointed bidder on a public contract could have a recognized property

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<sup>84</sup> *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 266 S.E.2d 157 (Ga. 1980).

<sup>85</sup> *See id.* at 161.

<sup>86</sup> *See* K.R.S. § 45A.110 (Michie 1997 & Supp. 1998) (requiring a written determination of bidder responsibility); *id.* § 45A.075(1) (listing one method in which the state contract may be awarded); *id.* § 45A.080(2) (stating that under the above method the contract shall go to the lowest bid or lowest evaluated bid).

<sup>87</sup> *See Hilton*, 266 S.E.2d at 161.

<sup>88</sup> *See* *Cardinal Glass Co. v. Board of Educ.*, 447 N.E.2d 546, 549 (Ill. App. Ct. 1983); *Albert Elia Bldg. Co. v. New York State Urban Dev. Corp.*, 388 N.Y.S.2d 462, 465-66 (App. Div. 1976).

<sup>89</sup> *See supra* notes 74-75 and accompanying text.

<sup>90</sup> *See, e.g., Quincy Ornamental Iron Works, Inc. v. Findlen*, 228 N.E.2d 453, 455 (Mass. 1967) (upholding disappointed bidder standing and stating that the possibility of receiving a public contract award is sufficient for standing to sue); *Barnes v. Binghamton Urban Renewal Agency*, 487 N.Y.S.2d 519, 522 (Sup. Ct. 1987) (holding that competitive bidding laws requiring an award to the lowest responsible bidder give standing to the lowest responsible bidder).

interest, which, if found, cannot be deprived in violation of statutory and, ultimately, due process protections. Under 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>91</sup>

As a general rule, maintaining a § 1983 action in federal court requires unlawful government conduct resulting in an invasion of a “private, substantive, legally protected interest.”<sup>92</sup> Within the present context, disappointed bidder standing under § 1983 depends upon the existence of a recognized property interest in the contract created by relevant state law supporting a “claim of entitlement to the award”<sup>93</sup> because the potential plaintiff is the lowest (or highest) responsible and responsive bidder.<sup>94</sup> Assuming such a property interest is present, due process notions give the unsuccessful bidder a right to the fair exercise of governmental discretion in making the public contract award; any deprivation of this constitutes an “actionable wrong.”<sup>95</sup> Given an actionable wrong, the person or entity wronged should be recognized as having standing to challenge the injurious conduct of the offending government official or agency in a judicial proceeding.

In those jurisdictions that have considered the unconstitutional deprivation of a property interest as that concept relates to disappointed bidders, the leading and most persuasive opinion is that of *Three Rivers Cablevision, Inc. v. City of Pittsburgh*.<sup>96</sup> In reviewing Pittsburgh’s award of a cable television contract under local law, the *Three Rivers* court noted that a significant property interest deserving judicial protection can arise from state statutory competitive bidding “schemes and customs which create legitimate claims of entitlement to the benefits which they confer.”<sup>97</sup> Elaborating upon this notion,

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<sup>91</sup> 42 U.S.C. § 1983 (1994).

<sup>92</sup> Kathleen M. Dorr, Annotation, *Standing of Disappointed Bidder on Public Contract to Seek Damages Under 42 USCS § 1983 for Public Authorities’ Alleged Violation of Bidding Procedures*, 86 A.L.R. FED. 904, 906 (1988).

<sup>93</sup> *Id.* at 907

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F Supp. 1118 (W.D. Pa. 1980).

<sup>97</sup> *Id.* at 1127

the court quoted the following conclusion from *Board of Regents v. Roth*:<sup>98</sup> “[t]o have a property interest in a benefit, a person clearly must have a legitimate claim of entitlement to it.”<sup>99</sup> In light of this and the above-stated principles,<sup>100</sup> the *Three Rivers* court recognized and upheld a disappointed claimant’s property interest in, and right to, an awarded public contract under certain circumstances.<sup>101</sup> Assuming there is a competitive bidding procedure, with which an unsuccessful bidder has complied and a successful bidder has not, under *Three Rivers* there exists an arbitrary and therefore wrongful governmental deprivation of a recognized proprietary interest (created by state bidding law). This results in an actionable injury under 42 U.S.C. § 1983 and its due process protections.<sup>102</sup>

Though ordinarily applied in federal court, the *Three Rivers* holding and § 1983 provide additional support for the recognition of unsuccessful bidder standing in state forums. In refusing to recognize such standing, Kentucky courts both prevent unsuccessful bidders from vindicating their constitutional rights and risk being overruled on due process grounds. Given a Kentucky law or procedure that entitles the disappointed bidder to the contract at issue, and an improper denial of that contract, the rejected contractor should be able to seek judicial relief on both § 1983 due process and fairness grounds.<sup>103</sup>

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<sup>98</sup> *Board of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>99</sup> *Three Rivers*, 502 F Supp. at 1127 (quoting *Board of Regents*, 408 U.S. at 577).

<sup>100</sup> See *supra* notes 78-81 and accompanying text; see also *Three Rivers*, 502 F Supp. at 1128-29.

<sup>101</sup> See *Three Rivers*, 502 F Supp. at 1131.

<sup>102</sup> See *id.*

<sup>103</sup> For other cases involving disappointed bidder standing to claim unlawful deprivation of a recognized property interest in violation of 42 U.S.C. § 1983 and due process of law, see, for example, *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238, 1242 (11th Cir. 1992) (recognizing a constitutionally protected property interest in a public contract award under Georgia competitive bidding law); *Sowell’s Meats & Servs., Inc. v. McSwain*, 788 F.2d 226, 228 (4th Cir. 1986) (implying that it is possible for state statutes to create a legal property interest in a disappointed bidder on state contractual awards, which would give the bidder standing to sue under § 1983); *Haughton Elevator Div. v. Louisiana*, 367 So. 2d 1161, 1165 (La. 1979) (finding a property right in the lowest responsible bidder such that notice and a due process hearing is required before bidder disqualification is permissible); *ISC Distribs., Inc. v. Trevor*, 903 P.2d 170, 173 (Mont. 1995) (noting that a due process claim requires “a definite property interest and that such interest was, under color of state law, abridged without appropriate process”) (quoting *Curtis Ambulance, Inc. v. Board of County Comm’r*, 811 F.2d 1371, 1375 (10th Cir. 1987)).



Disappointed bidder standing should follow from the recognition of such significant interests.

V ADDITIONAL ARGUMENTS AND THEORIES SUPPORTING  
A DISAPPOINTED BIDDER'S STANDING TO CHALLENGE A  
GOVERNMENT CONTRACT AWARD

A. *Federal Procurement Law*

Although federal procurement statutory and case law under the Administrative Procedure Act ("APA")<sup>104</sup> is technically inapplicable to the issue being considered, it adds meaningful and practical insight by analogy to the present discussion. More specifically, the fact that a majority of federal courts that have considered the question have held that "unsuccessful bidders for government contracts have standing to invoke judicial review of adverse procurement decisions"<sup>105</sup> makes a general consideration of federal procurement law highly relevant to this analysis.

In terms of procedure, standing within the federal procurement law context can be defined as "a right to judicial review of the action of an administrative agency"<sup>106</sup> As the most authoritative case in this area, *Perkins v. Lukens Steel Co.*<sup>107</sup> has proven to be a continuing obstacle for disappointed bidders seeking judicial review of federal contract awards. In rejecting a bidder's challenge to government wage determinations, the United States Supreme Court stated that federal statutes controlling government contract awards were enacted for the benefit of the government alone, not prospective contractors.<sup>108</sup> Under this rationale, such contractors lack the standing necessary to assert a claim.

Fortunately for unsuccessful bidders seeking meaningful judicial review of a particular government contract award, numerous legal scholars have recognized that the rule of *Perkins* has "eroded gradually over several

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<sup>104</sup> Administrative Procedure Act of 1966, 5 U.S.C. § 702 (1994). In support of this Note and its proposals, the APA provides that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

<sup>105</sup> *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1090 (6th Cir. 1981).

<sup>106</sup> Romualdo P. Eclavea, Annotation, *Standing of Unsuccessful Bidder for Federal Procurement Contract to Seek Judicial Review of Award*, 23 A.L.R. FED. 301, 304 (1975).

<sup>107</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

<sup>108</sup> *See id.* at 126-27

decades."<sup>109</sup> Following Congressional enactment of the APA, various decisions have granted disappointed bidders standing to bring an appropriate bid protest action.<sup>110</sup> The leading case is *Scanwell Laboratories, Inc. v. Shaffer*,<sup>111</sup> in which the Court of Appeals for the District of Columbia considered the claim of a second-lowest bidder on a government contract. The court held that any unsuccessful bidder showing arbitrary or capricious action on the part of a government agency or official has standing to sue under the APA.<sup>112</sup> Though the particulars of that Act are not relevant here, the reasoning of the *Scanwell* holding directly supports the proposal and arguments of this Note.<sup>113</sup> The court poignantly proposed the following rhetorical question: "If there is arbitrary or capricious action on the part of any contracting [government] official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity?"<sup>114</sup> Summarily stated, the trend in federal law generally supports disappointed bidder standing to challenge government contract awards.<sup>115</sup> The policy reasons discussed in both this and previous sections of this Note<sup>116</sup> hold true regardless of the jurisdiction in which they are considered. Thus, the current state of federal procurement law strengthens a proposal for change in Kentucky law generally to allow disappointed bidders standing to assert a bid protest cause of action.

*B. Suggested Liability Theories Under Which Disappointed Bidder Standing Should Be Recognized*

Despite the argument that Kentucky law and its standing requirements<sup>117</sup> are excessively restrictive, it seems obvious that neither public nor

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<sup>109</sup> David R. Hazelton, *The Federal Circuit's Emerging Role in Bid Protest Cases*, 36 AM. U. L. REV. 919, 923 (1987).

<sup>110</sup> See *supra* notes 96-101 and accompanying text.

<sup>111</sup> *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>112</sup> See *id.* at 869.

<sup>113</sup> See *id.* at 861-73.

<sup>114</sup> *Id.* at 866-67.

<sup>115</sup> For cases following *Scanwell's* holding that an unsuccessful bidder on a federal procurement contract has standing to seek judicial review of an award of contract to another bidder, see, for example, *William F. Wilke, Inc. v. Department of Army*, 485 F.2d 180, 182 (4th Cir. 1973); *Curtiss-Wright Corp. v. McLucas*, 364 F. Supp. 750, 756 (D.N.J. 1973); *Keco Indus. v. Laird*, 318 F. Supp. 1361, 1363 (D.D.C. 1970).

<sup>116</sup> See *supra* Part III.

<sup>117</sup> See *Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985) (rejecting disappointed bidder standing in the absence of fraud,

judicial policy favors unsuccessful bidder standing to challenge any and every governmental action. Such a practice would result in waste of the public funds that competitive bidding procedures are designed to protect,<sup>118</sup> as well as a significant burden upon already overcrowded trial dockets. As such, the following discussion sets forth those liability theories that would effectively limit generalized disappointed bidder standing to significant claims but would simultaneously allow appropriate bidders to vindicate their rights by challenging improper, but not necessarily fraudulent, collusive, or dishonest governmental behavior. Such a compromise approach would be preferable to current Kentucky standing doctrine and would accord with the KMPC's stated purpose "[t]o insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth."<sup>119</sup>

### 1. *Implied Contract Doctrine*

Though originating in and ordinarily applied within the federal sphere,<sup>120</sup> the implied contract theory provides persuasive grounds for granting a disappointed bidder standing to challenge a state or local public contract award. Under implied contract principles, each government job is awarded with the understanding that every relevant bidder "possesse[s] the right to have its bid fairly and honestly considered."<sup>121</sup> Upon breach of this obligation by the public authority in question, "the injured party has the right to come into court to try and prove his cause of action."<sup>122</sup>

Directly contradicting the view that a public bid solicitation creates no sufficient legal interests or contractual obligations,<sup>123</sup> the theory of implied contract sensibly recognizes that a contractor rejected unfairly or arbitrarily by the government has suffered an actionable wrong.<sup>124</sup> The fact that an express contract is not yet in existence should not function to prevent a valid claim based upon breach of an implied contract arising from the

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collusion or dishonesty).

<sup>118</sup> See 72 C.J.S. Supp. *Public Contracts* § 8 (1975).

<sup>119</sup> K.R.S. § 45A.010(2)(e) (Michie 1997 & Supp. 1998).

<sup>120</sup> See *Keco Indus. v. United States*, 428 F.2d 1233, 1236-38 (Ct. Cl. 1970); *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 413 (Ct. Cl. 1956).

<sup>121</sup> Michael F. Mason, *Bid Protests and the U.S. District Courts—Why Congress Should Not Allow the Sun to Set on This Effective Relationship*, 26 PUB. CONT. L.J. 567, 574 (1997).

<sup>122</sup> *Keco Indus.*, 428 F.2d at 1237

<sup>123</sup> See *supra* notes 36-39 and accompanying text.

<sup>124</sup> See *Keco Indus.*, 428 F.2d at 1238.

competitive bidding process.<sup>125</sup> Furthermore, bid and proposal costs have been considered recoverable damages for the government's arbitrary disregard of a more advantageous offer in favor of a preferred bidder.<sup>126</sup> In light of these notions, a governmental breach of the implied requirement of fairly considering all bids should be recognized as sufficient to support a wronged bidder's protest claim. While not overly expansive, standing to bring such an action furthers the fairness and equity policies underlying the KMPC<sup>127</sup> and is in the interest of contractors and the public generally. Kentucky standing doctrine should be changed accordingly.

## 2. *Correction of Bidding Mistakes*

An additional theory under which a disappointed bidder should be able to assert a bid protest claim involves correction of another's bid by a public official.<sup>128</sup> Such a complaint would arise where the plaintiff's lowest bid was unfairly usurped by the bid of a competing bidder after the soliciting public agency or officer chose to adjust or correct the competitor's bid. In *Armstrong & Armstrong, Inc. v. United States*,<sup>129</sup> the Ninth Circuit heard the complaint of, and awarded bid preparation costs to, the disappointed contractor and victim of such a scenario. In declaring that the awarding government agency had acted arbitrarily, and therefore unlawfully, the court relied upon both implied contract and policy considerations.<sup>130</sup> Noting the inherent unfairness of subsequent bid alterations generally, the *Armstrong* court concluded that the "opportunity to second guess one's bids after the bids have been opened subverts the competitive bidding process and creates the potential for abuse that procurement regulations are designed to prevent."<sup>131</sup> Though fraud, collusion, or dishonesty might not

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<sup>125</sup> See Gregg A. Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB. CONT. L.J. 325, 331 (1984).

<sup>126</sup> See *Keco Indus.*, 428 F.2d at 1240 (recognizing the possibility of awarding such damages but rejecting them under its particular facts); *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 409 (Ct. Cl. 1956).

<sup>127</sup> See *supra* note 119 and accompanying text.

<sup>128</sup> See *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975).

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 403. For further discussion of these policy considerations, see Thomas J. Goger, Annotation, *Recovery from United States of Costs Incurred by Unsuccessful Bidder in Preparing and Submitting Contract Bid in Response to Government Solicitation*, 30 A.L.R. FED. 355, 370 (1976).

<sup>131</sup> *Armstrong*, 514 F.2d at 403.

be present in such a bid correction situation, fairness and equity concerns sufficiently substantiate and support the need for disappointed bidder standing to sue under these or similar circumstances. Kentucky law should be modified to allow suit under such a theory

### 3. *Bad Faith*

Given a requirement of good faith on the part of an awarding government agency—which could be inferred from a reading of the KMPC and its provisions<sup>132</sup>—a disappointed contractor should be permitted to assert a bid protest claim on bad faith grounds. In *Millette Enterprises, Inc. v. State*,<sup>133</sup> the court examined the actions of a particular public authority that rejected all previously submitted bids, rewrote its bid specifications so that only a bidder with whom the authority was presently associated could qualify, and subsequently turned down the proposal of the prior low bidder. The court acknowledged the existence of a low bidder's claim for liability and damages.<sup>134</sup> Given an express statutory requirement of good faith, the court declared that the unsuccessful bidder had a cause of action because its allegations, assuming they were true, "established that the authority's conduct was actionable as violating the fundamental purpose of the procurement law to protect [the] public interest."<sup>135</sup> The public authority's actions caused the low bidder to waste resources in preparing a bid that never had a chance.<sup>136</sup> Allowing such agency behavior would violate applicable law, fairness principles, and public policy.<sup>137</sup> In order to avoid the possibility of reaching a different, undesirable holding on facts such as these, Kentucky standing doctrine should be amended to follow *Millette Enterprises*. Granting a disappointed bidder standing to challenge bad faith on the part of an awarding government agency furthers private contractor and public interests, and accords with the KMPC's fairness and equity policies.<sup>138</sup>

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<sup>132</sup> See *supra* note 119 and accompanying text.

<sup>133</sup> *Millette Enters., Inc. v. State*, 417 So. 2d 6 (La. Ct. App. 1982).

<sup>134</sup> See *id.* at 9-10. For a further discussion of *Millette* and a similar case, see James L. Isham, Annotation, *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 A.L.R. 4th 93, 114-15 (1989).

<sup>135</sup> Isham, *supra* note 134, at 115.

<sup>136</sup> See *Millette*, 417 So. 2d at 9-10; see also Isham, *supra* note 134, at 115.

<sup>137</sup> See *Millette*, 417 So. 2d at 5.

<sup>138</sup> See *supra* note 119 and accompanying text.

#### 4. *Failure to Negotiate*

Assuming the existence of a statutory or other duty to negotiate with all responsive and responsible bidders, failure by a public authority to negotiate fairly should be recognized as sufficient grounds for a rejected bidder's protest action. The court of *Continental Business Enterprises, Inc. v. United States*<sup>139</sup> considered this issue under a federal statute that required negotiation with "all responsible offerors who submit[ted] proposals within a competitive range, price and other factors considered."<sup>140</sup> The court denied the government's motion for summary judgment because the plaintiff's evidence indicated a violation of this negotiation requirement.<sup>141</sup> Though the statute considered in *Continental Business* is inapplicable to the issue, the court's recognition of a cause of action for bid preparation expenses under such circumstances remains both relevant and significant to this analysis. Generally stated, *Continental Business*'s holding stands for the proposition that the unsuccessful bidder who has been treated unfairly, though not necessarily fraudulently or dishonestly, by an awarding agency or official should be able to seek judicial redress. Such an assertion follows from the KMPC and its principles of fairness and equity,<sup>142</sup> and should be incorporated into Kentucky's standing law

#### VI. CONCLUSION:

##### A PROPOSAL FOR CHANGE IN KENTUCKY LAW

Questions of whether a disappointed bidder has standing to challenge an improperly awarded government contract are of crucial importance to a business-oriented society. Kentucky, no less than any other state and local governmental entities, requires and must contract for professional services and products on a regular basis. In addition to high quality performance, the public demands and is entitled to a reasonable price for such services. Competitive bidding procedures provide the means of achieving this goal. Though the Kentucky Model Procurement Code represents a comprehensive statute in this area, the administrative remedies it provides are clearly inadequate unless and until they are supplemented by the possibility of judicial review

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<sup>139</sup> *Continental Bus. Enters., Inc. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971).

<sup>140</sup> *Id.* at 1020 (quoting 10 U.S.C. § 2304(g) (1970)).

<sup>141</sup> *See id.* at 1016.

<sup>142</sup> *See supra* note 119 and accompanying text.

In spite of this most definite need, Kentucky's common law has consistently limited the standing of an unsuccessful bidder to bring a bid protest cause of action to those situations involving fraud, collusion, or dishonesty. Such a restrictive standard does not serve the public interest, and the law of this Commonwealth should be reconsidered and modified to confer generalized standing upon disappointed bidders seeking review in a judicial forum.

A move toward broad recognition of unsuccessful bidder standing would further the public interest, since only a rejected contractor, as opposed to an individual taxpayer, possesses the resources and motivation to monitor and challenge a particular bid award in a court of law. Furthermore, an expansion of Kentucky's rules would help to ensure that a disappointed bidder's contractual and proprietary interests in a public contract award are adequately protected and fairly treated. Clearly, federal procurement law, both in its development and policies, supports such a change. Finally, there exist numerous liability theories other than fraud, collusion, or dishonesty under which an unsuccessful bidder would be able to recover for improper governmental behavior without harming the public interest or overly burdening the judiciary. In light of these assertions, Kentucky's standing doctrine and the current common law rule must be amended to give a disappointed bidder standing to sue an awarding entity for any significant impropriety in the competitive bidding process. Even without fraud, collusion, or dishonesty, a party whose interests have been wrongfully deprived has a right to be heard. The judiciary from whom such a party seeks a forum for relief should unequivocally recognize that right.