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STANDING TO SEEK JUDICIAL REVIEW OF GOVERNMENT CONTRACT AWARDS: ITS ORIGINS, RATIONALE AND EFFECT ON THE PROCUREMENT PROCESS

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"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."
The Federalist, No. 78

I. INTRODUCTION

More than one hundred thousand contracts were awarded by the federal government in 1968, and procurement actions in that year alone represented commitments to expend over fifty billion dollars.¹ Virtually all of these contracts are entered into under authority delegated by statute from Congress to a department in the executive branch of the government. Usually, the contracts are awarded to private industry under the authority of the Armed Services Procurement Act of 1947² or the Federal Property and Administrative Services Act of 1949.³ Both statutes are implemented by volumes of procurement regulations which prescribe the authority and obligations of the public officials who enter into contracts on behalf of the government.⁴ These procurement regulations, if reasonably adapted to the administration of a

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¹ Hearings on H.R. 474 before the Subcomm. of the House Comm. on Government Operations, 91st Cong., 1st Sess., pt. 1, at 222, 394, 403. See also Cibincc and Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349, 387, n.183 (1970).

² 10 U.S.C. §§ 2301-14 (1964).

³ 41 U.S.C. §§ 251-60 (1964).

⁴ Armed Services Procurement Regulations (ASPR), 32 C.F.R. pts. 1-39; Federal

congressional act, have the force and effect of law.⁵ Generally, the procurement statutes and regulations provide that advertising for bids is the preferred method of procurement, that invitations for bids shall be designed to permit full and free competition, and that the award of advertised contracts shall be made to the lowest responsible, responsive bidder. In addition, the statutes and regulations provide that in certain circumstances the government may enter into contracts by negotiation. In a negotiated procurement, the limitations on the contracting officer's authority are far less stringent than those prescribed for advertised bidding. Negotiated contracts, notwithstanding the statutory preference for advertising, account for approximately eighty-seven percent of the total government expenditures for procurement.⁶

The act of contract formation, if contrary to the tenor of the authority delegated to the contracting officer by statute or regulation, is void and creates no binding obligation.⁷ Thus, government contractors have not been successful in their attempts to have courts uphold a contract or agreement entered into by an agent of the government which exceeds the amount appropriated for that purpose by Congress, which involves a lease with a term longer than the period specified in the appropriation, which does not have the required approval of a superior officer, which is not negotiated in accordance with applicable rules and regulations, or which includes terms the agent had no authority to accept.⁸ Remarkable, therefore, is the fact that contractors have been equally unsuccessful in their attempts to have federal courts void contracts awarded by unauthorized actions of government officials. Generally, these suits are initiated by offerors who unsuccessfully competed for the contract and who might have received the award had government contracting officers complied with the applicable procurement statutes and regulations. In denying relief, federal courts have consistently held that disappointed competitors have no standing to sue, that is, that the procurement statutes confer no enforceable rights on private litigants.⁹ In one case, a court observed:

The relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of

Procurement Regulations (FPR), 41 C.F.R. 1-1.00 et seq.; National Aeronautics and Space Administration Procurement Regulations (NASAPR), 41 C.F.R. ch. 18-1-52.

⁵ Paul v. United States, 371 U.S. 245, 255 (1963); Schoenbrod v. United States, 410 F.2d 400, 403 (Ct. Cl. 1969).

⁶ Hearings on H.R. 474 before the Subcomm. of the House Comm. on Government Operations, 91st Cong., 1st Sess. pt. 1, at 222, 394.

⁷ See, e.g., Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Sutton v. United States, 256 U.S. 575 (1921); Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).

⁸ See, Nash and Cibinic, Fed. Proc. Law, 2d ed., ch. 2, § 2; ch. 3, §§ 1, 2 and cases cited therein.

⁹ See, e.g., Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

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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 courts 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 review.¹⁰

Recently, however, in *Scanwell Laboratories, Inc. v. Shaffer*,¹¹ the doctrine that unsuccessful bidders have no standing to sue was greatly relaxed if not abandoned. The plaintiff, the second lowest and unsuccessful bidder for a government contract, urged that it had standing to challenge the validity of the contract awarded to its competitor, and, upon proof of illegality, to have the contract cancelled. The court sustained Scanwell's argument and concluded that the bidder had standing under the Administrative Procedure Act (APA).¹² The court reasoned that Scanwell was a "private attorney general," and, therefore, could vindicate a public interest by seeking cancellation of an allegedly illegal contract. The significance of this holding lies in the possibility that every unsuccessful offeror who formerly had no standing under the procurement statutes to contest the validity of a government contract may now assume the status of a "private attorney general" and challenge each contract that the government awards or proposes to award.

This article will examine the *Scanwell* decision, as well as the decisions prior to and after *Scanwell* which bear on the issue of standing in government contract cases. The article accepts the premise that fairness to competitors injured by the unauthorized acts of contracting officers is best assured by permitting them to sue the federal government. However, it will be demonstrated that suits under the present APA treat successful contractors unfairly and will adversely affect economy and efficiency in government. More importantly, it will be demonstrated that particularly damaging consequences to government operations will result from law suits challenging negotiated contracts which are associated with important national goals. With respect to these contracts, the article will review certain decisions by the Comptroller General of the United States, whose office is the only "quasi-judicial" forum, and until *Scanwell*, the only forum to which an unsuccessful offeror could apply for relief.¹³ An examination of these decisions will suggest that the wide latitude of authority which a

¹⁰ *Lind v. Staats*, 289 F. Supp. 182, 186 (N.D. Cal. 1968).

¹¹ 424 F.2d 859 (D.C. Cir. 1970).

¹² *Id.* at 864.

¹³ For the authority of the Comptroller General in reviewing the award of government contracts, see note 45, *infra*.

government contracting officer enjoys when he negotiates a contract will not bar successful law suits by those who are granted standing to sue. Finally, the article will propose an amendment to existing legislation which would permit unsuccessful offerors to sue while, at the same time, avoid the undesirable consequences now associated with such suits.

II. STANDING TO CONTEST GOVERNMENT CONTRACT AWARDS: THE PRE-*Scanwell* DECISIONS

The landmark decision on the standing of unsuccessful bidders to contest the validity of contracts awarded by the federal government is *Perkins v. Lukens Steel Co.*,¹⁴ decided in 1940. At issue was a provision in the Walsh-Healey Act¹⁵ requiring sellers to agree to pay their employees who were engaged in producing goods for sale to the government not less than a minimum wage as determined by the Secretary of Labor.¹⁶ The plaintiffs, prospective bidders, sought review of certain wage determinations by the Secretary of Labor, alleging that the determinations were the result of erroneous statutory interpretation. Mr. Justice Black, writing for the majority, held that the plaintiffs had no standing to challenge the administrative action of the Secretary since neither Section 3709 of the Revised Statutes¹⁷ nor the Walsh-Healey Act¹⁸ conferred any enforceable rights upon prospective bidders.

The Court emphasized that the statutes which govern the award of government contracts were enacted by Congress to impose a duty upon government officers alone and are only for the protection of the general public. "The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act."¹⁹ In further enunciating the

¹⁴ 310 U.S. 113 (1940).

¹⁵ 41 U.S.C. §§ 35-45 (1964).

¹⁶ 41 U.S.C. § 35 (b) provides:

That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid . . . not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract.

¹⁷ 41 U.S.C. § 5 (1964). This is the unrepealed precursor of the more current and now much more significant procurement statutes, i.e., Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-14 (1964), and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 251-60 (1964). NASA generally conducts its procurement in accordance with the Act of 1947. See the National Aeronautics and Space Act of 1958, Pub. L. 85-568, 72 Stat. 426, 42 U.S.C. § 2451 (1964), and 10 U.S.C. § 2302(1) (1964).

¹⁸ 41 U.S.C. §§ 35-45 (1964).

¹⁹ 310 U.S. at 129.

rationale underlying its decision that potential bidders have no right to challenge government procurement actions, the Court noted that:

Courts should not, where Congress has not done so, subject purchasing agencies . . . to the delays necessarily incident to judicial scrutiny at the instance of potential sellers. . . . A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered.²⁰

Nevertheless, the case for judicial review of the government procurement process is not difficult to construct. Since the passage of the basic procurement statutes in 1947 and 1949, the federal budget has risen from \$40 billion to over \$156 billion.²¹ During the same period, government procurement expenditures have increased from \$9 billion to \$55 billion.²² As a result of these increased expenditures, more individuals are affected by or involved in the procurement process and these people are becoming increasingly concerned about whether that process is administered fairly and in accordance with the relevant statutes and regulations, rather than in accordance with the well-intentioned desires of a government department or agency. The need for judicial review to satisfy this public concern was described by Judge Tamm in *Ballerina Pen Co. v. Kunzig*,²³ one of several recent decisions by the Court of Appeals for the District of Columbia on the subject of standing to challenge the award of government contracts:

Frequently the motivation of challenged agency action is neither caltiff nor paltry, with the result that the purity of doctrine and the nobility of purpose tend to narcotize completely the searches for legal authorization. The unfortunate result is euphemistic in that the legal wolf is effectively disguised in an emotionally appealing wool. Courts are therefore confronted with the problem of insuring that the idealistic objectives of brave but congressionally unauthorized action, ostensibly undertaken pursuant to a "public interest" provision, are legally bottomed upon something more than a Bourbon Monarch's "L'Etat—c'est Moi."²⁴

²⁰ Id. at 130.

²¹ Data compiled from U.S. Treasury Dept. Ann. Rep. of the Secretary (1946-1969).

²² Id.

²³ No. 22, 799 (D.C. Cir. April 24, 1970).

²⁴ Id. at 8, 9.

Ironically, the Supreme Court's decision in *Perkins* reversed the Court of Appeals for the District of Columbia which, thirty years later in *Scanwell*, again held that unsuccessful bidders have standing to sue. During those thirty years both Congress and the courts became increasingly more receptive to claims against administrative agencies. In 1946, Congress passed the APA which provides 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 relief thereof."²⁵ Since the passage of the APA, the Supreme Court has determined that Congress intended to broaden the concept of standing in the area of judicial review of administrative actions. The Court has noted that "[t]he legislative material elucidating that seminal act [APA] manifests a congressional intention that it cover a broad spectrum of administrative actions. . . ."²⁶ Furthermore, the Court has also held that the purpose of a statute may indicate that "aggrieved" persons have standing to contest administrative action independent of the APA.²⁷ On one occasion, the Court stated that in view of the congressional intent in enacting the APA, judicial review of administrative actions should not be restricted unless there is clear and convincing evidence of a contrary legislative intent.²⁸ Despite these pronouncements by the Supreme Court, however, none of its decisions had held that the APA alone, without an assist from the statute or constitutional guarantee allegedly violated, provided standing to contest the illegal actions of administrative agencies. Moreover, until *Scanwell*, federal courts have, with few exceptions, followed the *Perkins* rationale that an unsuccessful bidder for a government contract has no standing to complain.²⁹

The decision cited no less frequently than *Perkins* for the proposition that unsuccessful bidders lack standing to sue is *Friend v. Lee*,³⁰ decided in 1955. This action involved an invitation for bids by

²⁵ 5 U.S.C. § 702 (Supp. V, 1965-1970).

²⁶ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

²⁷ See *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), in which Mr. Justice Black, writing for the majority, and mindful of his earlier decision in *Perkins*, stated that an explicit statutory provision conferring standing is unnecessary when the purpose of the act allegedly violated is to protect competitors such as the plaintiff. See also, *Flast v. Cohen*, 392 U.S. 83 (1968).

²⁸ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

²⁹ *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *United States v. Gray Line Water Tours of Charleston*, 311 F.2d 779 (4th Cir. 1962); *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955); *Fulton Iron Co. v. Larson*, 171 F.2d 994 (D.C. Cir. 1948); *Walter P. Villere Co. v. Blinn*, 156 F.2d 914 (5th Cir. 1946). See also *Lind v. Staats*, supra note 10; *United States v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964); *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956). Also cf. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961). Contra, see *Contractors Ass'n v. Schultz*, C.A. No. 70-18 (E.D. Pa. March 13, 1970).

³⁰ 221 F.2d 96 (D.C. Cir. 1955).

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the Civil Aeronautics Administration (CAA) for a three-year exclusive car rental concession at Washington Airport. The contract ultimately was awarded to Avis. Friend, doing business as Hertz Driv-Ur-Self System, brought an action against the CAA alleging that the procurement had not been conducted in accordance with the rules of formal advertising, as set forth in regulations promulgated under the Federal Property and Administrative Services Act of 1949.⁸¹ Friend also alleged that the CAA was tortiously interfering with the conduct of its business by restricting its use of the public facilities at the airport.

With respect to the procurement issue, the court held that the plaintiff had no standing to sue. It stated:

Statutes regulating the contracting procedures of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. . . . In consequence, plaintiff cannot contest the award of the contract to Avis, either as a bidder or in his capacity as a citizen generally Contracting officers of the Federal Government have the duty to select the contract most advantageous to the Government. . . . The final selection of a contractor involves discretion and is not subject to review by the judicial branch of the Government.⁸²

The court did, however, hold that the plaintiff had standing to sue on the claim of tortious interference.⁸³ It was satisfied that the plaintiff had made a sufficient showing that the regulations imposed by the CAA on the delivery of its cars to the airport were capricious and arbitrary. "Where there is a threat of injury resulting from capricious or arbitrary performance of the regulatory functions of a government agency, the Federal courts have . . . been ready to grant relief."⁸⁴

Heyer Products Co. v. United States,⁸⁵ decided the year after *Friend*, represents the first cautious departure from the *Perkins* rationale. In *Heyer*, the plaintiff alleged that the procurement was not conducted in accordance with the Armed Services Procurement Act of 1947⁸⁶ which provided that contract "[a]wards shall be made . . .

⁸¹ 41 U.S.C. §§ 251-60 (1964).

⁸² 221 F.2d at 100.

⁸³ The court in *Scanwell* weakly distinguishes the *Friend* case on the basis that the plaintiff in *Friend* did not specifically allege that the government acted in an arbitrary and capricious manner. Moreover, in support of its position, the *Scanwell* court places considerable reliance on the second holding in *Friend*, that the plaintiff had standing to sue on his claim of tortious interference, a holding that had nothing to do with whether an unsuccessful bidder can sue to cancel a contract.

⁸⁴ 221 F.2d at 102.

⁸⁵ 140 F. Supp. 409 (Ct. Cl. 1956).

⁸⁶ 10 U.S.C. §§ 2301-14 (1964).

to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. . . .³⁷ The plaintiff suing for bid preparation costs and lost profits impressed the court with its showing of possible discriminatory action by the government agency in awarding the contract. Among other things, the court observed that the fact that the contract was awarded to a bidder whose bid was higher than six others, and was awarded at a price almost twice that of the low bid, "makes one strongly suspect discrimination and favoritism and a failure to accept that bid which was most advantageous to the Government, as [the agency] was required to do. . . ."³⁸

Despite these suspicions, the court granted the government's motion to dismiss insofar as it pertained to the claim for lost profits. The decision was based on the *Perkins* rationale that the procurement statutes were enacted for the benefit of the public and were not intended to confer any enforceable rights on individual bidders. Even if the Act were violated, the court emphasized, "it is only the public who has a cause for complaint, and not an unsuccessful bidder."³⁹

However, the court did hold that the plaintiff had a legal right to recover his bid preparation expenses if the facts as alleged were proved. The court reached this result by implying an obligation on the part of the government to consider both fairly and honestly all bids submitted.⁴⁰ Furthermore, the court stated that all contractors who incur expenses in preparing bids for submission have a right to expect that only that bid which is "most advantageous" to the Government will be accepted. However, on this point, the court stressed that:

Recovery can be had in only those cases where it can be shown by clear and convincing proof that there has been a fraudulent inducement for bids, with the intention, before the bids were invited or later conceived, 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.⁴¹

³⁷ 10 U.S.C. § 2305(c) (1964).

³⁸ 140 F. Supp. at 410.

³⁹ *Id.* at 412.

⁴⁰ For a critical comment on the implied contract theory enunciated in *Heyer*, see 56 Colum. L. Rev. 1239 (1956); also, 41 Minn. L. Rev. 373 (1957).

⁴¹ 140 F. Supp. at 414. Until the *Scanwell* decision, the *Heyer* precedent had not proved helpful to plaintiffs seeking recovery of bid preparation expenses. See *Robert F. Simmons & Associates v. United States*, 360 F.2d 962 (Ct. Cl. 1966); *Trans International Airlines, Inc. v. United States*, 351 F.2d 1001 (Ct. Cl. 1965); *Green Manor Const. Co. v. United States*, 169 Ct. Cl. 413 (1965); *Iscow v. United States*, 161 Ct. Cl. 875 (1963); *Keco Indus., Inc. v. United States*, 149 Ct. Cl. 837 (1960), cert. denied, 365 U.S. 815 (1961); *Heyer Prods. Co. v. United States*, 177 F. Supp. 251 (Ct. Cl. 1959). Cf. *Keco Indus., Inc. v. United States*, No. 173-69 (Ct. Cl. July 15, 1970).

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The court, in allowing the plaintiff to recover his bid preparation expenses departed from the *Perkins* rationale inasmuch as it held that the award of a government contract is not a wholly discretionary action but rather one which the court will review to determine if the government has met the standards of commercial good faith and fair dealing.⁴²

*Gonzales v. Freeman*⁴³ and *Copper Plumbing & Heating Co. v. Campbell*⁴⁴ involved the issue of standing to challenge the government's practice of "blacklisting" or debarring certain contractors from doing business with the government. After a careful review of the consequences of such action, both courts concluded that the APA permits, and *Perkins* does not preclude, the plaintiff's standing to challenge the Comptroller General's actions.⁴⁵ In *Copper Plumbing & Heating*, the court recognized that while the plaintiffs did not have a right to contract with the government, they did have "a right not to be invalidly denied equal opportunity" to seek government contracts.⁴⁶ If they are deprived of this right, they suffer a "legal wrong" within the meaning of the APA.⁴⁷ In *Gonzalez*, the court extended the procedural safeguards of notice and hearing to the debarment action. Moreover, on the issue of standing, the court stated:

[T]o 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

⁴² In support of its holding the court cited dictum in *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919) to the effect that unlimited discretion on the part of government contracting officers does not allow them to disregard mandatory procurement procedures. In *Purcell*, the Court found that the plaintiff's bid had been accepted and, therefore, had resulted in a contract upon which the company could sue. However, the court stated that Revised Statute 3709 "is a provision . . . in the interest of both government and bidder, necessarily giving rights to both and placing obligations on both." *Id.* at 318.

⁴³ 334 F.2d 570 (D.C. Cir. 1964).

⁴⁴ 290 F.2d 368 (D.C. Cir. 1961).

⁴⁵ The Comptroller General's authority to debar firms who have not paid their laborers or mechanics is set forth in the Davis-Bacon Act, March 3, 1931, ch. 411; as amended, 49 Stat. 1011, 46 U.S.C. § 276a-276a-5 (1964). The Comptroller derives his authority to determine the legality of contracts awarded by government agencies from the Budget and Accounting Act of 1921, 31 U.S.C. §§ 71, 74 (1964) under which he is obligated to disallow credit in the accounts of fiscal officers of the government for disbursements not made in accordance with federal law. See, e.g., 46 Comp. Gen. 441, 453 (1966). Pursuant to this authority, the Comptroller assumes jurisdiction over questions of contract formation, the rules upon which invitations for bids must be cancelled, the rejection of bids and the cancellation of contracts. His decisions on these matters are issued both in published bound volumes and in manuscript form. The latter, cited here as Comp. Gen. Ms. Decs., are often referred to as "unpublished" decisions. They are available upon request to the Comptroller's office, the United States General Accounting Office in Washington, D.C. For a recent and critical analysis of the Comptroller's position, see Ciblinec and Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349 (1970).

⁴⁶ 290 F.2d at 371.

⁴⁷ See text at note 25 *supra*.

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. . . . The injury to appellants . . . gives them standing to challenge the debarment processes. . . .⁴⁸

Both decisions distinguished the *Perkins* holding on the basis that the debarment action involved specific manufacturers rather than the entire industry as in *Perkins*, and that such action terminated an existing and economically crucial relationship between the government and a contractor, rather than merely affecting the position of one initially seeking a particular contract.

The final decision prior to *Scanwell* representing a departure from the *Perkins* rationale is *Superior Oil Co. v. Udall*,⁴⁹ written in 1969 by the then Circuit Judge Warren Burger. In this action, both the plaintiff and Union Oil submitted bids to the Department of the Interior for an oil lease. Although the Union Oil bid offered the best price, it was initially rejected by the contracting officer on the grounds that the bid form was not signed by an officer of the corporation as required by both the Notice of Sale and applicable regulations. Subsequently, the Secretary of the Interior, Mr. Udall, reversed the decision of his subordinate and attempted to award the lease to Union.

On application by Superior, the lower court enjoined the Secretary from taking such action.⁵⁰ The decision was affirmed by the court of appeals which held, *inter alia*, that the Secretary did not have the discretion to waive the decision of the contracting officer to reject the unresponsive bid of Union.⁵¹ The court reasoned that the regulations at issue gave the contracting officer authority to reject bids, and did not give the Secretary authority to overrule that officer's decision. In reaching its decision, the court did not indicate whether it agreed with the district court's finding that Superior's bid had been accepted by the contracting officer, whether such evidence was *prima facie* evidence of a contract upon which Superior could sue for breach, or whether Superior had standing upon some other basis. Whatever the basis, the court did not state that Superior had standing to sue because it was an unsuccessful bidder.⁵²

⁴⁸ 334 F.2d at 574-75.

⁴⁹ 409 F.2d 115 (D.C. Cir. 1969). The case was later dismissed sub nom. *Superior Oil Co. v. Hickel*, 421 F.2d 1089 (1969) when the parties agreed to settle the dispute.

⁵⁰ 133 U.S. App. D.C. 198 (1969).

⁵¹ 409 F.2d at 119.

⁵² The *Scanwell* court cited *Superior Oil* as impliedly holding that unsuccessful bid-

All of the decisions discussed above found that a legal right existed in the "aggrieved" plaintiff to sue in order to protect his own economic interests. In *Friend*, the court prohibited the government from interfering with the plaintiff's business, but did not require the government to defend the validity of a contract award. The contract involved in *Heyer* had already been performed and interference with the government's procurement operations was never a disputed issue. Although the court dismissed the claim for lost profits, it did hold that the plaintiff had standing to sue for recovery of its bid preparation expenses. Neither *Gonzales* nor *Copper Plumbing & Heating* involved challenges to the validity of a specific contract; rather, they granted to the plaintiffs a right to procedural due process during debarment proceedings. Finally, *Superior Oil* appears merely to have upheld the validity of a contract which the lower court found had already been executed by an authorized government agent. None of these decisions expressly held that unsuccessful bidders have standing to sue, either on their own behalf or on behalf of the public, for cancellation of a government contract not awarded under procedures conforming to those prescribed by the procurement statutes or regulations. This latter step remained for *Scanwell*.

III. THE *Scanwell* DECISION

The controversy involved in *Scanwell* resulted from the issuance by the Federal Aviation Administration (FAA) of an invitation for bids for certain instrument landing systems. These systems were to be installed in airports throughout the country and were designed to make the approach of aircraft safer. In soliciting the bids, the FAA specifically provided in the invitation for bids that only those manufacturers who already had such systems installed and tested in at least one location would be eligible for the award.⁵³ The contract was awarded to the

ders have standing to sue in the event a government contract is illegally awarded, 424 F.2d 859, 869 (D.C. Cir. 1970). However, the only discussion of standing was in the district court which merely stated that it had jurisdiction over the parties and the subject matter of the action, citing for support both the APA and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (1964).

The award of the contract involved in *Superior Oil* was governed by the Outer Continental Shelf Lands Act, and the regulations issued pursuant thereto, not by the more common procurement statutes enacted in 1947 and 1949. Unlike these latter procurement statutes, 43 U.S.C. § 1333(b) provides: "The United States district courts shall have original jurisdiction of cases and controversies [concerning the Outer Continental Shelf]. . . ."

⁵³ The invitation for bids provided:

To be responsive to this request, the contractor shall submit evidence that an identical equipment complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category 1 performance as certified by an FAA flight check.

424 F.2d at 860, n.1.

lowest bidder, Cutler-Hammer, Inc. Scanwell, the second lowest bidder, brought suit against the FAA challenging the award on the grounds that Cutler-Hammer's bid was not responsive to the invitation because its product had never been installed and tested as an integrated system, but only as separate components.⁵⁴ The district court dismissed the suit holding that Scanwell lacked standing to challenge the government's actions.⁵⁵

On appeal, the government relied heavily on *Perkins* to support its position. However, the court found this reliance "ill-founded."⁵⁶ The 1952 Fulbright Amendment⁵⁷ to the Walsh-Healey Act⁵⁸ demonstrates, the court observed, "that the basic approach of the Supreme Court in the *Perkins* case has been legislatively reversed. . . ."⁵⁹ Moreover, the court noted that the enactment of the APA has greatly modified the law of standing and evidences a legislative purpose favoring judicial review of administrative actions. It stated that:

in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case.⁶⁰

Finally, the court observed that recent decisions have established that a party injured in fact, but without a historically recognized legal right, nevertheless has standing to sue as a "private attorney general," that is, as a surrogate for the public interest which the relevant statute was enacted to protect.

⁵⁴ 424 F.2d at 860.

⁵⁵ Prior to filing suit in the district court, a formal protest was filed on Scanwell's behalf with the Comptroller General alleging the same facts as were later presented to the district court. In response to the protest, the FAA argued that the requirement for installation and testing was not a technical minimum need which all bidders had to agree to meet, but rather was one of several elements designed to prove the responsibility or capability of the bidder to manufacture the product. The distinction is significant because the Comptroller General takes the position that bids failing to meet the *literal* requirements of responsibility stated in the invitation need not be rejected if the bidder can prove that he is capable of manufacturing the required item. See, e.g., 45 Comp. Gen. 4 (1965). The Comptroller General, in *Scanwell*, upheld the FAA's interpretation of the invitation requirement for installation and testing and, with some apparent misgivings, rejected the protest. Comp. Gen. Ms. Decs. B-166468 (1969). To appreciate Scanwell's growing desire for judicial review, see Comp. Gen. Ms. Decs. B-163024 (1968), in which Scanwell unsuccessfully contested an earlier FAA procurement of similar equipment by negotiation rather than formal advertising.

⁵⁶ 424 F.2d at 867.

⁵⁷ 41 U.S.C. § 43(a) (1964).

⁵⁸ 41 U.S.C. §§ 35-45 (1964).

⁵⁹ 424 F.2d at 867.

⁶⁰ *Id.* at 872.

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The court agreed with the "private attorney general" theory and found that "the essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting."⁶¹ The court quoted with approval from *National Ass'n of Securities Dealers, Inc. v. SEC*⁶² the thought that the basic justification for permitting standing to sue is "to vindicate a public interest, and not a private right."⁶³ Thus, while "there is no right in Scanwell to have the contract awarded to it in the event the district court finds illegality in the award . . . to Cutler-Hammer,"⁶⁴ nevertheless, Scanwell can further both its private interest and that of the public by seeking to cancel a contract allegedly awarded by illegal means.

The *Scanwell* court recognized that the Supreme Court, in *Perkins*, specifically ruled that an unsuccessful bidder has no standing in court either to recoup private losses or to represent the public interest in seeing that contracts are awarded in accordance with applicable procurement statutes and regulations. Despite the fact that the Supreme Court has not ruled on the issue, the court in *Scanwell* found that the enactment of the APA and the "recent trend" of Supreme Court decisions on standing in controversies not involving government contracts indicate that *Perkins* is no longer viable law.⁶⁵ For these reasons, the court held that Scanwell had standing to sue under Section 10 of the APA, and accordingly remanded the case to the district court for a trial on the merits.⁶⁶

Initially, the *Scanwell* decision deserves two critical comments.⁶⁷ First, the court undoubtedly has over-emphasized the significance of the Fulbright Amendment. That amendment only indicates that Congress intended to reverse the narrow holding of *Perkins* that wage determinations by the Secretary of Labor cannot be contested in court.⁶⁸ If Congress had intended to reverse the basic approach of *Perkins* and grant standing to unsuccessful bidders, it would have amended Revised Statute 3709 or the more recent procurement statutes

⁶¹ Id. at 864.

⁶² 420 F.2d 83 (D.C. Cir. 1969).

⁶³ 424 F.2d at 870.

⁶⁴ Id. at 864.

⁶⁵ See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁶⁶ The court also ruled against the government's argument of sovereign immunity reasoning that the APA, when applicable, waives that defense. 424 F.2d at 873-74. The government also argued, unsuccessfully, that the plaintiff failed to exhaust all administrative remedies, and that the award action was not reviewable because it was committed to agency discretion. Id. at 875.

⁶⁷ Some may think the decision deserves more, particularly the point that when Congress passed the APA, the abuse of authority it intended to preclude did not embrace government action in its so-called "proprietary" roles of buying goods and services.

⁶⁸ See *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963).

enacted in 1947 and 1949 which supplement and, in large measure, supersede Revised Statute 3709. Significantly, it is these later statutes and their implementing regulations which bidders most commonly claim have been violated in the award of government contracts, and under which most bidders seek to have such awards invalidated by a court or by the Comptroller General of the United States. This comment, however, does not go to the foundation of the decision, and, therefore, does not suggest that *Scanwell* is in error.

The fundamental thrust of the court's discussion of *Perkins* is not that Congress intended to modify or overrule that decision when it enacted the APA or the Fulbright Amendment. Rather the court simply concluded that, in the absence of an express legislative intent to the contrary, government contract awards should be subject to judicial review. At first glance, it appears that the court largely based its conclusion on several recent Supreme Court decisions⁶⁹ which indicate that the Court is now more willing to confer standing than in 1940 when *Perkins* was decided. However, it must be noted that none of these decisions involved government contract awards. Thus, the court found it necessary to devise some rationale for not following the *Perkins* rule which it believed no longer represents the view of the Supreme Court.

The second critical comment concerns the rationale devised by the court to avoid the *Perkins* rule. The court theorized that its grant of standing to an unsuccessful bidder was justified because of the bidder's status as a "private attorney general" suing on behalf of the public. While the phrase does have an attractive jurisprudential ring, it is nevertheless an obvious fiction which only those who stand to gain economically from its acceptance can embrace as a reflection of reality. Moreover, it adds nothing of substance to the decision. The court observed that a plaintiff whether he be a private attorney general or not, must show before he is granted standing that the agency has injured him in a serious manner.⁷⁰ Thus, one who is interested in "good government," but who has no personal stake in a particular procurement, would not have standing under *Scanwell* to contest the validity of that procurement. The court itself recognized that the plaintiff seeking redress for economic injury may be less interested in the general public welfare than in securing the benefits he would have enjoyed if the relevant procurement statutes and regulations had been followed.⁷¹ Indeed, it is his own economic interest, not his interest in the general welfare, which gives the court confidence that the constitutional requirement of a "case or controversy" will be satisfied.⁷²

⁶⁹ See *supra* note 65.

⁷⁰ 424 F.2d at 872.

⁷¹ *Id.* at 866-67.

⁷² *Id.* at 864-65.

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In point of fact, the bidder does not bring suit on behalf of anyone other than himself. This does not suggest, however, that such a suit would be of no benefit to the public. In conferring standing in two recent cases,⁷⁸ for example, the Supreme Court found that the regulation of industries for the public welfare would best be assured by permitting those members of the public most concerned with the industry to sue not on behalf of, but certainly in the interests of, the general public. One element of the public interest likely to be present in any suit against administrative action, whether brought on behalf of the public or not, is the effort to seek enforcement of such regulation as Congress may have intended the public to enjoy. In any given case, however, the public may have countervailing interests. The distinction between suing "on behalf of the public" and suing "in the interests of the public" lies in the difference between a fiction that private parties may choose to assume the mantle of the attorney general, and an inquiry, balancing benefit against detriment, into what is considered to be in the overall interests of the public. Both may come to the same end, but the former circumvents the inquiry.

The characterization of one who seeks standing as a "private attorney general" portrays the plaintiff as a crusader for the public and avoids any discussion of the unfavorable consequences of granting standing to sue in the area of government contract awards. To allow unsuccessful bidders standing to challenge government contracts on the basis of their unconscious altruism may prove unsound for it is far from clear that the cancellation of government contracts, and the delay and cost incident thereto, vindicate a public interest. The decision on standing, given the absence of congressional intent, must ultimately rest upon the court's judgment, and justification, of what is in the public interest. Thus, the essential question may be framed as follows: is the public interest in having its 50 billion procurement dollars both committed by fair and established rules, and at the same time spent in the most economical and efficient manner, best served by permitting unsuccessful bidders to contest the legality of government contract awards? The *Perkins* decision answered the question in the negative, and supported its answer by emphasizing the benefit to the public in having its procurement dollars spent economically and efficiently. On the other hand, *Scanwell* responded in the affirmative, and supported its position by emphasizing the benefit to the public in having its government award contracts in accordance with published and established regulations.

⁷⁸ *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

IV. THE STANDING ISSUE: ITS LEGAL JUSTIFICATIONS IN GOVERNMENT CONTRACT SUITS

The adumbrations on standing which the court in *Scanwell* sensed from the recent "trend of cases . . . in the Supreme Court"⁷⁴ have taken on more substance since the *Scanwell* decision was rendered. Since that decision, the Supreme Court, in both its majority and concurring opinions, has clearly abandoned the traditional prerequisites to standing of either a "legal right" or of language or intent in the statute allegedly violated which specifically grants standing to certain designated parties.⁷⁵

In *Association of Data Processing Service Organizations, Inc. v. Camp*,⁷⁶ an association of data processing companies sued to reverse a ruling of the Comptroller of the Currency that the Bank Service Corporation Act of 1962⁷⁷ does not prohibit national banks from selling data processing services to other banks. The Court observed that "[w]here statutes are concerned the trend is toward enlargement of the class of people who may protest administrative action."⁷⁸ The Court reasoned that since the Bank Service Corporation Act⁷⁹ "arguably brings a competitor within the zone of interests protected by it,"⁸⁰ and does not explicitly deny standing, the association, which has been injured in fact and therefore is an "aggrieved party," has standing to sue under the APA to protect its own private economic interests. While the Court remarked that one who is likely to be financially injured may be a reliable private attorney general to litigate the issues of the public interest,⁸¹ the Court's opinion clearly indicates that such a status was not necessary to establish standing.

In discussing the traditional "legal interest" test, the Court stated that such a test goes to the merits and is not a prerequisite to standing.⁸² Thus, only after a full trial can it be determined whether anything in the Bank Service Corporation Act,⁸³ or the National Bank Act,⁸⁴ gives the association a "legal interest" that protects them against violations of those Acts, and whether the actions of respondents did

⁷⁴ 424 F.2d at 868.

⁷⁵ See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). For a discussion of these cases, see Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970).

⁷⁶ 397 U.S. 150 (1970).

⁷⁷ 12 U.S.C. §§ 1861-65 (1964).

⁷⁸ 397 U.S. at 154.

⁷⁹ 12 U.S.C. §§ 1861-65 (1964).

⁸⁰ 397 U.S. at 156.

⁸¹ *Id.* at 154.

⁸² *Id.* at 158.

⁸³ 12 U.S.C. §§ 1861-65 (1964).

⁸⁴ 12 U.S.C. § 1 et seq. (1964).

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in fact violate either of those acts.”⁸⁵ Accordingly, the case was remanded to the district court for a trial on the merits.

Less than two months after the Supreme Court’s decision in *Data Processing*, the Court of Appeals for the District of Columbia, in *Lodge 1858, American Federation of Government Employees v. Paine*,⁸⁶ again held that certain plaintiffs had standing to challenge the validity of a government contract. In rendering its opinion, however, the court was less willing than either the court in *Scanwell* or *Data Processing* to embrace the novel principle that if the interests of the plaintiffs are only “arguably” within the “zone of interests” protected by the statute allegedly violated, standing may be grounded on the APA.

In *Lodge 1858*, the court granted certain civil servants and their union standing to contest the legality of a government contract under the terms of which the National Aeronautics and Space Administration (NASA) had obtained base support services. The plaintiffs contended that the enabling legislation of NASA, which provides for the appointment of employees “in accordance with civil-service laws,”⁸⁷ required that the support services be performed by civil servants. The court’s rationale for granting standing was that the scheme of the NASA Act evidences a legislative purpose to protect the competitive interests of civil servants.⁸⁸ Thus, standing was granted solely because the court determined that the plaintiffs were “arguably” within the class intended to be protected by the allegedly violated statute. The APA and the *Data Processing* decision merely reinforced the court’s holding insofar as it rejected the “legal right” test of standing.

The distinction between *Lodge 1858* and *Scanwell* significantly affects their precedential value vis-à-vis government contract cases. The former concerns an alleged conflict between a contract for services and the employment laws of a civilian agency, rather than the general procurement statutes. In addition, the holding in *Lodge 1858* is based upon an affirmative finding that the legislative scheme of those employment statutes evidences a congressional intent to confer standing in order to contest economic injury of the type presented in the case. However, the *Scanwell* decision, like the *Data Processing* decision, is based on the mere absence of a contrary legislative intent, notwithstanding the court’s conjecture that the legislative intent in the area of government contracting generally seemed to run in favor of judicial review. Thus, the *Lodge 1858* decision is unlikely to influence future

⁸⁵ 397 U.S. at 158. The companion case to *Data Processing*, *Barlow v. Collins*, 397 U.S. 159 (1970) held that Congress intended that tenant farmers, eligible for payments under the Food and Agricultural Act of 1965, 7 U.S.C. § 1444 (Supp. IV, 1964), have standing to sue under that Act.

⁸⁶ No. 22,006 (D.C. Cir. April 21, 1970).

⁸⁷ 42 U.S.C. § 2473(b) (2) (1964).

⁸⁸ No. 22,006 (D.C. Cir. April 21, 1970) at 18.

cases in which the plaintiff seeks standing to challenge the validity of actions taken pursuant to the general procurement statutes, which indicate no congressional intent to allow standing.

The next major decision following *Scanwell* in the area of standing to challenge government contracts is *Ballerina Pen Co. v. Kunzig*.⁸⁹ This action involved the Wagner-O'Day Act,⁹⁰ under which the Administrator of the General Services Administration determined that contract competition for the supply of government pens should be limited to firms employing the blind. The plaintiff did not employ the blind and, consequently, was precluded from submitting a bid. The court of appeals reversed the lower court's dismissal and held that since the Wagner-O'Day Act⁹¹ did not preclude judicial review, the plaintiff had standing as a private attorney general to contest the Administrator's determination under the APA.⁹² Accordingly, the case was remanded to the district court for a trial on the merits. Since *Ballerina* deals with the specialized Wagner-O'Day Act⁹³ rather than the general procurement statutes, the scope of its precedential value is limited with respect to government contract cases, although not to the same extent as the *Lodge 1858* decision. Its limitations are not as restrictive for two reasons.

The first reason concerns the status of the plaintiff. In *Scanwell*, the plaintiff was an unsuccessful bidder claiming that the government improperly entertained its competitor's offer. In *Lodge 1858*, the plaintiffs were civil servants and their union alleging that the government had no authority to award any contract for the services in dispute. In *Ballerina*, however, the plaintiff neither bid for a contract nor claimed that the government was without authority to make an award. *Ballerina* claimed that it was legally injured because it was among those foreclosed from having an opportunity to bid, and contended that the foreclosure resulted from an improper interpretation of a statute designed to achieve certain economic and social goals.

Under the rationale of *Ballerina* standing may be afforded to those who claim that they were not allowed to offer a bid because the procuring agency misinterpreted certain socio-economic statutes or regulations in a manner which illegally restricted competition. For example, may a large business attempt to stop a government agency from setting aside certain contracts for small business under the Small Business Act?⁹⁴ May contractors obtain an injunction against the incorporation

⁸⁹ No. 22,799 (D.C. Cir. April 24, 1970).

⁹⁰ 41 U.S.C. § 46-48 (1964).

⁹¹ *Id.*

⁹² No. 22,799 (D.C. Cir. April 24, 1970). Petition for cert. filed, August 14, 1970.

⁹³ 41 U.S.C. § 46-48 (1964).

⁹⁴ 15 U.S.C. § 631 et seq. (1964).

into a contract of an allegedly arbitrary wage determination by the Secretary of Labor under the Service Contract Act of 1965?⁹⁵ Similarly, can contractors prevent an agency from giving certain competitive preferences to a firm in a labor surplus area, as authorized by Section 1-803 of the Armed Services Procurement Regulations and Section 1-1.802-2 of the Federal Procurement Regulations?⁹⁶ Finally, apart from such socio-economic statutes, will standing be afforded to one who claims that the general procurement statutes have been violated because the specifications in a solicitation are so restrictive, or the time allowed for submitting a bid is so limited, that he has no genuine opportunity to offer a bid? These questions suggest that prospective bidders will have to await further decisions in order to determine whether the APA provides standing to sue for violations of any statutes which are ancillary to the procurement statutes; and whether standing may be established where the plaintiff's injury is, in fact, somewhat speculative because, not having been allowed to bid on the contract, he cannot claim to have been eligible for the contract award.

The second aspect of the *Ballerina* decision which contributes to its value as precedent concerns its interpretation of *Data Processing* and *Barlow v. Collins*,⁹⁷ the recent Supreme Court decisions which held that a "legal interest" is not a prerequisite to standing. According to *Ballerina*, these decisions establish:

that a party has standing to challenge the government's award of a contract, even in the absence of specific "person aggrieved" language in the statute under which the contract is let, if a three-part test is satisfied. First, the party must allege that the challenged action has caused him injury in fact . . . The plaintiff must further allege that the agency has acted arbitrarily, capriciously, or in excess of its statutory authority so as to injure an interest that is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Finally, there must be no "clear and convincing" indication of a legislative intent to withhold judicial review. (Emphasis added.)⁹⁸

However, *Data Processing* stated that where there is injury in fact to the plaintiff, the only remaining question for standing is "whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or con-

⁹⁵ 41 U.S.C. §§ 351-57 (Supp. IV, 1969).

⁹⁶ Armed Services Procurement Regulations (ASPR), 32 C.F.R. pts. 1-39; Federal Procurement Regulations (FPR), 41 C.F.R. 1-1.00 et seq.; National Aeronautics and Space Administration Procurement Regulations (NASAPR), 41 C.F.R. ch. 18-1-52.

⁹⁷ 397 U.S. 159 (1970).

⁹⁸ No. 22,799 (D.C. Cir. April 24, 1970) at 7.

stitutional guarantee in question."⁹⁹ Thus, it appears that the court in *Ballerina* has, without explanation, identified "the interest sought to be protected by the complainant" with the plaintiff's allegation that the agency acted arbitrarily or in excess of its statutory authority. This point becomes clearer by reviewing the concurring opinion of Justices Brennan and White in *Data Processing*. They concluded that the only test of standing should be whether the plaintiff alleges that the challenged action has caused him such actual harm as to assure the existence of a genuine controversy. The second test, the "zone of interests" test, was considered confusing and unnecessary. Justice Brennan asked:

How specific an "interest" must he (the plaintiff) advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest . . . And what is the distinction between a "protected" and a "regulated" interest? Is it possible that a plaintiff may challenge agency action under a statute that unquestionably regulates the interest at stake, but that expressly excludes the plaintiff's class from among the statutory beneficiaries?¹⁰⁰

In government procurement, the crucial question is whether a plaintiff, having an "interest" in competition, may challenge agency action under a statute which unquestionably regulates the interest at stake, but under which the plaintiff's class is neither expressly excluded from, nor expressly included among the statutory beneficiaries. *Ballerina* answers the question by suggesting that if the "statutory scheme" or primary purpose of the procurement legislation would be thwarted by the arbitrary actions of government officials, the court should conclude that those parties, who are injured by such actions, have interests which are parallel to those of Congress. Thus, the interests of those parties may be considered within the "zone of interests" to be protected or regulated by the statute, even though Congress did not enact the legislation to protect the economic interests of those injured parties.

The interest sought to be protected by *Ballerina*, which interest will not afford standing unless it is within the "zone of interests" protected by the procurement statute, is the plaintiff's interest in preventing government agents from arbitrarily subverting the statutory scheme. The court viewing the problem in this fashion, reasoned that *Ballerina's* specific economic injury need not be within the ambit of the relevant statute's protection. Rather, the court observed:

Appellants (*Ballerina*) concede that the Wagner-O'Day Act

⁹⁹ 397 U.S. at 153.

¹⁰⁰ 397 U.S. at 177.

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does not confer specific rights on them and that it was not enacted for their benefit . . . They do submit, however, that the legislative history of that Act clearly shows a concern for and desire to protect private industries which might be disadvantaged by the inclusion of certain products on the schedule (of products made by the blind).¹⁰¹

The legislative history of the Act, however, was confined to the floor debates, the committee reports being silent on the problems of competition with private industry. Furthermore, the court's grant of standing to *Ballerina* was based on *Ballerina*'s prima facie showing of unauthorized acts by the government agency, thereby establishing an "interest" in limiting the agency's acts to those authorized by Congress. Clearly, the grant of standing was not based on a finding that one purpose of the Wagner-O'Day Act¹⁰² was to protect the economic interests of private industries.¹⁰³

The ease with which the "zone of interests" test of standing can be met is evident from another recent federal court decision, *Blackhawk Heating & Plumbing Co. v. Driver*.¹⁰⁴ In this action, the Veterans Administration, pursuant to its own procurement regulations and the Federal Procurement Regulations which implement the Federal Property and Administrative Services Act of 1949,¹⁰⁵ found that the low bidder, Blackhawk, lacked the responsibility necessary to be awarded a hospital construction contract. The lower court dismissed the suit on the ground that the plaintiff lacked standing to challenge the government agency's determination. On appeal, the court substantially repeated the three criteria it had enunciated in *Ballerina* and, without any further discussion, concluded that the "application of these criteria to the present case compels the conclusion that appellant has standing to challenge the instant agency action."¹⁰⁶ The court noted that the plaintiffs in *Scanwell* and *Ballerina* were private attorneys general and indicated that Blackhawk fulfilled the same role. It offered no discussion of whether Congress intended to confer or withhold standing under the 1949 procurement statute, or of why whatever interest Blackhawk was seeking to protect was within the critical "zone of interests" protected by the procurement statute.

Blackhawk does more than share with *Ballerina* a facility to read

¹⁰¹ No. 22,799 (D.C. Cir. April 24, 1970) at 16.

¹⁰² 41 U.S.C. §§ 46-48 (1964).

¹⁰³ Nevertheless, it is the plaintiff's economic injury which assures the existence of a controversy. No. 22,799 at 10.

¹⁰⁴ No. 22,956 (D.C. Cir. May 19, 1970). See also, *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) at 6, n.16.

¹⁰⁵ 41 U.S.C. §§ 251-60 (1964).

¹⁰⁶ No. 22,956 (D.C. Cir. May 19, 1970) at 4.

an unsuccessful bidder's interest into the "zone of interests" sought to be protected by the procurement statutes. It also demonstrates that the question on the merits of whether the procurement statute gives the plaintiff a specific "legal interest" may be conveniently bypassed. The court in *Blackhawk* found that the district court's treatment of the issues had virtually eliminated any genuine issues of material fact and considered itself free to proceed to the merits of the case. The "merits," however, involved only the question of whether the agency had properly found that the plaintiff was not a responsible contractor. The court did not first consider whether, in the language of the *Data Processing* decision, "anything in the [statute allegedly violated] gives petitioners a 'legal interest' that protects them against violations of those Acts."¹⁰⁷ Rather, once having decided that *Blackhawk* had an arguable "interest" within the "zone of interests" protected by the procurement statutes which the agency allegedly violated, the court bypassed the important substantive issue of whether *Blackhawk* also had a specific "legal interest" which was protected by those same statutes.¹⁰⁸

The court's apparent reluctance to discuss and distinguish the "zone of interests" protected by the relevant statute, and the specific "legal interest" possibly granted by the statute, is not difficult to understand. *Data Processing* did not define the terms. The Court's only explanation of "legal rights" was a quotation from *Tennessee Electric Power Co. v. TVA*¹⁰⁹ in which it defined the term as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."¹¹⁰ Unfortunately, the Court made little attempt to illuminate the manner by which one determines whether a statute confers a privilege. Mr. Justices Brennan and White, in a concurring opinion, stated that they were confused by the term "zone of interests."

The concurring opinion in *Data Processing* discarded the "zone of interests" test and attempted to enunciate a practical distinction between standing, reviewability, and the merits, with the merits in-

¹⁰⁷ 397 U.S. at 158.

¹⁰⁸ After the *Data Processing* decision, the Justice Department petitioned the court of appeals for a rehearing of the *Scanwell* decision. In its petition, it did not argue that *Scanwell's* interest was outside the "zone of interests" protected by the Federal Property and Administrative Services Act of 1949. However, since the *Data Processing* case said that a plaintiff's recovery depended on its proving during a trial on the merits before the lower court that it had a "legal interest" protected by statute, and since there were no disputed facts to be resolved in the *Scanwell* case, the Justice Department asked the *Scanwell* court to decide if *Scanwell* had a "legal interest," or at least to amend its remand order to instruct the district court to decide that issue. The petition was denied, without discussion. Judge MacKinnon dissented.

¹⁰⁹ 306 U.S. 118 (1939).

¹¹⁰ *Id.* at 137-38.

cluding a resolution of the question of whether the specific legal interest claimed by the plaintiff is protected by the relevant statute. According to the concurring opinion, a plaintiff's acquisition of standing to sue requires only an allegation of injury in fact. However, the fact that the plaintiff has standing does not mean that the issue is judicially reviewable.¹¹¹ To make this latter determination requires a "canvass of relevant statutory materials . . . to determine . . . whether Congress meant to deny or to allow judicial review of agency action at the instance of the plaintiff."¹¹² In the absence of express language conferring standing, slight statutory indicia may suffice to show that the plaintiff has established his right to review and thus to reach the merits of the case.¹¹³ As to the merits, the Court stated:

The same statutory indicia that afford the plaintiff a right to review also bear on the merits because they provide evidence that the statute protects his class, and thus that he is entitled to relief if he can show that the challenged agency action violated the statute. Evidence that the plaintiff's class is a statutory beneficiary, however, need not be as strong for the purpose of obtaining review as for the purpose of establishing the plaintiff's claim on the merits.¹¹⁴

The concurring opinion of Mr. Justice Brennan has the virtue of categorizing the elements of the problem with almost hornbook simplicity. However, it does not delineate the relative strengths of the evidence required to establish "reviewability" and to establish the "merits" insofar as that term refers to proof of a legal interest protected by the statute. How many courts may one realistically expect to hold that slight statutory indicia show that Congress intended the plaintiff's class to have the benefit of judicial review, but that the indicia are not strong enough to provide proof of a "specific legal interest," thus ending the court's review without ever considering the question of whether the agency action did, in fact, violate the relevant statute?

The decisions of the courts of appeals indicate that the issues of reviewability and standing will be merged with the merits issue of whether the plaintiff has a legal right or interest protected by the procurement statutes. Once convinced that the plaintiff has been genuinely injured if his allegations are true, the courts will proceed quickly to inquire whether the statute or implementing regulations have been violated by agency action. If the court decides that the statute or regula-

¹¹¹ 397 U.S. at 173-4.

¹¹² 397 U.S. at 169.

¹¹³ 397 U.S. at 175-6.

¹¹⁴ *Id.* (concurring opinion).

tions have been violated, its decision will first conclude that the plaintiff's interest is legally protected by a relevant statute, thus providing standing;¹¹⁶ or, utilizing the language and reasoning of the *Data Processing* decision, the court may conclude that the plaintiff's interest is within the "zone of interests" protected by the statute and, therefore, that standing is granted by the APA. If the court concludes, however, that the relevant statutes or regulations have not been violated, it may, as in *Blackhawk*, simply say so, or it may opine that the plaintiff's interest is not within the protected "zone of interests." In this area, conflicts between the circuits may be anticipated; some holding that the plaintiff loses because he has no standing, others holding that he loses because the statutes or regulations have not been violated. In any event, whether one accepts the above prognostications or not, the decisions of the courts of appeals on standing to challenge the award of government contracts are sufficient by themselves to warrant exploring the effect of similar future suits on private contractors and the government procurement process.¹¹⁶

V. THE ADVERSE EFFECT OF JUDICIAL REVIEW AND CONTRACT CANCELLATION ON GOVERNMENT CONTRACTORS AND THE PROCUREMENT PROCESS

One result of the *Scanwell* court's decision is apparent. An unsuccessful bidder who is willing and able to endure the expense and vexation of a law suit now has the option of seeking to have a court deny his competitor the enjoyment of the profits anticipated from that contract. However, the government contractor who, in good faith, has been awarded the contract is the one most seriously affected by the standing of his competitor.

From the successful bidder's point of view, the contract award

¹¹⁶ See *Citizens Comm. for the Hudson Valley v. Volpe*, No. 428-33 (2d Cir. April 16, 1970) at 2347, 2349.

¹¹⁶ Presumably, most actions in the near future will be brought in the District Court for the District of Columbia for three reasons: (1) plaintiffs know that at least this district court must follow the *Scanwell* line of decisions; (2) plaintiffs may wish to retain one of the many attorneys in the District of Columbia who are experienced in government contract suits; and (3) plaintiffs may wish to begin a separate suit for bid preparation costs in the Court of Claims, which is located only in Washington. However, since the United States, the defendant in all of these cases, "resides" in each of the fifty states, plaintiffs may be able to commence actions in their local district courts. If the *Scanwell* decision gains wider acceptance, plaintiffs' preference for local courts may develop, thus shifting the responsibility of defending the United States to the local U.S. Attorney. The local attorney will have less expertise in the field, and will have less time to confer with the responsible government agents in Washington. It is not too uncharitable to suspect that a trend toward the use of local courts also may be enhanced because those courts are less familiar with the idiosyncrasies of government contract law, such as the rule that an agent of the government with apparent but not actual authority cannot bind his principle to what proves to be a bad bargain for the government. See e.g., *Federal Crop Ins. Corp. v. United States*, 332 U.S. 380 (1947).

created a firm obligation which bound him to begin performance or risk cancellation of the contract for default. If standing is afforded unsuccessful bidders and the court finds that the contract award is illegal, it may "set aside agency action"¹¹⁷ by cancelling the contract, or "compel agency action unlawfully withheld"¹¹⁸ by directing the agency to award the contract to the competitor who would have received it had proper procurement procedures been followed.¹¹⁹ The remedy of contract cancellation, the only remedy considered by *Scanwell* and compatible with the language of the APA, is patently inequitable to the successful bidder. It may prove particularly onerous in a fixed price contract, or one where the reimbursement of his costs, not to mention profits, depends upon his completing a contract which he may not be allowed to complete; and even more so where such contracts are for complex items which have no market other than the government agency which procured them.

In addition to the individual contractor, the government procurement process, by which the government obtains the goods and services necessary to execute the programs authorized by Congress, is also adversely affected by the grant of standing to unsuccessful bidders. Despite this fact, the court in *Scanwell* and *Ballerina* expressed only one concern, before dismissing it, over the possibility that the grant of standing to unsuccessful bidders would adversely affect the procurement process. The court dismissed the idea of opening a "Pandora's box" of litigation as bankrupt of substance, in view of the judicial discretion the court may exercise to avoid frivolous suits, the experience of state courts when they relaxed the criteria for standing to sue, and the expense and vexation of bringing law suits.¹²⁰ Apparently, however, that one concern had grown by the time the court rendered its decision in *Blackhawk*. There the court explained the *Scanwell* and *Ballerina* decisions as having noted that "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."¹²¹

The solution reached by the court in *Blackhawk* to avoid these "prolonged delays" was the suggested use of summary proceedings.

¹¹⁷ 5 U.S.C. § 706(2) (A) (Supp. IV, 1965-1968).

¹¹⁸ 5 U.S.C. § 706(1) (Supp. IV, 1965-1968).

¹¹⁹ That a court might direct the actual award of a contract by an executive agency thus appears to be a distinct possibility notwithstanding (1) dictum in *Scanwell* to the contrary, 424 F.2d at 864, (2) the authority of the government to reject all offers and resolicit bids, and (3) the important constitutional questions which such action would raise with respect to the separation of powers. See also *Schoonmaker Co. v. Resor*, C.A. No. 1760-70 (D.C. September 24, 1970); *Simpson Elec. Co. v. Seamans*, C.A. No. 2713-70 (D.C. D.C. September 9, 1970).

¹²⁰ 424 F.2d at 872-73.

¹²¹ No. 22, 956 (D.C. Cir. May 19, 1970 at 5).

The trial judge had correctly determined that Blackhawk's allegations presented no genuine issues of material fact, and that, as a matter of law, the contracting officer had done all which was required to determine that Blackhawk was not a responsible bidder. Had the trial judge foreseen that the prevailing criteria of standing were to be relaxed, he could have properly issued summary judgment against Blackhawk.¹²²

The court in *Blackhawk* does not suggest however, how it might expeditiously deal with cases involving a material issue of fact or several complicated questions of law. These cases are not difficult to imagine and may also challenge "government contracts which are vital to the functions performed by the sovereign."¹²³ Delays will first be encountered by motions for temporary restraining orders and injunctions. Then, if an injunction is issued, the government may be forced to wait several months or longer before reaching a trial on the merits. Because of the serious consequences of such a delay, the government may decide to cancel the incumbent's contract on the basis of the injunction, and either award a new contract to the plaintiff or re-solicit offers. Whatever course the government decides to follow, further delay is almost a certainty since the firm whose contract has been cancelled, either after the injunction issues or after a trial on the merits, will almost certainly appeal the court's decision. A successful appeal will return the government to the dilemma it faced with the lower court decision. The government may, of course, return to the original contractor, and hope that the new losing party does not successfully petition the Supreme Court for certiorari. Finally, those firms whose contracts are threatened with cancellation may complicate matters further by residing outside the jurisdiction of the court and refusing to join in the suit.¹²⁴

By definition, all government contracts "are vital to the functions performed by the sovereign,"¹²⁵ but in only a small portion of the government's procurements, usually those involving exceptionally large public expenditures, will delay resulting from judicial review under-

¹²² Since Blackhawk had not tendered as evidence all documents possibly relevant to a motion for summary judgment, the court refrained from entering such judgment for the government, and remanded the case to the lower court with instructions to enter summary judgment unless Blackhawk could demonstrate that there was a genuine issue of material fact. *Id.* at 16.

¹²³ *Id.* at 5-6.

¹²⁴ Several interesting questions outside the scope of this article are raised in connection with the status of the firms whose contracts are the subject of these suits. Under Rule 19 of the Federal Rules of Civil Procedure, is the firm an "indispensable party" which must be joined in the action if the suit is to proceed? If it is not indispensable and is not joined, what consideration will the court give to its position? If the firm need not be joined, should it choose to intervene under Rule 24 in the jurisdiction chosen by the plaintiff, or should it hold back and then consider appealing an adverse decision or starting a new suit in another jurisdiction?

¹²⁵ See text at note 123 *supra*.

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mine any national goal. Most government contracts involve formally advertised procurements for commercial items. Where the government, state or federal, purchases commercial goods, a cancellation of a public contract for such items may not be unduly onerous. In fact, state courts have occasionally held that unsuccessful bidders have standing to sue to cancel such contracts,¹²⁶ and have afforded injunctive relief as well.¹²⁷ In short, most items procured by the government do not significantly involve the defense, security, safety or health of the nation, and may be promptly re-procured or completed by another contractor in the event a court directs cancellation of the original contract award.

However, in major federal procurements for complex military or space hardware, or for other research and development items or services, cancellation of partially completed projects often means the government and the new contractor must start again from the beginning. Usually, there is no existing stock to be procured elsewhere. The anticipated product has such individual complexity that the incomplete work of one contractor usually cannot be used as a foundation for another contractor. The acuteness of the problem in these procurements must be seen in this perspective—in many military, space and other procurements, late delivery simply is not an alternative because the items are essential for programs and goals which either must be achieved in accordance with the schedule contemplated by the contract, or not achieved at all. These goals and programs are those which elected officials have decided are required in the public interest. If the agents responsible for reaching them are not "private attorney generals," they are at least as much surrogates for a public interest as unsuccessful bidders.

The procurement method most commonly employed to accomplish these national goals is negotiation. The procurement procedures in the Armed Services Procurement Act of 1947¹²⁸ and the Federal Property and Administrative Services Act of 1949¹²⁹ have similar provisions covering both negotiated and advertised procurements. The latter Act governed the advertised procurements at issue in *Scanwell* and *Blackhawk*. However, since both procurement statutes have similar purposes, one must surmise that standing granted under the latter would not be

¹²⁶ See McQuillan, *Municipal Corporations* ¶ 29.83.

¹²⁷ *Id.* at ¶ 29.85.

¹²⁸ 10 U.S.C. §§ 2301-14 (1964).

¹²⁹ 41 U.S.C. §§ 251-60 (1964).

¹³⁰ Indeed, the District Court for the District of Columbia recently issued a preliminary injunction against awarding a proposed Army contract. *Schoonmaker Co. v. Resor*, C.A. No. 1760-70 (D.D.C. June 26, 1970). The same court also issued a preliminary injunction against the award of an Air Force contract. *Fermont v. Seamans*, C.A. No. 1330-70 (D.D.C. May 28, 1970). A temporary restraining order was also issued against the Air Force by a federal court in California. *Aerojet-General Corp. v. Thiokol Chem. Co.*, C.A. No. 70-1493 (July 15, 1970), and a contract awarded by the Air Force was

withheld under the former.¹⁸⁰ Moreover, as indicated above, the Court of Appeals for the District of Columbia has predicated standing in government contract cases on the APA rather than on the intent of the relevant procurement statute allegedly violated. Were it otherwise predicated, one could at least argue that Congress did not intend to have procurements for the national defense disrupted by court action. Both procurement statutes also provide for negotiation in certain enumerated circumstances,¹⁸¹ and both have been implemented by agency regulations which can have the force of law.¹⁸² The regulations implementing those portions of the statutes which establish the rules for conducting procurements by advertising are simple, at least in their general purpose, which is to see that the contract is awarded to a capable firm which has submitted the lowest price and has agreed to do precisely the work specified in the invitation for bids. According to these regulations, the work must be specified in sufficient detail to allow evaluation of all bids on a common basis. The regulations which govern negotiation are separate and distinct from those which cover advertised procurement. Negotiated procurement is cryptically defined as procurement which is not conducted by formal advertising.¹⁸³ The regulations provide, in substance, that in a competitive negotiation the contracting officer must consider the experience and management, the degree of technical ability, and the submitted prices of each competitor.¹⁸⁴ Lastly, after considering these factors, the contracting officer must decide which competitor offers the most attractive performance to the government.¹⁸⁵ Price, although not necessarily controlling, must be considered in this matter.¹⁸⁶ Obviously, there often may be no common basis of evaluation. The Comptroller General of the United States has remarked:

Negotiation procedures, unlike those required for formal advertising, are designed to be flexible and informal. These procedures properly permit the contracting officer to do things in the awarding of a negotiated contract that would be a rad-

recently cancelled in *Lloyd Wood Const. Co. v. Sandoval*, C.A. 70-426 (N.D. Ala. August 13, 1970).

¹⁸¹ 10 U.S.C. § 2304(a); 41 U.S.C. § 252(c).

¹⁸² *Paul v. United States*, 371 U.S. 245, 255 (1963).

¹⁸³ See, e.g., 10 U.S.C. § 2302(2) (1964); ASPR, 32 C.F.R. 1.201-11 (1970); NASAPR, 41 C.F.R. 18-3.100 (1970); FPR, 41 C.F.R. 1-1.218 (1970).

¹⁸⁴ See, e.g., ASPR 32 C.F.R. 3.101 (1970). Noncompetitive negotiations, those in which only one firm is solicited for an offer, are not considered in this discussion. It has been noted, however, that *Ballerina* may provide a basis for challenging sole-source solicitations.

¹⁸⁵ See, e.g., ASPR, 32 C.F.R. 3.805-2 (1970).

¹⁸⁶ See 40 Comp. Gen. 35 (1960); 40 Comp. Gen. 508 (1960); Comp. Gen. Ms. Decs. B-167508 (Dec. 8, 1969); B-159540 (Jan. 11, 1967); B-161676 (Aug. 22, 1966); B-163166 (April 5, 1968).

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ical violation of the law if the procurement were being accomplished by formal advertising. . . . The emphasis here is on permitting the contracting officer to take a course of action which would be of great benefit to Government.¹⁸⁷

At present, the courts of appeals have not ruled on whether standing should be afforded to an unsuccessful offeror who wishes to challenge a negotiated contract.¹⁸⁸ No sound reason appears why standing to contest advertised contracts will not be extended to contracts negotiated pursuant to the same statutes. However, the latitude which the federal procurement statutes give the contracting officers in determining who should receive a negotiated contract award might appear to the most litigious competitors as a formidable impediment to winning a law suit.¹⁸⁹ Were this in fact the case, one would anticipate that the disruption of negotiated contracts for defense, security, safety and health would subside quickly, as soon as the prospective plaintiffs discovered that virtually whatever the contracting officer did in negotiating a contract was within the latitude of his proper discretion. However, this latitude is not quite so omnifarious.

First, it has been held that a government contract awarded in 1962 was illegal and properly cancelled where, in contravention of published negotiation regulations, the government agency did not consider price in determining which firm was entitled to the contract.¹⁴⁰ The statute involved was the Federal Property and Administrative Services Act of 1949.¹⁴¹ However, the court looked to the legislative intent behind the Armed Services Procurement Act of 1947¹⁴² to discover that Congress required both military and civilian agencies to consider price in determining who wins a negotiated procurement.¹⁴³

The court noted that the contract involved was not a cost-reimbursement contract or one for research and development.¹⁴⁴ These latter contracts are most frequently employed to obtain those national

¹⁸⁷ 47 Comp. Gen. 279, 284 (1967).

¹⁸⁸ The District Court for the District of Columbia has done so in *Forera Corp. v. AVCO Corp. and Shultz, Secretary of Labor*, C.A. No. 1509-70. The plaintiff, which was required to post a \$2000 bond, obtained a temporary restraining order on May 19, 1970, against a negotiated contract to operate a job corps center. Also see *Schoonmaker Co. v. Resor*, supra note 130, where the plaintiff had standing to challenge the negotiations in the first step of a "two step advertised" procurement.

¹⁸⁹ See *United States v. Gray Line*, 311 F.2d 779 (4th Cir. 1962), where the court, after holding that the plaintiff had no standing to challenge the award of a government contract, indicated that the plaintiff would have had no case anyway in view of the Secretary of the Interior's discretion under 16 U.S.C. § 3 to award without advertising, and to negotiate with any offeror.

¹⁴⁰ *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969).

¹⁴¹ 41 U.S.C. §§ 251-60 (1964).

¹⁴² 10 U.S.C. §§ 2301-14 (1964).

¹⁴³ 410 F.2d at 402-03.

¹⁴⁴ 410 F.2d at 402.

objectives which will suffer if their procurement is subjected to court suits. Nevertheless, the legislative intent discovered by the court made no distinction between the negotiation criteria applied to cost-reimbursement or research and development contracts and all other negotiated contracts. Moreover, whatever distinction there was in 1962 may have been eradicated by Pub. L. 87-653, which provides in part:

In all *negotiated procurements* in excess of \$2500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, *proposals including price shall be solicited from the maximum number of qualified sources* consistent with the nature and requirements of the supplies or services to be procured, *and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered*: . . . (Emphasis added).¹⁴⁵

The quoted portion of the statute does not merely provide statutory support for cancellation of a negotiated contract where the government has failed to consider price in choosing a contractor. It also requires that proposals be solicited from the maximum number of qualified sources and that oral or written discussions be held with all firms which submit offers within a competitive range.¹⁴⁶

Since the federal courts have not, until *Scanwell*, granted unsuccessful bidders standing to sue, they have not had an opportunity to consider what is required of an agency when it negotiates a contract. However, the Comptroller General has issued a number of decisions interpreting the statutes and regulations which govern negotiated procurement. Since the Comptroller's office has been the only forum in which unsuccessful offerors have contested negotiated procurement procedures, an examination of his decisions should provide some indication of the issues and conclusions which might be expected in future court decisions concerning negotiated procurement. Furthermore, the Comptroller's decisions may at least provide the basis upon which standing itself is granted. The rationale of the *Ballerina* and *Blackhawk* decisions is that a plaintiff meets the Supreme Court test for standing by being "arguably" within the "zone of interests" protected by the relevant statute, if he alleges the government procure-

¹⁴⁵ 10 U.S.C. § 2304(g) (1964) as amended by Pub. L. 90-500, Sept. 20, 1968. The Comptroller has held that the requirements of this section apply to cost-reimbursement and research and development contracts. 47 Comp. Gen. 336 (1967); 45 Comp. Gen. 417 (1966).

¹⁴⁶ Although Pub. L. 87-653 does not apply to civilian agencies other than NASA, FPR, 41 C.F.R. 1-3.101(d), 1-3.805 have adopted similar requirements for those civilian agencies. Whether the regulations are a proper implementation of the civilian procurement statute and, therefore, have the force and effect of law, remains to be judicially determined.

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ment procedures violated the mandate of that statute. The procurement statutes rarely explain in detail what procedures must be employed by government contracting officers. The regulations implementing those statutes are not always a clear expression of what Congress intended to be minimum prerequisites to a legal contract award. Therefore, evidence that the Comptroller General had held procedures similar to those alleged by a plaintiff to be illegal violations of the relevant procurement statute or regulations, might persuade a court that the plaintiff was "arguably" within the critical "zone of interests," and consequently had standing to sue.

VI. THE DECISIONS OF THE COMPTROLLER GENERAL ON NEGOTIATED PROCUREMENT: AN ALLUSION TO JUDICIAL REVIEW WITH EXECUTIVE CHAOS

In two recent decisions,¹⁴⁷ the Comptroller General concluded that the government did not solicit proposals from the maximum number of qualified sources as required by the provisions of the procurement statutes or regulations dealing with negotiation. The Comptroller found that the procuring agency involved failed to solicit proposals from certain firms potentially able to perform the contract. In the first decision,¹⁴⁸ the Comptroller held that in a brand-name-or-equal procurement,¹⁴⁹ the degree of competition contemplated by the statute and the regulations was not obtained by sending a solicitation to several firms not including the producer of the brand name. In the second opinion,¹⁵⁰ the Comptroller reached a similar result by relying on Section 1-3.101 of the Federal Procurement Regulations, which provides that negotiated procurement "shall be on a competitive basis to the maximum practical extent."¹⁵¹ In the latter decision, the Comptroller held that the General Services Administration should have sent a solicitation to an incumbent lessor even though earlier the lessor had quoted a price for renovation which indicated that his offer on the lease would have exceeded the legal cost limit.¹⁵²

Even where an agency has solicited proposals from the maximum number of qualified sources there is no assurance that the agency will conduct discussions with those sources. Indeed, in accordance with

¹⁴⁷ 48 Comp. Gen. 722 (1969); 46 Comp. Gen. 600 (1967).

¹⁴⁸ 46 Comp. Gen. 600 (1967).

¹⁴⁹ This type of procurement is one in which the specifications merely identify a particular product or products and the salient features thereof.

¹⁵⁰ 48 Comp. Gen. 722 (1969). The contract was not cancelled because of the considerable expense the successful contractor had incurred prior to the decision. *Id.* at 726-27.

¹⁵¹ 41 C.F.R. 1-3.101.

¹⁵² The cost limitation was one imposed by the Economy Act, 40 U.S.C. § 278(a) (1964).

Section 2304(g) of the Armed Services Procurement Act,¹⁵³ the agency may decide that discussions with any of the solicited firms are unnecessary if "it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices."¹⁵⁴ However, the Comptroller General has observed that it is a questionable practice to negotiate with only one firm on the basis of "accurate prior cost information" where the prior procurements were not competitive.¹⁵⁵ Moreover, the Comptroller maintains that the statutory section which provides that discussions with all firms in the competitive range need not be conducted where acceptance of the initial proposal will result in a reasonable price¹⁵⁶ is operative only if the agency does not conduct discussions with any of the competitors.¹⁵⁷ He has also held that a clear violation of the statute occurs when the procuring agency, instead of entering into the contract on the basis of the reasonably priced initial proposal, conducts negotiations only with the firm offering that proposal, and deletes a material requirement from the contract.¹⁵⁸

Procuring agencies may also decide that discussions or negotiations should be conducted with only one firm because only that firm's proposal is within the "competitive range." However, the Comptroller General has, on one occasion,¹⁵⁹ overruled an agency's selection of IBM and reversed its determination that Honeywell was not within the competitive range because the latter firm had failed a benchmark test.¹⁶⁰ The Comptroller stated:

When the application of a mandatory benchmark test requirement results, as in this case, in leaving one proposer, and its price is, initially at least, substantially in excess of the

¹⁵³ 10 U.S.C. § 2304(g) (1964).

¹⁵⁴ *Id.*

¹⁵⁵ 48 Comp. Gen. 605 (1969). However, the Comptroller did not think that "the Government's best interest would be served if the awards were cancelled at this time." *Id.* at 612.

¹⁵⁶ 10 U.S.C. § 2304(g) (1964).

¹⁵⁷ 48 Comp. Gen. 605 (1969); 46 Comp. Gen. 191 (1966); Comp. Gen. Ms. Dec. B-165837 (March 28, 1969); B-161448 (February 7, 1968); B-158528 (April 26, 1967).

¹⁵⁸ 48 Comp. Gen. 663 (1969). The contract was not cancelled because of the contractor's advanced status of production. *Id.* at 668. See also, Comp. Gen. Ms. Decs. B-165084-165691(2) (April 11, 1969).

¹⁵⁹ 47 Comp. Gen. 29 (1967). Generally, however, the Comptroller General considers that a determination of competitive range is a matter of administrative discretion. See, e.g., 46 Comp. Gen. 606 (1967); Comp. Gen. Ms. Decs. B-168603 (February 13, 1970); B-166052 (May 20, 1969); B-165488 (January 17, 1969); B-163024 (August 27, 1968); B-164313 (July 5, 1968). The Comptroller may, however, be extremely critical of a determination excluding a given firm from the competitive range. See Comp. Gen. Ms. Decs. B-158042 (March 30, 1966).

¹⁶⁰ A benchmark test is an examination of the program capabilities of a computer system wherein the system is required to perform a series of hypothetical tests.

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price of another proposer we believe the spirit and intent [of 10 U.S.C. § 2304(g)] would not be served without further discussion to determine whether the other proposal can be improved to meet the benchmark requirement.

Concededly, both IBM and Honeywell are responsible offerors. Discussions were conducted, at least with Honeywell, after proposals were submitted in December 1966. The only justification for refusing to continue discussions with Honeywell after it failed the benchmark test would be a determination that its proposal was not within a competitive range, price, and other factors considered. When the benchmark test left only one proposer as an eligible contractor, we do not believe that a 200 hour benchmark test, which was the only test Honeywell failed, should have been considered determinative of what constituted a "competitive range" without regard to price.¹⁶¹

As a result, the Comptroller ruled that the Honeywell proposal should have been considered within the competitive range, and that further discussions with Honeywell should have taken place before source selection.¹⁶²

Whether a proposal ranks within the competitive range depends upon how well it is scored in accordance with criteria which the procuring agency has selected for evaluating proposals. Often, however, offerors are not informed of the evaluation criteria applicable to their proposals or of the relative importance of those criteria. Recently the Comptroller held that the absence of this information in a solicitation for offers to supply statistical analytical support required the cancellation of that solicitation.¹⁶³ He also stated that the failure to provide offerors with this information is not in accordance with sound procurement policy and the public interest, and that his office may direct the cancellation of a contract which is clearly contrary to the public interest.¹⁶⁴

The Comptroller General has often held that a proposal need not be considered to be within the competitive range, and thereby require discussion, if the procuring agency considers the proposal so "tech-

¹⁶¹ 47 Comp. Gen. at 53-54.

¹⁶² *Id.* In Comp. Gen. Ms. Decs. B-169645(1) (July 24, 1970), the Comptroller expressed serious reservations that the "competitive range" could not be properly determined by using a pre-established minimum point scale.

¹⁶³ Comp. Gen. Ms. Decs. B-169645, *supra*, note 162.

¹⁶⁴ See also Comp. Gen. Ms. Decs. B-168958 (May 28, 1970) and B-169382 (July 9, 1970), in which the Comptroller recommended to the procuring agencies that they terminate apparently legal contracts under certain termination clauses in the contracts because proper procurement procedures were not utilized.

nically inferior" as to render meaningful discussions an impossibility.¹⁶⁵ In one decision, however, the Comptroller concluded that negotiations for a \$3 million research and development contract were unjustifiably limited to a firm which had, in the opinion of the procuring agency, submitted a proposal of "substantial superiority."¹⁶⁶ In reaching the decision, the Comptroller explained that the term "negotiation" generally implies a series of offers and counter-offers until a mutually satisfactory agreement is reached by the parties. He stated:

In this context, we believe that an obligation to negotiate . . . existed notwithstanding that [the one] proposal was determined to be technically superior . . . We find nothing in the record which would indicate that [the other] proposal was so technically inferior as to preclude any possibility of meaningful negotiations with such offeror. This is what both the law and the ASPR [Armed Services Procurement Regulations] require in order to assure the competition contemplated.¹⁶⁷

In addition to reversing an agency determination that a particular proposal is so technically inferior that meaningful discussions are precluded, the Comptroller has also held that the maximum competition contemplated by the statute was not obtained by the agency when it failed to conduct discussions with an offeror who did not supply sufficient information to determine if his offer was technically acceptable.¹⁶⁸

The Comptroller observed:

Unlike the case of a Request for Proposal for a research and development contract when precise engineering and scientific data would be the heart of the proposal, a few instances of

¹⁶⁵ Comp. Gen. Ms. Decs. B-167508 (December 8, 1969); B-166213 (July 18, 1969); 48 Comp. Gen. 314 (1968); B-160620 (March 13, 1967); B-161676 (August 22, 1966); B-159540 (January 11, 1967). The Comptroller's reluctance to question an agency's competitive range determination on the basis of the proposal being technically unacceptable stems from his traditional position that his office does not have technical expertise and therefore does not question an agency's technical judgment unless clearly arbitrary. See, e.g., 40 Comp. Gen. 294, 297 (1960). However, a court will not operate under the same constraints and presumably will consider such questions as whether the specifications are unduly restrictive and whether a firm's offer to meet a given specification is in fact "technically unacceptable."

¹⁶⁶ 45 Comp. Gen. 417, 425 (1966). Cf. 45 Comp. Gen. 749 (1966) indicating that in a competition between two firms, a proposal by one which represents a substantial breakthrough in the state of the art may be so substantially superior to the other as to be the only one in the competitive range. See also, Comp. Gen. Ms. Decs. B-169429 (August 21, 1970).

¹⁶⁷ 45 Comp. Gen. at 427. The Comptroller concluded, however, that "practical considerations preclude our disturbing the award." *Id.* at 433.

¹⁶⁸ Comp. Gen. Ms. Decs. B-159796 (November 30, 1966).

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insufficient data or detail are not ordinarily an adequate reason for rejecting without discussion a low bid on a common article of industrial equipment.¹⁶⁹

The most interesting conflicts between the wide discretion given the contracting officer in negotiated procurement and the restrictions placed on that discretion by the requirements in section 2304(g)¹⁷⁰ for discussions with competitive offerors, occur in those cases in which the agency has conducted discussions with several offerors but, nevertheless, is found by the Comptroller General not to have complied with the statutory mandates. For example, the Comptroller has observed, "it is axiomatic that the contracting officer enjoys the widest possible range of discretion in the evaluation of negotiated proposals and in determining which offer or proposal is entitled to be accepted as in the Government's best interest."¹⁷¹ However, the Comptroller then proceeded to rule that the requirements of the negotiated procurement statute had not been met because the cost negotiations conducted by the contracting officer with all three offerors were not "meaningful."¹⁷² Instead of cancelling the award, which was considered impractical in view of the circumstances of the case, the Comptroller directed the agency not to exercise a contract option for a second year of services.

From the procuring agency's point of view, the rulings of the Comptroller General present difficult problems of statutory compliance. For example, during the course of often hectic negotiations, the questions of how a procuring agency is to determine which areas of deficiency in a proposal it should discuss with the offeror, and the extent to which it should continue to discuss any given area are presented. In one decision, however, the Comptroller observed:

To point out during negotiations every area in which another offeror has achieved a high point score or provided more detail is not only not required by statute or regulation, but in fact is specifically precluded by ASPR 3-805.1(b) which prohibits the use of "auction techniques."¹⁷³

Nevertheless, it may be difficult for a procuring agency to perceive which areas must be discussed in order to comply with the statute.¹⁷⁴

¹⁶⁹ *Id.* at 4. The award was not cancelled because such action would have caused a two month delay in the delivery of a critically needed item. *Id.* See also, *Comp. Gen. Ms. Decs. B-167291(1)* (December 1, 1969).

¹⁷⁰ 10 U.S.C. § 2304(g) (1964).

¹⁷¹ 47 *Comp. Gen.* at 341.

¹⁷² The contracting officer discovered that the proposers' cost estimates were unrealistic; these estimates had not been discussed during the initial negotiations, and negotiations were not reopened to discuss them.

¹⁷³ *Comp. Gen. Ms. Decs. B-164552(2)* (February 24, 1969) at 6.

¹⁷⁴ See 47 *Comp. Gen.* 252 (1967), where the agency's discussions were clearly

The Comptroller has also issued a number of decisions in the situation where the procuring agency wishes to bring the discussions to a close with some or all competitors. Here a difficulty often arises because the military procurement regulation which calls for the rejection of late proposals or late proposal modifications also calls for discussions which may generate changes in the initial proposals. In these instances, offerors will be uncertain as to whether these changes will be ignored on the basis of lateness, or considered under the regulation permitting negotiations.¹⁷⁶ The Comptroller believes that every solicitation in a negotiated procurement should incorporate a "cut-off" date for the submission of proposals. Furthermore, in cases where discussions are to be conducted, a cut-off date should likewise be established for the submission of proposed modifications.¹⁷⁶ He has stated that modifications submitted after the cut-off date should not be considered, but if no such date has been established, untimely offers should be considered regardless of how late or administratively burdensome those offers are.¹⁷⁷

In 48 Comp. Gen. 536 (1969), two competitors initially refused to amend their proposals in order to make them acceptable to the Department of the Navy. Later, the small business firm which had submitted the less attractive offer acquiesced to the Navy requirements. However, a question concerning that firm's responsibility arose and was referred to the Small Business Administration (SBA) for resolution.¹⁷⁸ Favorable action by SBA appeared both probable and imminent.¹⁷⁹ At this point, however, the small business firm's competitor submitted a modification to his proposal and withdrew his initial exception to the Navy specifications. Because no cut-off date for proposal modifications had been established, the Navy asked both offerors to confirm their proposals by a specific date and advised them that any revisions after that date would be considered late. Both offerors confirmed their proposals. Since the competitor of the small business firm had initially submitted the most attractive offer, the Navy

inadequate with respect to both cost and technical aspects of a proposal, notwithstanding that an elaborate and no doubt expensive "proposal Evaluation Board" had helped to determine the scope of those discussions. See also, Comp. Gen. Ms. Decs. B-167492, (August 12, 1969), holding the Navy should discuss its decision with a potential new supplier that \$40,000 represented the government's additional cost to purchase products not interchangeable with those previously bought from a sole-source.

¹⁷⁶ Comp. Gen. Ms. Decs. B-161782 (March 25, 1968) (letter to the Secretary of the Navy).

¹⁷⁷ Comp. Gen. Ms. Decs. B-151944 (March 19, 1969) (Letter to GSA).

¹⁷⁸ Id.

¹⁷⁹ Generally, the SBA is the final arbiter of whether a small business firm, as here, is competent to perform a contract. 15 U.S.C. § 637(b) (7) (1964).

¹⁸⁰ The facts do not disclose whether the small business firm's competitor was also a small business, or whether it had any knowledge of the action the SBA appeared ready to take.

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proposed to award the contract to that firm. Prior to awarding the contract, the small business firm lodged a protest with the Comptroller General who ruled that the proposed award would be open to serious question because negotiations had not been properly closed. On the issue of properly closing negotiations, the Comptroller held that offerors should be advised (1) that negotiations are being conducted; (2) that offerors are being asked for their best and final offer, not merely to confirm or reconfirm prior offers, and finally; (3) that revision must be submitted by the date specified.¹⁸⁰ Since the offerors had not been advised that negotiations were being conducted and that they should submit their best and final offers, the Comptroller directed the Navy to conduct further discussions before making any award.

In another decision of the Comptroller,¹⁸¹ the Federal Aviation Administration (FAA) was involved in discussions with three offerors including one Wilcox. In this case, the agency did establish a cut-off date for submission of proposal modifications. Wilcox submitted a modification which would have made its offer the lowest in terms of price. The modification was not considered by the FAA, however, because it was received after the established cut-off date. Thereafter, and largely because of funding problems, the FAA requested Airborne Instruments Laboratories, which had submitted the most favorable timely offer, to modify its offer to one for a multi-year contract.¹⁸² The offer was to provide that delivery would be extended over a two year period, and that in the event the contract was cancelled, there would be a charge against the government of up to nine percent of the contract price. Airborne agreed to the modifications and was awarded the contract.

In resolving the controversy between Wilcox, Airborne and the FAA, the Comptroller stated that in his view the contract should be cancelled and further discussions should be conducted with the parties. He reasoned that as long as negotiations are open, every offeror has a right to change his price for any reason and that, under Section 1-3.805 of the Federal Procurement Regulations,¹⁸³ Wilcox should have been allowed to exercise that right when the FAA reopened discussions with Airborne.¹⁸⁴ The Comptroller was of the opinion that this should be the result even where, as here, the changes to which Airborne agreed

¹⁸⁰ 48 Comp. Gen. at 542.

¹⁸¹ Comp. Gen. Ms. Decs. B-167386 (December 22, 1969).

¹⁸² A multi-year contract is a contract which is firm for one year's requirements and under its terms may extend beyond that year for another increment of requirements. See ASPR 1-322, 32 C.F.R. 1-322.

¹⁸³ 41 C.F.R. 1-3.805.

¹⁸⁴ The language of Section 1-3.805 of the FPR indicates that discussions are not necessarily essential, as they are under 10 U.S.C. § 2304(g), in cost-reimbursement or research and development contracts.

gave it no advantage and prejudiced no other offeror.¹⁸⁵ Despite his conclusions, the Comptroller did not direct cancellation of the contract. Instead, he requested the FAA to negotiate an agreement between all the parties which would best serve the interests of the government.¹⁸⁶ However, he required that if such an agreement could not be reached, the matter would be returned to him for his consideration of the cost of cancelling the second year's requirements of the contract.

In 48 Comp. Gen. 583 (1969), the General Steel Tank Company submitted the most favorable offer to each of several amendments of the Marine Corps' original solicitation for bridges to be used in South Vietnam. The last amendment reduced the contract's requirement from eleven bridges to eight. Only General Steel, having submitted the most favorable offer, was asked to submit a revised proposal. Within one day, which was the established cut-off period for submission of a revised offer, General Steel advised the Corps that there would be no price increase. Thereafter, the Marine Corps realized that it should have solicited offers on the revised quantity from General Steel's competitors. The Corps adopted this procedure and allowed each of the competitors a one day cut-off for revisions. One of the competitors submitted an offer which was more favorable than that of General Steel and was awarded the contract.

The Comptroller held that the procedure followed by the Marine Corps "deviated from the requirements of 10 U.S.C. § 2304(g) and regulations so materially as ordinarily would warrant cancellation of the award and the reopening of negotiations with all offerors in the competitive range."¹⁸⁷ One of the deviations from the statute perceived by the Comptroller was that the Marine Corps established two separate cut-off dates for modifications, one for General Steel and another for its competitors, rather than a common cut-off date for all offerors. The requirement for a common cut-off date was derived from the fact that the regulations implementing the statute call for a simultaneous notice of a cut-off date, thus implying an intent that there should be a common cut-off date for all offerors. Moreover, the Comptroller concluded that the separate dates may have prejudiced General Steel.¹⁸⁸

¹⁸⁵ Cf. B-165837 (March 28, 1969) and 48 Comp. Gen. 449 (1968), two earlier decisions not cited in the instant decision, where the improper reopening of negotiations with only one competitor in one case, and the improper closing of negotiations in another, was not held illegal because those actions did not prejudice competing offerors.

¹⁸⁶ No agreement was ever reached. Of more importance, however, is the fact that the Comptroller found that the civilian regulations imposed on an agency legal obligations to conduct discussions properly. See also, 48 Comp. Gen. 722 (1969); Comp. Gen. Ms. Decs. B-169429 (August 21, 1970).

¹⁸⁷ 48 Comp. Gen. at 593.

¹⁸⁸ The contract was not cancelled due to the urgency of the military requirements and the substantial termination costs which would have ensued. See Comp. Gen. Ms. Decs. B-169429 (August 21, 1970).

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In addition, the Comptroller General believes that the procedures contemplated by 10 U.S.C. § 2304(g) not only require that proposal modifications have a common cut-off date where the absence of one might prejudice a competitor, but also require that offerors be given equal time for consideration and submissions of such proposals.¹⁸⁹ In a recent decision,¹⁹⁰ the Comptroller appeared more concerned with the latter requirement of the statute. In this case, the National Aeronautics and Space Administration (NASA) proposed to award a contract to General Electric (GE). The latter's competitor, Fairchild-Hiller, was required to submit its proposal modifications one week earlier than GE. The Comptroller found, *inter alia*, that the disparity in submission dates created a situation prejudicial to Fairchild which claimed that if it had been afforded an additional week to negotiate with its subcontractors or develop cost saving methods prior to submitting its modifications, it might have reduced its cost proposal in the same manner as did GE. The Comptroller advised NASA to reconsider its proposed award to GE, and subsequently, NASA awarded the contract to Fairchild.

The decisions of the Comptroller General do not necessarily forecast what conclusions the courts will reach should they adopt the *Scanwell* rule of conferring standing on unsuccessful bidders. Rather, they indicate that the procurement statutes and regulations constitute a dynamic body of law which is susceptible of varied interpretations. More importantly, however, the decisions of the Comptroller General involve the same issues arising out of negotiated procurements which the courts will have to resolve if standing is to be afforded to unsuccessful bidders. In this respect, they will serve as a valuable guide, first, in resolving the issue of standing itself, and, second, in meeting the substantive issues which will surely arise once standing is granted.

However, it should be noted that a court which holds that the APA is applicable to government contracts may prove more circumspect than the Comptroller General in concluding that a contract was illegally awarded. The soundness of this prophesy lies in the fact that the Act appears to provide only for cancellation in the event of an illegal award. Conversely the Comptroller General may, as was indicated from an examination of several of his decisions, find that although a procurement statute or regulation has been violated, practical considerations restrain him from advising the procuring agency

¹⁸⁹ Comp. Gen. Ms. Decs. B-164728 (September 3, 1968) (letter to the Secretary of Army). The existence of a common cut-off date and of equal time for the submission of modifications after discussions appear to be mutually exclusive unless discussions are conducted simultaneously with all competitors, a practice which is rarely if ever followed.

¹⁹⁰ Comp. Gen. Ms. Decs. B-169535 (July 2, 1970).

that he will disallow any payments made pursuant to a contract that he regards as illegally awarded.¹⁹¹

The Comptroller has exercised such restraint in determining whether the violation of a procurement statute or regulation must result in the cancellation of a government contract that his office oftentimes appears ineffective. For example, in one decision, the Comptroller advised the Secretary of the Army that if another contract was awarded where discussions were limited to one firm simply because that firm's initial proposal was a reasonable one, that contract "will be considered void *ab initio* by this office."¹⁹² Subsequently, the Comptroller issued several decisions on the same issue reaching the same conclusion. Despite his protestations, none of the contracts involved were declared void.¹⁹³ Indeed, less than a year had elapsed after his first decision to the Secretary of the Army before a second decision followed on the identical point; the contract was not cancelled.¹⁹⁴

In his second decision to the Secretary of the Army, the Comptroller concluded:

The procurement deviated from requirements of the law and regulation in matters material enough to warrant cancellation of the award under ordinary circumstances. However, we are not unmindful of the fact that this is a *high priority emergency procurement*. Therefore, we would not direct cancellation if such action would result in delaying deliveries of the end items. If, on the other hand, the instant contract can be cancelled without any adverse effect on military posture, we think such action is required.¹⁹⁵

The items being procured were telephone terminals which the Department of Defense had determined were urgently needed for the military effort in Southeast Asia.¹⁹⁶ The Comptroller General's failure to cancel this contract may contribute to the criticism that his office is ineffective in this area. However, the criticism might become more intense if the Comptroller, and now the courts, began to cancel contracts

¹⁹¹ In *Reiner Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), the court held that since the illegality of a contract cancelled at the direction of the Comptroller General was not plain, the contract was lawful, not void. The court opined that the Comptroller directed cancellation of contracts on the basis of whether procurement policy had been ignored, and not necessarily on whether the contract was illegal. The Comptroller disavowed the authority that the court imputed to his office. See 44 Comp. Gen. 221, 223 (1964); cf. Decisions cited at note 164 *supra*.

¹⁹² Comp. Gen. Ms. Decs. B-158528 (April 26, 1967), at 13.

¹⁹³ See 48 Comp. Gen. 605 (1969); 48 Comp. Gen. 663 (1969); Comp. Gen. Ms. Decs. B-165837 (March 28, 1969).

¹⁹⁴ Comp. Gen. Ms. Decs. B-161448 (February 7, 1968).

¹⁹⁵ *Id.* at 11.

¹⁹⁶ *Id.* at 1.

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involving military supplies for use in South Vietnam, space experiments which can be conducted only once every 20 years, educational or housing programs or crime-prevention studies designed to meet campaign promises which an administration believes were a major factor in its election, or, finally, defense systems which the Joint Chiefs of Staff recommend as necessary for protection against imminent threats to our national security.

It is submitted that the major point of significance here is not that the Comptroller has been too ready to declare contracts illegal or too lax in cancelling them, but rather to suggest that if courts are to entertain suits from unsuccessful bidders under the Administrative Procedure Act they will not have a workable rationale to avoid cancelling illegal contracts in those situations where good sense and the national interest clearly dictate that result. The other side of the coin, however, is that without judicial review, there is no effective restraint on the manner by which the executive branch of the government expends the \$50 billion which Congress appropriates each year for the procurement of necessary goods and services. Not only the enormous expenditure itself, but also the procedures by which this money is allocated, has a tremendous impact on the patterns of our economy. Government contracts have become the lifeblood of many firms and communities, and the procedures employed to award the contracts may determine which firms and communities prosper and which atrophy. Furthermore, government contracts have become an important vehicle by which the government attempts to implement various policies concerning poverty, small businesses, environmental control, equal employment, the balance of payments, labor standards and fair wages. These policies may at times tend to undermine an executive agency's desire to accomplish a government program in the most effective manner at the least possible cost. In short, government procurement has assumed such an important and vital position in the economy and general well-being of the nation that judicial review of the procurement process was predictable, and now, barring an unexpected reversal of the trend by Congress, it appears virtually inevitable. The unfavorable consequences of this result, however, need not be inevitable.

VII. JUDICIAL REVIEW WITHOUT EXECUTIVE CHAOS: A VIABLE ALTERNATIVE

The *Perkins* decision concluded that judicial review of government contracts would disrupt the even and expeditious functioning of government.¹⁹⁷ The court in *Lind v. Staats*¹⁹⁸ expressed concern over the

¹⁹⁷ See p. 5 *infra*.

¹⁹⁸ 289 F. Supp. 182 (N.D. Cal. 1968).

damage and delay which would be done to government business if unsuccessful bidders were allowed to use the injunctive power of the courts. Both decisions assumed, not unreasonably, that the consequence of litigation by an unsuccessful offeror is interference with the procurement process. Also, the decisions recognized that, if successful, such suits will result in government responsibility for the cost of overlap or duplication in the work performed by the competing contractors. Finally, it has been indicated that interference with some procurements may destroy the efficacy of many government "priority" programs which are closely related to important national goals. These consequences, however, need not result from allowing unsuccessful offerors to sue in government contract cases.

In the absence of new legislation, a court following the *Scanwell* line of cases has available at least three methods by which it can avoid cancelling a contract where such action would seriously interfere with the defense, security, health or safety of the nation. First, a court could rationalize the *Perkins* and *Scanwell* decisions as being compatible, in that the strict holding of the former was that mere *potential* bidders have no standing, while the latter held that *actual* bidders who would have been awarded the contract but for the illegal agency action do have standing. Thus, standing could be limited only to actual bidders who stood next in line for the award.¹⁹⁹

Another way in which a court may avoid contract cancellation is for it to declare that when a plaintiff charges the government with arbitrary or capricious action, he must satisfy a high standard of proof²⁰⁰ and demonstrate that the government action was palpably illegal.²⁰¹ The import of such a judicious sounding dictum could prove to be that plaintiffs challenging the validity of important government contracts could rarely if ever live up to the required standard of proof, since the height of that standard would appear to increase in proportion to the amount of chaos which would be created by cancelling the government contract. Precedent might soon discourage most plaintiffs from attempting to challenge the award of a government contract. Courts could also discourage actions to cancel certain government contracts where the plaintiff's initial strategy is to seek a temporary restraining order and preliminary injunction. This could be accomplished

¹⁹⁹ Since the Court of Appeals for the District of Columbia held in *Ballerina* that a potential bidder has standing, it is obvious that it would not accept this rationalization.

²⁰⁰ See *Keco Indus., Inc. v. United States*, No. 173-69 (Ct. Cl., July 15, 1970) at 10, where the court discusses the standard of proof required of an unsuccessful bidder suing for bid preparation expenses.

²⁰¹ See *Reiner v. United States*, 325 F.2d 438 (1963), concerning the standard of proof that the government must meet to sustain its cancellation of a contract which it believes was illegally awarded.

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by requiring the plaintiff to post a prohibitively high bond.²⁰² Requiring the plaintiffs to meet an inordinately high standard of proof or to post a prohibitively high bond would be unworthy of our judicial system to the extent that both alternatives require the court to reach conclusions or take actions almost totally independent of the legal merits of the case before them. The posting of an unreasonably high bond has the further disadvantage of making standing to sue in government contract cases a luxury which only large corporations would be able to afford.²⁰³ Finally, none of the above methods effectively forecloses the possibility of law suits, successful or not, which will severely disrupt the procurement process by which important national policies are implemented. Such a result should not be accepted where a viable alternative is available which gives due regard to our aim of assuring that all contractors be treated in accordance with fair and established rules while still maintaining the strength of the procurement process and, in turn, the national goals which it implements.

Legislation may be necessary to achieve an equitable balance between the competing goals of judicial review and an efficient procurement system.²⁰⁴ Possibly the most promising alternative to avoiding the chaos of allowing all unsuccessful offerors to sue would be an amendment to the APA or the procurement statutes which would provide for a new remedy in government contract cases as a substitute for those presently contained in the Act. Presently, the APA authorizes the court to hold unlawful and set aside illegal agency action, and to

²⁰² Under Fed. Rules Civ. Proc. rule 65c, 28 U.S.C.A. (1964), a court may refuse to issue such an order or injunction unless the plaintiff posts a bond in an amount sufficient to cover the costs and damages the government may incur as a result of having been wrongfully restrained or enjoined. In many government contract cases, the costs which possibly could result from delay would easily exceed the cost of the item being purchased. Where a contract involving the defense, security, health or safety of the nation was being challenged, a court might be tempted to set the amount of the bond at whatever cost could possibly result from the delay, rather than the amount which would probably result.

²⁰³ The situation may already exist because probably only large corporations or those heavily dependent on government contracts can afford to undertake a suit which, even if successful, may bring only the cancellation of a competitor's contract rather than an immediate pecuniary benefit.

²⁰⁴ The APA or the procurement statutes could be amended to exempt government contracts from judicial review. Many of those responsible for executing government programs would be relieved by this "solution," but little would be achieved toward a balance of competing goals. Moreover, the Supreme Court has correctly observed that "where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970). Excepting government procurement statutes from this trend does not reflect the important position which the procurement process occupies in maintaining our national economy and well-being. The same disability applies to suggestions that a new administrative tribunal, or an existing one, such as the Comptroller General's office, be given exclusive jurisdiction and adequate powers and procedures with respect to bid protest matters.

compel agency action unlawfully withheld.²⁰⁵ The Act could be amended so as to provide that, in government contract cases, the only remedy available to unsuccessful offerors would be an award of damages related to the profits the offeror would have enjoyed had proper procurement procedures been followed.²⁰⁶

If one concedes that an unsuccessful offeror who challenges a government contract is not a "private attorney general" concerned with the general welfare, but rather a businessman rightly concerned with his profits, then it follows that his primary economic interest in bringing the law suit can be served best by an award of damages. If a court is empowered to award the profits which the plaintiff reasonably anticipated from the contract had it been awarded to him, he should not suffer undue regret over the loss of his chance to have the contract award set aside and have the agency award the contract to him.

Furthermore, an award of damages as the unsuccessful offeror's sole remedy has other virtues. For example, those who solicit government contracts would be relieved of the drastic consequences that would ensue should a court declare a contract void after the award has been made. Indeed, a contractor who in good faith had begun performance on what he considered to be a valid contract generally would not be affected by the court challenge. Thus, he would be able to continue performance on the contract and presumably receive the profits he anticipated.²⁰⁷ Finally, and most importantly, this procedure would assure that the government procurement process continues unhampered by the vicissitudes of court action, including the possibility of contract cancellation. A suit for damages, in which the fear of contract cancellation is not present, could proceed at its leisurely and unpredictable pace without imposing those delays upon the procurement process which are so clearly injurious to the public interest. The cost of these gains for the public interest, however, is acceptance of the not altogether palatable precept that the government may be required to pay contract damages to one who never received the contract. Such a procedure would be considered preposterous in private industry, where the primary obligation is to make a profit for one's stockholders. The government as contractor, however, has an obligation not only to get the most for the taxpayers' dollar, but also to treat fairly all those

²⁰⁵ 5 U.S.C. § 706 (1964) as amended by Pub. L. 89-554, Sept. 6, 1966.

²⁰⁶ Suits against the United States for damages in excess of \$10,000 cannot be brought in the district courts, 28 U.S.C. 1346(a)(2) (1964). Where anticipated profits exceed this amount the action will have to be brought in the Court of Claims unless the ceiling is lifted. See 28 U.S.C. § 1491 (1964).

²⁰⁷ If this procedure is utilized and the court should find in favor of the unsuccessful offeror, the government would have to pay the lost profits to two different contractors for the same work. However, this should prove considerably less expensive than paying for the costs incurred by both contractors, which may occur if the contract were cancelled.

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who deal with it and to comply with various socio-economic statutes and regulations. If judicial review is to become a feasible means of assuring that the government meets these often conflicting obligations, that review, ironically, may have to be designed to allow an award of damages under a contract the plaintiff never received.

However novel, the remedy of money damages for illegal contract awards is not without precedent. In *Heyer*,²⁰⁸ the Court of Claims granted standing to an unsuccessful offeror to recover his bid preparation expenses. The court reasoned that where there was a fraudulent inducement for bids, the plaintiff could recover upon an implied promise on the part of the government to consider honestly all solicited bids. In a similar and more recent case decided after *Scanwell*, the Court of Claims concluded that the government's implied promise was operative without a fraudulent inducement.²⁰⁹ Moreover, the court held that the *Scanwell* decision

is broad enough to grant standing to a party seeking personal money damages as well as to one acting as a quasi attorney general for the benefit of the public. Regardless of the fact that plaintiff in the instant case is seeking money damages, it is still requiring the Government to enforce its regulations fairly and honestly and treat all bidders without discrimination. Thus, plaintiff is acting both for itself and the good of the public.²¹⁰

The court did, however, refuse to allow the plaintiff to recover his anticipated profits, stating that such an award would be improper "since the contract under which the plaintiff would have made such profits never actually came into existence."²¹¹ Moreover, the court noted that "there is no way that it could be said for certain that had Acme's bid [the low bid accepted by the procuring agency] been rejected, the award would have been made to the plaintiff."²¹² The court failed to add that the APA, which sets forth with considerable

²⁰⁸ 140 F. Supp 409 (Ct. Cl. 1956).

²⁰⁹ *Keco Indus., Inc. v. United States*, *supra* note 200.

²¹⁰ *Id.* at 8.

²¹¹ *Id.* at 10.

²¹² *Id.* at 10-11. The synthesis of the court's holdings in this area is that the government, if it did not properly evaluate the plaintiff's bid, would breach an *implied* contract. Plaintiff could sue for bid preparation costs under either that contract or as a quasi attorney general. Refusal to extend relief to lost profits is no longer based on the *Perkins* rule of no standing to sue, but on the fact that an actual contract never came into existence. What remains to be tested is whether the court having joined *Scanwell* in rejecting *Perkins*, would now extend damages to include lost profits for breach of what it might construe as an *implied-in-fact* contract. Such a development could put an end to suits in district courts for injunctive relief, since an adequate remedy at law would be available to plaintiffs. Cf. *Simpson Elec. Co. v. Seamans*, C.A. No. 2713-70 (September 9, 1970).

specificity the remedies available, does not provide for an award of damages.

The suggested amendment to the APA or to the procurement statutes would overcome both of the court's reasons for not awarding some measure of damages related to the plaintiff's anticipated profits. Under the proposed amendment, it would not be necessary for a plaintiff to prove that he had a contract or that he would have received the award had his competitor's bid been rejected. Rather, the sole issue before the court would be whether the plaintiff should have received the contract had proper procurement procedures been followed. Therefore, only a rare case would present the difficult question of whether proper procurement procedures would have required the procuring agency to reject all bids and re-solicit new offers, instead of awarding the contract to the complaining bidder.

The problem of determining when proper procurement procedures would have resulted in re-solicitation is not the only difficulty or limitation generated by substituting the remedy of damages for one of cancellation. None, however, appear quite so formidable as the consequences of law suits seeking an injunction or a contract cancellation. For example, entertaining suits for loss of anticipated profits would sometimes create difficult problems in determining the amount of anticipated profits, particularly where complex incentive-fee, award-fee contracts were involved. However, courts in the past have demonstrated an ingenuity equal to similar tasks. They commonly face baffling problems of damages in anti-trust suits and in suits for wrongful default of a contract for a custom item.

Serious questions could also be raised as to whether a plaintiff suing for damages under a contract he never received should enjoy a six-year statute of limitations; whether the contractual parties, the government and the successful contractor, would continue to be bound by a contract which, in an unusual case, might not be fully performed when a court concluded that it had been illegally awarded; and whether the remedy of contract cancellation should be retained as a deterrent to future illegal agency action because, unlike a Court of Claims judgment for damages, the expenditures for the cancelled contract as well as for the one which may replace it are charged to the procuring agency's appropriations.²¹³ However, if any of these questions do in fact present genuine problems, they could be resolved by the same legislation which would amend the APA or the procurement statutes to substitute the remedy of damages for the remedy of contract cancellation. An appropriately short statute of limitations could be

²¹³ Judgments awarded by the Court of Claims are satisfied from an appropriation for that particular purpose.

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established. The obligations of the parties to the contract could be left intact regardless of the outcome in a suit brought by a third party to challenge the legality of the contract. The deterrent effect of the remedy of damages could be increased by providing that such judgments in the Court of Claims be satisfied out of money appropriated to the procuring agency in the year the judgment is rendered.²¹⁴

Another consequence of substituting the remedy of damages is that an unsuccessful offeror who cannot demonstrate that he would have been eligible for the contract had proper procurement procedures been followed, could not prove a loss of anticipated profits and would be limited to recovering his bid preparation expenses on an implied contract theory. Many would not regard this result as a drawback to the remedy of damages, since the injury to such a bidder seems clearly speculative. However, this group of unsuccessful offerors probably would include all those whose complaints of inadequate oral or written discussions were considered in the Comptroller General's decisions discussed above. Judging from those decisions, one could conclude that the mandate of Congress for competition in negotiated procurement has proved to be no mandate at all, and will not become one until some administrative or judicial tribunal requires its enforcement. A second group of unsuccessful offerors who would not have an adequate remedy if only suits for anticipated profits were permitted are firms which are only potential bidders. Like *Ballerina*, their injury in one sense is speculative, but on the other hand, these firms may be most seriously harmed because in some cases the government action at issue will foreclose their competing for many or all future government contracts.

With respect to the injuries alleged by unsuccessful offerors who cannot prove a loss of anticipated profits, or by other unsuccessful offerors who simply cannot afford the expense of a law suit, much reliance must be placed in the hope for improved procedures before the Comptroller General. There can be no doubt that the Comptroller is fully cognizant of the *Scanwell* line of decisions and its potential effect on both the substance of his decisions and the procedures by which they are reached. These procedures should be amended to encourage the issuance of his decisions before a contract is awarded so that remedial action would be more feasible. For example, except in cases where the head of an agency determines that an immediate award is necessary to the national interest the Comptroller has recommended that no award should be made until five days after the con-

²¹⁴ Since the damages are related to profits rather than costs, the amount deducted from the appropriations will be painful to the agency but may not seriously disrupt its programs as the cost incident to contract cancellation certainly would.

tracting agency has submitted a report to his office and has discussed the matter with the officials in his office.²¹⁵

Also, it is necessary that these procedures provide some mechanism for at least selectively reviewing the allegations of fact presented to the Comptroller by the procuring agency. At present, these allegations are accepted by his office as undisputed unless proof to the contrary is virtually overwhelming.²¹⁶ Finally, the Comptroller may have to be more willing than he has been in the past to take effective action against improperly awarded contracts which do not concern the defense, security, safety or health of the nation.²¹⁷

The possibility of improving the procedure for protesting contract awards to the Comptroller General may suggest that court actions for damages or any other remedy will become altogether unnecessary. However, this situation is highly unlikely. In order to be effective, the Comptroller or any other administrative tribunal will be compelled, under whatever procedures are adopted, to issue decisions before the contract is awarded. The dispatch with which such decisions must be issued will require abbreviated procedures which will not compare with the discovery, procedural safeguards and adversary hearings which are only afforded by use of the judicial process. Moreover, it is probable that only such review as is available in a court of law is commensurate with the importance to our economy of government procurements, particularly those procurements involving the defense, security, safety or health of the nation which should not be subjected to the risk of cancellation.

Restricting the judicial review of government contracts to suits for damages only, appears to be the most promising compromise between the chaos of unrestricted review and the potentially arbitrary exercise of executive power in the allocation of \$50 billion.²¹⁸ Indeed, if the chaos is to be avoided and any judicial review retained, it may be the only workable compromise short of judicial sophistry. Thus, it is submitted that, despite its limitations, legislation restricting an unsuccessful offeror's remedy to one for damages presents the most

²¹⁵ Hearings on H.R. 474 to establish a Commission on Government Procurement, 91st Cong., 1st Sess., pt. 3, at 685.

²¹⁶ See, e.g., 42 Comp. Gen. 124, 134 (1962), and decisions cited therein.

²¹⁷ See note 164 *supra*.

²¹⁸ The substitution of damages in lieu of other affirmative relief against the government in its contracting capacity has a long-standing legislative precedent. See 12 Gov't. Cont. ¶ 255 Note, July 27, 1970, in which the author suggests the relevance of 28 U.S.C. 1498 to suits against government contracts. The cited Code provision establishes that where a government contractor uses someone else's patented invention in performing the contract, the patent owner cannot sue to enjoin its use but must sue the government for compensation.

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· viable approach to a complex problem having no perfect solution. Such an amendment to the APA or the procurement statutes, if adopted, together with the increased effectiveness of the Comptroller General's office, will best safeguard the interests of contractors, the government and the public at large.