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# THE FEDERAL COURTS IMPROVEMENT ACT OF 1982: NO RELIEF FOR THE DISAPPOINTED BIDDER

## INTRODUCTION

The Federal Courts Improvement Act of 1982<sup>1</sup> (Act) was enacted "as part of a comprehensive program designed to improve the quality of the Federal court system and to enhance citizen access to justice."<sup>2</sup> The Act completely reorganized the United States Courts of Claims and Custom and Patent Appeals,<sup>3</sup> and in so doing substantially altered the handling of claims against the Federal Government. Although not within the scope of this discussion, the Act also dramatically affected

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\* The author wishes to acknowledge the contribution of Wayne H. Metalski, Esquire, who encouraged the initial stages of research that resulted in this note.

1. Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of 28 U.S.C.A. (West Supp. 1983); also codified in scattered sections of 5, 7, 16, 18, 19, 22, 25, 26, 28, 35 and 41 U.S.C.A. (West Supp. 1983)).
2. S. REP. NO. 275, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11 [hereinafter cited as SENATE REPORT]. See also Kennedy, *The Federal Courts Improvement Act: A First Step for Congress to Take*, 63 JUDICATURE 8 (1979).
3. Section 101(a) of the Federal Courts Improvement Act amended 28 U.S.C. § 41 to create the United States Court of Appeals for the Federal Circuit. This new article III court is structurally similar and on hierarchical par with the other twelve circuit courts of appeals. The Court of Appeals for the Federal Circuit differs, however, in that its jurisdiction is defined by subject matter rather than territory.

Section 127(a) of the Act (to be codified at 28 U.S.C. § 1295) states the jurisdiction of Court of Appeals for the Federal Circuit. Portions of that section relevant to this discussion specify:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court;

In addition to granting the appellate jurisdiction of the Court of Claims to the Court of Appeals, the Act reassigned the trial functions of the Court of Claims to a newly-created article I court designated the United States Claims Court. See Federal Courts Improvement Act, § 105 which will amend chapter 7 of 28 U.S.C. The trial jurisdiction of the Claims Court is specified in section 133(a) of the Act (to be codified at 28 U.S.C. § 1491) as follows:

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . The Claims Court shall have jurisdiction

the practice of customs and patent cases.<sup>4</sup>

This note will discuss the Federal Courts Improvement Act in the particular context of its impact on claimants suing as disappointed bidders on government contracts. The analysis begins with a summary of the legislative purposes and objectives of the Act. It continues with an examination of the situation facing a "model" disappointed bidder in order to demonstrate how a typical claim may arise and be resolved under the Act. The analysis will indicate that the Act, at least insofar as it affects disappointed bidder claims, has had the unanticipated effect of augmenting the confusion and controversy surrounding such issues as standing to sue, equitable jurisdiction, and what constitutes a federal question. Thus, the note concludes that the Act fails to reach its intended objectives by a wide margin. In light of this conclusion the note recommends modifications to the Act to enhance its effectiveness. If amended as suggested, the Act, in tandem with pertinent government regulations, will be more likely to achieve efficient and equitable resolution of these disappointed bidder claims. This result will accrue from orderly processing of claims through a logical sequence of administrative and judicial proceedings.

#### THE PURPOSES AND OBJECTIVES OF FEDERAL COURTS IMPROVEMENT LEGISLATION

The Federal Courts Improvement Act of 1982 resulted from over a decade's advocacy of major structural changes in the federal appellate court system.<sup>5</sup> The Federal Judicial Center has been credited with first raising the alarm that the appellate system was suffering overload.<sup>6</sup> Having identified the overall contours of the issue, the Judicial Center commissioned a study group to pinpoint specific problems facing the Supreme Court.<sup>7</sup> The report recommended a variety of structural revisions to the appellate system, although its most controversial recom-

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to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) 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.

4. The Justice Department proposal which had perhaps the greatest influence on the eventual constitution of the Court of Appeals for the Federal Circuit and the Claims Court recommended that civil tax and environmental cases also be included in the appellate jurisdiction of the new appeals court. These provisions were dropped after considerable congressional debate, some of which referred to the substantial pressure of the highly organized tax bar.
5. Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982—And Beyond*, 32 AM. U.L. REV. 543 (1983).
6. *Id.* See also Kennedy, *supra* note 2, at 8.
7. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, PREPARED FOR THE FEDERAL JUDICIAL CENTER (1972), reported in 57 F.R.D. 573 (1972) [hereinafter cited as FREUND REPORT]. The study group prepared a report commonly referred to as the Freund Report after the Chairman of the study group, Professor Paul A. Freund of Harvard Law School. Chief Justice Burger in 1971 directed the study group "to study the caseload of

mentation<sup>8</sup> completely overshadowed the others.<sup>9</sup>

The next major set of recommendations originated in a report prepared by the Commission on Revision of the Federal Court Appellate System.<sup>10</sup> This Commission, whose findings are generally referred to as the Hruska Report, focused primarily on problems confronting the United States Courts of Appeals rather than the Supreme Court.<sup>11</sup> Nonetheless, it too recommended a National Court of Appeals.<sup>12</sup> The Hruska Report, however, envisioned a substantially different jurisdiction for the National Court of Appeals than did the Freund Report.<sup>13</sup>

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the Supreme Court and to make such recommendations as its findings warranted." *Id.* at 576.

8. The Study Group's most controversial recommendation pertained to establishment of a National Court of Appeals. This suggestion was offered in response to two major factors perceived as contributing to the Court's overload. The first factor was the requirement of screening the multitudes of petitions for *certiorari* filed each year from federal and state courts. The study documented a threefold increase in the number of petitions acted upon between the years 1941 and 1971. *Id.* at 615. The other major contributing factor the report identified was the requirement that the Supreme Court hear and decide cases of conflict between circuits, which the group characterized as deserving resolution but "otherwise not of such importance as to merit adjudication in the Supreme Court." *Id.* at 590.

The proposed National Court of Appeals would be empowered to screen all petitions seeking Supreme Court review. Those found to establish a verified conflict among circuits would be heard by the court except where the issues presented were "deemed important enough for certification to the Supreme Court." *Id.* at 591. Decisions of the National Court of Appeals would be final and not reviewable by the Supreme Court. *Id.* at 593.

9. In conjunction with, but independent of the recommendation for a National Court of Appeals, the Freund Report Study Group recommended: (1) that direct appeals from the district courts to the highest court be abolished and that all cases be brought instead by *certiorari*; (2) elimination of the three-judge court and of direct review in cases in which constitutionality of state or federal statutes is challenged, 28 U.S.C. §§ 2281, 2282, and those in which orders of the Interstate Commerce Commission are challenged, 28 U.S.C. § 2325; (3) repeal of the authorization for certification of questions from a court of appeals to the Supreme Court, 28 U.S.C. § 1254(2), (3); (4) deletion of 28 U.S.C. §§ 1254(1) and (2) so that appeals to the Supreme Court from cases coming from state courts would be abolished and *certiorari* would be made the exclusive method of review; and (5) further study of the internal organization of the Court with an eye to increasing efficiency through use of paraprofessionals, provision of secretarial assistance to judicial clerks, and acquisition of data and word processing equipment. See FREUND REPORT, *supra* note 7, at 590-611.
10. The Commission was established by statute: Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807. The report entitled COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 94TH CONG., 1ST SESS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) reported in 67 F.R.D. 195 (1975), was prepared by a study group chaired by Senator Roman Hruska (R-Neb.) [hereinafter cited as HRUSKA REPORT].
11. The statute establishing the Commission assigned two major tasks, to be completed according to individual time tables. In Phase I, the Commission was to "study the present division of the United States into the several circuits and to report. . . its recommendations for changes in the geographical boundaries. . . as may be most appropriate for the expeditious and effective disposition of judicial business." HRUSKA REPORT, *supra* note 10, at 207-08. In Phase II the Commission was directed "to study the structure and internal procedures of the Federal courts of appeal system, and to report. . . its recommendations for such additional changes in structure or internal procedure as may be appropriate [for disposition of the caseload] consistent with fundamental concepts of fairness and due process." *Id.* at 208.
12. HRUSKA REPORT, *supra* note 10, at 238-39.
13. The National Court of Appeals would have jurisdiction to hear cases on the basis of "reference jurisdiction," that is, cases brought to the Supreme Court on appeal or on petition for *certiorari* could be referred to the National Court of Appeals directing that court to decide the issues on the merits, or permitting that court to exercise its discretion whether to decide the issues or to deny review. In addition, the National Court of Appeals would have jurisdiction to hear cases on the basis of "transfer jurisdiction," meaning that cases could be transferred to the National Court from regional courts of appeals in those "certain kinds of cases

From these recommendations and the storm of critical analysis and commentary which these reports engendered<sup>14</sup> was born the legislation finally enacted as the Federal Courts Improvement Act of 1982.<sup>15</sup> The notion of a new court of appeals having national jurisdiction, which germinated in the Freund Report and which was nourished by the Hruska Report's refinement of limiting jurisdiction on the basis of subject matter, finally came to fruition in the Federal Circuit Court of Appeals.<sup>16</sup>

The legislation which eventually evolved into the Courts Improvement Act was originally introduced as Senate bill 1700.<sup>17</sup> The Senate Judiciary Committee's report, which accompanied S. 1700 set forth the multifold aims of the legislation. The report indicates that Congress acted in response to the perceived necessity to "resolve some of the myriad structural administrative and procedural problems that have impaired the ability of our Federal Courts to deal with the vast range of controversies among our citizens." Congress, therefore, enacted this legislation "to improve the quality of [that] Federal court system and to enhance citizen access to justice."<sup>18</sup>

#### A DISAPPOINTED BIDDER CASE HISTORY<sup>19</sup>

In order to illuminate problems involving disappointed bidder claims, a discussion of the relevant issues in the context of the situation confronting a specific "disappointed bidder"<sup>20</sup> will be helpful. Despite

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[in which] it will be highly desirable to obtain a nationally binding decision at the first level of appellate review." *Id.* at 241. Typically this category was comprised of tax and patent law appeals, environmental law appeals, appeals from the Court of Claims, and review of administrative agency orders. *Id.*

14. See Petrowitz, *supra* note 5, at 547 nn.36-39, 550 nn.56-60.

15. *Id.* at 551-54.

16. See SENATE REPORT, *supra* note 2 and accompanying text.

17. S. 1700, 97th Cong., 1st Sess., 127 CONG. REC. S14709-23 (daily ed. Dec. 8, 1981). The language of the Senate bill, S. 1700, was largely adopted as the text of the Courts Improvement Act.

18. The Senate Report recites the major goals of the Federal Courts Improvement Act as:

- [a] to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of law where Congress determines there is a special need for nationwide uniformity;
- [b] to improve the administration of the patent law by centralizing appeals in patent cases;
- [c] and to provide an upgraded and better organized trial forum for government claims cases.

SENATE REPORT, *supra* note 2, at 12.

Focusing on this latter objective, the Senate Report later refined its statement of purpose to specify that "[t]he creation of the United States Claims Court will reduce delay in individual cases and will produce greater efficiencies in the handling of the court's docket" [by permitting the court's judges to enter dispositive orders].

19. This case history presents a factual situation. The plaintiff remains unidentified because the case has not yet been adjudicated. Comparable fact situations have arisen in recent cases. See *United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1363 (F. Cir. 1983); *Textron, Inc., Bell Helicopter Div. v. Adams*, 493 F. Supp. 824 (D.D.C. 1980).

20. Federal Procurement Regulations published at 41 C.F.R. §§ 1-2.407-8 and 1-2.408-1 (1983) refer respectively to this entity as the "protesting bidder" and "the unsuccessful bidder." Court of Claims and Claims Court opinions have used a variety of terms including "disappointed bidder", see, e.g., *Indian Wells Valley Metal Trades Council v. United States*, 553 F.

this particularized approach, however, one must remain aware that the options available to the bidder remain the same regardless of the individual facts of his claim.

Corporation received a "Solicitation, Offer, and Award"<sup>21</sup> from the General Services Administration (GSA) to offer a bid to provide specified quantities of products manufactured and distributed by Corporation. By its terms the GSA solicitation required that each bid comply with the "Buy American Act" provision of Clause 14 of the GSA Form 1246.<sup>22</sup> Corporation submitted its bid to provide the requested commodities, affirming that its offer complied with the terms of the solicitation including the Clause 14 provision.

Prior to awarding the contract, the GSA responded to Corporation's bid informing Corporation that the products it offered were not wholly "produced" in the authorized source country and hence failed to meet the requirements of the "Buy American Act" clause. Corporation requested and was granted a meeting with GSA officials to explain its belief that its products did comply. Subsequently, yet still prior to awarding the contract, the GSA responded to Corporation's position as presented at the meeting. In essence, the GSA formally ruled that Corporation's products, if provided as intended by Corporation, would not comply with the terms of Clause 14. Because Corporation could only provide these commodities from this source, this ruling not only precluded Corporation from being awarded the contract in issue, but also foreclosed Corporation's opportunity to bid on future solicitations. Almost simultaneously with informing Corporation of its ruling, the GSA awarded the contract to another bidder.

In reaction to the GSA's ruling, Corporation exercised two separate options seeking relief, only the first of which would have been available prior to enactment of the Federal Courts Improvement Act. First, Cor-

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Supp. 397, 1 Cl. Ct. 43 (1982). This terminology was recently adopted by the Court of Appeals for the Federal Circuit, *see, e.g.*, *United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1363 (F. Cir. 1983).

21. A letter of "Solicitation, Offer, and Award" notifies producers and suppliers of the Government's intent to procure goods or services. The regulations which implement the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-412 (Supp. V 1981) are published in 41 C.F.R. §§ 1-1.000 to 1-30.708 & App. (1983) [hereinafter cited as *Federal Procurement Regulations*]. These regulations set forth in considerable detail the policies which Congress intended to implement by enacting the legislation (*Id.* §§ 1-1.301 to 1-1.302) and the specific procedures to be followed to achieve those policy goals. *See, e.g., id.* §§ 1-2.101 to 1-2.106 (Use of Formal Advertising); *id.* §§ 1-2.301 to 1-2.305 (Submission of Bids); and *id.* §§ 1-2.401 to 1-2.408-2 (Opening Bids and Contract Award Procedures). *See also infra* note 30.
22. The particular requirements of the "Buy American Act" clause are not pertinent to this discussion. In general, however, the clause requires bidders to affirm that the commodities which they will supply in fulfillment of the contract will have originated in the "source country" specified within the bid solicitation. In addition, the clause limits the percentage of the commodity's total cost which may be attributed to "components" of that commodity which originated outside the authorized source country. Clause 14 adopted by reference the provisions of AID Regulation 1, part 201 published at 22 C.F.R. §§ 201.10-201.74 (1983). *See* GSA Form 1246, GSA Supplemental Provisions (AID Procurement) 3 (Rev. 9-78), which specifies supplemental provisions to the regulations governing the procurement of goods and services for the Agency for International Development (AID).

poration availed itself of the procedure for administrative review of the GSA's ruling by filing a protest with the Comptroller General of the General Accounting Office (GAO).<sup>23</sup> As an alternative source of relief, Corporation filed a claim in the United States Claims Court seeking a declaratory judgment that its plan for providing the solicited commodities did not violate the "Buy American Act" provisions of Clause 14.<sup>24</sup>

Corporation did have another alternative to administrative relief. It had the option of filing a claim in United States District Court,<sup>25</sup> though Corporation did not recognize this option at the time.

Much of the confusion surrounding the decision in which court to bring the claim arose from the Court Improvement Act's allocation of limited jurisdiction over equitable claims to the Claims Court. In response to this uncertainty, bidders may attempt to seek relief from all possible sources. That many disappointed bidders will employ this scattergun approach to seeking relief must be seen as a major shortcoming of the Courts Improvement Act. The shortcoming apparently results from the drafters' insufficient appreciation for the complexities and inconsistencies of the administrative review process<sup>26</sup> as it relates to the Claims Court and district court judicial review alternatives.<sup>27</sup> This note examines in some detail each of the disappointed bidder's alternative sources of relief. Initially each option will be examined in isolation. Subsequently, some of the potential interactions among the different alternatives will be explored. It will readily become apparent that collateral concerns facing the bidder may influence the bidder to avoid the Claims Court, thereby preventing the Courts Improvement Act from achieving its intended purpose. Finally, this note will propose relatively minor modifications to the Courts Improvement Act. These modifications effectively enhance the attractiveness of the Claims Court alternative to the disappointed bidder and thus increase the likelihood that the Act will "improve the quality of the federal court system and. . .enhance citizen access to justice."<sup>28</sup>

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23. See Federal Procurement Regulations, *supra* note 21, at 41 C.F.R. § 1-2.407.8(a) (1983). The Federal Procurement Policy regulations delineate procedures which apply to "all protests or objections regarding the award of a contract, whether submitted before or after award."

24. This claim was erroneously filed in the United States Claims Court as will be discussed in detail below. See *infra* notes 55-60 and accompanying text.

25. Actually, in light of the timing of Corporation's filing of its claim, the district court properly had jurisdiction to grant equitable relief. As will be discussed below, the time of filing the bid protest claim is critical to the determination of whether the Claims Court or district court will have jurisdiction to hear a claim seeking injunctive or other equitable relief. See *infra* notes 79-80 and accompanying text.

26. See *infra* notes 29-43 and accompanying text.

27. See *infra* text accompanying notes 45-89.

28. See SENATE REPORT, *supra* note 2.

ALTERNATIVE SOURCES OF RELIEF<sup>29</sup>

## The Administrative Review Process

The Office of Federal Procurement Policy Act Amendments of 1979<sup>30</sup> reaffirmed Congress' policy to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the executive branch of the Federal Government. . . .<sup>31</sup> The procurement policy amendments expressed the intent to achieve that policy goal by, *inter alia*:

- (1) promoting the use of full and open competition in the procurement of products and services;
- (2) establishing policies, procedures, and practices which will require the Government to acquire property and services of the requisite quality and within the time needed at the lowest reasonable cost;
- (3) improving the quality, efficiency, economy and performance of Government procurement organizations and personnel. . . .<sup>32</sup>

Furthermore, the amendments renewed the Office of Federal Procurement Policy in the Office of Management and Budget<sup>33</sup> and re-established the position of Administrator to head the office.<sup>34</sup> Among other responsibilities, the Administrator is "authorized and directed. . . to promulgate a single, simplified, uniform Federal procurement regulation."<sup>35</sup> The current federal procurement regulations establish the right of a bidder to lodge a protest regarding contract awards<sup>36</sup> when the protesting bidder is an "interested party."<sup>37</sup> In addition, the subpart specifies that protests should be addressed to the Comptroller General in accordance with GAO procedures.<sup>38</sup>

29. For discussion of a disappointed bidder's prospect for relief prior to enactment of the Courts Improvement Act, see generally Note, *Judicial Review and Remedies for the Unsuccessful Bidder On Federal Government Contracts* 47 N.Y.U. L. REV. 496 (1972) [hereinafter cited as Note, *Judicial Review*]; Note, *Government Contract Bid Protests: Judicial Review and the Role of the Court of Claims*, 39 U. CHI. L. REV. 814 (1972) [hereinafter cited as Note, *Contract Protest*].

30. The Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648 (codified at 41 U.S.C. §§ 401-412 (Supp. V 1981)) (amending the Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974)). The amendments contained in the more recent Act consist primarily of minor textual alterations in the declaration of policy and in the statement of the Office of Federal Procurement Policy Administrator's responsibility with respect to the development and implementation of procurement policies.

31. 41 U.S.C. § 401 (Supp. V 1981).

32. *Id.*

33. *Id.* § 404(a).

34. *Id.* § 404(b) (Supp. V 1981). The Administrator is "appointed by the President, by and with the advice and consent of the Senate."

35. *Id.* § 405(a) (Supp. V 1981).

36. The current federal procurement regulations are published beginning at 41 C.F.R. § 1-1.011. Specifically this subpart requires that "[c]ontracting officers [defined by § 1-1.207 as an 'official designated to enter into or administer contracts and make related determinations and findings'] shall consider *all* protests or objections regarding the award" (emphasis added). 41 C.F.R. § 1-2.407-8(a)(1) (1983).

37. GAO regulations specifying protest procedures are published at 4 C.F.R. §§ 21.0-21.10 (1983).

38. *Id.* The Comptroller General has traditionally narrowly construed "interested party." His decisions have consistently held that a party is "interested only if it would be in line for the contract award if its protest were upheld." Thus, in *Pluribus Products, Inc.*, 83-1 COMPTROL-



While the language of the procurement policy amendments emphasizes the government's self-interest in efficient and cost-conscious procurement of goods and services, the regulations implementing the amendments seem to take a somewhat more evenhanded approach. In fact, the regulations pertaining to GAO review of agency rulings may be construed as having been written to encourage disappointed bidders to avail themselves of the remedy—at least as a first step toward seeking full relief.

Corporation, as a typical disappointed bidder,<sup>39</sup> clearly qualifies as an interested party and therefore is entitled to seek GAO review of the GSA's ruling. Due to the apparent simplicity and speed of the administrative review process, most bidders in Corporation's position will probably opt for this remedy.<sup>40</sup> As an added inducement, where the disappointed bidder has filed a protest with the GAO prior to award of the contract in issue, the contracting agency is usually precluded from making any award prior to disposition of the protest.<sup>41</sup>

The perceived attractiveness of the administrative protest procedure may be misleading, however. The authority of the GAO to suspend the award is strictly circumscribed and subject, in large part, to the discretion of the contracting agency whose actions are challenged.<sup>42</sup> Moreover, when brought subsequent to award, even a "successful" appeal to the GAO may not result in an award of the contract to the disap-

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LER PROCUREMENT DECISIONS 226 No. B-210444 (March 7, 1983), the protesting bidder challenged a proposed award alleging that the bid recipient lacked capacity to perform the contract. Finding that Pluribus was not the second lowest bidder on any of the challenged line items, the GAO dismissed the protest concluding that "protest from [a] firm not in line for award if [the] protest is upheld is dismissed because protestor does not have [the] requisite direct and substantial interest with regard to [the] award to be considered as "interested party."

39. See cases cited *supra* note 19.

40. The GAO review procedure may be briefly summarized as follows:

- (1) Initial protests need only contain a statement of grounds for protest and a request for Comptroller General's review. Protests shall be filed within 10 days of formal notification or actual or constructive knowledge of initial adverse agency action (although late protests may be considered). 4 C.F.R. §§ 21.1, 21.2 (1983).
- (2) The contracting agency is required to submit its complete report of matters pertaining to the protest "as expeditiously as possible (generally within 25 working days)." Rebuttal remarks by protestor to anything contained in the report must be submitted within 5 days after receipt of the report. *Id.* § 21.3 (1983).
- (3) A conference on the merits of the protest may be requested if such request is made prior to expiration of the above-mentioned 5 days for filing rebuttal comments. Similarly, the conference normally will be held prior to expiration of that period. *Id.* § 21.7 (1983).
- (4) Finally, the Comptroller General "establishes a goal of 25 days for issuing a decision on a protest after receipt of all information" and the conclusion of any conference. *Id.* § 21.8 (1983).

41. 4 C.F.R. § 21.4 (1983). GAO regulations specify that the award will be suspended "except as provided in the applicable procurement regulations."

42. The applicable procurement regulations require that the award "shall not be made until the matter is resolved" except where:

- (i) The items to be procured are urgently required; or
- (ii) Delivery or performance will be unduly delayed by failure to make award promptly; or
- (iii) A prompt award will otherwise be advantageous to the Government.

41 C.F.R. § 1-2.407-8(b)(4) (1983).

pointed bidder, particularly where the contractor who was unjustifiably awarded the contract has already begun to perform.<sup>43</sup> These deficiencies in the scope of administrative relief compel many disappointed bidders to seek a judicial remedy for their claim.

### The Judicial Remedies

Depending on the type of relief which the disappointed bidder seeks, the bidder may choose to bring his complaint in the United States Claims Court or in the Federal District Court. In either event, the bidder must be conscious of timing in filing his claim. In light of his particular circumstances, a bidder may consider seeking a judicial remedy in tandem with or as a *de novo* alternative to the administrative process. Neither of these options should be pursued, as both will frustrate the bidder's intended purpose.<sup>44</sup>

### The Claims Court's Remedies

Jurisdiction over the disappointed bidder's claim against the Federal Government is vested in the United States Claims Court by section 133(a) of the Courts Improvement Act.<sup>45</sup> From the Claims Court the bidder may seek monetary damages<sup>46</sup> or equitable relief, including declaratory judgment or injunction.<sup>47</sup>

A disappointed bidder who seeks money damages or equitable relief in the Claims Court is entitled to do so because the claim is founded upon "regulation[s] of an executive department."<sup>48</sup> For exam-

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43. *Wheelebrator Corp. v. Chafee*, 455 F.2d 1306, 1315 n.11 (D.C. Cir. 1971) (Address by Paul G. Dembling, General Counsel of GAO, to National Contract Management Association, (Sept. 1971)). [The GAO] may (and frequently does) decide that although the award was contrary to the rules, full performance under the awarded contract is nevertheless in the best interests of the Government. Such a decision is considered to be justified by the Government's need to obtain prompt performance, the extent to which the contract has already been performed, and similar considerations.
  44. Simultaneously seeking relief in two forums creates a problem because the Comptroller General will not decide protests where issues are also before a court of competent jurisdiction. 4 C.F.R. § 21.10 (1983). The Comptroller General applied this provision in *Weeks-Miller Joint Venture*, 81-2 COMPTROLLER PROCUREMENT DECISIONS 76 No. B-203107 (July 31, 1981) and declined to hear the protest. His decision was based on information that Weeks-Miller had filed an intervenor complaint in another bidder's claim regarding the same contract award. The Comptroller General ruled that "[a]s the material issues are pending before a court of competent jurisdiction and because the court has not expressed an interest in our views, we decline to hear [Weeks-Miller's] objections." *Id.* Problems facing bidders who seek judicial rather than administrative relief will be discussed in the context of the bidder's access to district court.
  45. See Federal Courts Improvement Act, § 133(a)(1) (to be codified at 28 U.S.C. § 1491). See also jurisdictional discussion, *supra* note 3.
  46. The United States Court of Claims traditionally had jurisdiction over cases seeking money damages. This jurisdiction derived from the initial enactment establishing that court, Act of February 24, 1855, ch. 22, 10 Stat. 612. See generally W. COWEN, P. NICHOLS JR. & M. BENNETT, *THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II: ORIGIN—DEVELOPMENT—JURISDICTION* (1978) [hereinafter cited as CT. CL. HISTORY].
  47. See Federal Courts Improvement Act § 133(a)(3) of the Act (to be codified at 28 U.S.C. § 1491). In contrast, jurisdiction over cases seeking equitable remedies is an original grant of the Courts Improvement Act.
  48. 28 U.S.C.A. § 1491(a)(1) (West Supp. 1983).

ple, regulations governing GSA procurements generally, and the use of Form 1246 for AID procurements<sup>49</sup> specifically, are capable of supporting such a claim.<sup>50</sup> The claimant argues that the procurement process, by operating according to these executive regulations, creates an implied-in-fact contract<sup>51</sup> between the parties. The disappointed bidder argues further that the government breaches this contract when a Federal procurement official rejects bidder's offer or awards a contract to another bidder if that government action was arbitrary, capricious, or deliberately discriminatory.<sup>52</sup>

Despite this implied-in-fact contract, the relief available to a disappointed bidder in the Claims Court (as it was in the Court of Claims) is limited in scope. The money-damages remedy, for example, is obviously only a valid option *after* the award has been made. Moreover, even where the disappointed bidder prevails in his argument that he was arbitrarily or capriciously denied the award, the bidder may never

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49. See discussion *supra* notes 21-22 and accompanying text.

50. In an action involving procurement of FAA devices, the district court acknowledged that the "procurement regulations of the United States have the force of law." *T.M. Systems v. United States*, 473 F. Supp. 481, 486 (D.D.C. 1979) (citing *Paul v. United States*, 371 U.S. 245 (1963)).

51. See *infra* note 52 for the basis of this claim.

52. The Court of Claims in *Heyer Products Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956) held that a disappointed bidder who alleged "that [the Government's] action throughout the entire [procurement] transaction was arbitrary, capricious and taken in bad faith," and that "the failure of the defendant to award it the contract 'was the result of a deliberate artifice to retaliate against [the bidder]'" had standing to maintain an action for damages. *Id.* at 410. In its conclusion the court reasoned: "[i]t was an implied condition of the request for offers that each of them would be honestly considered." *Id.* at 412. "The Government is under the obligation to honestly consider [the bid] . . . and not to wantonly disregard it. If this obligation is breached and plaintiff is put to needless expense in preparing its bid, it is entitled to recover such expenses." *Id.* at 413-14. The *Heyer* decision may be seen as an initial attempt to avoid the apparent inequities which arose from strict interpretation and application of the legal rights doctrine. That doctrine, initially stated in *Massachusetts v. Mellon and Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) formed the basis for the taxpayer-standing test formulated in the *Frothingham* opinion.

The legal rights doctrine was applied most stringently to procurement-based claims in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1939) and its progeny. In *Perkins*, the Supreme Court ruled that a bidder whose complaint asserted that a provision of the Public Contracts Act of 1936 was "arbitrary, capricious, and unauthorized by law" was without standing to maintain the suit. *Id.* at 114. Citing *Frothingham* the Court stated:

It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such.

*Id.* at 125 (citation omitted).

Applying this principle to the case before it, the *Perkins* Court reasoned:

Section 3709 of the Revised Statutes [41 U.S.C. § 5, a predecessor of current procurement regulations] requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.

*Id.* at 126.

In the wake of *Perkins*, courts routinely denied standing to disappointed bidders who alleged that by not awarding the contract in issue to the lowest bidder, the Government had violated the provisions of a procurement regulation or statute requiring such award. The doctrinal obstacle to standing posed by this emphasis on legal rights was not overcome. *Heyer* notwithstanding, until *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) some thirty-years later.

recover his anticipated profits,<sup>53</sup> but only money damages equivalent to his bid preparation costs.<sup>54</sup>

The limitations on recovery of injunctive relief in the Claims Court are even more substantial than those affecting monetary damages. While claims for equitable relief are also founded on the implied-in-fact contract to "fully and fairly consider the plaintiff's bid,"<sup>55</sup> the Claims Court's equity jurisdiction is limited to "contract claim[s] brought before the contract is awarded . . . ."<sup>56</sup> The Court of Appeals for the Federal Circuit recently grappled with the ambiguities of this grant of jurisdiction in *United States v. John C. Grimberg Co., Inc.*<sup>57</sup> The case arose when Grimberg and co-plaintiff W.M. Schlosser, Co., Inc. jointly filed a complaint in the Claims Court seeking termination and re-award to themselves of certain contracts awarded to another. The Claims Court denied their motions for a temporary restraining order and preliminary injunction<sup>58</sup> and transferred the complaint to district court.<sup>59</sup> The Court of Appeals affirmed, finding a lack of jurisdiction in the Claims Court over this complaint which sought equitable relief only and which was filed in the Claims Court after the award of the contracts.<sup>60</sup>

Employing a strict construction of the statutory language,<sup>61</sup> the court found that the "contract" on which the claim was brought, was the implied-in-fact contract. The "contract" which "is awarded," however, is the contract to provide or perform as required by the solicitation. Finally, the court concluded that the implied-in-fact "contract claim" must be filed in the Claims Court before the express "contract" to provide or perform was awarded in order to be "brought" in timely fashion.<sup>62</sup>

Timeliness is not the only concern facing the bidder seeking equita-

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53. *See Heyer Products Co.*, 140 F. Supp. at 412; *Essex Electro Engineers, Inc. v. United States*, 3 Cl. Ct. 277, 306 (1983). Two propositions support this position. The first proposition is that no contract from which these anticipated profits would derive was ever consummated. The second rationale is that no bidder is entitled to any award whatsoever, given that the contracting officer has the power to reject all bids if rejection is in the public interest. *See also Keco Industries v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970).
54. *See Heyer Products Co.*, 140 F. Supp. 409. *See also Essex Electro Engineers, Inc. v. United States*, 3 Cl. Ct. 277 (1983).
55. *Downtown Copy Center v. United States*, 3 Cl. Ct. 80, 83 (1983).
56. Federal Courts Improvement Act, § 133(a), 96 Stat. 39 (to be codified at 28 U.S.C. § 1491).
57. 702 F.2d 1362 (F. Cir. 1983).
58. *John C. Grimberg Co., Inc. v. United States*, 1 Ct. Cl. 253 (1982).
59. This transfer is permitted under the Federal Courts Improvement Act, § 301(a) (codified at 28 U.S.C.A. § 1631 (West Supp. 1983)). The SENATE REPORT, *supra* note 2, acknowledges that the language of this provision is "broadly drafted to permit transfer between any two federal courts."
60. *United States v. John C. Grimberg*, 702 F.2d 1362 (F. Cir. 1983).
61. Circuit Judge Nichols in his concurring opinion especially emphasized the necessity of construing the statute narrowly. This narrow construction is mandated by the nature of the statute in that the provision constitutes a partial waiver of sovereign immunity. Where a statute acknowledges consent by the sovereign to be sued, the Supreme Court has held that such consent "must be unequivocally expressed." *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *U.S. v. King*, 395 U.S. 1, 4 (1969)).
62. The *Grimberg* Court attributed the difficulty in defining the scope of the Claims Court's

ble relief in the Claims Court. Assuming the disappointed bidder brings his claim in time, the complaint must be artfully drafted. In *Downtown Copy Center v. United States*,<sup>63</sup> the plaintiff sought a restraining order against award of a contract to another and a declaratory judgment that certain actions of the United States in preparing and issuing the solicitation were in violation of applicable law and regulations.<sup>64</sup> The Claims Court held that plaintiff's claims were not within the scope of its equity jurisdiction. The court conceded that the implied-in-fact contract, on which the equity jurisdiction is founded, "guarantees that a bid submitted in conformity with the requirements of the invitation for bids will be fully and fairly considered."<sup>65</sup> The court distinguished, however, between an allegation that a bid complying with the regulations had been rejected unfairly and an allegation that the process under which a solicitation was made resulted in plaintiff's bid not being evaluated as fairly as competitive bids. The court found no "contract claim" as a foundation for the latter complaint.<sup>66</sup>

The particularly exacting burden of proof which must be overcome by the disappointed bidder presents yet another hurdle to a grant of injunctive relief from the Claims Court. In *Essex Electro Engineers, Inc. v. United States*,<sup>67</sup> the plaintiff sued for injunctive relief and a declaratory judgment on grounds that the government's rejection of its bid as "nonresponsive"<sup>68</sup> had breached the implied-in-fact contract to evaluate the plaintiff's bid fairly. Citing the holding of *M. Steintal & Co. v. Seamans*,<sup>69</sup> the court ruled that it should not overturn the rejec-

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equitable jurisdiction to "the propensity of the Congress, the courts, and others, for using ['claim'] to mean different things in different contexts." *Grimberg*, 702 F.2d at 1365.

The *Grimberg* opinions deal at considerable length with some of the more likely explanations for the ambiguity of this section of the Act. The majority in *Grimberg* noted initially that the section 1491(a)(3) equitable jurisdiction provision was the first grant of equitable power to the Claims Court. See also CT. CL. HISTORY, *supra* note 46, at 114-15. In addition, the Court noted that the final language of the section resulted from a compromise effected in response to the Justice Department's strenuous objection to the initially proposed grant of equitable jurisdiction "[t]o afford complete relief in controversies within its jurisdiction . . . ." *Grimberg*, 702 F.2d at 1369 (citing S. 21, 97th Cong., 1st Sess. § 132(a)(2) (1981)). The Court seemed to conclude that the interaction of these two factors had resulted in the ambiguous language concerning the new court's jurisdiction.

63. 3 Cl. Ct. 80 (1983).

64. *Id.*

65. *Id.* at 82.

66. *Id.* at 83. Thus the court held:

The statutes and regulations governing the structure of the bid solicitation process create statutory rather than contractual obligations . . . . The United States owes bidders no contractual duty to comply with procurement regulations . . . . Because this Court's equity jurisdiction depends upon the existence of a contractual relationship, a duty owed by virtue of a statute or regulation cannot . . . justify exercise of that authority (citations omitted).

67. 3 Cl. Ct. 277 (1983).

68. *Id.* at 283. "Nonresponsive" in this context refers to a bid which fails to comply with the terms and/or specifications required by the solicitation for bids. In this instance, the solicitation required, *inter alia*, a particular engine which operated at 1200 rpm. The government had ruled that Essex's bid was nonresponsive on being advised by a competitor that the engine offered by Essex normally operated at 1800 rpm and required modification to comply with the 1200 rpm specification.

69. 455 F.2d 1289, 1301 (D.C. Cir. 1971).

tion of Essex's bid as nonresponsive "unless no rational basis exists for the agency's determination."<sup>70</sup> The *Essex* court acknowledged that this standard of proof was higher than that which had prevailed prior to *Steinthal*, in that the prior standard permitted rejection of administrative action on a showing that it was merely "arbitrary or capricious."<sup>71</sup>

*Essex Electro Engineers* demonstrates, moreover, that the Claims Court also adheres to the *Steinthal* balancing test which requires that a "no rational basis" determination in favor of the protesting bidder be weighed against the "strong public interest in avoiding disruptions in procurement."<sup>72</sup> Applying *Steinthal*, the *Essex* court found that a permanent injunction against awarding the contract to anyone other than Essex, the lowest responsive bidder, "is consistent with the overriding purpose of Federal procurements to serve the public weal at a reasonable cost."<sup>73</sup>

### *The Federal District Court Remedies*

The Claims Court's ruling in *Essex*<sup>74</sup> clearly demonstrates that the disappointed bidder faces substantial obstacles to obtaining relief in that court. In light of this fact, many disappointed bidders, particularly those seeking post-award equitable relief, have brought their claims in federal district court. The burdens facing the bidder in federal district court are, however, no less onerous than those he would have faced in the Claims Court.

The jurisdiction of the district court to hear these claims and the standing of disappointed bidders to bring their claims<sup>75</sup> may be analyzed by comparison with the Claims Court. Clearly, the basis for the claim is identical in both instances. Thus, Corporation could have alleged that the GSA arbitrarily and capriciously rejected Corporation's

70. *Essex*, 3 Cl. Ct. 277, 284 (1983). *Steinthal*, 455 F.2d 1289, decided in 1971, preceded the grant of equitable jurisdiction to the Claims Court. By following *Steinthal*, the Claims Court has apparently signalled that it has adopted the D.C. Circuit's holdings as precedent in cases where equitable relief is sought.

In *Steinthal*, plaintiff sued alleging that the government's decision to cancel an ambiguous solicitation was arbitrary and capricious. The district court granted the injunction sought by plaintiff thus restraining the opening of bids submitted in response to readvertisement of the solicitation and the award of the contract in issue to anyone other than plaintiff. The Court of Appeals reversed, holding that "courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there is no rational basis for the agency's decision." *Id.* at 1301.

71. See, e.g., *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

72. *Steinthal*, 455 F.2d at 1300. See also *Steinthal* discussion, *supra* note 70.

73. In *Steinthal*, the District of Columbia Court of Appeals, the same court which had decided *Scanwell*, emphasized that the interest of a plaintiff with standing to sue who had proved "no rational basis" for an agency decision contrary to his interest might nevertheless be outweighed by a greater public interest. Thus the court held that "even in instances where such a [no rational basis] determination is made, there is room for sound judicial discretion, in the presence of overriding public interest considerations, to refuse to entertain declaratory or injunctive actions in a pre-procurement context." *Steinthal*, 455 F.2d at 1301.

74. *Essex Electro Engineers, Inc.*, 3 Cl. Ct. at 307.

75. These preliminary justiciability issues are so intertwined in this area as to defy all attempts to discuss them individually.

bid because the agency misinterpreted or misapplied federal agency regulations.<sup>76</sup> On these grounds, Corporation would have been entitled to invoke the "federal question" jurisdiction of the district court<sup>77</sup> through a grant of standing from the Administrative Procedure Act (APA).<sup>78</sup>

Clearly, however, to have overcome the initial hurdles of jurisdiction and standing does not guarantee the bidder the remedy it seeks. As was true of cases filed in the Claims Court, the disappointed bidder

76. The pertinent agency regulations include General Services Administration Procurement Regulation (GSPR) 5A-74.407-2, which mandates incorporation of GSA Form 1246 provisions in all AID solicitations, 41 C.F.R. § 5A-74.407-2(a) (1982) (*subsequently deleted*, 47 Fed. Reg. 28650 (1982)) and by reference, AID Regulation 1, Part 201, *codified at* 22 C.F.R. §§ 201.10-201.74.

77. Federal question jurisdiction is governed by 28 U.S.C. § 1331 (Supp. V 1981) which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Court in *Chasse v. Chasen* interpreted this statutory grant as it applies to administrative regulations. *Chasse v. Chasen*, 595 F.2d 59 (1st Cir. 1979). That court noted: "[i]t is beyond dispute that validly issued administrative regulations. . . . may be treated as 'laws of the United States' under Section 1331(a)." *Id.* at 61.

78. The pertinent sections of the Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 392 (codified as amended at 5 U.S.C. §§ 551-559 and §§ 701-706 (1982)) specify:

§ 701(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

§ 702. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

*See also* *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 865, 874 (D.C. Cir. 1970). Prior to *Scanwell*, disappointed bidders were routinely denied standing to challenge procurement decisions on grounds that no "legal rights" accruing to the bidders were infringed. *Scanwell Laboratories* brought its appeal from an order dismissing its claim on grounds of lack of standing to sue.

The Court of Appeals overruled that order identifying a broad mandate for what it referred to as the "person-aggrieved" criterion for standing to sue. *Id.* at 863. The court traced the roots of that mandate to the Supreme Court's rulings in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (recognizing that economic loss may provide a "person aggrieved" with a private interest standing to sue) and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) in which the Court proposed a standard to provide redress in cases in which the plaintiff asserted a public rather than a specific private interest. The *Scanwell* court acknowledged that passage of the APA had significantly ameliorated the applicability of the Court's language in *Perkins*, since the APA was itself "constitutional legislation recognizing a source of legal rights" in the disappointed bidder. *Perkins*, 310 U.S. at 125. In conclusion, the *Scanwell* court held:

[i]t is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency. . . . They may not base decisions on arbitrary or capricious abuses of discretion, however, and. . . one who makes a prima facie showing alleging such action. . . has standing to sue. . . .

*Scanwell*, 424 F.2d at 869.

The *Scanwell* doctrine has since been adopted by virtually all of the federal circuits. *See, e.g.*, *Davis Associates, Inc. v. Secretary, Dept. HUD.*, 498 F.2d 385 (1st Cir. 1974); *Spencer, White & Prentiss, Inc. v. United States EPA*, 641 F.2d 1061 (2d Cir. 1981); *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973); *Wilke, Inc. v. Dep't of the Army*, 485 F.2d 180 (4th Cir. 1973); *Hayes Int'l Corp. v. McLucas*, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Airco, Inc. v. Energy Research & Dev. Admin.*, 528 F.2d 1294 (7th Cir. 1975); *Park View Heights, Corp. v. City of Blackjack*, 467 F.2d 1208 (8th Cir. 1972); *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975); *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan. 1971); *Keco Industries, Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970).

in district court may seek monetary damages or injunctive relief. As for the latter, the disappointed bidder in district court may seek injunctive or other equitable relief whether before or after the contract was awarded.<sup>79</sup> The timing of filing should, therefore, have no impact on the nature of the relief sought.<sup>80</sup> The Claims Court's reluctant attitude toward granting equitable remedies was, however, adopted from the district court.<sup>81</sup> Thus, any belief on the part of a bidder that his chances for an equitable remedy will be enhanced in the district court as compared to the Claims Court would be unwarranted.

Similarly, the availability and scope of monetary damages in the district court will in most instances be indistinguishable from those which may be awarded by the Claims Court.<sup>82</sup> District courts have uniformly limited damages to recovery of bid-preparation costs as has the Claims Court.<sup>83</sup> Moreover, it is likely that the \$10,000 limitation on recovery,<sup>84</sup> even where only bid preparation costs are at stake, has caused many disappointed bidders to prefer the Claims Court to district court.

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79. This issue remains unsettled though the test states the position that the Federal Circuit Court of Appeals seems likely to adopt if required to decide the question. In *Grimberg*, 702 F.2d 1362, the court of appeals ruled not only on the Claims Courts' lack of jurisdiction to grant equitable relief in a post-award case, but also on the propriety of the Claims Court's transfer of *Grimberg & Schlosser's* claim into the district court. The court found "nothing in the statute or its legislative history," *id.* at 1374, to suggest Congress' intent to alter the district court's equitable jurisdiction over post-award suits, and therefore ruled that *Grimberg's* claim "could have been brought at the time it was filed" in the district court. The court affirmed the Claims Courts' transfer on those grounds. *Id.* at 1377. See Federal Courts Improvement Act, § 301(a).

The Court of Appeals also discussed, but did not decide, the impact of section 1491(a)(3) on the equitable jurisdiction of a district court in pre-award cases. *Grimberg*, 702 F.2d at 1374. See Federal Courts Improvement Act, § 133(a) (to be codified at 28 U.S.C. § 1491). The pertinent language of the statute states with regard to the Claims Court that "[i]o afford complete relief on any contract claim brought before the contract is awarded, the court shall have *exclusive jurisdiction* to grant [equitable relief]" (emphasis added). Emphasizing the legislative reports which accompanied the House version of the bill, H.R. 4482, the *Grimberg* Court concluded that Congress intended "that the grant in § 1491(a)(3) is exclusive only of contract boards, and that District Courts retain whatever equitable jurisdiction they had in contract cases under [Scanwell]." 702 F.2d at 1374-75.

To support its conclusion the court cited the House of Representatives report in which this specific point is discussed. *Id.* at 1375, (citing H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981)).

80. This lack of impact of timing on the scope of the remedy sought results in all likelihood from the APA's requirement for exhaustion of administrative remedies before seeking judicial review of agency action. 5 U.S.C. § 704 (1982) states, in pertinent part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The Supreme Court has stated that the goal of this restriction is to review "final agency action" in order "to prevent the courts. . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

81. See *supra* text accompanying notes 55-56. *Accord* note 70 and accompanying text.

82. 28 U.S.C. § 1346 (1976 & Supp. V 1981) grants the district court concurrent original jurisdiction with the Claims Court over prescribed civil actions or claims against the United States. With the exception of claims for recovery of internal revenue tax, however, recovery is limited to \$10,000.

83. See, e.g., *General Electric Co. v. Seaman*, 340 F. Supp. 636 (D.D.C. 1972).

84. 28 U.S.C. § 1346 (1976 & Supp. V 1981). See also discussion *supra* note 82.



In summary, both the Claims Court and the district court will properly have jurisdiction to hear claims brought by disappointed bidders. Section 133(a)(3) of the Courts Improvement Act<sup>85</sup> limits the Claims Court's jurisdiction to awarding equitable relief to claims filed in that court prior to awarding the contract in issue. Because the Courts Improvement Act apparently does not alter the equitable jurisdiction of the district court, that court may grant injunctive or declaratory relief both pre- and post-award. The distinction may be meaningless, however, in light of both courts' emphasis on the strong public interest in "orderly, efficient [and] expeditious"<sup>86</sup> government procurement as a countervailing factor against unrestricted "judicial interference with the administration of government contracts."<sup>87</sup> Thus, both courts have placed a heavy burden on plaintiffs seeking injunctive relief prior to award of the contract in issue.

Moreover, although the district court may have jurisdiction to grant equitable relief prior to contract award, the circumstances under which it may do so will undoubtedly be strictly limited by the requirement of exhaustion of administrative remedies.<sup>88</sup> In addition, the position of the GAO as stated in *Wheelebrator Corp. v. Chafee*<sup>89</sup> indicates that the GAO weighs pragmatic concerns more heavily than equitable concerns in reaching a decision as to the bidder's remedy.

Finally, both the Claims Court and the district court have uniformly restricted monetary damage awards to bid preparation costs rather than awarding the bidder his anticipated profits.

Clearly the scattergun approach employed by a disappointed bidder seeking a remedy does not necessarily result from an attempt to seek relief from *all* the possible sources, but rather to seek some relief from *any* source.

## CONCLUSION

Recalling that the roots of the Courts Improvement Act can be found in the Freund<sup>90</sup> and Hruska<sup>91</sup> reports, and that the stated intent of the drafters was "to improve the quality of the federal court system,"<sup>92</sup> it seems that Congress' overriding aim in enacting this legislation was to alleviate some of the backlog in the district courts by providing an orderly and systematic channel within which a disappointed bidder might resolve legitimate claims against the government. Thus, for example, Congress specifically acknowledged the *Scanwell* criteria for standing to sue on disappointed bidder claims. Similarly, it

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85. To be codified at 28 U.S.C. § 1491(a)(3).

86. *Grimberg*, 1 Cl. Ct. at 1371.

87. *Id.*

88. See discussion *supra* note 78.

89. *Wheelebrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971). See discussion *supra* note 43.

90. FREUND REPORT, *supra* note 7.

91. HRUSKA REPORT, *supra* note 10.

92. SENATE REPORT, *supra* note 2.

granted the Claims Court jurisdiction over claims for equitable relief concluding that "this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and [an] equitable [remedy]."<sup>93</sup>

From the preceding discussion, it should be clear that the Act has been only marginally successful, if at all, in achieving its intended purposes. This note, therefore, offers some suggestions for modification of the Act, and recommends coextensive legislation, regulations and policies to provide a coherent and stable framework for equitable resolution of these claims.

Initially, Congress should amend 28 U.S.C. § 1346 to deny concurrent jurisdiction to the district court over disappointed bidder claims, so that all of these claims will properly be filed in the Claims Court. This amendment would eliminate much of the confusion relating to the choice of the proper forum in which to bring these suits. Implementation of this proposal will only be warranted, however, if the equitable jurisdiction of the Claims Court is expanded. This expanded jurisdiction should encompass all claims brought in timely fashion for resolution to the Comptroller General.

Furthermore, since Congress has already explicitly acknowledged that disappointed bidder standing in the Claims Court rests on *Scanwell* criteria, Congress might reasonably condition access to judicial review of the bidder's claim on exhaustion of administrative remedies as that requirement is presently applied to cases brought in district court. It seems likely that implementation of these proposals would encourage disappointed bidders to press their claims most diligently at the administrative level. A moderate tightening-up on conditions under which the contracting officer could override the Comptroller General's power to postpone the contract award would allow full examination of the basis for any complaint without too significantly infringing on the public interest in expeditious public procurement. Only after a final decision had been reached would bidders have access to judicial review. Thus, only claims of substantial legitimacy would be brought to Claims Court.

As a final matter, it seems clear that the Claims Court's policy of limiting awards to bid-preparation costs must be reconsidered, and ultimately revised. Insofar as the disappointed bidder brings his claim under *Scanwell* criteria, he asserts an injury based on capricious and arbitrary government conduct. Such claims, though they may not entitle the bidder to anticipated profits, may well be compensable by some measure of damages. The public interest in full performance under a contract awarded contrary to the rules should not obviate the public interest in having its government servants operate within guidelines established by Congress. To the extent that monetary damages will en-

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93. *Id.* at 22.

courage adherence to those guidelines by penalizing lack of adherence, those damages should be awarded.

Implementation of these or comparable amendments and modifications would move the Federal Courts Improvement Act substantially closer to its objective of improving the federal court system and enhancing citizens' access to justice.

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