

# JUDICIAL AND ADMINISTRATIVE REVIEW OF GOVERNMENT CONTRACT AWARDS

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The government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

—Chief Justice Fred M. Vinson<sup>1</sup>

The public interest is not necessarily in the solution adopted by the agency. . . . [I]ndeed . . . the public interest is often identified with settling an issue right rather than settling it quickly.

—Louis L. Jaffe<sup>2</sup>

The basic issue [involves] balancing the public interest in preventing undue judicial interference with ongoing governmental programs against the desire to provide judicial review to individuals claiming that the government has harmed or threatens to harm them . . . .

—Roger C. Cramton<sup>3</sup>

## I

### THE PROBLEM STATED

Government contracts for supplies, construction, research and development, personal services, and the like are awarded to private business concerns through two basic techniques, formal advertising and negotiation. The standards for choice between and the basic controls upon each of these techniques are set forth in such legislation as the Armed Services Procurement Act and the Federal Property and Administrative Services Act and implemented by complex procurement regulations, such as the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulation (FPR),<sup>4</sup> promulgated by the various executive agencies

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<sup>1</sup> *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

<sup>2</sup> L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 693 (1965).

<sup>3</sup> Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 400 (1970).

<sup>4</sup> Armed Services Procurement Act, 10 U.S.C. §§ 2304-05 (1970); Armed Services Procurement Regulations, 32 C.F.R. pts. 2-3 (1971); Federal Property and Administrative Services Act, 41 U.S.C. §§ 252-53 (1970); Federal Procurement Regulations, 41 C.F.R. pts. 1-2, 1-3 (1972). For some purposes, these implementing regulations have the force of law. See, Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171, 185-209 (1971).

and departments. In addition, each agency has its own set of internal procurement regulations and operating instructions which further delegate and define the power of agents to bind the United States by contract.<sup>5</sup>

Formal advertising is, by statute, the preferred method of procurement.<sup>6</sup> This highly structured method is administered under a set of detailed and tightly drawn standard forms and regulations which are designed, in the words of the Court of Claims, "to give everyone an equal right to compete for Government business . . ."<sup>7</sup> Negotiation, whereby roughly eighty-five per cent of the total government expenditure for procurement is obligated, is conducted with much less formality but, in theory at least, with the same concern for competitive pricing.<sup>8</sup> Under both methods of procurement, bids or offers are solicited from a pool of prospective contractors and are evaluated on the grounds of price, responsiveness to the invitation for bids or request for proposals, and the responsibility—that is, the capacity, credit, and integrity—of the potential contractor. A critical difference between the two methods of procurement is the degree of control imposed by statute and regulation upon contracting officers. In formal advertising, Congress, to obtain competitive prices and equality of access, relies upon a system within which contracting officers have relatively little discretion. If the system works, basic legislative policies are supposedly achieved. In negotiation, Congress relies more upon executive judgment and discretion to achieve similar objectives in procurements where formal advertising is not practical or feasible, either because of urgency, the complexity or experimental nature of what is being purchased, or the absence of multiple sources of supply.<sup>9</sup> The constant tension between these methods of procurement mirrors a deeper conflict between two different kinds of public interests in the procurement process.

<sup>5</sup> It is well established that, without more, executive officers have a "capacity . . . to contract" that is "co-extensive with the duties and powers of government." More specifically, there is power to contract "in every case where it is necessary to the execution of a public duty." *United States v. Maurice*, 26 F. Cas. 1211, 1217 (No. 15,747) (C.C.D. Va. 1823). See *United States v. Tingey*, 30 U.S. (5 Pet.) 248 (1831); *United States v. Salon*, 182 F.2d 110 (7th Cir. 1950). Professor Whelan has provided two interesting studies of the process whereby authority is delegated and limited within a particular agency and the legal effect when an executive officer exceeds his actual authority in the contracting process: Whelan & Phillips, *Government Contracts: Emphasis on Government*, 29 LAW & CONTEMP. PROB. 315, 331-42 (1964); Whelan & Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830 (1967).

<sup>6</sup> "Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances." 10 U.S.C. § 2304(a) (1970); 32 C.F.R. § 2.102-1(a) (1971).

<sup>7</sup> *Pretext, Inc. v. United States*, 320 F.2d 367, 372 (Ct. Cl. 1963).

<sup>8</sup> See 10 U.S.C. § 2304(g) (1970), as amended, Pub. L. No. 90-500 (Sept. 20, 1968); 32 C.F.R. § 3.101 (1971); *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969) (competitive negotiation policy). It has been suggested that truly open competition for advanced technical systems is not possible and that such competition as does exist "is not a significant factor in controlling costs, nor does it affect efficiency directly." Drake, *Major DOD Procurements at War with Reality*, HARV. BUS. REV., Jan.-Feb., 1970, at 119, 120. See Moore, *Efficiency and Public Policy in Defense Procurement*, 29 LAW & CONTEMP. PROB. 3 (1964).

<sup>9</sup> 10 U.S.C. § 2304(a) (1970). See Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. IND. & COM. L. REV. 1, 26-41 (1970).

The first is the practical need for executive officers to have power effectively to implement public programs or satisfy agency needs from private sources of supply. This need is implicit in Professor Mitchell's theory of governmental effectiveness<sup>10</sup> and may be the primary justification for what remains of the sovereign immunity doctrine.<sup>11</sup> The second is a broader and perhaps overriding Congressional concern that the award process achieve competitive pricing and insure equality of access to the procurement dollar. In addition, there are diverse social and economic policies, rooted in statute and Executive Order, which are to be implemented through the contracting process. These policies, which are somewhat collateral to the business of getting timely supplies and quality services at fair prices, include preferences for small business and economically disadvantaged areas, a condition that government contractors and subcontractors provide equal employment opportunities, and a requirement that contractors "buy American."<sup>12</sup> The potential for collision between the ongoing procurement process and these restraints upon eligibility for award is great indeed. A contracting officer may honestly and correctly believe that the procurement could be accomplished more efficiently if the agency is permitted to deal quickly and exclusively with a reliable supplier who charges a bit more and is neither a small business concern nor an equal opportunity employer. Yet action according to this belief could exceed or abuse the limited authority actually delegated to him.

<sup>10</sup> J. MITCHELL, *THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY* 6-7 (1954); Mitchell, *A General Theory of Public Contracts*, 63 *JURIDICAL REV.* 60 (1951). For discussions of this theory in other contexts, see Frenzen, *The Administrative Contract in the United States*, 37 *GEO. WASH. L. REV.* 270 (1968); Speidel, *Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts*, 51 *GEO. L.J.* 516 (1963).

<sup>11</sup> While speaking about intergovernmental tax immunity, Mr. Justice Frankfurter caught the essence of governmental effectiveness:

"... The distinction [between direct and indirect taxes] embodies a considered judgment as to the minimum safeguard necessary for the National Government to carry on its essential functions without hindrance from the exercise of power by another sovereign within the same territory. That in a particular case there may in fact be no conflict in the exercise of the two governmental powers is not to the point. It is in avoiding the potentialities of friction and furthering the smooth operation of complicated governmental machinery that the constitutional doctrine of immunity finds its explanation and justification." *City of Detroit v. Murray Corp.*, 355 U.S. 489, 504 (1958) (dissenting opinion). Compare *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 130 (1940), where the Court, speaking through Mr. Justice Black, stated,

"Courts should not . . . subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is . . . essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered."

<sup>12</sup> For the classic study, see Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies with Other Governmental Policies*, 29 *LAW & CONTEMP. PROB.* 277 (1964). For recent developments, see *Contractors Ass'n of E. Pa. v. Shultz*, 442 F.2d 159 (3d Cir. 1971), cert. denied, 92 S. Ct. 98 (1971) (Philadelphia Plan upheld); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 *CORNELL L. REV.* 84 (1970); Sky, *Defense Procurement Preferences as a Remedy for Subemployment: A Comment*, 82 *HARV. L. REV.* 1266 (1969) (while price differentials magnify departures from traditional procurement aims, costs are outweighed by gains achieved in the ghetto). For another perspective, see *DOD Irked at Growing Social Responsibilities*, *AIR FORCE MANAGEMENT*, Jan., 1970, at 48.

There are, of course, substantial private interests involved in this public award process. The United States does not rely upon "in-house" sources, condemnation, requisition, or mandatory orders to implement public programs. Rather, private concerns must be induced by the prospect of profitable contracts to invest the often substantial sums necessary to be in a position to compete with other bidders. While this undertaking is replete with business risks, it is the opportunity to compete and the prospect of profitable awards that holds the public contracting system together.<sup>13</sup>

Profit, in this context, is a broad concept. The failure to receive an expected award could mean the loss of net gains on the particular contract or the loss of valuable experience needed to compete for and earn future awards. Both are important to the firm's long-range profit picture. Losses other than of net gains are also involved. At the very least, the expenses incurred in preparing to compete may be wasted.<sup>14</sup> At the other extreme, losing the award of a contract destined to be a "sure loser" may mean the difference between business survival and bankruptcy. At a time of economic instability where there is fierce competition for scarce awards, the paradigm of the healthy government contractor who wins some and loses others and yet is still willing and able to compete is suspect.<sup>15</sup> This suspicion is reinforced by the increasing dependence of business concerns upon government spending through contracts and the disruptive impact of spending cutbacks upon the communities in which these businesses are located. As in other areas of governmental operations, the reality of dependence has eroded the traditional right-privilege distinction<sup>16</sup> and has stimulated remarkable candor by some courts:

<sup>13</sup> Professor Reich has pointed out that the "opportunity for private profit is intended to serve as a lure to make private operators serve the public" and that only a contractor's "right to profits and his control over how the job is done distinguish his private status." Reich, *The New Property*, 73 *YALE L.J.* 733, 745 (1964). The same point has been made about public contracts in Great Britain, another economy which features a blurring or fusion of public and private interests. See Turpin, *Government Contracts: A Study of Methods of Contracting*, 31 *MOD. L. REV.* 241 (1968). Apparently agreeing that public contracts are "undoubtedly" located in the "area too large to be comfortable, in which the market economy does not automatically look after the public interest," H. CATHERWOOD, *THE CHRISTIAN IN INDUSTRIAL SOCIETY* 35 (2d ed. 1966), Mr. Donald Frenzen has urged that the theories which underlie private contracts be replaced by an administrative contract. Frenzen, *supra* note 10. See also Mewett, *The Theory of Government Contracts*, 5 *MCGILL L.J.* 222 (1959). For a particularly stimulating discussion of these and other developments, see Smith, *Accountability and Independence in the Contract State*, in *THE DILEMMA OF ACCOUNTABILITY IN MODERN GOVERNMENT* 3-69 (B. Smith & D. Hague eds. 1971). For discussions of the business risks and strategies of competitive bidding, see Stark & Mayer, *Some Multi-Contract Decision-Theoretic Competitive Bidding Models*, 19 *OPERATIONS RESEARCH* 469 (1971); Anderson, *Handling Risk in Defense Contracting*, *HARV. BUS. REV.*, July-Aug., 1969, at 90.

<sup>14</sup> These expenses are, however, deductible as "ordinary and necessary" business expenses, *INT. REV. CODE OF 1954* § 162(a), unless the business is on a "completed contract" method of accounting, whereupon they are treated as business losses under *INT. REV. CODE OF 1954* § 165(a).

<sup>15</sup> Even more suspicious is Professor Reich's assertion that it is "virtually impossible to lose money" on government contracts. Reich, *supra* note 13, at 735. See *Contractors Claw at the Money Door*, *BUS. WEEK*, Jan. 2, 1971, at 14, where it is stated that inflation and the substantial drop in defense spending has changed contractor behavior patterns. Where previously they tended to minimize and settle disputes at the lowest possible level, they now protest more frequently and visibly, risk ire by filing claims for extras, and ask to be declared essential to maintenance of the mobilization base.

<sup>16</sup> The "right-privilege" distinction in government contracts reached its zenith in *Perkins v. Lukens*

The consequences of administrative termination of all right to bid or contract, colloquially called "blacklisting" and formally called suspension or debarment, will vary, depending upon multiple factors: the size and prominence of the contractor; the ratio of his government business to non-government business; the length of his contractual relationship with government; his dependence on that business; his ability to secure other business as a substitute for government business. These are some of the basic factors involved. The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of "loss of face" in the business community. These consequences are in addition to the loss of specific profits from the business denied as a result of debarment. We need not resort to a colorful term such as "stigma" to characterize the consequences of such governmental action, for labels may blur the issues. But we strain no concept of judicial notice to acknowledge these basic facts of economic life.<sup>17</sup>

The critical question, therefore, is how much protection this private economic interest should receive against award decisions which exceed or abuse the actual authority delegated to contracting officers.<sup>18</sup> In approaching this question, the

Steel Co., 310 U.S. 113 (1940), where the Court stressed that procurement statutes and regulations were managerial and conferred no rights upon prospective contractors to whom no contract had been awarded. See also *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 896 (1961) (summary dismissal of federal employee upheld because in its "proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control" and because the action involved the government's "dispatch of its own internal affairs.") The decline of the distinction in other areas of governmental operations, principally welfare spending, has been notable. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); R. O'NEIL, *THE PRICE OF DEPENDENCY* 251-318 (1970); Van Alstyne, *Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968). Cf. Summers, *The Technique Element in Law*, 59 CALIF. L. REV. 733, 739-41 (1971) (legal ordering and control are essential elements when public benefits are conferred). The attack on the distinction in government contracts has been persistent, see, e.g., K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 177-80* (1969); JAFFE, *supra* note 2, at 369-71; Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 430-42 (1966); Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781, 803 (1955), and not without some impact in the courts. As the distinction continues to erode, the ultimate questions are, what are the "rights" of disappointed bidders, and how can they best be protected in a system of broad standards, wide discretion, and, because of the fact of dependency upon government spending, a relationship that is fundamentally coercive.

<sup>17</sup> *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (Burger, J.).

<sup>18</sup> A number of questions about the propriety of contract award decisions are raised by those competing for government business. In one category is the prospective contractor who complains that he and perhaps others similarly situated have improperly been excluded from competing for government business. The actions complained of may include debarment or suspension, bidding conditions which he is unable or unwilling to meet, an inadequate solicitation for bids, or unduly restrictive specifications. Parties in this category normally have a continuing interest in and a general investment in a capacity to compete for government contracts, but have not actually made any expenditures toward a particular contract. For a recent example, see *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970). A second and larger category includes actual but disappointed bidders on particular contracts who complain about decisions made in the award process. These complaints take two basic forms, either that the opportunity fairly to compete has been impaired and should be restored or that the disappointed bidder was entitled to a contract which went to someone else. The substance of the complaint might involve one or more of the following: (a) the contract should have been awarded through formal advertising rather than negotiation (or vice versa); (b) the invitation for bids or the proposed specifications were so defective or ambiguous as to preclude competition on an equal basis;

reciprocal dependence of the government upon the private sector of the economy must be taken into account. Both agency effectiveness and overriding Congressional policies would seem to depend, in the long run, upon a broad base of willing and able prospective contractors. Usual business risks aside, if a pattern of award decisions exists which seem to deviate from the "rules of the game" and there is no effective way to improve or reverse the pattern, a realistic cost-benefit analysis might induce many firms to stop or cut back competition for government business and reallocate resources to other commercial markets.<sup>10</sup> Given this possibility, the loss to and of particular contractors would not necessarily be offset by the assertion that the award process works well most of the time and that occasional defects will be corrected in the next procurement.

Assuming the importance of the private interest and the need for balancing

(c) one or more bidders had an unfair opportunity after the time for bid opening had passed to withdraw or modify his bid; (d) the contracting officer erroneously determined that a bid was or was not responsive to the invitation or that a bidder was or was not responsible; (e) the decision to prefer one bidder over another, made after evaluating complex, technical proposals, was erroneous; or (f) the decision to cancel an advertisement or solicitation and try again was improper.

There are an infinite number of variations on these themes, all of which are complicated by the degree of discretion given by statute and regulation to the contracting officer. Consider, for example, what is involved in the decision to cancel the invitation and try again. The Armed Services Procurement Act provides that "all bids may be rejected if the head of the agency determines that rejection is in the public interest." 10 U.S.C. § 2305(c) (1970). The head of the agency, however, may delegate this power to a subordinate officer, and there is no statutory requirement that the decision to reject all bids be reduced to a writing containing the findings which justify it. The Armed Services Procurement Regulation (ASPR), 32 C.F.R. § 2.404-1 (1971), however, states that "the preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsible bid, unless there is a compelling reason to reject all bids and cancel the invitation." To cancel an invitation after opening but before award, the contracting officer, to whom the cancellation power is delegated, must determine in writing that one or more of eight possible justifying conditions exist, including that the "supplies or services being provided are no longer required," or "all acceptable bids received were at unreasonable prices" or "for other reasons, cancellation is clearly in the best interest of the Government." As might be expected, both GAO and the courts have been reluctant to overturn decisions to cancel an invitation unless there was a clear abuse of discretion. 49 COMP. GEN. 683 (1970); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-16 (1971); Comment, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 315-25 (1971).

<sup>10</sup> In an earlier article I stated:

"In an enlightened public purchasing process, both the public and private interests should be identified, evaluated and given protection commensurate with the actual needs of that process. On the Government's side, one such basic need is for a broad base of capable contractors who are willing and able to satisfy the Government's purchasing requirements; another is for efficient and economical operation. The inherent difficulty, however, is that if, in the name of the public interest in economy, a broad imposition of risk is made on private contractors, the public interest in a broad base of capable producers may be impaired. Without reasonable assurance of a fair profit the capable, responsible contractor may divert his productive energy to private commercial undertakings." Speidel, *supra* note 10 at 516-7.

I would only add that whether the contractor will divert his productive energy depends upon the transaction costs incurred in preparing to deal in another or different market or reorganizing the firm. If because of size, specialization, or other variations on the dependence theme, the rearrangement is excessively costly, the contractor may decide to forego the activity altogether or continue to compete despite the harmful effect complained of. This latter point is well made in Drake, *supra* note 8, at 120: "A company that has prepared itself to compete in this market cannot readily redirect its energies into the commercial market place: Competition requires a deep and relatively inflexible commitment to serving the needs of the DOD." See also Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

it with the often conflicting public interests in the award process, the more particular inquiry becomes when and how can a disappointed bidder insist that a decision be right rather than quick. In almost every case, the most effective way to protect the private and the overriding public interest will be for the contracting officer to stop, reverse the wrong decision, and continue the award process according to the rules.<sup>20</sup> There are, of course, costs to governmental effectiveness in this approach, primarily in delay and the effort to undertake a reconsideration. But who is to tell the contracting officer to stop and for how long? Who has power to order the contracting officer to play the game according to the rules and when should this power be exercised? The complexity of these questions is obvious—a price to be paid for a government of separate powers and a procurement process that has evolved as a pragmatic, unplanned response to governmental needs.<sup>21</sup> The answers are not made easier by the plain fact that if a court is the body empowered to act, the relief most appropriate from the plaintiff's perspective—a temporary or preliminary injunction pending a decision on the merits followed by a mandatory injunction—poses the greatest threat to governmental effectiveness. Yet anything short of this permits the award process in the particular procurement to continue at the discretion of contracting officials. If the decision complained of was in fact wrong, the agency will be reluctant to cancel the contract and start over. Thus, protection of the private interest will be left to the remote prospect of damages in the Court of Claims, and protection of the overriding public interest in an award system operating in accordance with law will depend on the uncertain pressures of the political process.

With these problems in mind, let us next examine the extent to which a disappointed and protesting bidder can, through either administrative or judicial review, stop the award process "in its tracks" pending an authoritative determination of the validity of the proposed action.

## II

### ADMINISTRATIVE REVIEW

Disappointed bidders have two primary administrative channels within which to protest an award decision. The first is within the procuring agency itself, the protest being lodged with the contracting officer or his superiors. The second is to

<sup>20</sup> Another cost of this action may be to the competitor unfortunate enough to have received an allegedly erroneous award. If the contract is cancelled and the award was illegal, the contractor's recovery is limited to restitution. See *Campbell v. Tennessee Valley Authority*, 421 F.2d 293 (5th Cir. 1969). If the award was not illegal, the contractor's recovery for the improper cancellation is limited to actual expenses incurred plus profit on any work done. See *G. C. Casebolt Co. v. United States*, 421 F.2d 710 (Ct. Cl. 1970). Ironically, the contractor's position improves if, after a protest, performance is permitted to continue while a decision on legality is being reached. The Comptroller General is reluctant to direct cancellation, see 49 COMP. GEN. 639 (1970), and the courts, seemingly, require a more egregious error before willing to enjoin performance. See *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970). This, of course, works to the disadvantage of the protesting bidder.

<sup>21</sup> This point is made in Stover, *The Government Contract System as a Problem in Public Policy*, 32 GEO. WASH. L. REV. 701 (1964).

the General Accounting Office (GAO), the protest being lodged with the Comptroller General. Frequently, a protest will be made in both channels, with a Congressman or Secretary thrown in for good measure. Despite procedures designed to facilitate administrative review, these channels have been relatively unsuccessful in stopping the award process or contract performance until a decision on the merits has been reached. Let us briefly consider why this is so.

#### A. Within the Procuring Agency

Most executive departments or agencies have some published procedures for internal review of contracting officer decisions in the award process.<sup>22</sup> Despite wide variances, all can be triggered by a protest from a disappointed bidder. How the protest is processed depends, in turn, upon whether it is made before or after award and whether the GAO has become involved.<sup>23</sup> Assuming for a moment that GAO is not involved, what chance might a bidder on an Air Force contract have to stop the award process pending internal review? More specifically, suppose that the Aeronautical Systems Division (ASD) at Wright-Patterson Air Force Base has been negotiating a complex contract and, after extensive evaluation, has decided to award the contract to Bidder A. Bidder B, who learns of the decision before the award is made, files a written protest with the contracting officer, claiming that the evaluation was erroneous and that he was entitled to the award.

Armed Services Procurement Regulation (ASPR) 2-407.8 provides that the contracting officer "shall consider all protests . . . to the award of a contract" and requires that notice of the protest be given to "other persons . . . involved in or affected by the protest" so that they may submit their views and supply relevant information. A general policy is stated in ASPR 2-407.8(a)(4): "Timely action on protests is essential to avoid undue delay in procurements and to assure fair treatment to protesting firms or individuals. Accordingly, protests should be handled on a priority basis." While ASPR and the implementing Air Force regulations state what shall be in the protest file and who shall decide the protest, they provide no procedures or standards for internal review.<sup>24</sup>

<sup>22</sup> Basic regulations governing bid protests are found in the Armed Services Procurement Regulation (ASPR), 32 C.F.R. §§ 2.407.8, 3-509 (1971) (military procurement), and the Federal Procurement Regulation (FPR), 41 C.F.R. § 1-2.407-8 (1971) (non-military procurement). Supplementary procedures for different agencies and departments exist. *See, e.g.*, Army Procurement Procedure (APP) 2-407.8 (1 Apr. 1970), 5 CCH Gov't CONT. REP. ¶ 38,235; Navy Procurement Directives (NPD) 2-407.9 (Mar. 1971), 6 CCH Gov't CONT. REP. ¶ 63,330; General Services Procurement Regulation (GSPR), 41 C.F.R. §§ 5-2.407-8, 5-2.408 (1971); National Aeronautics and Space Administration Procurement Regulation (NASAPR), 41 C.F.R. §§ 18-2.407-8, 3.111 (1971); Atomic Energy Comm'n Procurement Regulation (AECPR), 41 C.F.R. § 9-2.407-8 (1971).

<sup>23</sup> A direct protest to GAO shifts the responsibility for decision from the agency to the Comptroller General. In any case, the agency must prepare a file and report on the protest for GAO. *See* ASPR, 32 C.F.R. § 2-407.8(a)(2), (4) & (5) (1971). If protest is made to GAO before award, the contracting officer's decision to continue the award process must be approved by superior officers after GAO advice is given regarding the status of the protest. ASPR, 32 C.F.R. § 2-407.8(b)(2) (1971); Headquarters United States Air Force, ASPR Supp. (HQ USAF ASPR Supp.) 2-407.9(b)(3), 5 CCH Gov't CONT. REP. ¶ 41,542.20 (1970).

<sup>24</sup> *See* HQ USAF ASPR Supp. 2.407.9, 5 CCH Gov't CONT. REP. ¶ 41,542.20 (1970).



In most cases, the final decision on the protest will be made at a major command headquarters, such as the Air Force Systems Command (AFSC), rather than by the contracting officer.<sup>25</sup> However, the primary decision to stop the procurement process or make the award to Bidder A remains with the contracting officer, subject to ASPR 2-407.8(b)(3). This subsection provides that when a written protest prior to award is made, "award shall not be made until the matter is resolved, unless the contracting officer determines that: (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." In sharp contrast, if the protest is made after award, ASPR 2-407.8(c) provides that the contracting officer "should seek a mutual agreement with the successful offeror to suspend performance on a no-cost basis" when it "appears likely that an award may be invalidated" and a delay is not prejudicial to the government's interest.<sup>26</sup> Finally, a decision to award the contract to Bidder A after a protest from Bidder B need not be approved by superior officers unless a protest has also been filed with GAO.<sup>27</sup>

A charitable cynic might observe that the deck is stacked against the protesting bidder. In the absence of an early debriefing, he will be lucky to know enough to protest before award is made, and timing is obviously critical in this situation. Even with a protest before award, the decision to suspend the award process is left to the contracting officer from whose decision the bidder is appealing. If the contracting officer has consulted extensively with his "team" of experts before making the decision and considerations of urgency are present, the probabilities of achieving a suspension pending review seem slim indeed.

Unfortunately, there is little persuasive data available on the effectiveness of internal bid protests procedures in the Air Force or other executive departments. A synopsis of forty-seven bid protests involving AFSC during fiscal year 1970,<sup>28</sup> for example, shows that thirty-one protests were made prior to award and that relief of some sort was granted in seven of these cases. In the sixteen post-award protests, the requested relief of cancellation was granted in two cases. However, there is no indication in the synopsis in which cases the award process was actually suspended or for what reasons or for how long. Further, in thirty-four of the forty-seven protests and eight of the nine cases where some relief was granted, a direct protest to the GAO was also filed thereby preempting the internal review process. This data may confirm that many bidders believe that even the Air Force protest pro-

<sup>25</sup> An Air Force contracting officer decides a protest filed with him "only if he is satisfied that the protest is without any reasonable degree of foundation." HQ USAF ASPR Supp. 2-407.9(b)(2)(iv), 5 CCH Gov't Cont. Rep. ¶ 41,542.20 (1970). Otherwise, the protest is resolved at a major command level or higher. HQ USAF ASPR Supp. 2-407.9(a), 5 CCH Gov't Cont. Rep. ¶ 41,542.20 (1970).

<sup>26</sup> The critical importance of a timely protest is illustrated in COMP. GEN. B-169754 (23 Dec. 1970), where the protest was filed within minutes after award, performance under the awarded contract was not suspended and a final GAO decision was made 7 months later.

<sup>27</sup> See note 23 *supra*.

<sup>28</sup> The synopsis was prepared for the Commission on Government Procurement by the AFSC.

cedures, reputed to be among the best, offer little opportunity to stop the award process pending review. On the other hand, the ready availability of GAO bid protest procedures and the prospect of an independent review may be viewed as impairing the development of effective internal procedures and undermining the efforts of procurement officials to avoid and settle protests as quickly and fairly as possible.<sup>29</sup> However one reads the equivocal data, the potential for effective internal administrative review remains largely unrealized.

### B. The General Accounting Office

Under interim GAO rules on "Bid Protest Procedures and Standards,"<sup>30</sup> an "interested party" may protest the award or proposed award of a contract by letter or telegram to GAO. The protest should identify the procurement and agency involved and state "the specific grounds upon which the protest is based." The contracting officer involved is provided with a copy of the protest. The popularity of the direct protest is attested by the fact that GAO received 1054 protests in fiscal year 1971—a thirty-seven per cent increase over fiscal year 1970.<sup>31</sup>

If the protest is not withdrawn, current procedures permit the protestor and others who have "a substantial and reasonable" prospect of receiving the award to have a "reasonable opportunity to present views," including a conference with a GAO attorney who has been assigned primary responsibility for handling the protest. The procuring agency's case is contained in the file and report submitted to GAO after the direct protest is filed. A written decision, often lengthy, is then made on this record but without a formal hearing or efforts to subpoena witnesses or documents.<sup>32</sup> These decisions review the challenged exercise of agency discretion under standards similar to those employed by courts and tend, when the evidence is balanced, to uphold rather than to reverse the agency action.<sup>33</sup> Nevertheless, of the

<sup>29</sup> According to Cibinic and Lasken, this "may be unfortunate since the operating agencies are probably better equipped by reason of practical experience, to determine which course of action would be in the Government's best interest." Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 383 (1970). Informal discussions with Air Force procurement officials reveal that a stated objective is to avoid or minimize protests in the award process. Suggested methods for accomplishing this include: (a) develop incentives for contracting officers to follow more completely purchasing policies and procedures; (b) better preparation of solicitations for bids and more clarity and completeness in the criteria for evaluation; (c) earlier and more complete briefings—that is, information to unsuccessful bidders as to what happened and why; (d) more centralized administration of internal bid protest activities; (e) a more systematic collection of bid protest data.

<sup>30</sup> 4 C.F.R. pt. 20 (1972).

<sup>31</sup> For a discussion of these statistics, see 13 GOVERNMENT CONTRACTOR ¶411 (1971).

<sup>32</sup> A concise discussion of GAO practice and procedure is found in Schnitzer, *Handling Bid Protests Before GAO* (Briefing Paper No. 70-3, Federal Publications, Inc. 1970).

<sup>33</sup> Since GAO usually does not have any independent means of deciding disputed issues of fact, it adopts a presumption in favor of the contracting agency's version of disputed facts and this prevails unless the protestor can clearly prove facts to the contrary. See 49 COMP. GEN. 463, 469 (1970); 42 COMP. GEN. 346, 352-53 (1963). As for the standards of review, "it is a responsibility of our Office to insure that Government procurements are made in accordance with applicable law, and this necessarily involves review of the administrative discretion to the extent necessary to insure that such discretion has been exercised within proper limits. . . . In this regard, we have adopted the general rule that we will not substitute our judgment for that of the contracting officer, unless it is shown by

715 protests actually decided in fiscal year 1971, some relief was granted in seventy-four, or eleven per cent.

Several objections to the GAO role are frequently made, including alleged lack of statutory power, substandard procedures, and doubts about the propriety of an auditing agency lodged in the legislative branch being involved in what appears to be the adjudication of private protests against executive action.<sup>34</sup> From the protestor's perspective, however, the loudest complaints are against the time required to resolve a protest and the inability or unwillingness of GAO to direct the contracting officer to suspend the award process pending decision or cancel an award once made.<sup>35</sup> In fiscal year 1971, the average time to resolve a protest was 106 days. Given this delay, the probabilities are that the contract will be awarded and performance will be underway at the time of decision, even though the contracting officer's decision to proceed must be approved by superior officers. Here the fiscal year 1971 statistics show that of the seventy-four protests where some relief was granted, only four decisions, or five per cent, recommended cancellation of a contract. Notwithstanding the conceded beneficial impact of these decisions on the award process as a whole, disappointed bidders have been known to complain about pyrrhic victories where protests are sustained without either the award or damages being obtained.<sup>36</sup>

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convincing evidence that a determination was arbitrary, or not based on substantial evidence." 48 COMP. GEN. 689, 696-97 (1969). For variations on this theme, see 49 COMP. GEN. 683, 685-86 (1970) (technical evaluation is matter of administrative discretion which will not be disturbed in absence of clear showing that determination was arbitrary); 49 COMP. GEN. 463, 471 (1970). In a decision of major importance, the Supreme Court has decided, *inter alia*, that GAO's power to review final agency post-award decisions under the contract disputes procedure is limited to allegations of fraud or bad faith. *S&E Contractors, Inc. v. United States*, 406 U.S. 1 (1972).

<sup>34</sup> See Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 372-84 (1970). For discussion of the GAO functions of auditing and claims settlement, see S. Doc. No. 96, 87th Cong., 2d Sess. (1962); Note, 70 HARV. L. REV. 350 (1956). A complete collection of the various complaints about the GAO bid protest role can be found in the ABA SECTION ON PUBLIC CONTRACT LAW, REPORT OF THE COMMITTEE ON BIDS AND PROTESTS (1971).

<sup>35</sup> GAO takes the position that it cannot require the agency to withhold contract award pending a decision on the protest. See Schnitzer, *supra* note 32, at 4. However, GAO does, upon occasion, direct the agency to cancel a contract award which was improperly made. See 48 COMP. GEN. 589 (1969). If this direction is followed, the terminated contractor may sue for damages in the Court of Claims. See discussion accompanying note 47 *infra*. The basis for this direction to cancel is, according to the Comptroller General, his responsibility to "recommend or direct such action as we believe is required by the public policy expressed in applicable statutory enactments to preserve the integrity of the competitive bidding system" and his power under the Budget and Accounting Act of 1921 to "disallow credit in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract." 44 COMP. GEN. 221, 223 (1964). See Meyer, *The Role of the Comptroller General in Awarding Formally Advertised Contracts*, 18 AD. L. REV. 39 (1966); Schnitzer, *Changing Concepts in Government Procurement—The Role and Influence of the Comptroller General on Contracting Officer's Operations*, 23 FED. B.J. 90 (1963). But see *Kecco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970) (a Comptroller General opinion on the legality of a contract is not binding on the courts and the Comptroller General cannot order award or termination of a contract).

<sup>36</sup> SELECT SENATE COMMITTEE ON SMALL BUSINESS, SELECTED PROBLEMS OF SMALL BUSINESS IN THE AREA OF FEDERAL PROCUREMENT, S. REP. NO. 1671, 90th Cong., 2d Sess. (1968) (GAO remedies too little and too late).

In summary, while GAO exists as an eager alternative to internal agency review and is quite capable of catching and exposing agency impropriety, its primary impact has been upon the ongoing award system rather than protecting private interests in particular protests. The agency frequently is told to correct a deficiency the next time, but nothing is done to disturb actions already taken.<sup>37</sup> Given the strong private economic interests involved and the inability of administrative review in either channel consistently to stop the award process pending a decision on the merits, it is not surprising that disappointed bidders and their attorneys have turned with renewed vigor to the courts.

### III

#### JUDICIAL REVIEW: THE RISE AND FALL OF INJUNCTIVE RELIEF

##### A. Prior to *Scanwell*

Prior to January 1970, the date of *Scanwell Laboratories, Inc. v. Shaffer*,<sup>38</sup> unsuccessful bidders seeking declaratory or injunctive relief were rarely able to obtain judicial review of contract award decisions. The primary reason was that the plaintiff had no standing to sue because he had no "right" to a government contract which could be invaded by improper governmental action. This was reinforced by the notion that procurement statutes were enacted and regulations were promulgated for the benefit of the public as a whole and that deviations by executive officers must be rectified through the political rather than the judicial process.<sup>39</sup> A secondary reason was rooted in the doctrine of sovereign immunity. Since Congress had not expressly consented to suits of this sort, the United States was immune unless the officer sued had acted beyond his actual authority or in an unconstitutional manner.<sup>40</sup> Otherwise, the suit and its invariable request for equitable relief was against the United States and barred under *Larson v. Domestic & Foreign Commerce Corp.*<sup>41</sup>

Beneath the labels "standing," "sovereign immunity," and "proprietary functions" invoked to deny review was a fear that judicial review backed by injunctive relief would impair governmental effectiveness in implementing public programs through contracts:

<sup>37</sup> "Corrective action (cancellation) at this date would be impracticable and inconsistent with the government's interest. We strongly recommend the procurement procedures at the buying activity be reviewed in the light of this protest and decision." 49 COMP. GEN. 639, 646 (1970). For more "hand slapping," see 49 COMP. GEN. 772, 779 (1970); 49 COMP. GEN. 764, 768 (1970).

<sup>38</sup> 424 F.2d 859 (D.C. Cir. 1970).

<sup>39</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). See *Woolridge Mfg. Co. v. United States*, 235 F.2d 513 (D.C. Cir. 1956); *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955); *Robert Hawthorne, Inc. v. United States*, 160 F. Supp. 417 (E.D. Pa. 1958); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934).

<sup>40</sup> *United States v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964), *aff'd per curiam*, 339 F.2d 753 (D.C. Cir. 1964). See *Cotter Corp. v. Seaborg*, 370 F.2d 686 (10th Cir. 1966); *Walter P. Villere Co. v. Blinn*, 156 F.2d 914 (5th Cir. 1946).

<sup>41</sup> 337 U.S. 682 (1949). For a critical discussion of *Larson* and its progeny, see Cramton, *supra* note 3, at 404-17 (the vice of *Larson* is that it permits and even encourages courts to avoid the hard task of determining the limits of official power).

The relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of government. It does not require much imagination to anticipate the chaos which would be caused if the bidding procedure under every government contract was subject to review by court to ascertain if it was fairly and properly done, and the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision.<sup>42</sup>

Similar concerns were expressed in *Perkins v. Lukens Steel Co.* and the *Larson* case, two Supreme Court decisions frequently cited to support the "no-review" rule.<sup>43</sup>

These no-review decisions, in effect, minimized the importance of private legal interests in the bidding process and, by inference at least, preferred the public interest in effective procurement over the broader public interest in an award system operating in conformance with congressional policy. Protection of the latter public interest was first left to internal administrative review and, as time passed, was assumed by the General Accounting Office.

Three exceptions to the "no-review" rule evolved in the courts, each in its own way preserving the sanctity of government effectiveness:

1. In public land cases, disappointed competitors have been able to obtain both judicial review of award decisions and, where appropriate, the award itself through mandatory injunction.<sup>44</sup> These cases, which fail to confront the knotty problems of standing and sovereign immunity, may be partially explained by an historical exception in public land cases to the sovereign immunity doctrine.<sup>45</sup> In any event, the availability of injunctive relief where the government is a lessor or seller would seem to have a less adverse effect on effectiveness than where the government seeks to meet basic needs by procurement.

2. Where potential bidders have, by administrative action, been debarred or suspended from participating in the bidding process, the Court of Appeals for the District of Columbia has permitted judicial review under section 10 of the Administrative Procedure Act. These decisions hold, in essence, that the debarred bidder has standing to test the authority of the officer imposing the restraint or to attack the quality of the procedures used in the debarment and may, in appropriate cases, obtain injunctive relief. This result was justified in *Gonzalez v. Freeman*:

<sup>42</sup> *Lind v. Statts*, 289 F. Supp. 182, 186 (N.D. Cal. 1968).

<sup>43</sup> In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the Court stated: "But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event." 337 U.S. at 704. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 130 (1940) (quoted in note 11 *supra*). But see *Noce v. Edward E. Morgan Co.*, 106 F.2d 746 (8th Cir. 1939).

<sup>44</sup> *Superior Oil Co. v. Udall*, 409 F.2d 115 (D.C. Cir. 1969); *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

<sup>45</sup> See Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

There can be no doubt that the invasion of some legally protected right is the predicate upon which any exercise of judicial power must rest. . . . It is equally correct, broadly speaking, to say that no citizen has a "right," in the sense of a legal right, to do business with the government. . . . But use of such terms as "right" or "privilege" tends to confuse the issues presented by debarment action. Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.

. . . .

Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such *right*; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts. An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy in our view. The injury to appellants alleged in their complaint gives them standing to challenge the debarment processes by which such injury was imposed.<sup>46</sup>

3. The Court of Claims has heard suits both by disappointed bidders and by plaintiffs to whom a contract was awarded but later terminated on the ground that the award was improper. In the latter cases, the plaintiff seeks damages for breach of contract under the Tucker Act.<sup>47</sup> Recovery is probable unless the termination was justified by the plain illegality of the award. Put another way: "If the contracting officer acts in good faith and his award of the contract is reasonable under the law and regulations, his action should be upheld. In other words, a determination should not be made that a contract is invalid unless its illegality is palpable."<sup>48</sup> The standard "termination for convenience" clause, however, has been held applicable to wrongful terminations, thus limiting the plaintiff's recovery to expenses incurred plus profit on work done up to the termination—anticipated profits are not recoverable.<sup>49</sup> Since the contested cancellation is usually prompted by a GAO recommendation made after a bid protest has been upheld, the Court of Claims is, in effect, reviewing a pressured reversal by the contracting officer of an earlier award decision.

<sup>46</sup> 334 F.2d 570, 574-75 (D.C. Cir. 1964). In *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 371 (D.C. Cir. 1961), the court stated that a prospective contractor had a "right not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects." See *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967).

<sup>47</sup> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon . . . any express or implied contract with the United States . . ." 28 U.S.C. § 1491 (1970). The district courts have concurrent jurisdiction on contract claims "not exceeding \$10,000." 28 U.S.C. § 1346(2) (1970).

<sup>48</sup> *Warren Bros. Rds. Co. v. United States*, 355 F.2d 612, 615 (Ct. Cl. 1965); *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 383 U.S. 931 (1964). If the award is found to be palpably illegal, the former contractor's recovery is limited to *quantum meruit* for work done and accepted by the United States. *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963). See *Campbell v. Tennessee Valley Authority*, 421 F.2d 293 (5th Cir. 1969).

<sup>49</sup> See *G. C. Casebolt Co. v. United States*, 421 F.2d 710 (Ct. Cl. 1970), and cases cited therein.

The disappointed bidder to whom no contract has been awarded has been successful in obtaining review when his petition supports an inference that his bid was not "fairly and honestly" considered by contracting officials.<sup>50</sup> This implied condition of fair and honest treatment, by whatever process imposed, seems to square matters with the Court of Claims jurisdictional statute, the Tucker Act, and to support the view that the plaintiff without a contract has some "rights" in the process.<sup>51</sup> On the other hand, the theoretical limit of recovery is stated to be damages measured by lost bid preparation costs, not lost profits.<sup>52</sup> To date, no plaintiff has been able to prove that his bid was not fairly and honestly considered. This practical problem coupled with clear holdings that the Court of Claims has no power to grant declaratory or equitable relief<sup>53</sup> tends to produce minimal rights with illusory remedies.

In short, while the cumulative effect of the three exceptions is to recognize and justify some private "rights" in the award process, the remedies, when granted, have not interfered in any way with the on-going procurement process or adequately protected the bidder's competitive opportunity in particular cases. The twin reluctance on the part of the courts to "stop the government in its tracks" or to award damages based upon lost profits left disappointed bidders with no effective way to obtain judicial protection of substantial economic interests.

### B. *Scanwell* and the Aftermath

In early 1970, the door to judicial review of award decisions seemed to burst open. In *Scanwell*, the Federal Aviation Authority (FAA) had solicited bids for an instrument landing system and limited eligibility for award to those producers who had operational systems already installed and tested in at least one location. *Scanwell*, the second low bidder, met this condition. *Scanwell* alleged, however, that

<sup>50</sup> *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). See Note, *An Expanded Cause of Action Under the Tucker Act for an Unsuccessful Bidder*, 44 TEMP. L.Q. 552 (1971). The *Keco* test was reaffirmed in *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971).

<sup>51</sup> The implied condition theory originated in *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956), which stressed that the plaintiff must show "by clear and convincing proof that there has been a fraudulent inducement for bids, with the intention, before the bids were invited . . . to disregard them all except the ones from bidders to one of whom it was intended to let the contract, whether he was the lowest responsible bidder or not." 140 F. Supp. at 414. The plaintiff was unable to sustain this burden before the Trial Commissioner. *Heyer Prods. Co. v. United States*, 177 F. Supp. 251 (Ct. Cl. 1959). See *Robert F. Simmons & Associates v. United States*, 360 F.2d 962 (Ct. Cl. 1966); *Trans Int'l Airlines, Inc. v. United States*, 351 F.2d 1001 (Ct. Cl. 1965). This test was relaxed in *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970).

<sup>52</sup> "Plaintiff claims that it is entitled to recover both bid preparation costs and lost profits. We find, however, that it would be improper for this court to award plaintiff lost profits since the contract under which plaintiff would have made such profits never actually came into existence. . . . Also, there is no way that it could be said for certain that had Acme's bid been rejected, the award would have been made to plaintiff. Consequently, if it should be determined subsequently by the commissioner that plaintiff's bid was not treated honestly and fairly by the Government, then plaintiff should be allowed to recover only those costs incurred in preparing its technical proposals and bid." *Keco Indus., Inc. v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970).

<sup>53</sup> *United States v. King*, 395 U.S. 1 (1969).

the low bidder to whom the contract was awarded did not and that the FAA's decision to accept a nonresponsive bid was arbitrary, capricious, and in violation of the statutory and regulatory provisions governing FAA procurement.<sup>54</sup> Suing in the United States District Court for the District of Columbia, Scanwell sought to have the decision reviewed and the award declared illegal. The District Court dismissed the petition on the ground that the plaintiff had no standing to sue. Upon appeal, the Court of Appeals, speaking through Judge Tamm, reversed and remanded the case for a hearing on the merits.

In the course of the long and complicated opinion, a number of propositions emerged. First, Scanwell had standing to obtain judicial review because its prospective beneficial relationship with the government had been adversely affected in fact by an allegedly illegal award to another. To the court, this conclusion was supported by the legislative history rather than the language of section 10 of the Administrative Procedure Act<sup>55</sup> and by the presumption in favor of judicial review unless there is "clear and convincing evidence" of a contrary legislative intent.<sup>56</sup> Conceding that Scanwell had suffered injury from governmental action, the court stressed that it "had no right . . . to have the contract awarded to it" and that the suit was "brought in the public interest by one acting essentially as a 'private attorney general' . . . ." Since Scanwell had a sufficient stake in the matter to insure a "case or controversy" under article III of the Constitution and to minimize the risk of a completely frivolous law suit, it had standing even though the injury was caused by governmental action in an area to which no constitutional protection attached.<sup>57</sup> Second, section 10 of the Administrative Procedure Act was also relied

<sup>54</sup> 41 U.S.C. § 253(b) (1970) provides that the award "shall" be made to the bidder whose "conforming" bid is most advantageous to the United States, price and other factors considered. The Federal Procurement Regulation which governs FAA procurement, however, provides that a bid, to be considered, "must comply in all material respects with the invitation for bids" and that "any bid which fails to conform to the essential requirements of the invitation . . . shall be rejected as non-responsive . . . ." 41 C.F.R. §§ 1-2.301(a), 1-2.404-2(a) (1971).

<sup>55</sup> Section 10 provides, in part, that "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." 5 U.S.C. § 702 (1970). The adversely affect "in fact" language appears in the legislative history but not in the statute. For further discussion, see note 57 *infra*.

<sup>56</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-48 (1967). See generally Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1483-87, 1491-1500 (1971). Judge Tamm's lengthy effort at 424 F.2d at 866-68 to distinguish *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), is criticized in Pierson, *supra* note 9, at 13-14.

<sup>57</sup> Relying on *Flast v. Cohen*, 392 U.S. 83 (1968), Judge Tamm stated that a "person injured by governmental activity which goes to non-constitutional areas of his well-being is just as interested in judicial review of that activity as one whose constitutional rights are being trampled . . ." 424 F.2d at 872. More recent Supreme Court decisions such as *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), both reinforce this point and cast doubt upon *Scanwell's* total reliance upon section 10 of the APA to confer standing. See note 55 *supra*. Under these decisions, three conditions must be met for standing: (1) the plaintiff must have a personal stake or interest imparting the concrete adverseness required by article III of the Constitution; (2) the plaintiff must "arguably" be within the zone of interests protected by the Constitution or any relevant statute; and (3) Congress must not have precluded judicial review of the decision involved. See *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). The "zone of interest test," while going to standing rather than the merits, is tied to the "adversely affected or aggrieved by agency



upon to circumvent the defense of sovereign immunity, an interpretation frequently advocated but not fully supported in the primary materials.<sup>58</sup> Third, the award decision was not committed to agency discretion because the plaintiff had made a *prima facie* showing of illegality. Since that question was uniquely appropriate for judicial determination, judicial review could not be denied. Fourth, for similar reasons, Scanwell was not required first to exhaust administrative remedies by protesting to the GAO, a procedure which might be useful but was not a prerequisite to court review.<sup>59</sup> Finally, on remand the plaintiff was given an opportunity to prove either that the decision was illegal because there was no discretion to ignore the regulations or, if there was discretion, that it was not properly exercised. This concluded what proved to be an eventful day in the uneasy relationship between administrative law and the government contracting process.

Shortly thereafter, two decisions by the Court of Appeals for the District of Columbia reinforced the *Scanwell* conclusion on standing even though the plaintiffs there sought injunctive rather than declaratory relief.<sup>60</sup> In one case, however, the public interest in governmental effectiveness began to emerge in the question of how best to "weed out" frivolous law suits. The court, again speaking through Judge Tamm, used the summary judgment device where issues of illegality were

action within the meaning of a relevant statute" language of section 10 of the APA—there must be a "relevant statute" other than the APA which creates the zone of interest within which the plaintiff must "arguably be." See *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54; *Barlow v. Collins*, 397 U.S. 159, 164-65; *Vining*, *supra* note 56, at 1473-82. Decisions of the District of Columbia Court of Appeals subsequent to *Scanwell* have applied the Supreme Court's "3 point" standing test to suits by disappointed bidders, concluding, *inter alia*, that an allegation that the award decision was illegal was required to show injury to an interest of the plaintiff that was "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204, 1207 (D.C. Cir. 1970); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137, 1140-41 (D.C. Cir. 1970). This could be a shift from total reliance upon section 10 of the APA, although a recent decision states that standing is under the Administrative Procedure Act and rests upon "two interrelated principles: (1) the losing bidder's substantive interest as an aggrieved party in asserting that it was denied the contract because of arbitrary or capricious agency action . . . and (2) the public interest in policing governmental action through frustrated bidders serving as 'private attorney generals.'" *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1291 n. 2 (D.C. Cir. 1971). If disappointed bidders have any distinct private rights created and protected by procurement statutes, they have not clearly emerged in the efforts to find standing. *But see Perkins v. Lukens Steel Co.*, 310 U.S. 113, 126-27 (1940); *Edelman v. Federal Housing Administration*, 382 F.2d 594, 597 (2d Cir. 1967); *United States v. Gray Line Water Tours*, 311 F.2d 779 (4th Cir. 1962) (bidding procedures are for the public generally and confer no private rights on bidders). At least one district court appears to have rejected *Scanwell* altogether. *Gary Aircraft Corp. v. Seamans*, 342 F. Supp. 473 (W.D. Tex. 1972).

<sup>58</sup> This is consistent with a proposal by the Administrative Conference of the United States made to Congress but not yet enacted into law. See *Cramton*, *supra* note 3, at 428-36. The accuracy if not the wisdom of this conclusion, however, has been doubted. See *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 326-31 (1967), and there is authority to the contrary. *Cotter Corp. v. Seaborg*, 370 F.2d 686, 692 n. 15 (10th Cir. 1966). The cases are discussed in *Scalia*, *supra* note 45, at 920-24.

<sup>59</sup> Unknown to the court, GAO had upheld the award against the protest of another participant in the procurement. 49 COMP. GEN. 9 (1969).

<sup>60</sup> *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. 1970); *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970). See note 57 *supra*.

raised by the pleadings but where there were no genuine issues of material fact and stated:

Fortunately, the inquiry does not end with a determination that the plaintiff has standing; rather, the inquiry begins in more relevant detail at that point. As we noted in *Scanwell* . . . the mere fact that a party has standing to sue does not entitle him to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign. The recent decisions in this court and in the Supreme Court have served to eliminate the artificial barrier created by the concept of standing, but that does not mean that the traditional legitimate bars to frivolous lawsuits have also been abrogated.<sup>61</sup>

Despite this note of caution, the case stressed the importance of the "public interest in having agencies follow the regulations which control government contracting"<sup>62</sup> and determined that review on the merits would be governed by standards more or less consistent with those provided in the Administrative Procedure Act.<sup>63</sup> In neither case did the fact of internal administrative review or a protest before GAO figure in the decision.

Meanwhile, the corridors of the federal district court in the District of Columbia were seemingly swarming with disappointed bidders alleging illegality in award decisions and seeking to stop the government in its tracks. In these suits, the court was typically asked to restrain agency action in the particular procurement until a decision on the merits could be reached, declare that the award decision was improper, and order the government either to correct a defect in the process of competition or order the award of the contract to the plaintiff. While not present in every case, some plaintiffs sought to restrain agency action to preserve a protest then pending before GAO.<sup>64</sup> In exercising discretion whether to issue temporary restraining orders and grant preliminary injunctions in particular cases, the courts purported to balance four closely related factors: "the relative

<sup>61</sup> *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137, 1141 (D.C. Cir. 1970).

<sup>62</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

<sup>63</sup> Section 10(e) of the Administrative Procedure Act provides that the "reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ." 5 U.S.C. § 706 (1970).

In the *Scanwell* line of cases, there is some confusion over what the plaintiff must allege to insure standing and what standards the court will apply to determine the merits. In *Scanwell*, the court held that standing turned, in part, on an allegation of illegality and suggested that the merits turned on whether the contracting officer "properly exercised discretion in awarding the contract" or, if no discretion was confided to ignore the regulations, whether the award was illegal. 424 F.2d at 873. In *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204, 1207 (D.C. Cir. 1970), the court stated that the plaintiff must allege that the "agency has acted arbitrarily, capriciously, or in excess of its statutory authority" to secure standing and suggested that the same standard governed the merits. *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970) is in accord. In *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), the court, speaking through Judge Leventhal, stated that standing depended upon an allegation that the award decision was arbitrary and capricious and that the courts "should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision."

<sup>64</sup> See, e.g., *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970) (injunction denied); *Law Bros. Contracting Corp. v. Resor*, No. 2137-70 (D.D.C. 1970).

importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from the denial of preliminary relief, the probability of the ultimate success or failure of the suit, [and] the balancing of damage and convenience generally."<sup>65</sup>

Initially, the balancing permitted disappointed bidders to obtain the temporary or preliminary relief requested. The highwater mark in the district court was the celebrated case of *A. G. Schoonmaker Co. v. Resor*,<sup>66</sup> where a permanent injunction enjoining the award of the contract to anyone else and a mandatory injunction requiring the award of the contract to the plaintiff was issued.

In *Schoonmaker*, the plaintiff Libby and the intervenor Bogue Electric were determined to have acceptable proposals in step one of an Army generator procurement to be awarded by "two-step" formal advertising.<sup>67</sup> Both plaintiff and intervenor spent substantial time and money in preparing the technical proposal for step one and the pricing bid for step two. Prior to submission of bids in step two, however, a question of interpretation arose, and, after extensive discussion among Army and Air Force officials (who were also interested in generators), it was determined that identical prices should be bid for the pre-production and production models. This information was communicated to intervenor but not to plaintiff, even though defendant knew that plaintiff interpreted the invitation as requiring different prices for the models. When the bids were opened, plaintiff was low bidder by some \$570,000 over intervenor. Intervenor protested to the GAO that plaintiff's bid was not responsive because of different pricing. Plaintiff then protested against the award to anyone but itself. On May 22, 1970, almost three months after intervenor's protest was filed, the GAO decided that, while plaintiff's bid was responsive to the invitation (the Army's interpretation of the invitation was "clearly erroneous"), intervenor was prejudiced by receipt of the Army's interpretation.<sup>68</sup> Accordingly, the defendant was directed to cancel the invitation and solicit new bids. The defendant, on May 27, 1970, cancelled the invitation and solicited new bids in step two, which provided for identical pricing of models. On June 11, plaintiff filed suit alleging

<sup>65</sup> *Perry v. Perry*, 190 F.2d 601, 602 (D.C. Cir. 1951), quoting *Communist Party of the United States v. McGrath*, 96 F. Supp. 47, 48 (D.D.C. 1951). See JAFFE, *supra* note 2, at 687-708; *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); Note, 71 COLUM. L. REV. 165 (1971).

<sup>66</sup> No. 1760-70 (D.D.C. 1970), *rev'd*, Nos. 24,706 & 24,708 (D.C. Cir. 1971). See note 70 *infra*. Other cases where a TRO or preliminary injunction was granted are *Forera Corp. v. Avco Economic Sys. Corp.*, No. 1509-70 (D.D.C. 1970); *Harry Winston, Inc. v. Kunzig*, No. 1894-70 (D.D.C. 1970); *Big Four Mechanical Contractors, Inc. v. Small Business Administration*, No. 70-312 (W.D. Okla. 1970); *Aero-Jet Gen. Corp. v. Thiokol Chem. Corp.*, No. C.70-1493-LHB (N.D. Cal. 1970).

<sup>67</sup> Two-step formal advertising was developed to increase the use of advertising in procurements where, due to inadequate specifications, negotiation had previously been employed. In step one, an attempt is made through negotiation to develop realistic specifications against which price competition can occur. In step two, the developed specifications form the basis for competition among some of those involved in step one under the usual procedures for formal advertising. See ASPR, subpt. E, 32 C.F.R. §§ 2.501-2.503 (1971); Cuneo & Crowell, *Negotiated Contracts—Two-Step Procurement, Cost and Pricing Data Requirements and Protests to the Comptroller General*, 5 B.C. IND. & COM. L. REV. 43 (1963).

<sup>68</sup> Ms. Comp. Gen. B-170268 (November 9, 1970), 50 COMP. GEN. — (1970).

the defendant had acted "arbitrarily, capriciously and unlawfully" and sought declaratory and injunctive relief prohibiting the award to anyone other than the plaintiff and requiring that a contract be awarded to it under the first invitation. On June 12, a temporary restraining order enjoining the opening of bids was issued, and, on June 26, a preliminary injunction was issued. The case then was heard on the merits, whereupon the court issued, on September 24, 1970, a permanent injunction enjoining award of the contract to anyone else and a mandatory injunction requiring the award of the contract to plaintiff.

In a cryptic opinion by Judge Waddy, the court first concluded by citing *Scanwell* that it had jurisdiction, that the plaintiff had standing, and that the action was not barred by the doctrine of sovereign immunity. On the merits, the court held that the defendant's *ex parte* communication to intervenor alone "undermined the integrity of the competitive bidding process" and that intervenor's reliance on such information was unjustified. Thus, cancellation of the invitation for bids was "arbitrary, capricious and unlawful," and the new invitation and any action taken thereunder was null and void. Second, the court concluded that the plaintiff rather than intervenor was the lowest responsive, responsible bidder and that the defendants had "a duty under the circumstances of this case" to award the contract to plaintiff under the original invitation. Finally, the permanent relief granted was justified as preventing irreparable injury to the plaintiff, who "does not have an adequate remedy at law," and as protecting the public interest "in the integrity of the bidding and procurement processes and procedures of the government."

Almost immediately, however, the balance seemingly struck in favor of the private interest and the broader public interest in having "agencies follow the regulations which control government contracting" over governmental effectiveness was reversed. The issue focused upon when temporary or preliminary restraints upon agency action pending judicial review should be granted. A key district court decision in this reversal was *Simpson Electric Co. v. Seamans*,<sup>60</sup> where the court exercised its discretion against injunctive relief.

In *Simpson*, the plaintiff submitted a bid modification which, if timely, would have entitled it to award. Bruno, a competing bidder, protested the contracting officer's determination that the bid was timely to the GAO, which decided that the modification was not timely and directed an award to Bruno. The plaintiff, seeking injunctive relief, sought review of final agency action under the Administrative Procedure Act and alleged that the contracting officer's decision, although pressured by the GAO, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court, speaking through Judge Gesell, first decided that the final decision to be reviewed was that of the contracting officer rather than the GAO, although the GAO's reasoning, which compelled the contracting officer "against his better judgment" to change his mind, was critical in the review. Rely-

<sup>60</sup> 317 F. Supp. 684 (D.D.C. 1970).

ing on *Scanwell* as authority for standing and jurisdiction, the court noted that *Scanwell* did not deal with the standard that should govern review or the scope of available relief. Stating that the standard for review was whether the contracting officer acted "arbitrarily, capriciously, or in violation of law," the court concluded that the refusal to accept plaintiff's bid modification was "arbitrary and irrational"—the GAO failed to consider a course of dealing between the parties which justified the communication device employed by the plaintiff.

On the question of appropriate relief, the court noted that the contract had been awarded to Bruno, "which is not before the court and the extent of whose performance to date is unknown but undoubtedly substantial." Rejecting the government's argument that the court had no power, under the APA, to "require the government to enter into a contract or enjoin it from proceeding with a contract,"<sup>70</sup> the question was posed by the court as whether injunctive relief, which is discretionary and to be used sparingly, was appropriate here. Classifying the transaction as a "routine, short-term procurement where performance has already begun" and suggesting that both parties could perfect their claim to damages, if any, in the Court of Claims, the court concluded that "[m]andatory relief by way of injunction is not required to preserve the integrity of the bid process since a declaration of rights with the liability for damages that will flow therefrom will suffice."<sup>71</sup> Further:

The Court is hesitant to utilize its injunctive powers for yet another reason. Neither the Administrative Procedure Act nor *Scanwell Laboratories, supra*, can be responsibly read, whether singly or together, as contemplating that the Court in all disputed cases will direct the course of Government contracting. As already indicated, the scope of review is narrow, and once the rights of litigants are declared, the Government should in the normal case be free to make choices as to whether it will run the risk of damages, open the contract for rebidding, resolve the dispute by negotiation, or meet its needs, if they still exist, in some other fashion. The variety and complexity of situations that will be presented make it abundantly apparent that in the usual case the courts have only a limited function in this area.<sup>72</sup>

Finally, the court declared that the plaintiff was the lowest bidder, that he was admittedly qualified in all other respects and that it was illegal to award the contract to anyone else. Injunctive relief, however, was denied.<sup>73</sup>

<sup>70</sup> The court construed the statement by Judge Tamm in *Scanwell*, 424 F.2d at 864, that there was "no right in *Scanwell* to have the contract to it" to be "merely . . . recognition that *Scanwell* had not established facts which would compel award of the contract to itself in the event the award . . . should be declared void." 317 F. Supp. at 687.

<sup>71</sup> 317 F. Supp. at 687, 688.

<sup>72</sup> 317 F. Supp. at 688.

<sup>73</sup> In *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970), the court stressed that the "appropriateness of injunctive relief turns, in some measure on the final relief this court will grant" and that "injunctive relief is discretionary and its exercise should be determined according to the circumstances of the particular case in question." In denying a request for a preliminary injunction against continued performance of a contract awarded by negotiation pending determination of a protest filed with GAO, the court relied upon three factors: (1) since procurement officials have more discretion in the award of contracts by negotiation than by formal advertising, the standards for judicial review

While the result in *Simpson* cast a pall over the corridors of the district court, a glimmer of hope remained. *Schoonmaker*, where permanent and mandatory injunctions had been issued, was on appeal to the Court of Appeals, as were two cases, *Wheelabrator Corp. v. Chafee*<sup>74</sup> and *M. Steinthal & Co. v. Seamans*,<sup>75</sup> where the district court had issued injunctions against making a protested award pending judicial review. The bad news, however, was not long in coming. *Schoonmaker* was reversed with a rather disappointing opinion,<sup>76</sup> and the injunctions issued in *Wheelabrator* and *Steinthal* were vacated with opinions that left no doubt that the interest in governmental effectiveness had returned with a vengeance.<sup>77</sup>

The critical case was *M. Steinthal & Co. v. Seamans*,<sup>78</sup> where the overlapping provinces of administrative and judicial review collided, with adverse vibrations for

should differ and protection may be achieved by "actions less than the directed award of a contract and preliminary injunctive relief"; (2) since the contract had been awarded, performance commenced, and the successful contractor was not before the court, only serious governmental irregularity would support injunctive relief; and (3) there was no serious irregularity. *Accord*, *American Standard, Inc. v. Laird*, No. 2653-70 (D.D.C. 1970); *Lombard Corp. v. Resor*, No. 2200-70 (D.D.C. 1970).

<sup>74</sup> No. 2437-70 (D.D.C. 1970).

<sup>75</sup> No. 2422-70 (D.D.C. 1970).

<sup>76</sup> *A. G. Schoonmaker Co. v. Resor*, Nos. 24,706 & 24,708 (D.C. Cir. 1971). The court ducked the question of power to order a contract award and, seemingly, assumed that the decision under review was that of the Comptroller General rather than the contracting officer. This decision was not arbitrary, capricious, abusive of discretion, or in violation of law, and the district court erred in not considering what GAO had done before issuing the injunction. That *Schoonmaker* reviewed the decision of the Comptroller General is confirmed in *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971), although the court noted that GAO's decision is "not necessarily dispositive" and that there "certainly may be instances where the District Court will find procurement illegality that the GAO failed to recognize, or at any event failed to correct."

<sup>77</sup> At issue in *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), was the propriety of a Navy decision to use two-step formal advertising rather than negotiation. The plaintiff claimed that because of a 12 year research and development program costing over \$100,000 it had developed a "new and unique" device and was thereby qualified as a sole source contractor. Plaintiff protested to GAO and submitted a proposal in step one. While that protest was pending, the Navy proceeded to step two, whereupon plaintiff first obtained a temporary restraining order and, later, a preliminary injunction against opening the bids in step two and making an award. See note 74 *supra*. The grounds were that the plaintiff would otherwise suffer irreparable loss, the Navy would be deprived of special skills, a meaningful protest to GAO would be abridged and there was a substantial likelihood of success on the merits. The court of appeals, speaking through Judge Leventhal, held that plaintiff had failed to establish the prima facie case of illegality needed to support the preliminary injunction. In seeking to force the Navy to negotiate the contract, plaintiff ran counter to the congressional policy favoring advertising and was requesting the court to order the Secretary to make a decision which under the statute, 10 U.S.C. § 2304(a)(14) (1970), was permissive rather than mandatory and was, therefore, "committed to agency discretion by law" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1970). According to the court, plaintiff failed to show that the Navy's decision violated a "clear command of governing law" or that "no state of facts may reasonably be conceived that would justify the administrative action." Given the nature of the question involved and the need for exceptional circumstances to justify a preliminary restraint upon the award process, the plaintiff had failed to show probability of success on the merits.

Regarding an injunction pending resolution of the GAO protest, the court, while stressing that it had primary jurisdiction and had the final say on any GAO decision, recognized that it might defer to an agency with special competence by issuing an injunction pendente lite. Without deciding whether GAO had authority to resolve bid protests, the court held that the plaintiff's request for relief pendente lite was too broad in this case—it had not limited its request for relief necessary to preserve the protest for GAO decision.

<sup>78</sup> 455 F.2d 1289 (D.C. Cir. 1971).

disappointed bidders seeking equitable relief. The plaintiff was low bidder on an Air Force advertised procurement for parachutes. Claiming an ambiguity in the specifications, the second low bidder protested to the contracting officer against the proposed award and claimed that under a correct interpretation of the specifications it was entitled to the contract. The contracting officer denied this protest but, after a careful internal review by the Air Force Logistical Command, re-evaluated and reversed his decision, cancelled the invitation, and readvertised under a revised invitation for bids. The plaintiff and the second low bidder both protested to GAO, and these protests were denied the day before the scheduled opening of bids on the new invitation. The plaintiff, with the second low bidder intervening, then obtained a permanent injunction against bid opening, the district court concluding that there was no basis for the cancellation and that the plaintiff would be unduly prejudiced if the new bids were opened.<sup>79</sup> Upon appeal, the court of appeals, speaking through Judge Leventhal, vacated the injunction and dismissed the complaint.

The essence of a long and complicated opinion is this. The court reaffirmed that two interrelated principles supported the plaintiff's standing under the Administrative Procedure Act to seek judicial review—his substantive interest as an aggrieved party denied a contract because of allegedly illegal action and the public interest in policing the award system as a private attorney general. However, a strong public policy exists in avoiding disruptions in the free flow of the contracting process. Thus, while there is a general public interest in having executive officers follow the statutes and regulations governing advertised procurement, the plaintiff, when asserting this interest as a private attorney general, bears a heavy burden when seeking to overturn executive action and obtain injunctive relief. This is especially true where the final decision complained of was made after careful internal administrative review and was sustained by GAO.<sup>80</sup> Thus, when "emergency challenges" to determinations of procurement officials are made, "courts should not overturn any procurement determination unless the aggrieved party demonstrates that there was not rational basis for the agency's decision." A less restrained approach would make the courts a "forum for all manner of objections to procurement decisions" and would propel them "without adequate preparation into a tangle of complex statutory and decisional rules." The district court, therefore, erred in not considering the decision to cancel the invitation and readvertise in the total context of the administrative review given to it and in deciding that the decision was arbitrary and capricious. In short, there was a rational basis for the decision.

On the question of injunctive relief pending a judicial decision on the merits,

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<sup>79</sup> See note 75 *supra*.

<sup>80</sup> The court stressed the responsibility of the district court to "consider the totality of the administrative process in their review of agency action." This approach "would serve to insure the requisite judicial deference to well-reasoned judgments of agency officials acting within the confines of their statutory delegated authority and their own procurement regulations." Finally, the process of internal agency review "is a legitimate check on the decision-making process in the executive branch of government as it is in the judicial branch." 455 F.2d, at 1298.

the court manifested an even more cautious approach. The instances of judicial intervention into the procurement process must be limited, especially where difficult decisions on technical matters are required in the emergency setting which permeates the request for temporary or preliminary relief. Even though there is a probability that the decision complained of has no rational basis, "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." The "public interest in the smooth flow and expeditious completion of the procurement process" combines with urgent needs on a "short delivery schedule," such as in the case at bar, to dictate restraint, particularly when the plaintiff has a damage remedy, even though limited to bid preparation costs, in the more relaxed atmosphere of the Court of Claims.

Only when the court concludes that there has been a clear violation of duty by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits.<sup>81</sup>

Finally, the court, without resolving the power issue, acknowledged the expertise of GAO in these matters, reinforced the notion that a GAO decision should be afforded great respect by the court, and expressed the view that an injunction against agency action pending decision of a protest to GAO might be granted in appropriate circumstances.

As a final word the court said:

We do not recede from our expression in *Scanwell* of the beneficial purposes served by frustrated bidders who, as "private attorney generals," can aid in furthering the public interest in the integrity of the procurement process. The courts are properly concerned that the procurement activities of the Government be carried out in accordance with the applicable statutes and agency regulations and that these governmental functions not be permitted to deteriorate into actions reflecting personal predilections of administrative officials, whether ascribable to whim, misplaced zeal, or impermissible influence. However, the public interest in a Government procurement process that proceeds with expedition is likewise of importance. The court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis.<sup>82</sup>

<sup>81</sup> *Id.* at 1303.

<sup>82</sup> *Id.* at 1305-06. But see Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35, 40 (1966):

"Beneath the surface similarities and differences between administration of the procurement and the conventional regulatory functions, there lies the rock bottom of government accountability, '[w]hatsoever, the form in which the Government functions.' Under our system, restraint on governmental power, fair procedures and judicial review insure the supremacy of law over administrative absolutism.

. . . .

There is much merit to the observations of critics of the conventional administrative process that it has become overjudicialized. The Government must be sure-footed, not leaden-footed. We cannot establish checks against the abuse of governmental power that inhibit the effective exercise of power. But in the soul-searching and analysis ahead ways should be sought to apply to the procurement process the fundamentals underlying administrative law without inhibiting minimum effectiveness in administration."



## IV

## THE PROBLEM REVISITED AND SOME DIRECTIONS FOR REFORM

*Scanwell* seemingly eased the path to judicial review of award decisions by boldly employing the Administrative Procedure Act to flatten the obstacles of sovereign immunity and standing. Twenty-one months later *Steinthal*, by stressing the demands of governmental effectiveness, partially resurrected at least one of these obstacles and decorated it with the restrained language of judicial review. An award decision will stand unless without "any rational basis," and, even if that conclusion is probable, the court should exercise extreme caution in enjoining the award process pending judicial review.

While this result is better than the pre-*Scanwell* line of cases, the manifested reluctance to intrude into the on-going procurement process arguably preserves an alleged vice of *Larson*, that courts are permitted and even encouraged to "shirk the hard task of determining the limits of official power."<sup>83</sup> This reluctance will undoubtedly reinforce the volume of GAO bid protests. When this is combined with the current inability of administrative review consistently to insure that award decisions are right rather than quick, a more complete victory for the public interest in effective procurement cannot be imagined. Ignored in the purported balance is whether disappointed bidders have any distinct economic interests which require greater legal protection.<sup>84</sup> Assumed, is that the overriding public interest in having executive agencies follow the rules of the award game will receive adequate protection from the flow of protests by disappointed bidders wearing the armor of the private attorney general.

It is possible, of course, that GAO involvement in resolving protests and the occasional intervention of courts in cases of "shocking disproportion" will place consistent and effective pressure upon agencies to improve the procedures and standards for making contract awards. As Judge Leventhal observed in *Steinthal*, the provision of protection against "illegal" governmental action is "salutory [*sic*] not only for the relatively few cases that might result in court intervention, but also for the greater number of cases which will be handled with greater care and more diligence within the government because of the awareness of the availability of

<sup>83</sup> Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1491 (1962). Even though award decisions are now reviewable, the "rational basis" test is likely to catch only those decisions which are clearly erroneous as a matter of law or involve "shocking disproportion" in the exercise of discretion. See Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 870 (1963).

<sup>84</sup> In balancing the private and public interests thought to be necessary for sound decisions in this general area, see *Cramston*, *supra* note 3, at 400, Judge Leventhal, in *Steinthal*, has deleted the private interest from the equation. He identifies the "strong public interest in avoiding disruptions in procurement" and the "overriding public interest in having agencies follow the regulations which control government contracting," 455 F.2d 1289, 1300 (D.C. Cir. 1971), and indicates that he is "balancing . . . the public interest in free and fair competitive bidding against both fairness to the parties and the Government's contractual needs." *Id.* at 1304. If "fairness to the parties" is intended to identify private interests, they are equated, substantially, with the disappointed bidder's role as a private attorney general and not squarely balanced against the need for governmental effectiveness.

judicial scrutiny."<sup>85</sup> But even if true, the approach equates the private interest in competitive opportunity with the overriding public interest in an award system operating according to law and assumes that both will receive adequate protection under the current system. Put another way, it assumes that the regular victory of governmental effectiveness over private and overriding public interests in particular procurements is justified,<sup>86</sup> with any damage to those interests being remedied by constant efforts to improve the on-going process. All of this is assumed to be at no cost to the profit and other incentives necessary to develop and preserve a base of willing and able contractors or the achievement of important collateral policies, such as the small business program, which the government seeks to implement through contracts.

There are no empirical studies supporting a claim that the current system of administrative and judicial review does produce these costs.<sup>87</sup> There is only speculation from observing a low visibility process which spawns tales of increased concentration of firms receiving defense contracts, financial "bail outs" for "essential" contractors, small business bankruptcies, and conflicting views about who is making how much profit on public contracts.<sup>88</sup> Perhaps it is time to disregard award policies designed to foster equality of access and competition and take steps to establish a system of procurement that relies upon public institutions rather than private corporations as the primary sources of supply. But until this is done, it is clear that the current objectives in government procurement cannot be achieved without consistent conformity of executive award decisions to statutes and implementing regulations. Furthermore, a public award process, insulated in particular cases by a shield of governmental effectiveness, gives contracting officials an uncomfortable latitude for the exercise of discretion. Finally, this brief study indicates that contracting officials have the primary discretion in deciding whether the award process or contract performance is to stop or continue when a protest is made and

<sup>85</sup> 455 F.2d at 1301. See *The Administrative Process*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 108, 138 (M. Paulsen ed. 1959) (the availability of judicial review is by far the most significant safeguard against administrative excesses which can be contrived); Berger, *Administrative Arbitrariness: A Synthesis*, 78 *YALE L.J.* 965 (1969).

<sup>86</sup> One aspect of the governmental effectiveness problem is the asserted urgency of a particular procurement. As Judge Leventhal stated in *Steinthal*: "We are not referring solely to the public interest in the smooth flow and expeditious completion of the procurement process, but more specifically to the additional public interest consideration that obtains when what is involved is an item like parachutes and a short delivery schedule. This kind of urgent matter should not arise often, but when it does arise there is discretion in the District Court to decline to consider the prayer for injunctive or declaratory relief." 455 F.2d at 1302. A recent report of the Comptroller General was highly critical of executive agencies for engaging in non-competitive procurements on dubious grounds of urgency. It was reported that these decisions were made more on the grounds of item priority rather than data based upon the urgency of the mission, the date the supplies were needed, and the effect of delay. See 13 *GOVERNMENT CONTRACTOR* ¶ 158 (1971).

<sup>87</sup> The meager collection of studies as of 1964 is discussed in Marcus, *Studies of the Defense Contracting Process*, 29 *LAW & CONTEMP. PROB.* 19 (1964). See also, C. DANHOF, *GOVERNMENT CONTRACTING AND TECHNOLOGICAL CHANGE* (1968), a study of research and development contracting sponsored by the Brookings Institute.

<sup>88</sup> See *The Profit Puzzle in Procurement*, *BUSINESS WEEK*, Mar. 6, 1971, at 44.

that no one outside the agency is able to do much about alleged illegality until it is too late to rectify the situation. The conclusion from all this is that it is time for some serious thinking about reform.

A possible direction for reform in this specialized area can be found in some fundamental ideas about administrative law. A basic question is how best to insure quality decisions by executive and administrative officers as they implement governmental programs. A general answer was provided in the 1941 Report of the Attorney General's Committee on Administrative Procedure:

To assure enforcement of the laws by administrative agencies within the bounds of their authority, reliance must be placed on controls other than judicial review—internal controls in the agency, responsibility to the legislature or the executive, careful selection of personnel, pressure from interested parties, and professional or lay criticism of the agency's work.<sup>89</sup>

More recently, FCC Commissioner Nicholas Johnson has emphasized the need to develop "methods for improving the administrative process and to avoid unsound, unfair, and arbitrary decisions,"<sup>90</sup> and Professor Kenneth C. Davis, in a widely discussed book, has argued that the most effective restraints upon abuse of discretion must come from the administrators themselves through the development of rules which clarify and make more precise the standards for decision in particular cases.<sup>91</sup> Put another way, the arena for the exercise of discretion must be clearly delineated and the standards for application made more explicit through the rule-making process. Finally, executive agencies have been urged to develop more effective systems of internal administrative review. Through the power that superior officers have to control the actions of subordinates, administrative review could be achieved which would be less expensive and time-consuming than judicial review and, at the same time, achieve a better pattern of quality in the decisions made.

In sum, the review by superior officials enabled by the power of control is so flexible and broad as to satisfy all reasonable needs of the administration in this

<sup>89</sup> U.S. ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 76 (1968).

<sup>90</sup> Johnson, *Book Review*, 23 STAN. L. REV. 173, 174 (1971). For a similar perspective, see Rabin, *Book Review*, 22 STAN. L. REV. 421 (1970).

<sup>91</sup> DAVIS, *supra* note 16, at 220-21. See Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51. It has been asserted that "an outstanding failure of the contemporary administrative process is the failure of the typical agency sufficiently to use the rule-making process or to clarify the standards which govern its decisions." Committee on Informal Action of the Administrative Conference of the United States, *Guidelines for the Study of Informal Action in Federal Agencies 2* (Draft of Apr. 10, 1971). For an extreme reaction to this failure in the area of environmental protection, see *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971) (courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible). For another approach to the problem, see Hanes, *Citizen Participation and its Impact Upon Prompt and Responsible Administrative Action*, 24 SW. L.J. 731 (1970).

respect, as well as to afford considerable protection to citizens against excesses by subordinate officers.<sup>92</sup>

Taken together, then, the most effective ways to control and improve the quality of administrative discretion may be further to clarify and amplify the standards for decision at the action level and to establish solid procedures for internal administrative review.

Can this approach be applied to the special problems arising in the award of public contracts? In my judgment, the answer is "yes." I will proceed on the assumption that the relationship of mutual dependence between the United States and the business community cannot afford to absorb the shocks produced by the persistent inability of anyone to insure that award decisions are made correctly rather than quickly. Whether the increased unwillingness of contractors to deal with the United States or increased pressure on contractors locked into the contracting process, the cumulative effects of this inability could impair the mix of public and private interests which underlie the existing system. Further, I will assert that any reform effort should strive for the twin objectives of improving the standards and procedures for contract award and increasing, without a substantial impairment of governmental effectiveness, the legal protection available to disappointed bidders who, in particular cases, can show that the award decision complained of was improper. This reform could be accomplished in three closely related steps:

1. By legislation, GAO could be removed from involvement in the decision of bid protests made by "interested parties," although advisory opinions on proposed awards might still be given upon agency request. Instead, GAO's role as critic and reformer of the operating award system would be strengthened by assigning it to review groups of agency award decisions made over a stated period of time and, based upon this data, to propose clearer or more complete standards and procedures for adoption by the agency involved. This role is more consistent with GAO's traditional investigation and auditing functions and would be a more efficient allocation of time and resources than waiting for evidence of impropriety to emerge from over 1,000 bid protests more or less fortuitously presented in the course of a year. Of crucial importance, the change would permit each agency to develop better procedures for internal administrative review since these procedures could no longer be suspended by direct protests to GAO. Finally, the opportunity for courts to develop a realistic theory of private "rights" in the bidding process should be greater than when the energies of disappointed bidders were directed toward persuading the Comptroller General that the proposed obligation of appropriated funds was illegal.<sup>93</sup>

<sup>92</sup> Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 889 (1969). See note 29 *supra*.

<sup>93</sup> This recommendation rejects as inappropriate current efforts by the General Accounting Office to improve the speed of the bid protest decision process at GAO and to suspend the award process pending a final decision. See the proposed changes to 4 C.F.R., pt. 20, in 36 Fed. Reg. 8060 (1971).

2. By executive order, a uniform, internal bid protest procedure could be established within each executive agency or department and made available to disappointed bidders as a channel through which to protest award decisions. This procedure would have the following features:

(a) The responsibility for decision would be lodged with a bid protest officer, independent of and higher than the contracting officer. While a formal hearing with confrontation would not be required, the protesting bidder and other "interested parties" would be permitted to present written and oral objections to the decision which, along with agency legal, technical, and policy advice and the bid protest file, would provide the context for review. Even though the minimum standards of review would be similar to those employed by the courts, the opportunity for more control in the interest of better quality and better protection of the contractor's economic position would be available.<sup>94</sup> The written decision with reasons and the full review file would then be preserved for later scrutiny by GAO or the courts. A protesting bidder would be required to use the internal procedure before filing suit in the federal courts.

(b) An improved debriefing system would be developed to give each bidder or offeror maximum information about the award decision at the earliest possible time consistent with competitive bidding. The goal is to defuse protests by improved communication.<sup>95</sup> With better communication and internal review procedures, competing contractors should have more control over the risk of improperly losing the award.<sup>96</sup>

(c) Upon making a timely protest to the Bid Protest Officer within, say, five days after an award is made or an invitation cancelled, the award process or contract performance would be automatically suspended. The suspension would be effective whether the protest was made before or after award and would continue until a decision on the protest was made. To facilitate a good faith decision and to substitute certainty for discretion at this critical time, no decision adverse to the protesting bidder could be made in less than five working days beyond the date of the protest. Beyond this time, the dictates of urgency should control when the decision is made unless an advisory opinion is requested from GAO. If, before any decision is made, the award process or contract performance is permitted to continue, the protesting bidder may seek an injunction to enforce the automatic

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<sup>94</sup> While similar in some respects to a recommendation by the Committee on Bids and Protests of the Section of Public Contract Law of the American Bar Association, this recommendation rejects the notion that the review process should be lodged in the agency boards of contract appeals and that decisions, while expedited, should be accompanied by notice, hearing, and confrontation, and reviewed in the federal courts under the Wunderlich Act, 41 U.S.C. § 321 (1971).

<sup>95</sup> This need is acknowledged by Air Force procurement officers. See note 29 *supra*.

<sup>96</sup> It has been suggested that while a dynamic model for competitive bidding must take uncontrollable risks—that is, that contracting officers will make illegal decisions—into account, that the probabilities of winning can better be calculated where the bidder has more control. The fact and cost of this control will influence rational decisions on whether to compete or not. See Stark & Mayer, *supra* note 13, at 470-71.

suspension in the federal courts.<sup>97</sup> Otherwise, there will be no access to the courts until the protest is resolved against the disappointed bidder.

3. By legislation, the following clarification could be made in the structure and powers of the federal courts in the area of bid protest litigation:

(a) As recommended by the Administrative Conference of the United States, the Administrative Procedure Act could be amended so as to clearly abolish the defense of sovereign immunity and to establish uniform standards for the review of final agency action.<sup>98</sup>

(b) A protesting bidder could be permitted to seek judicial review of any adverse decision by the Bid Protest Officer. The review should focus upon the documents and materials considered at the informal hearing and be governed by the "total context" approach developed in *Steinthal*. If, however, the decision were found to be "without rational basis," the plaintiff's only remedies would be a declaration of invalidity or damages. The automatic suspension while internal administrative review is underway is offered as a substitute for both the discretion of contracting officials to continue the award process in cases of urgency and the discretion of courts to enjoin the award process pending judicial review.

(c) The power both to issue appropriate injunctions and to award damages in bid protest litigation could be combined in one court, preferably the federal district court. The suggestion in *Steinthal* that one court should declare a contract invalid and another award damages is as unrealistic as the suggestion that injunctive relief should not be granted because the disappointed bidder has an adequate damage remedy in the Court of Claims. At some point, the courts must confront the question of what rights and remedies are consistent with a competitor's legitimate interests in the award process. Given the incentives and assumptions upon which government contracting is based, protection of competitive opportunity should, upon proper proof, include at the very least the net gains prevented by failing to receive the particular contract at issue.<sup>99</sup>

<sup>97</sup> The seeds for this form of equitable relief were planted in *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), where the court was receptive to the notion that where a plaintiff was likely to succeed on the merits the administrative process might be enjoined pending resolution of a protest by GAO. See JAFFE, *supra* note 2, at 663-86. Under this recommendation, the policy decision favoring suspension of the award process pending internal administrative review would be made by the Executive Order and removed from the discretion of the court. Likelihood of success, therefore, would be irrelevant. In a post-*Steinthal* decision, the Court of Appeals for the District of Columbia has affirmed a district court injunction against proceeding with contract award pending determination of a GAO protest. *General Elec. Co. v. Seamans*, No. 248-72 (C.A.D.C., June 16, 1972).

<sup>98</sup> See Cramton, *supra* note 3, at 428-36.

<sup>99</sup> Private contract law has struggled with fitful success to resolve issues of liability and remedy arising in business relations where some reliance has been induced and some profit expectations created but an agreement enforceable under traditional doctrine has not yet emerged. Apart from restitution and cases where fraudulent intent is proved, [*see, e.g., Keeton, Fraud: The Necessity for an Intent to*

In summary, these proposed changes should accomplish three basic objectives: (1) strengthen GAO's role as overall "watchdog" of the award systems in the executive departments and initiator of proposals for change; (2) provide the disappointed bidder with a short but automatic suspension of the award process in particular cases, which, combined with improved procedures for internal administrative review, should increase the chances that award decisions will be made correctly rather than quickly; and (3) clarify and redefine the role of federal courts in bid protest litigation to insure that they are the exclusive forum for the balancing of the public and private interests involved. To some, these changes will be radical or politically unrealistic. Clearly, the details for implementation have yet to be developed. However, the basic thrust of the changes—to shift the primary responsibility for the initial review of agency award decisions from GAO and the courts to the agency itself and provide for an automatic suspension while that review is underway—is sound. In my judgment, it offers the best opportunity to differentiate more plainly the private and overriding public interests involved in particular procurements and to improve their protection without unduly impairing governmental effectiveness.

#### EPILOGUE

As this article goes to press, a four volume Report by the Commission on Government Procurement has just been submitted to Congress. Volume Four, Part G deals with Administrative and Legal Remedies and Chapter 3 of Part G discusses and makes recommendations concerning *Disputes Related To The Award Of Contracts*. Without embellishment, the specific recommendations, taken from a Summary of the Report, are as follows:

*Deceive*, 5 U.C.L.A.L. Rev. 583 (1958)], is there any liability when the inducer of reliance and creator of expectations terminates the relationship before the magic moment of formation? While no clear trends have emerged, recent cases have been more willing to impose some liability under the label of promissory estoppel or "good faith bargaining" and have been open to remedies that include net gains prevented by the improper termination. For disparate indicators pointing toward a more cohesive theory, see *Greene v. Howard Univ.*, 412 F.2d 1128, 1133-34 (D.C. Cir. 1969) (university terminates non-tenured faculty); *Clausen & Sons v. Theo. Hamm Brewing Co.*, 395 F.2d 388 (8th Cir. 1968) (brewery terminates existing franchise relationship); *Coleman Eng'r Co. v. North Am. Aviation*, 55 Cal. Rptr. 1, 420 P.2d 713 (1966) (subcontractor withdraws from negotiations with prime contractor); *Marchiondon v. Scheck*, 78 N.M. 440, 432 P.2d 405 (1967) (owner terminates listing with broker); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis.2d 683, 133 N.W.2d 267 (1965) (prospective franchisee breaks off negotiations with grocery chain); *Air Technology Corp. v. General Elec. Co.*, 347 Mass. 613, 199 N.E.2d 538 (1964) (prime contractor terminates proposed joint venture with subcontractor); *Jenkins Towel Serv., Inc. v. Fidelity-Philadelphia Trust Co.*, 400 Pa. 98, 161 A.2d 334 (1960) (seller refuses award to highest bidder); *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960). For excellent discussion, see Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673 (1969); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 357-65, 376-87 (1969); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 216-27, 256-58 (1968); Comment, *Once More Into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559 (1970).

*Recommendation 13.* Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.

*Recommendation 14.* Continue the General Accounting Office as an award protest-resolving forum.

*Recommendation 15.* Establish, through executive branch and GAO corporation, more expeditious and mandatory time requirements for processing protests through GAO.

*Recommendation 16.* Establish in the executive procurement regulations, in cooperation with the GAO, a coordinated requirement for high-level management review of any decision to award a contract while a protest is pending with GAO.

*Recommendation 17.* GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.

*Recommendation 18.* Improve contracting agency debriefing procedures.

*Recommendation 19.* Establish a pre-award protest procedure in all contracting agencies.

*Recommendation 20.* Conduct periodic reviews by GAO of agency award protest procedures and practices.

While discussing the value of judicial review and the need to clarify problems of scope and remedy, the Report made no specific recommendations regarding the role of the courts in this area.