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WALSH-HEALEY PUBLIC CONTRACTS ACT - RIGHT OF PROSPECTIVE BIDDER TO QUESTION WAGE DETERMINATION OF SECRETARY OF LABOR

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WALSH-HEALEY PUBLIC CONTRACTS ACT — RIGHT OF PROSPECTIVE BIDDER TO QUESTION WAGE DETERMINATION OF SECRETARY OF LABOR — Complainants, small steel companies in eastern Pennsylvania, Maryland and Connecticut, brought this action to enjoin the secretary of labor and others from applying the provisions of the Public Contracts Act,[1] as construed, to the iron and steel industry. It was contended that the secretary's wage determination was the result of an erroneous interpretation of the word "locality" as included

[1] 49 Stat. L. 2036 (1936), 41 U. S. C. (Supp. 1939), §§ 35-45. The act provides that government supply contracts shall contain a stipulation by which sellers must agree to pay employees engaged in producing goods so purchased "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which . . . the supplies . . . are to be manufactured or furnished under said contract." Prior to the passage of the act, the "lowest responsible bidder" statutes of the federal government had an adverse effect upon wages in the industries bidding, as labor costs were lowered in order to secure contracts. To remedy this situation, the Walsh-Healey Act was passed.

in the act.[2] The district court dismissed the complaint. Upon appeal the Court of Appeals of the District of Columbia granted the injuction. On certiorari, *held*, reversed. The complainants have no standing in court to sue. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 S. Ct. 869 (1940).

To have a right to sue to enjoin enforcement of an allegedly erroneous wage determination, the complainants must show that the action of the secretary invaded some of their protected legal rights. The right must be either one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute.[3] The Court in the principal case, speaking through Justice Black, with a dearth of comment rejected complainants' contention that the secretary's action was a tortious invasion of their right to bid and negotiate for government contracts free from unlawful interference by third parties.[4] As ground for its decision, the Court had strong precedent for denying that the lowest responsible bidder statute conferred any litigable rights on bidders.[5] Nor did the Public Contracts Act confer any rights on the complainants. It is unquestioned that like any private individual, the government has the privilege of deciding on what terms it will deal with others,[6] and this it did in the Public Contracts Act.[7] And in the past the Court has consistently refused

[2] The act does not define the word "locality," nor does it set up any guides for administrative interpretation of the term. The complainants were included in the "Pittsburgh District," whose minimum wage was higher than they were accustomed to pay. They contended that the word "locality" was construed to include too large a geographical area.

[3] Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118 at 137-138, 59 S. Ct. 366 (1939). See also Alabama Power Co. v. Ickes, 302 U. S. 464, 58 S. Ct. 300 (1938); Louisiana v. McAdoo, 234 U. S. 627, 34 S. Ct. 938 (1913); Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597 (1922).

[4] The complainants contended that petitioners were acting beyond the scope of their authority and were therefore acting as individuals. In referring to those cases cited by complainants where it has been held that unauthorized interference by public officers with private rights may be enjoined, the Court in the instant case said that the problems there involved were "different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies." 310 U. S. 113 at 129-130.

[5] The requirements of the Public Contracts Act of 1861, Rev. Stat. (1861), § 3709, 41 U. S. C. (1934), § 5, were held to be for the protection of the United States, not of the seller. See American Smelting & Refining Co. v. United States, 259 U. S. 75, 42 S. Ct. 420 (1921). Upon the few occasions where this statute (or any similar federal statute) has been before the courts, it has been uniformly stated that it gives no standing to bidders to attack the award of contracts. O'Brien v. Carney, (D. C. Mass. 1934) 6 F. Supp. 761; B. F. Cummins Co. v. Burleson, 40 App. D. C. 500 (1913); Strong v. United States, 6 Ct. Cls. 135 (1870). And where under similar state or municipal statutes the question has arisen, the majority of courts have held that the laws are enacted for the benefit of the public alone, and that a bidder has no standing to enjoin a rejection of his bid, to enjoin an award to a competing bidder, to compel an award to himself, or to obtain damages for loss of profits. See 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., §§ 1341, 1342, 1343 (1928), and cases there collected.

[6] Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78 (1915) and cases there cited.

[7] The Court regarded the act as merely an instruction by Congress to its agent to fix the terms and conditions under which the government will permit goods to be sold

to enjoin or issue mandamus to control the actions of administrative or executive officials involving an exercise of discretion even where the duties of those officials included an interpretation of the law.[8] It is difficult to ascertain, however, whether the Court placed more emphasis on precedent or on the policy factor in the instant case—the desire to keep the purchasing machinery of the government free from judicial scrutiny at the instance of potential bidders. The Court denied that the Public Contracts Act represented an exercise by Congress of regulatory power over private business. Even if it did, it seems settled that no one has a standing to question the propriety of government expenditures as such, regardless of their incidental regulatory effect.[9] Although from the history of the act it is apparent that its purpose was sound,[10] still it would seem that the Court failed to consider a vital factor in the case—that the effect of its decision was to place an uncontrolled regulatory power in the hands of the secretary since only the government is allowed to complain.

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to it. However, it has been pointed out that the fact that the government may impose its own conditions on its purchases should not be determinative of the prospective bidder's right to challenge the secretary's determination. See 49 YALE L. J. 548 at 544 (1940).

[8] Brunswick v. Elliott, 70 App. D. C. 45 at 49, 103 F. (2d) 746 (1939), and cases there cited. The Court in the instant case felt that the act gave the secretary an adequate range of discretion. 310 U. S. 113 at 127.

[9] Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597 (1922). But see Grant, "Commerce, Production, and the Fiscal Powers of Congress," 45 YALE L. J. 751, 991 (1936).

[10] See supra, note 1. The principal case is also noted in 35 ILL. L. REV. 473 (1940).