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COMMENTS

JUDICIAL REVIEW FOR DISAPPOINTED BIDDERS ON FEDERAL GOVERNMENT CONTRACTS

by Darrel A. Rice

Federal procurement has a tremendous impact on the national economy and the quality of American life. The United States Government annually spends over \$50 billion on contracts for the procurement of goods and services.¹ The procedures employed to award government contracts are of vital interest to the many firms and communities which depend on such contracts for all or part of their livelihood. The public has an interest in seeing that its tax dollars are spent fairly. Furthermore, government contracts have an important role as a device for performing public functions and implementing various public policies, such as those concerning small business, equal employment, the environment, labor standards, and fair wages.² Federal government procurement has thus assumed an important position in the economy and general well-being of the nation which warrants close scrutiny in both administrative and judicial tribunals.

Authority to enter into contracts on behalf of the Government is delegated by statute from Congress to departments in the executive branch of the Government. Contracts are usually awarded under the authority of the Federal Property and Administrative Services Act of 1949³ or the Armed Services Procurement Act of 1947.⁴ These statutes are implemented by procurement regulations⁵ which, if reasonably related to the administration of a congressional act, have the force and effect of law.⁶ The statutes and regulations provide that contracts may be awarded either by means of formal advertising (competitive bidding)⁷ or by negotiation.⁸ The federal statutes indicate that Congress prefers competitive bidding, since procurement by negotiation is only permitted as an exception to the general policy of permitting full competition through formal advertising of bids.⁹ Nevertheless, negotiated contracts account for the largest part of total Government expenditures for procurement.¹⁰ In negotiated pro-

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 (1969).

² See, e.g., R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 383-441 (1969) [hereinafter cited as NASH & CIBINIC]; Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies with Other Government Policies*, 29 *LAW & CONTEMP. PROB.* 277 (1964); Stover, *The Government Contract System as a Problem in Public Policy*, 32 *GEO. WASH. L. REV.* 701 (1964).

³ 41 U.S.C. §§ 251-60 (1971).

⁴ 10 U.S.C. §§ 2301-14 (1971).

⁵ Federal Procurement Regulations (FPR), 41 C.F.R. §§ 1-1.000 to .1806 (1972); Armed Services Procurement Regulations (ASPR), 32 C.F.R. §§ 1.100-30.9 (1971); National Aeronautics and Space Administration Procurement Regulations (NASAPR), 41 C.F.R. §§ 18-1.100 to .5204 (1971).

⁶ *Paul v. United States*, 371 U.S. 245, 255 (1963); *Schoenbrod v. United States*, 410 F.2d 400, 403 (Ct. Cl. 1969).

⁷ NASH & CIBINIC 221-73.

⁸ *Id.* at 274-332.

⁹ 10 U.S.C. § 2304 (1971); 41 U.S.C. § 252(c) (1971).

¹⁰ *Hearings on H.R. 474, supra* note 1, at 222, 394. Negotiation accounted for 86.2% of military procurement dollars spent, with formal advertising accounting for only 13.8%. However, about 43% of procurement expenditures were placed under competitive tech-

curement, the contracting officer's authority allows a good deal more discretion in decision-making than do competitive bidding procedures. The federal statutes regulating bidding require that the award of the contract shall be made to the lowest responsible,¹¹ responsive¹² bidder.

When a contracting officer's decision gives one bidder an advantage over his competitor the latter frequently seeks judicial relief. A contract formed contrary to the authority delegated to the contracting officer by statute or regulation is void and creates no binding obligation.¹³ A bidder who unsuccessfully competed for such a contract and who might have received the award, had the contracting officer complied with the applicable procurement statutes and regulations, should seemingly be able to have the Government void the contracts. Before the disappointed bidder can get judicial review, however, he must overcome the hurdles of standing and nonreviewability. Standing concerns the question of whether the plaintiff is a proper party to secure review.¹⁴ Nonreviewability concerns the question of whether the action challenged is judicially reviewable.¹⁵ Disappointed bidders on government contracts have traditionally been denied standing to sue, and have thus been precluded from judicial redress.¹⁶ Recent cases, however, have greatly relaxed if not abandoned the doctrine that unsuccessful bidders lack standing to sue.¹⁷ Yet, even though disappointed bidders now apparently have standing, other recent cases have denied judicial review by holding that the challenged action is committed to agency discretion and, therefore, unreviewable. Those cases granting review have often defined the scope of review narrowly or otherwise denied relief on the merits. This Comment will examine each of these stumbling blocks along the path of the disappointed bidder seeking judicial relief.

I. STANDING

The courts, in deciding the issue of standing, must determine whether the plaintiff in question is a proper party to seek an adjudication of a particular niques. Wheelabrator Corp. v. Chafee, 16 CCH Cont. Cas. F. ¶ 80,780, at 85,801 n.6 (D.C. Cir. Oct. 14, 1971).

¹¹ The congressional mandate is that the award of a contract shall be made to "that responsible bidder whose bid . . . will be considered most advantageous to the Government, price and other factors considered." 41 U.S.C. § 253(b) (1971).

Since formal advertising is based upon open competition, the Government does not pre-judge or pre-select bidders. Thus, bids are often received from bidders who do not possess the ability or resources to perform the contract. In addition, an otherwise able bidder may become disabled between the time of opening and award. Thus, prior to award, procurement officials must ascertain that the bidder selected will be able to perform the contract and that he meets established standards for Government contractors. If the bidder does not possess such qualifications he is not responsible and may not receive the award.

NASH & CIBINIC 251.

¹² A bid may contain mistakes or omissions, or may include conditions or provisions not authorized in the invitation for bids. "In such cases the bid is considered to be nonresponsive because it fails to respond precisely to the invitation for bids." NASH & CIBINIC 239. Non-responsive bids are not considered for award because they give the bidder a competitive advantage. *Id.* at 240.

¹³ See, e.g., *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Byrne Org'n, Inc. v. United States*, 287 F.2d 582 (Ct. Cl. 1961).

¹⁴ See note 18 *infra*, and accompanying text.

¹⁵ See note 69 *infra*, and accompanying text.

¹⁶ See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

¹⁷ See, e.g., *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

issue.¹⁸ Most state courts have dispensed with highly technical rules and generally grant standing to any party who has in fact suffered injury as a result of agency action.¹⁹ The federal courts, however, have created a morass of rules relating to standing in suits against the Government and its agencies and now find it practically impossible to achieve consistency among them.²⁰ The traditional federal rule is that a bidder has no standing to challenge the award of a public contract to a competitor. The landmark decision denying unsuccessful bidders standing to contest the validity of federal government contract awards is *Perkins v. Lukens Steel Co.*,²¹ decided in 1940. Certain steel companies who wished to contract with the Government challenged an administrative requirement that they comply with a minimum wage determination which they asserted to be unauthorized by statute. The Supreme Court held that the plaintiffs had no standing because the statutes under which they sought relief conferred no enforceable legal rights upon them. The Court stated that: "Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."²² The Court also held that no legal rights of the steel companies had been violated because "the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."²³ If anyone was harmed by the violation of such regulations, it was the Government (the public) rather than the prospective contractor. Thus, the disappointed bidder was denied standing either because the agency was acting within the scope of its statutory discretion to award the contract to a competitor or because an abuse of discretion created

¹⁸ The issue of standing concerns "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

¹⁹ 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 291-92 (1958).

²⁰ *Id.* It is not the purpose of this Comment to detail the long and complicated history of the federal rule on standing to challenge administrative actions. Early Supreme Court cases on standing developed the "legal right" doctrine. A plaintiff is without standing unless "the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939). The "legal right" doctrine was later the basis of the denial of standing to prospective bidders on federal government contracts to contest the award of such contracts. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Other cases granted standing in somewhat similar situations, resulting in a good deal of confusion and complexity in the law of standing. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), holding that even though an existing radio station lacked a legal right, it had standing to challenge an FCC order granting a certificate to a new competitor station. The court in *Sanders* held that Congress could authorize, by statute, suits by parties injured in fact by agency action. An extension of the *Sanders* doctrine was the idea that Congress could authorize private parties aggrieved by agency action to bring suit in the public interest. A plaintiff having "a private substantive legally protected interest" may be authorized by Congress "to vindicate the interest of the public" and thus serve as a private attorney general. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943). For a discussion of the concept of standing see K. DAVIS, ADMINISTRATIVE LAW TEXT 419-39 (1972); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 208-94 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395-423 [hereinafter cited as JAFFE]. See also Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Comment, *Standing To Secure Judicial Review of Administrative Action—A New Direction*, 37 J. AIR L. & COM. 117 (1971).

²¹ 310 U.S. 113 (1940).

²² *Id.* at 125.

²³ *Id.* at 127.

a legal wrong suffered by the Government, not the bidder. In either case, the invasion of a legal right of the bidder, a requisite of standing, was absent.

The Court also emphasized the pragmatic considerations behind its refusal to grant standing. The Court pointed out that courts should not "subject purchasing agencies . . . to the delays necessarily incident to judicial scrutiny at the instance of potential sellers. . . . [A similar restraint on private industry] would be widely condemned as an intolerable handicap."²⁴ The Court recognized that "[i]t is . . . essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered."²⁵ Thus, the necessity of avoiding interference with the smooth functioning of the federal procurement program was articulated as a basis for denial of standing to bidders.

The first cautious departure from *Perkins* came in *Heyer Products Co. v. United States*²⁶ in 1956. The plaintiff alleged that the contract award had been made contrary to the statutory mandate that "[a]wards shall be made . . . to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered."²⁷ The plaintiff sued for both bid preparation costs and lost profits. The fact that the contract was awarded to a bidder whose bid was higher than six others and twice as high as the low bidder made the court "strongly suspect discrimination and favoritism"²⁸ and a failure to follow the statutorily required bid procedure. Despite these suspicions, the court refused to award damages for lost profits.²⁹ The decision was based on the *Perkins* rationale that procurement statutes were enacted for the benefit of the public and not for individual bidders. If they were violated, "it is only the public who has a cause for complaint, and not an unsuccessful bidder."³⁰ It was held, however, that the plaintiff had standing to sue and recover its bid preparation costs, since the Government has an implied obligation to consider fairly and honestly all bids submitted. This implied contract theory was narrowly limited to cases in which there was a fraudulent inducement for bids, with a premeditated intent to reject all the bids except the bid of a particular contractor "whether he was the lowest responsible bidder or not."³¹ The court, in allowing the recovery of bid preparation costs, departed from *Perkins* in that it interposed the obligations of commercial good faith and fair dealing as limitations on the otherwise complete discretion of contracting officers in making awards.³²

The *Heyer* decision proved to be little help to plaintiffs seeking recovery

²⁴ *Id.* at 130.

²⁵ *Id.*

²⁶ 140 F. Supp. 409 (Ct. Cl. 1956).

²⁷ 10 U.S.C. § 2305(c) (1971).

²⁸ 140 F. Supp. at 410.

²⁹ The Government "could accept or reject an offer as it pleased, and no contract resulted until an offer was accepted. Hence, an unsuccessful bidder cannot recover the profit he would have made out of the contract, because he had no contract." *Id.* at 412.

³⁰ *Id.*

³¹ *Id.* at 414.

³² Even though the departure from the *Perkins* rationale was slight, the case aroused considerable interest. See, e.g., Note, *Bid on Government Contract Held To Give Implied Rights Not Included in Statute*, 56 COLUM. L. REV. 1239 (1956); 70 HARV. L. REV. 564 (1957); 41 MINN. L. REV. 373 (1957); 11 SW. L.J. 521 (1957).

of bid preparation expenses in subsequent cases.³³ The federal courts generally continued to apply the rigid rule denying standing to a defeated bidder.³⁴ It was not until 1970 that the District of Columbia Circuit Court in *Scanwell Laboratories, Inc. v. Shaffer*,³⁵ in a dramatic break with tradition, granted aggrieved bidders standing to enter the judicial arena. In *Scanwell* the Federal Aviation Administration had issued an invitation for bids (IFB) for instrument landing systems to be installed at airports. The contract was awarded to the lowest bidder; Scanwell, the second lowest bidder, challenged the award on the grounds that the lowest bid was not responsive to the IFB.³⁶ Scanwell argued that the FAA, in awarding the contract to a non-responsive bidder, had acted in violation of the statutory provisions governing the award of contracts. Scanwell was thus entitled to standing as a "person . . . aggrieved by agency action" within the meaning of section 10 of the Administrative Procedure Act (APA).³⁷

The Government relied heavily on *Perkins* to support its position. The court viewed this reliance as "ill-founded,"³⁸ pointing out that "*Perkins* was decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act."³⁹ The court concluded that a 1952 amend-

³³ See Robert F. Simmons & Associates v. United States, 360 F.2d 962 (Ct. Cl. 1966); Trans Int'l Airlines, Inc. v. United States, 351 F.2d 1001 (Ct. Cl. 1965); Green Manor Constr. 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. Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971); Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). One writer remarked that "the fate of those bidders who sought to gain standing under . . . [the *Heyer*] holding . . . made the *Heyer* case in retrospect more aberrational than trendsetting." Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 FORDHAM L. REV. 103, 113 (1970).

³⁴ See, e.g., Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967); Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968); Robert Hawthorne, Inc. v. Department of Interior, 160 F. Supp. 417 (E.D. Pa. 1958).

³⁵ 424 F.2d 859 (D.C. Cir. 1970). There were a few cases prior to *Scanwell* representing a departure from the *Perkins* rationale, notably *Superior Oil Co. v. Udall*, 409 F.2d 1115, dismissed sub nom. by agreement, *Superior Oil Co. v. Hickel*, 421 F.2d 1089 (D.C. Cir. 1969). However, none of these decisions expressly held that unsuccessful bidders have standing to sue for cancellation of a government contract not awarded in conformance with the procedure prescribed by statute and regulation. The court in *Superior Oil* enjoined the government agency involved from awarding an oil lease to the plaintiff-bidder's competitor, but it did not specifically discuss the issue of standing. However, the court in *Scanwell* stated that the court in *Superior Oil* "[i]n allowing that suit without denying standing to Superior Oil because it was a competitive bidder for a government contract . . . impliedly held that such persons have standing to sue in the event the contract is illegally awarded." 424 F.2d at 869. See also *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), and *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961), both granting certain contractors from doing business with the Government. For a critical analysis of the role of the Comptroller General in government contracts see Cibinic & Lasken, *The Comptroller and Government Contracts*, 38 GEO. WASH. L. REV. 349 (1970).

³⁶ Since a prime goal of the FAA here was safety, the IFB criteria precluded bids from contractors who did not have an operational system already installed and tested in at least one location. Scanwell argued that the low bid was nonresponsive because the low bidder did not have such a system installed in one location, and because it did not have a certificate of performance based on an FAA flight check, another requirement of the IFB. 424 F.2d at 860.

³⁷ 5 U.S.C. § 702 (1971). This section provides: "A person suffering legal wrong because of agency action . . . within the meaning of a relevant statute, is entitled to judicial review thereof."

³⁸ 424 F.2d at 867.

³⁹ *Id.* at 866.

ment⁴⁰ to the Walsh-Healy Public Contracts Act⁴¹ shows that "the basic approach of the Supreme Court in the *Perkins* case has been legislatively reversed by the Congress . . ."⁴² The court held that Scanwell had standing as a "person aggrieved" under section 10 of the APA, and that the infringement of a "legal right" was no longer a prerequisite of standing. The court concluded 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."⁴³ Thus, any bidder who makes a prima facie showing of arbitrary or capricious abuse of discretion on the part of an agency has standing to sue under the provisions of section 10 of the APA.⁴⁴

The court also discussed the theory of the "private attorney general" as a basis for standing. This theory permits standing to an individual to vindicate the public interest in having government agencies follow the statutes and regulations which control government contracting.⁴⁵ The court stated that the "essential thrust"⁴⁶ of Scanwell's claim was to satisfy such a public interest, since Scanwell had no right to have the contract awarded to it even if the district court were to find the contract to have been illegally awarded. The court reasoned that "[i]f there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits . . ."⁴⁷ The court thus opened the door to frustrated bidders, as "private attorneys general," to vindicate their own interests because of their service to the public interest in policing governmental action.⁴⁸

Even though the question may yet be open, *Scanwell* seems to have replaced *Perkins* in the law of standing for defeated bidders. The Court of Appeals for the District of Columbia Circuit has repeatedly affirmed the *Scanwell* holding as to standing.⁴⁹ Numerous other lower federal courts across

⁴⁰ 41 U.S.C. § 43 (a) (1971).

⁴¹ 41 U.S.C. §§ 35-45 (1971).

⁴² 424 F.2d at 867.

⁴³ *Id.*

⁴⁴ *Id.* at 869.

⁴⁵ The court quoted with approval from the concurring opinion in *National Ass'n of Secs. Dealers, Inc. v. SEC*, 420 F.2d 83, 96 (1969), the idea that "the basic justification for entertaining competitor's suits to challenge administrative action as statutory aggrieved parties . . . is to vindicate a public interest, and not a private right." 424 F.2d at 870.

⁴⁶ 424 F.2d at 864.

⁴⁷ *Id.* at 866-67.

⁴⁸ For a critical analysis of the *Scanwell* concept of the "private attorney general," see Pierson, *Standing To Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. IND. & COM. L. REV. 1, 14, 15 (1970).

⁴⁹ *E.g.*, *A.G. Schoonmaker Co. v. Resor*, 445 F.2d 726 (D.C. Cir. 1971); *M. Steintal & Co. v. Seaman*, 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971); *Wheeler Corp. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,780 (D.C. Cir. Oct. 14, 1971); *Balerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). *See also* *National Cash Register Co. v. Richardson*, 324 F. Supp. 920 (D.D.C. 1971); *Northeast Constr. Co. v. Romney*, 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. June 21, 1971); *Page Communications Eng'rs, Inc. v. Resor*, 16 CCH Cont. Cas. F. ¶ 80,313 (D.D.C. 1971); *Lombard Corp. v. Resor*, 321 F.

the nation have adopted *Scanwell* as precedent on the issue.⁵⁰ The Supreme Court has not yet considered the continued vitality of *Perkins*. Two recent Supreme Court decisions rendered subsequent to *Scanwell*, however, seem to lend additional weight to its value as precedent.

The two cases are *Association of Data Processing Service Organizations, Inc. v. Camp*⁵¹ and *Barlow v. Collins*.⁵² The *Data Processing* case was a competitor's suit. Sellers of data processing services challenged a ruling of the Comptroller of Currency that national banks may make data processing services available to other banks and to bank customers. On the issue of whether the seller-petitioners had standing to challenge the Comptroller's action, the Court held that these sellers did have standing and went on to specifically reject the old test of a recognized "legal interest."⁵³ To replace it were two new tests. The first, constitutionally based on article III, was "injury in fact, economic or otherwise."⁵⁴ The basic test of standing is whether an article III case or controversy exists.⁵⁵ If the party seeking review can show injury in fact, the first test is satisfied.⁵⁶ The second was the "zone of interests" test. To meet the requirements of this second test, the party must show that the interest which he seeks to protect is "arguably within the zone of interests to be protected" by the statute which he alleges has been violated.⁵⁷

In *Barlow* the issue was whether tenant farmers eligible for payments under the federal upland cotton program had standing to challenge an amended regulation promulgated by the Secretary of Agriculture. The program, prior to the amended regulation, precluded assignments by farmers of their crops for the payment of cash rent on a farm. The new regulation permitted assign-

Supp. 687 (D.D.C. 1970); *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970); *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970).

⁵⁰ *E.g.*, *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan. 1971); *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971); *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). Also, opinions as yet unreported, *e.g.*, *Hayes Int'l Corp. v. Seamans*, 16 CCH Cont. Cas. F. ¶ 80,830 (N.D. Ala. Sept. 30, 1971); *Aerogjet-Gen. Corp. v. Thiokol Chem. Corp.*, 15 CCH Cont. Cas. F. ¶ 83,786 (N.D. Cal. 1970); *Big Four Mechanical Contractors, Inc. v. SBA*, 15 CCH Cont. Cas. F. ¶ 83,766 (W.D. Okla. 1970). Two of the circuits, however, purport to have reserved decision on whether *Perkins* is still the law. *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *Hi-Ridge Lumber Co. v. United States*, 15 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971).

⁵¹ 397 U.S. 150 (1970).

⁵² 397 U.S. 159 (1970). For a discussion of both *Data Processing* and *Barlow* see Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

⁵³ The Court quoted the remark from *Tennessee Electric*, see note 20 *supra*, about a "legal interest," and rejected it, saying: "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The Court in a footnote emphasized that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing." *Id.* n.1.

⁵⁴ *Id.* at 152.

⁵⁵ *Id.* at 151.

⁵⁶ The petitioners here alleged the loss of two customers to their new competitor, a national bank, and the Court recognized this as a showing of injury in fact. *Id.* at 152.

⁵⁷ *Id.* at 157. The Court held that petitioners met the "zone of interests" test. The remaining question for the Court to decide was whether judicial review of the Comptroller's decision had been precluded by statute. The Court held that judicial review had not been precluded, and that the "petitioners, as competitors of national banks which are engaging in data processing services, are clearly within that class of 'aggrieved' persons who . . ." are entitled to judicial review under the Administrative Procedure Act. *Id.* at 157.

ments of crops for payment of cash rent for farming land. The tenant farmers objected to the new regulation because it allegedly allowed landlords to compel them to obtain all their financing for farm needs from the landlords, since the farmer's major source of credit was exhausted by the assignment. The landlords allegedly charged such high prices and rates of interest that the tenants' profits each year were consumed by debt payments.

The Supreme Court held that the tenants had standing because they had "the personal stake and interest which impart the concrete adverseness required by Article III." The tenants also were "clearly within the zone to be protected by the Act."⁵⁸ The court further held that the case was not unreviewable because precluded by statute or committed to agency discretion.⁵⁹

The second requirement of the *Data Processing* and *Barlow* cases, the "zone of interests" test, has been criticized.⁶⁰ It was suggested in a concurring opinion to these two cases that this second test be abandoned in favor of a single test based on "injury in fact."⁶¹ Cases decided subsequent to *Data Processing* and *Barlow* have upheld the standing of disappointed bidders on government contracts without an analysis showing that the "zone of interests" test had been satisfied. These cases indicate that the test may be easily met, and perhaps even indicate that it is not really a requirement of standing for bidders.⁶² One

⁵⁸ *Id.* at 164.

⁵⁹ *Id.* at 165-66. The Administrative Procedure Act, 5 U.S.C. § 701(a) (1971) allows judicial review of challenged agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." See note 80 *infra*, and accompanying text.

⁶⁰ 397 U.S. at 167-68 (concurring opinion). See also Davis, *supra* note 52. Professor Davis suggests that the test of "zone of interests" has several faults: (1) The test is analytically faulty; by requiring that the plaintiff's interest be within the zone of interests "to be protected" by the statute or constitutional guarantee it "ignores the need for continuing common-law protection of some interests." *Id.* at 458. The test is also analytically faulty because the requirement "to be . . . regulated," if literally interpreted, would preclude standing for a plaintiff injured by regulation which was without statutory authorization (for example, if the plaintiff could not show that he is "to be" regulated). (2) The test is contrary to many prior cases which the Court obviously did not intend to overrule. (3) The test is cumbersome and artificial, because it is often difficult or practically impossible to determine whether a statute was meant to protect a specific interest asserted by a particular plaintiff. (4) The test is contrary to the intent of Congress in enacting the APA. The intent was that any person "injured in fact" should be granted standing. Thus, "injury in fact" should be the sole test of standing. These views are also expressed in K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07 (1972).

⁶¹ Mr. Justice Brennan, joined by Mr. Justice White, concurred in the result and dissented as to the holding on standing:

My view is that the inquiry in the Court's first step [injury in fact] is the only one that need be made to determine standing. I had thought we discarded the notion of any additional requirement where we discussed standing solely in terms of its constitutional content in *Flast v. Cohen*, 392 U.S. 83 (1968). By requiring a second, non-constitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.

397 U.S. at 168 (concurring opinion).

⁶² *E.g.*, *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). For a good discussion of the *Ballerina* and *Blackhawk* cases see Pierson, *supra* note 48, at 18-24. Many cases upholding standing for bidders have merely followed *Scanwell* without making an analysis showing that the "zone of interests" test had been satisfied. *E.g.*, *A.G. Schoonmaker Co. v. Resor*, 445 F.2d 726 (D.C. Cir. 1971); *Gould, Inc. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,499 (D.C. Cir. June 30, 1971); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Northeast Constr. Co. v. Romney*, 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. June 21, 1971); *Continental Business Enterprises, Inc. v. United States*, 452 F.2d

of the most significant post-*Scanwell* cases is *Ballerina Pen Co. v. Kunzig*,⁶³ which rearticulated the requirements for standing of bidders. *Ballerina* interpreted *Data Processing* and *Barlow* to require a three-fold test of standing for bidders: "[1] First, the party must allege that the challenged action has caused him injury in fact . . . [2] The plaintiff must further allege that the agency has acted arbitrarily, capriciously, or in excess of 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 . . . [3] Finally, there must be no 'clear and convincing' indication of a legislative intent to withhold judicial review."⁶⁴

It should be noted that *Data Processing* required, as the second test of standing, that "*the interest sought to be protected by the complainant* is arguably within the zone of interests to be protected . . ."⁶⁵ Thus, it appears that the court in *Ballerina* equated "the interest sought to be protected by the complainant" with the plaintiff's allegation that the agency acted arbitrarily, capriciously, or in excess of its statutory authority. *Ballerina* suggests that if the congressional purpose underlying procurement statutes would be thwarted by the arbitrary and capricious actions of government officials, the court should allow defeated bidders, who are injured by such actions, standing to sue because they have interests parallel to those of Congress. Therefore, the interests of bidders may be considered within the "zone of interests" to be protected by statute, even though Congress did not intend to enact the particular statute to protect the interests of those particular bidders. The *Scanwell* idea of "private attorneys general" thus seems intimately related to standing requirements for bidders, and it is questionable whether standing for bidders could be achieved without that concept.⁶⁶ *Scanwell* held that a bidder for a government contract who makes a prima facie showing of illegality in the manner by which a contract is awarded has standing to seek judicial review of the agency's action. Under the *Scanwell* rationale, it would seem that the only two requirements of standing for bidders should be that the plaintiff show injury in fact and a

1016 (Ct. Cl. 1971); *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970); *cf. Pullman, Inc. v. Volpe*, No. 71-2442 (E.D. Pa. 1971), which denied standing to an unsuccessful bidder because the plaintiff did not show that the interest which he sought to vindicate was within the zone of interests intended to be protected by a particular statute. In that case, however, the plaintiff was challenging a procurement by a state rather than a federal agency. The court held that none of the federal statutes or regulations involved evidenced any intent by Congress to protect the individual interests of a disappointed bidder where the procurement was made by a state agency.

⁶³ 433 F.2d 1204 (D.C. Cir. 1970).

⁶⁴ *Id.* at 1207.

⁶⁵ 397 U.S. at 153 (emphasis added).

⁶⁶ This is indicated by *Scanwell* and *Ballerina*, as well as the statement by the D.C. Circuit that standing in *Scanwell* was grounded on the two *interrelated* principles of a "party aggrieved" under § 10 of the APA and the concept of "private attorneys general." *M. Steintal & Co. v. Seamans*, 16 CCH Cont. Cas. F. ¶ 80,781, at 85,805 n.2 (D.C. Cir. Oct. 14, 1971). One commentator, in discussing *Scanwell*, stated: "Employing the belt and suspenders technique, Judge Tamm gave several reasons to support the standing holding, any one of which presumably would have been adequate by itself. His opinion does not make clear, however, which of the several rationale is intended to be controlling." Address by William Munves, Deputy General Counsel of the Air Force, at the Southwestern Legal Foundation Eleventh Annual Institute on Government Contracts, Dallas, Texas, Nov. 4, 1971 (unpublished). The Circuit Court for the District of Columbia has not yet made clear whether one rationale is controlling.

prima facie case of illegality on the part of procurement officials. Regardless of the nature of the requirements of the second test, the third test enunciated by *Ballerina* should not be a requirement for standing. The third test, that there is no legislative intent to withhold judicial review, should properly go to the question of reviewability rather than to standing.⁶⁷

A more manageable and understandable delineation of the specific test or tests for standing of bidders must await future judicial decisions. However, one proposition seems fairly certain: Regardless of the specific articulation of the test of standing, *Scanwell* and its progeny clearly hold that disappointed bidders may have standing to sue. The Supreme Court could, of course, reverse these cases, but such a holding seems unlikely in light of its recent decisions on standing.⁶⁸ Thus, the question of the bidder's standing, which once was the greatest stumbling block to allowing judicial redress for defeated bidders, is no longer a bar to judicial review.

II. AVAILABILITY OF REVIEW—REVIEWABILITY AND SCOPE OF REVIEW

The availability of judicial review of administrative action involves two considerations—reviewability and scope of review. The first phase of availability of review concerns whether or not a particular issue is subject to judicial review, and may be called reviewability.⁶⁹ The second phase of availability of review concerns how much review is to be given on a particular issue which is subject to judicial review. This second phase is customarily discussed as scope of review. Actually, reviewability and scope are interrelated. Whether or not a court will determine that a particular issue or matter is reviewable may well be decisively influenced by the scope of review that will be given if review is made available.⁷⁰

Review on the merits may be precluded by a number of judicially developed doctrines of nonreviewability. The doctrine of standing operates to deny review to a particular plaintiff if he is not a proper party to litigate a particular issue. The doctrines of ripeness⁷¹ and exhaustion of administrative remedies,⁷² although not literally doctrines of nonreviewability, operate like standing to deny review for failure to bring suit at the proper time. The doctrines of sovereign immunity,⁷³ non-justiciability of political questions,⁷⁴ and separation of powers⁷⁵ are frequently the basis for denying review. Review may also be denied under the Administrative Procedure Act because precluded by statute

⁶⁷ As the *Ballerina* court points out in a footnote: "This criterion [of legislative intent to preclude review] is sometimes regarded as involving the question of 'reviewability' rather than 'standing' . . . but the two concepts are not always sharply distinguished." 433 F.2d at 1207 n.6.

⁶⁸ See notes 51, 52 *supra*, and accompanying text. See also *Flast v. Cohen*, 392 U.S. 83 (1968); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).

⁶⁹ *Kramer, The Place and Function of Judicial Review in the Administrative Process*, 28 *FORDHAM L. REV.* 1, 11-14 (1959).

⁷⁰ *Id.*

⁷¹ See K. DAVIS, *ADMINISTRATIVE LAW TEXT* 396-418 (1972); JAFFEE 395-423.

⁷² See authorities cited note 71 *supra*.

⁷³ See C. WRIGHT, *LAW OF FEDERAL COURTS* 69-72 (1970).

⁷⁴ *Id.* at 46-48.

⁷⁵ *Id.* at 49-50.

or "committed to agency discretion." Unfortunately, courts often confuse the issues of standing, reviewability, and review on the merits.⁷⁶ Perhaps this is due to the fact that matters relevant to the merits already have been tangentially considered in the determination of standing, and often in the determination of reviewability. To be entitled to standing, the plaintiff must prove the existence of injury in fact, which necessitates a consideration of some relevant aspects of the merits. A consideration of the merits is also necessary to establish reviewability in cases where the plaintiff's right to review is dependent upon evidence that his class is a statutory beneficiary.⁷⁷ In addition, the merits must be considered to determine reviewability of challenged actions which are allegedly "committed to agency discretion" under the APA.

Disappointed bidders on federal government contracts were denied review under the *Perkins* rationale because they lacked standing. Although defeated bidders now have standing under *Scanwell*, they may be denied review because of the judicial doctrines of non-reviewability, or because review is precluded under the provisions of the APA. A defeated bidder who overcomes these obstacles and is granted review on the merits must then contend with a rather narrowly limited scope of review. This section will discuss the problems of reviewability and scope of review which are faced by bidders seeking judicial review of contracting agency action.

A. Reviewability

Section 10(c) of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review."⁷⁸ Section 10 provides two exceptions to this statute. "This chapter applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."⁷⁹ Thus, the statutory exceptions lead to two reasons for not reviewing a matter: legislative intent to cut off review, and a finding that the issue is inappropriate for judicial determination because it is "committed to agency discretion."⁸⁰ To determine whether these exceptions are applicable, courts must examine pertinent statutory language, legislative history, and considerations of public policy.

Initial Post-Scanwell Attempts To Limit the Extent and Function of Judicial Review. In *Ballerina Pen Co. v. Kunzig*⁸¹ the court recognized that once

⁷⁶ For a discussion of this problem see *Barlow v. Collins*, 397 U.S. 159, 167-78 (1970) (concurring opinion).

⁷⁷ *Id.* at 175.

⁷⁸ 5 U.S.C. § 704 (1971).

⁷⁹ 5 U.S.C. § 701 (1971).

⁸⁰ The doctrine of "committed to agency discretion" does not make an agency action absolutely unreviewable. "As with all doctrines of non-reviewability, the committed-to-agency-discretion doctrine is subject to limitations: it usually yields to nonfrivolous constitutional claims such as those of deprivation of property or liberty without due process, and to contentions that the administrator acted beyond his jurisdiction or in violation of a clear statutory duty." Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 369-70 (1968). See also K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 28.12-15 (1958).

⁸¹ 433 F.2d 1204 (D.C. Cir. 1970). Some of the public policy considerations underlying judicial review for disappointed bidders were discussed in *Ballerina*, although the

standing is given to aggrieved bidders, there must exist "adequate safeguards to insure that there will be no incursion of frivolous lawsuits which will flood the courts with unnecessary litigation. We think that such safeguards are provided by the criteria established in *Scanwell Laboratories*."⁸² The problem of a possible inundation of suits by bidders received further attention in *Blackhawk Heating & Plumbing Co. v. Driver*.⁸³ Apparently realizing the reality of the potential flood of cases, the Circuit Court for the District of Columbia attempted to remedy the problem they brought upon themselves with *Scanwell* by narrowing the floodgates via summary judgment. The court in effect stated that under *Scanwell*⁸⁴ the plaintiff had standing to litigate, but the court could have properly given a summary judgment for the defendant if all the requirements of a summary judgment had been met.⁸⁵

Blackhawk was followed by an interesting case from the district court for the District of Columbia, *Simpson Electric Co. v. Seaman*.⁸⁶ At the outset the court emphasized the uncertainty which immediately followed *Scanwell*. While the *Scanwell* decision settled the question of standing, it did not specify the scope of review or the scope of relief to be applied by the district courts. In *Simpson Electric* the court declined to exercise its discretion to grant a mandatory injunction since the plaintiffs could obtain adequate relief through a suit for damages in the Court of Claims. The court stated that the scope of review on bid protests is narrow, and that "once the rights of the litigants are declared, the Government should in the normal case be free to make choices as to whether it will run the risk of damages, open the contract for rebidding, resolve the dispute by negotiation, or meet its needs . . . in some other fashion."⁸⁷ The court further emphasized that "[t]he variety and complexity of situations that will be presented make it abundantly apparent that in the usual case courts have only a *limited function* in this area."⁸⁸

A district court case in which the plaintiff was successful in overcoming the

case dealt primarily with standing. The court stated that "in an era when, as the 'fourth branch of government,' the administrative agencies may well have a more far-reaching effect on the daily lives of all citizens than do the combined actions of the executive, legislative, and judicial branches, the necessity for a legal means of piercing the glittering carapace of agency determinations to insure that they do not conceal congressionally unauthorized action is obvious." *Id.* at 1208.

⁸² *Id.* at 1209. The court stated that criteria established by *Scanwell* were: (1) injury in fact, (2) case or controversy under art. III, and (3) otherwise reviewable subject matter.

⁸³ 433 F.2d 1137 (D.C. Cir. 1970).

⁸⁴ The district court decision was prior to *Scanwell*.

⁸⁵ The court stated that it was inclined to enter summary judgment in favor of the defendant, but it did not for the reason that the opinion of the district court revealed that some of the documents and information contemplated by rule 56 were not tendered in the case. The court reversed and remanded, with instructions that all parties have an opportunity to present the necessary relevant information, and that summary judgment be entered in favor of the defendants unless it appears to the trial judge that there is a genuine issue as to material fact.

⁸⁶ 317 F. Supp. 684 (D.D.C. 1970).

⁸⁷ *Id.* at 688.

⁸⁸ *Id.* (emphasis added). At this point a trend to limit the function of judicial review of procurement activities began to become apparent. *Lombard Corp. v. Resor*, 321 F. Supp. 687 (D.D.C. 1971), followed the lead of *Blackhawk* and granted a summary judgment for the defendant. *Lombard* was an action by a low bidder for injunctive relief and for a declaratory judgment that it was entitled to be awarded a contract. The court rejected the Government's contention that suit was barred by sovereign immunity. The court relied on the holding in *Scanwell* that the enactment of the APA evidenced an "intention on the part of Congress to waive the right of sovereign immunity." 321 F. Supp. at 693.

problem of nonreviewability because "committed to agency discretion" was *National Helium Corp. v. Morton*,⁸⁹ which dealt with a contract termination. Plaintiffs were awarded contracts for extraction and sale of helium to the federal government pursuant to the National Helium Act. The contract provided that the Government could terminate the contract at any time if "in the opinion of the Secretary [circumstances] should occur which would make the continued operation of seller's plant and the continued purchase of [helium] unnecessary to accomplish the purposes of the act"⁹⁰ The plaintiffs sued for an injunction restraining the Secretary of Interior from cancelling the contract pending hearing on the merits. The court granted standing under *Scanwell*, and granted a temporary injunction because plaintiffs made a sufficient showing of irreparable harm and probability of success on the merits. Although this case involved a suit on a contract cancellation rather than a suit by an unsuccessful bidder, it is informative because of its discussion relating to reviewability. The court held that the challenged action did not come within the exception of actions unreviewable because "committed to agency discretion." The court stated that only when there "is no law to apply due to the fact that the statute conferring authority upon the Secretary is extremely broad, will this exception preclude judicial review."⁹¹

The broad authority delegated to an administrative agency was also instrumental in the Ninth Circuit's decision in *Hi-Ridge Lumber Co. v. United States*.⁹² The court articulated some of the considerations relevant to a determination of whether agency action is committed to agency discretion under section 10: "Lacking specific legislative instruction as to the availability of judicial review, the court must balance the need for speedy and efficient enforcement of Congressional programs and the growing demands on judicial resources against an individual's interest in having a claim adjudicated."⁹³ The court recognized that the test of reviewability under section 10 cannot be merely whether the agency possesses some discretion under the controlling law. The court noted that almost every agency action involves some discretion, but this does not mean that every agency action is unreviewable.⁹⁴ The problem, then, is determining when agency action is "committed to agency discretion" within the meaning of section 10 of the APA, as opposed to when it merely involves discretion which is nevertheless reviewable.

The court concluded that it would not review the defendant's action in rejecting all bids submitted. The court said that there were compelling reasons which justified nonreview because the challenged action was committed to agency discretion. First, the authority delegated by the statutes and regulations was quite broad. The court had no standards or criteria by which to review the rejection of all bids, and the "development of such criteria and factors to be weighed would be too onerous a burden upon this or any court."⁹⁵ Second, the

⁸⁹ 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971).

⁹⁰ 326 F. Supp. at 152-53.

⁹¹ *Id.* at 154.

⁹² 16 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971).

⁹³ *Id.* at 85,583.

⁹⁴ The court quoted its earlier decision in *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964).

⁹⁵ 16 CCH Cont. Cas. F. at 85,583.

⁹⁶ 16 CCH Cont. Cas. F. at 85,584.

decision required a technical expertise which the court did not possess.⁹⁶ In addition, the court implied something akin to a failure to exhaust administrative remedies by its statement that "the Forest Service appeals procedures provide a fair and expeditious forum in which dissatisfied participants in the bidding may lodge their protests and have them fully considered."⁹⁷

The Fifth Circuit emphasized the importance of administrative expertise as a factor in judicial nonreviewability in *Allen M. Campbell Co. v. Lloyd Wood Construction Co.*⁹⁸ The Allen M. Campbell Company was the low bidder on a government construction contract set aside under the Small Business Act for award to a "small business" as determined by the Small Business Administration (SBA) under applicable regulations. The second lowest bidder, Lloyd Wood Construction Company, protested the award administratively on the theory that Campbell was not a "small business" under the applicable size standards because its average annual receipts had been computed under a completed contracts rather than a cash accounting method. The SBA determined that Campbell met the size standards for a "small business," thus implicitly adopting the "completed contracts" accounting method as a proper method for size determination. Lloyd Wood then filed suit in the district court seeking declaratory relief voiding the SBA size determination and injunctive relief against the award of the contract to Campbell. The district court invalidated the SBA size determination, on the ground that the agency had based its determination upon an improper accounting method. On appeal, the Fifth Circuit reversed. The court granted standing to Lloyd Wood on the basis of the SBA regulations providing for bid protests.⁹⁹ In considering the question of reviewability, the court stated the axiom that "judicial review of an administrative agency's interpretation of its own regulations must be accorded the greatest deference."¹⁰⁰ The court reasoned that when, as here, a determination incorporates quasi-technical expertise and familiarity with an administrative scheme and its subject matter, judges should be especially reluctant to substitute their judgment for that determination. The court noted that "[c]ourts have not demonstrated any great competence in either discerning or applying the sometimes esoteric mysteries of [the accounting] profession. It is better left to those having, or thought to have, a business-experience-oriented expertise."¹⁰¹ The court therefore reversed the district court's decision and upheld the SBA size determination.

A Drastic Retreat From Judicial Intervention: Wheelabrator and Steinthal.
The most devastating blow to the defeated bidder's chances for judicial review

⁹⁶ "[T]he decision whether to award a specific contract in view of the Government's need for revenue, management of timber and its roadbuilding needs, is one which is necessarily based upon some expertise in the financial and ecological management of our natural resources. This court has neither the technical expertise nor the intuitive knowledge gained from daily acquaintance with this subject to provide an informed review of executive decision-making." *Id.*

⁹⁷ *Id.*

⁹⁸ 446 F.2d 261 (5th Cir. 1971).

⁹⁹ The court declined to follow *Scanwell*, stating that it considers the question of standing for disappointed bidders in other contexts an open question. *Id.* at 264 n.5.

¹⁰⁰ *Id.* at 265.

¹⁰¹ *Id.*

came from the District of Columbia Circuit Court, in the companion cases of *Wheelabrator Corp. v. Chafee*¹⁰² and *M. Steintal & Co. v. Seaman*.¹⁰³ These cases suggest a drastic, if not complete, retreat from the judicial intervention made possible by *Scanwell*. Although *Scanwell* extended standing to disappointed bidders, *Wheelabrator* and *Steintal* deprived this new status of much of its significance by making it more difficult to obtain review or relief on the merits. *Wheelabrator* involved a Navy procurement of a portable ship hull cleaning device. The Navy proceeded by "Two-Step Formal Advertising," under which bidders must first submit technical proposals without price quotations and then those bidders whose technical proposals are acceptable to the procuring agency are invited to submit price bids. The plaintiff, *Wheelabrator*, submitted three technical proposals, one of which was accepted by the Navy. The plaintiff then protested to the Comptroller General, contending that the contract should be awarded by sole source negotiation with the plaintiff rather than by the "Two-Step Formal Advertising" method. Without awaiting the Comptroller's decision, the Navy proceeded to the second step and issued an invitation for bids to plaintiff and one other company, these two companies being the only ones whose technical proposals were deemed acceptable by the Navy.

The plaintiff refused to submit a bid on the ground that this method of procurement was illegal because contrary to the relevant provisions of the Armed Services Procurement Act¹⁰⁴ and regulations thereunder.¹⁰⁵ The district court issued a temporary restraining order enjoining the Navy from opening bids and awarding a contract. The district court found that the plaintiff had developed a unique ship hull cleaning device, never previously purchased by the Government, as a result of twelve years of research and development, on which the plaintiff allegedly spent over \$100,000, and which included demonstrations and consultations with Navy personnel. The district court held that the award of the contract to the plaintiff's competitor would result in irreparable injury to the plaintiff through loss of investment, waste of acquired technology and expertise, and abridgement of the right to a meaningful decision by the Comptroller General. The district court also concluded that the plaintiff had a substantial likelihood of success on the merits.

The circuit court reversed on appeal, concluding that the pre-conditions for the use of two-step formal advertising had been met.¹⁰⁶ It further concluded that the statutory and regulatory authority for negotiations was permissive rather than mandatory, and the Government's discretionary decision not to

¹⁰² 16 CCH Cont. Cas. F. ¶ 80,780 (D.C. Cir. Oct. 14, 1971).

¹⁰³ 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971).

¹⁰⁴ 10 U.S.C. §§ 2301-14 (1971).

¹⁰⁵ 32 C.F.R. §§ 2.501 to .503-2 (1971).

¹⁰⁶ The Armed Services Procurement Regulations require as a pre-condition for the use of two-step formal advertising the existence of definitive criteria for evaluating technical proposals. ASPR 2-502(a)(2), 32 C.F.R. § 2.502(a)(2) (1972). The court held that this requirement was met because the IFB contained a 20-page Purchase Description on thinning the Government's needs. The court held that the use of admittedly broad performance requirements nevertheless met the definition of definitive criteria. Another ASPR requirement as a pre-condition is that "[m]ore than one technically qualified source is expected to be available." ASPR 2-502(a)(3), 32 C.F.R. § 2.502(a)(3) (1972). The court held that this requirement was also met because 37 potential suppliers were solicited, even though only two acceptable bids were received. 16 CCH Cont. Cas. F. ¶ 80,780, at 85,799.

negotiate cannot be challenged judicially because it is committed by law to agency discretion. Thus, the court cannot order a procurement official to make the discretionary decision to negotiate.¹⁰⁷ The court did indicate that, perhaps in extreme circumstances, judicial review would be available. These extreme circumstances would include cases in which there is a claim of fraud, bribery, or the equivalent based on extrinsic facts, or in which the pleadings establish on their face, without any reference to the administrative file, that the agency action violates a clear command of governing law and lacks any conceivable reasonable basis to justify the administrative action. The court then bolstered its decision by adding that even if the decision not to negotiate could be subjected to judicial review, there was no abuse of discretion shown in this case because the would-be sole source, (Wheelabrator) did not show that the competition would result in excess cost to the Government or undue interference or delay with the procurement process.

An interesting question which the court mentioned but did not decide is how the nature of the item under procurement affects reviewability. The court recognized that the pertinent negotiation procurement statutes appear to address themselves to major procurements like tanks, missiles, and aircraft. It could be argued that for purposes of reviewability, a distinction can be drawn between major high priority items vital to the national defense, health, or welfare, which are generally procured by negotiation, and those invoking readily available commercial items, which are generally procured by formal advertised bidding.¹⁰⁸ The court also gave great deference to the opinion of the Comptroller General, demonstrating a willingness to defer to the Government Accounting Office (GAO) of which the Comptroller General is the head, in bid protests because of the GAO's expertise in that area.¹⁰⁹

In *M. Stenthal & Co. v. Seamans*¹¹⁰ the court also emphasized the importance in government procurement of the GAO.¹¹¹ The major thrust of the decision, however, concerned the scope of review to be given to disappointed bidders who challenge government contracts.¹¹² The court of appeals noted that in post-*Scanwell* cases, it had "suggested the judicial responsibility to consider carefully and attentively the peculiar circumstances of each case, with a view towards limiting the instances of unnecessary judicial intervention into the procurement process."¹¹³ The court stressed that in undertaking judicial review of procurement agency action, the district courts must take account of the strong public interest in avoiding disruptions in government procurement, and must withhold "judicial interjection unless it clearly appears that the case calls for an asserting of an overriding public interest 'in having agencies follow the regulations which control government contracting.'"¹¹⁴

The court then focused on two interrelated principles which it deemed of special importance in judicial review of procurement agency actions: "(1)

¹⁰⁷ 16 CCH Cont. Cas. F. ¶ 80,780, at 85,800.

¹⁰⁸ See note 133 *infra*, and accompanying text.

¹⁰⁹ See notes 195-97 *infra*, and accompanying text.

¹¹⁰ 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971).

¹¹¹ See note 194 *infra*, and accompanying text.

¹¹² See notes 139, 140 *infra*.

¹¹³ 16 CCH Cont. Cas. F. ¶ 80,781, at 85,812.

¹¹⁴ *Id.*, citing *Scanwell*, 424 F.2d at 86.

courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was *no rational basis* for the agency's decision; and (2) even in instances where such a determination is made there is room for sound judicial discretion, in the presence of overriding public interest considerations, to refuse to entertain declaratory or injunctive actions in a pre-procurement context."¹¹⁵ The court reiterated the salutary effect of *Scanwell* in providing protection against illegal government action.¹¹⁶ It cautioned, however, that *Scanwell* and its progeny also impose a responsibility upon courts to exercise restraint in using the power to enjoin a procurement program. Among the considerations that may cause a court to refrain from injunctive relief are a realization of the Government's need for smooth and expeditious functioning of the procurement process in general and short-delivery-time procurements in particular, as well as the possibility of subsequent relief in the form of damages for the bidder.¹¹⁷

Factors Influencing the Determination of Nonreviewability. From a review of the preceding cases, it is readily apparent that there is no single factor which has influenced the courts to grant or deny review. Rather there are a number of factors which have appeared as influences in determining reviewability.¹¹⁸ The major factors relevant to nonreviewability seem to be: (1) the need for the smooth and expeditious functioning of the procurement process;¹¹⁹ (2) broad discretion in the procurement agency;¹²⁰ (3) technical or quasi-technical expertise required to understand the subject matter of agency action;¹²¹ (4) the potential flood of government contracts cases brought to the courts by disappointed bidders.¹²² Some of these factors seem rather weak individually as a basis for nonreviewability. The concern that courts may be flooded with cases, which was mentioned in *Scanwell*, *Ballerina*, and *Blackhawk*, all primarily dealing with the issue of standing, seems to be of much less concern to the

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ The court stated that *Scanwell*, in allowing judicial challenges of procurement actions, "was salutary not only for the relatively few cases that might result in court intervention, but also for the greater number of cases which would be handled with greater care and more diligence within the Government because of the awareness of the availability of judicial scrutiny." *Id.*

¹¹⁷ The court also gave a boost to the prestige of the GAO, stating that a court's reluctance to interfere with the procurement process should be particularly strong where the GAO has made a determination on the merits upholding the procurement official's actions. See note 194 *infra*, and accompanying text.

¹¹⁸ See Saferstein, *supra* note 80.

¹¹⁹ *E.g.*, *M. Steinthal & Co. v. Seamans*, 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971); *Wheelabrator Corp. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,780 (D.C. Cir. Oct. 14, 1971); *Hi-Ridge Lumber Co. v. United States*, 16 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971).

¹²⁰ *E.g.*, *Hi-Ridge Lumber Co. v. United States*, 16 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971).

¹²¹ *E.g.*, *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *M. Steinthal & Co. v. Seamans*, 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971); *Wheelabrator Corp. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,780 (D.C. Cir. Oct. 14, 1971); *Hi-Ridge Lumber Co. v. United States*, 16 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971); *Pullman, Inc. v. Volpe*, No. 71-2442 (E.D. Pa., Dec. 14, 1971).

¹²² *E.g.*, *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). Other factors mentioned include the managerial nature of the agency and the existence of alternative methods of review. See, *e.g.*, *Hi-Ridge Lumber Co. v. United States*, 16 CCH Cont. Cas. F. ¶ 80,476 (9th Cir. 1971).

courts in later decisions. The reason is that through the increased use of summary judgment and doctrines of nonreviewability, the courts should be able to stem any potential tide of cases. Many bidders who have standing to sue under *Scanwell* will be denied relief by a summary judgment or the invocation of the "committed to agency discretion" doctrine of nonreviewability under section 10 of the APA. In addition, the narrow scope of review as stated in *Steinthal* may contribute to the regulation of the number of cases. It would seem that the use of summary judgment as a tool to exclude frivolous lawsuits and the probable effect of the narrow scope of review and doctrine of "committed to agency discretion" in discouraging the institution of lawsuits should be particularly effective in dispensing with the "flood of cases" argument as a basis for nonreviewability.¹²³

The need for technical or quasi-technical expertise in the determination of judicial disputes, as a basis of nonreviewability, is subject to criticism.¹²⁴ Although federal government contracting is admittedly a most complex area of the law, it is not necessarily beyond the comprehension of the courts. In fact, many judges have found themselves able to reach well-reasoned decisions involving various fields of technical expertise. In *Allen M. Campbell* the Fifth Circuit court stated that accounting is an esoteric field "better left to those having . . . a business-experience-oriented background."¹²⁵ Yet the courts all across the nation daily decide tax cases, securities cases, and corporate law cases involving the esoteric mysteries of the accounting profession. Although some government contract cases undoubtedly involve technical questions which are beyond the present experience or knowledge of a particular court, many do not. It would seem that those cases involving procedural fairness would be an example of an area which does not require technical expertise.¹²⁶ Expertise was heavily emphasized in *Steinthal* and *Wheelabrator*, and it appears that it is here to stay as far as nonreviewability is concerned. Expertise, along with broad discretion, seems to be a prerequisite to any determination of nonreviewability because the issue is "committed to agency discretion," but it is questionable whether it can support such a finding by itself.¹²⁷

Broad discretion seems inherent in any finding of "committed to agency discretion." However, as the court in *Hi-Ridge Lumber* observed, the test of reviewability under section 10 of the APA cannot be merely that the agency possesses some discretion, but rather how much discretion it possesses.¹²⁸ Al-

¹²³ See *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970); cf. Saferstein, *supra* note 80, at 393: "Nor may it always be assumed that the delay even for summary judgment will not be harmful to administrative efficiency."

¹²⁴ "[U]nless we make the requirements of administrative action strict and demanding, expertise . . . can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (emphasis in original), quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (dissenting opinion).

¹²⁵ 446 F.2d at 265.

¹²⁶ See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). *Gonzalez* dealt with a challenge to the Government's practice of "blacklisting" or barring certain contractors from doing business with the Government. The court, in addition to granting standing on the basis of the injury to the plaintiff contractors, extended the procedural safeguards of notice and hearing to the disbarment action.

¹²⁷ "Like broad discretion, expertise seems to be a prerequisite for even a prima facie case of nonreviewability, but cannot itself support such a finding." Saferstein, *supra* note 80, at 384.

¹²⁸ See text accompanying note 94 *supra*.

though broad discretion seems necessary before even a *prima facie* case of nonreviewability because "committed to agency discretion" can be made,¹²⁹ it would seem that broad discretion should not be enough alone to put administrative action beyond judicial review.¹³⁰

The factor which seems to be the most influential policy reason for non-reviewability is the need for the smooth and expeditious functioning of the procurement process. This factor was a major consideration in the *Perkins*¹³¹ case. The court of appeals which ignored the Supreme Court's opinion in *Perkins* when deciding the *Scanwell* case is now reconsidering the wisdom of that earlier case. The *Wheelabrator* and *Steinthal* cases place particular emphasis on the responsibility of the courts to avoid unnecessary interference with the operation of government procurement. Injunctive relief may be particularly disruptive to the procurement process. An interesting aspect of this problem is suggested, but not discussed, by the *Wheelabrator* court.¹³² Although injunctive relief may cause costly delays in government procurement, the extent of possible adverse effects depends on the nature of the particular procurement.¹³³

It is suggested that the primary ground upon which judicial nonreviewability of procurement agency action may be validly founded is the potential disruption of the procurement process. Minimizing this potential disruption is necessary to make judicial review for bidders a viable means of obtaining relief. One method would be to draw a distinction based on the nature of the procurement, that is, between negotiated and advertised procurements, or more properly, between procurements in which the cost of interference or delay is prohibitive in terms of money or damage to national goals, and procurements in which interference or delay is not unduly onerous to the Government, the successful bidder, and the protesting bidder. Unfortunately, this is at best only a partial solution, and the courts presently do not seem inclined to make such distinctions. Instead, the courts seemingly are developing, around the "committed to agency discretion" exception of the APA, a doctrine of nonreviewability which makes judicial review of procurement extremely difficult to secure for any bidder on a federal government contract. The *Wheelabrator* opinion establishes that there are certain discretionary procurement decisions that are nonreviewable because "committed to agency discretion," and the

¹²⁹ Saferstein, *supra* note 80, at 380.

¹³⁰ See generally Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969).

¹³¹ See text accompanying notes 24, 25 *supra*.

¹³² See text accompanying note 108 *supra*.

¹³³ One writer, in discussing standing, has stated that in only a small portion of government contracts, usually those involving exceptionally large expenditures of public funds, will delay resulting from judicial review substantially impair any national goal. Thus, cancellation of contracts for purchases of commercial goods through formal advertisement may not be unduly onerous. Most items procured by the Government are not significantly involved with or essential to the defense, health, safety, or welfare of the nation and may be promptly reprocured or completed by a different contractor in the event of a court-ordered cancellation. Negotiated procurement, on the other hand, often involves military, space, and other procurement items which are essential to the national interest and must be completed on schedule or not at all. Pierson, note 48 *supra*, at 26, 27. There would thus seem to be some basis for a distinction between bidders on negotiated and advertised contracts.

exceptions which the court hypothesizes are so restrictively defined as to make those exceptional cases which are reviewable few indeed.¹³⁴

B. *Scope of Review*

In addition to developing a doctrine of nonreviewability which often precludes review for disappointed bidders on federal government contracts, the courts have limited the scope of review for those bidders who do obtain judicial review. The district court for the District of Columbia made some of the first efforts to establish restrictive standards for scope of review in order to stem the tide of post-*Scanwell* cases. In *Simpson Electric Co. v. Seaman*¹³⁵ the court issued a declaratory judgment that the award of a government contract had been conducted illegally. The court nevertheless refused to grant injunctive relief, stating that the scope of review is narrow, and emphasizing the limited function of the courts in reviewing contracting agency action.¹³⁶ The district court went a step further in the case of *National Cash Register Co. v. Richardson*,¹³⁷ holding that the federal courts should establish a requirement of proof of "flagrant disregard for the regularity of contracting procedures"¹³⁸ before intervening in the government procurement process at the request of a defeated bidder.

The judicial efforts to place some practical limitations on the scope of review culminated in *Steinthal* and *Wheelabrator*. The *Steinthal* opinion announced a new test which probably sounds the death knell for a majority of aggrieved bidders' suits. The new test for scope of review is that the court must "restrict its inquiry to a determination of whether the procurement agency's decision had a *reasonable basis*."¹³⁹ The two interrelated principles which the court in *Steinthal* found to be of special importance in judicial review of procurement agency actions were a "rational basis" test for scope of review and a sound judicial discretion to deny, for public policy reasons, declaratory or injunctive relief in preprocurement actions.¹⁴⁰ The impact these standards will have on government contract bid award protests is tremendous. There are almost no contract awards that cannot, either before or after the fact, be justified on some reasonable or rational basis. Thus, by narrowly defining the scope of review, the courts are spared any potential flood of cases, since prospective plaintiffs will soon discover that virtually anything the contracting officer did in awarding the contract will be upheld in court as long as there is any rational basis for his actions.

III. RELIEF ON THE MERITS

Since *Scanwell*, aggrieved actual and prospective bidders theoretically have access to a broad range of equitable remedies, as well as to damages. Due to the judicial development of nonreviewability because "committed to agency

¹³⁴ See note 107 *supra*, and accompanying text.

¹³⁵ 317 F. Supp. 684 (D.D.C. 1970).

¹³⁶ See notes 87, 88 *supra*, and accompanying text.

¹³⁷ 324 F. Supp. 920 (D.D.C. 1971).

¹³⁸ *Id.* at 921.

¹³⁹ 16 CCH Cont. Cas. F. ¶ 80,781, at 85,812 (emphasis added).

¹⁴⁰ See text accompanying note 115 *supra*.

discretion" and the "rational basis" test for the scope of review, most aggrieved bidders at present will probably be precluded from relief on the merits. However, assuming that a defeated bidder were to get a plenary consideration of the merits of his case, he could be entitled to a temporary restraining order, a preliminary injunction, a permanent injunction, or damages, were he to prevail.

The equitable remedies of temporary restraining order and injunction are often the most attractive remedies to the aggrieved bidder. The power of courts to enjoin the Government's activities through the use of equitable relief is a power not possessed by the GAO, which has been the traditional forum for bid protests. Temporary restraining orders may be obtained by a party without giving notice to the adverse party, but to do so he must show by affidavit or verified complaint that immediate and irreparable damage is likely to result before the adverse party can be heard in opposition.¹⁴¹ As a matter of practice, some notice is usually given, although it is often short notice.¹⁴² Ex parte temporary restraining orders expire after ten days unless extended by the court for a like period.¹⁴³ In addition, a hearing for a subsequent preliminary injunction must be held by the court at the earliest possible time.¹⁴⁴ Temporary restraining orders have been issued on an ex parte basis to stay the award or performance of government contracts.¹⁴⁵

On the other hand, the refusal of a district court to grant a temporary restraining order has not meant that a preliminary injunction will automatically be denied as well.¹⁴⁶ The standards for the issuance of a preliminary injunction have been largely shaped by case law rather than the language of rule 65. The preliminary injunction cannot be ex parte, and must withstand several judicially-developed questions:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits?
- (2) Has the petitioner shown that without the relief requested it will be irreparably injured?
- (3) Would the issuance of an injunction substantially harm other parties interested in the proceedings?
- (4) Where does the public interest lie?¹⁴⁷

The permanent, mandatory injunction is also governed by rule 65. As with equitable remedies generally, the permanent injunction may be granted only if the plaintiff can show irreparable injury and inadequate remedy at law.¹⁴⁸

¹⁴¹ FED. R. CIV. P. 65.

¹⁴² Address by William Munves, *supra* note 66.

¹⁴³ FED. R. CIV. P. 65.

¹⁴⁴ *Id.*

¹⁴⁵ Address by William Munves, *supra* note 66.

¹⁴⁶ *See, e.g.*, *Northeast Constr. Co. v. Romney*, 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. June 21, 1971).

¹⁴⁷ *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). This case has been considered as controlling for the last decade, particularly in the District of Columbia Circuit, where the majority of post-*Scanwell* cases have been brought. Address by William Munves, *supra* note 66.

It has also been argued that a preliminary injunction should issue only if it will preserve, rather than change, the status quo. *See Warner Bros. v. Gittone*, 110 F.2d 292 (3d Cir. 1940).

¹⁴⁸ *See Z. CHAFEE & E. RE, CASES AND MATERIALS ON EQUITY 795-817 (1967)*. As

Another type of equitable relief is the power of the court of appeals to enjoin matters pending review on appeal.¹⁴⁹

A. *The Availability of Equitable Relief*

Although equitable relief is theoretically available to defeated bidders, the post-*Scanwell* cases indicate that the availability of such relief exists more in theory than in reality. Immediately following *Scanwell*, a number of district courts granted injunctive relief.¹⁵⁰ The trend since that time, however, has been against injunctive interference, both in terms of the overturning of district court orders, and of an increasing reluctance of district courts to grant injunctive relief.¹⁵¹

Four opinions of the district court of the District of Columbia were among the first to deny injunctive relief. In *Simpson Electric Co. v. Seamans*,¹⁵² although the court held that the plaintiff was the proper awardee of the bid in question, it determined that injunctive relief was inappropriate. Recognizing their authority to require the Government to enter a contract or enjoin it from proceeding with a contract, the court, nevertheless, seemed persuaded by two reasons to deny injunctive relief: (1) adequate remedy at law (availability of damages), and (2) the interest of the Government in being free to do its own contracting without interference from the courts.¹⁵³

That same court denied injunctive relief in *Keco Industries, Inc. v. Laird*,¹⁵⁴ in which an unsuccessful bidder on a negotiated procurement for air conditioning units sued the Government for a preliminary injunction which would require it to halt all work on disputed contracts. The court stated that a protest to the GAO is not a prerequisite to judicial review, and, also, that the scope of review carries with it the authority to direct the award of a government contract and to exercise injunctive powers in appropriate circumstances. The court recognized the beneficial purpose underlying *Scanwell*, i.e., the protection of the integrity of the contract award system as established by Congress, and found this purpose to be relevant to negotiated as well as ad-

for inadequate remedy at law, see also H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 103-24 (2d ed. 1948).

¹⁴⁹ FED. R. APP. P. 8.

¹⁵⁰ 319 F. Supp. 933 (D.D.C. 1970), *rev'd*, 446 F.2d 261 (D.C. Cir. 1971); *Hayes Int'l Corp. v. Seamans* (N.D. Ala. Sept. 30, 1971) (unreported; see 16 CCH Cont. Cas. F. ¶ 80,830); *Aerojet-Gen. Corp. v. Thiokol Corp.* (N.D. Cal. 1970) (unreported; voluntarily dismissed; see 15 CCH Cont. Cas. F. ¶ 83,786); *Big Four Mechanical Contractors, Inc. v. SBA* (W.D. Okla. 1970) (unreported; see 15 CCH Cont. Cas. F. ¶ 83,766).

¹⁵¹ Injunctions reversed: e.g., *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *A.G. Schoonmaker Co. v. Resor*, 445 F.2d 726 (D.C. Cir. 1971); *M. Steinthal & Co. v. Seamans*, 16 CCH Cont. Cas. F. ¶ 80,781 (D.C. Cir. Oct. 14, 1971); *Wheelabrator Corp. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,780 (D.C. Cir. Oct. 14, 1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970). Injunctive relief denied: e.g., *Pullman, Inc. v. Volpe*, No. 71-2442 (E.D. Pa., Dec. 14, 1971); *American Standard, Inc. v. Laird*, 326 F. Supp. 492 (D.D.C. 1971); *National Cash Register Co. v. Richardson*, 324 F. Supp. 920 (D.D.C. 1971); *Lombard Corp. v. Resor*, 321 F. Supp. 687 (D.D.C. 1970); *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970); *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970).

¹⁵² 317 F. Supp. 684 (D.D.C. 1970); see notes 86-88 *supra*, and accompanying text.

¹⁵³ The court distinguished *Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), with perhaps the most important distinction being that the contract here had already been awarded and performance had already begun. See notes 164-67 *infra*, and accompanying text.

¹⁵⁴ 318 F. Supp. 1361 (D.D.C. 1970).

vertised procurements. The court, nevertheless, denied the injunction, stating that "[s]ince procurement officials are allowed wider discretion in negotiated procurement, the standard of review will differ from that used in advertised procurement. Protection may be achieved by actions less than the directed award of the contract and preliminary injunctive relief."¹⁵⁵ The court noted that here the contract had already been awarded and performance had already begun. In this small, routine procurement the grant of an injunction would not preserve the status quo but would, rather, alter it. The court found that the benefits derived from the enforcement of the regulations of the procurement system may be outweighed by the liabilities incurred by the Government by way of both damages and the inconveniences of reprocurement. Furthermore, the successful bidder, likely to suffer substantial loss in this action, was not a party. "In this situation only very serious governmental irregularities will support injunctive relief."¹⁵⁶ The court thus engaged in a "balancing of equities" to determine whether such relief would be proper. The court weighed the benefit to the plaintiff in its capacity as a private attorney general against the harm to the defendant and found the equities to favor the defendant. The comment concerning the absence of the successful bidder as a party created implications of an indispensable party problem, but the issue was not discussed in the opinion. The court implied that a combination of a large contract and a protest prior to the award or the beginning of performance would support injunctive relief.

A third case from the District of Columbia, *Lombard Corp. v. Resor*,¹⁵⁷ denied the plaintiff's request for injunctive relief and granted the Government's motion for summary judgment. The contract contemplated forging press lines to be installed in a plant owned by the Government operated on a contract basis by Chamberlin Manufacturing Corporation. Chamberlin requested the Government to conduct a pre-award survey of Lombard to determine if it was qualified to do the work. The survey recommended that no award be made to Lombard because it was not "responsible." Chamberlin accordingly made the award to another bidder. Lombard protested to the Comptroller General, and he advised that another solicitation be made including Lombard as a bidder. The Government contended that Chamberlin was an indispensable party and that the case should, therefore, be dismissed. The court rejected this contention, stating that the Government had "experienced no difficulty in obtaining from Chamberlin information necessary to the defense of this suit."¹⁵⁸ Although the court recognized that a judgment in favor of the plaintiff would prejudice Chamberlin, who would remain liable on subcontracts, it found that such prejudice could be eliminated by intervention and that a judgment entered in Chamberlin's absence would be viable since it would accord complete relief to the parties before the court. The court therefore held that Chamberlin was a necessary rather than an indispensable party.

¹⁵⁵ *Id.* at 1364.

¹⁵⁶ *Id.*

¹⁵⁷ 321 F. Supp. 687 (D.D.C. 1970).

¹⁵⁸ *Id.* at 691.

The court also gave weight to the fact that little performance had begun, and then issued a warning:

The Court is somewhat concerned, however, that Chamberlin may have endeavored to spend money on this project as fast as possible in order to preclude court action. . . . While it is obvious that an agency or contractor cannot afford to stop all action every time a disappointed bidder files for relief, it should be noted that in a case where the court felt there was arbitrary action in the award of a contract, we would not hesitate to enjoin further payment by the government, letting the chips fall where they may.¹⁵⁹

Finally, in *National Cash Register Co. v. Richardson*¹⁶⁰ the district court for the District of Columbia denied a preliminary injunction, pending actions by the GAO on a bid protest, requested by a defeated bidder on a negotiated contract with the Department of Health, Education, and Welfare. The court found that "[t]he practices of HEW in awarding the contract were sloppy if not irregular."¹⁶¹ However, the court held that the plaintiff had failed to show the flagrant disregard for the contracting procedures and "other factors bearing on the public interest"¹⁶² which would justify an injunction. Pointing out that the successful bidder had already incurred expenses in contemplation of performing the contract, that the contract was to commence soon, and that the effect of an injunction would be to interfere with the procurement process, the court denied the preliminary injunction on the grounds that it would change, not preserve, the status quo.

The circuit court in *A. G. Schoonmaker Co. v. Resor*¹⁶³ reversed the district court's grant of injunctive relief. The suit was a challenge to a Department of Defense procurement of generator sets. Technical proposals were solicited and received, following which invitations to bid were issued to three qualified firms, including A. G. Schoonmaker Co. Schoonmaker was the apparent low responsible bidder. One of the two defeated bidders protested to the Comptroller General on the ground that the Schoonmaker bid was not responsive, and the Comptroller ordered all bids to be rejected and new bids solicited from the three qualified bidders because the IFB was ambiguous. That decision was based on the fact that the IFB did not clearly specify whether preproduction and production models were to be assigned the same price, as was done by one bidder, or whether they might be assigned different prices, as was done by another bidder. Schoonmaker, claiming to be entitled to the contract award, then sought declaratory and injunctive relief in the federal district court. The district court judgment in effect required that Schoonmaker be awarded the contract. The court of appeals reversed, holding that the Comptroller General, in finding the bid invitation ambiguous and ordering new invitations for bids, was not acting in an arbitrary or capricious manner. The requested relief was denied because the court found the challenged action to be legal. Similarly, the circuit court of appeals in *Steinthal* had held that the challenged action was legal because it was neither arbitrary nor capricious.

¹⁵⁹ *Id.* at 693.

¹⁶⁰ 324 F. Supp. 920 (D.D.C. 1971).

¹⁶¹ *Id.* at 921.

¹⁶² *Id.*

¹⁶³ 445 F.2d 726 (D.C. Cir. 1971).

(However, the significance of that case goes far beyond its narrow holding, and it will be discussed later.)

To date, not a single mandatory injunction directing the award of a contract has stood upon appeal, with the exception of the pre-*Scanwell* case of *Superior Oil Co. v. Udall*.¹⁶⁴ That case involved the award of long-term government oil leases rather than procurement. The Court of Appeals for the District of Columbia Circuit ordered that the leases be issued to Superior Oil, the second highest bidder, since the highest bidder had failed to sign his bid as required by the notice and regulations. The highest bidder had requested that the Government reject all bids and start over again. The rationale for the decision was that "[i]t would be plainly inequitable to Superior [the second highest bidder] and damaging to the long range public interest in the integrity of the bidding process to allow Union [the highest bidder], whose error has caused this problem, to have a second opportunity to bid against Superior and all other bidders."¹⁶⁵ *Superior Oil* received little attention prior to *Scanwell*, but it is now cited for the proposition that the federal courts have the power to direct the award of government contracts to specific bidders.¹⁶⁶ The case is, however, generally distinguished on its facts, as in *Simpson Electric Co. v. Seamans*: "The situation presented in *Superior Oil Co.*, where the contract involved millions of dollars, called for a long-term performance, and had not yet been awarded, is wholly different from a more routine, short-term procurement where performance has already begun, such as the Court is considering here."¹⁶⁷

That the trend of the post-*Scanwell* cases is to deny equitable relief is clear. Cases granting equitable relief such as *Northeast Construction*¹⁶⁸ and *National Helium*¹⁶⁹ are definitely in the minority; not a single post-*Scanwell* case granting injunctive relief to defeated bidders has stood up on appeal. A number of cases since *Scanwell* have made it clear that the federal courts

¹⁶⁴ 409 F.2d 1115 (D.C. Cir. 1969).

¹⁶⁵ *Id.* at 1122.

¹⁶⁶ See, e.g., *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970).

¹⁶⁷ 317 F. Supp. 684, 688 (D.D.C. 1970).

¹⁶⁸ In *Northeast Constr. Co. v. Romney*, 16 CCH Cont. Cas. F. ¶ 80,459 (D.D.C. June 21, 1971), the GAO had held the plaintiff's bid non-responsive because it left blank the part of an appendix where it was to have specified the percentage of minority workers to be employed. The court granted a preliminary injunction holding that the failure to comply with the requirement of copying these figures in the blanks was at most a minor irregularity covered by regulations which allow for correction. The court found that the plaintiff's bid was non-responsive in form only and that the plaintiff gained no competitive edge by being allowed to cure the defect. Since the Government gave no reason for its failure to follow the regulations allowing correction of minor details and since the plaintiff was the low bidder, the failure to award the contract to the plaintiff was arbitrary and capricious. The court, in granting the injunction, found that there was irreparable injury to the plaintiff, an inadequate remedy at law, a public interest in seeing the bidding statutes and regulations enforced, and a high probability of success on the merits. The court also rejected the Government's contention that the second low bidder was an indispensable party.

¹⁶⁹ In *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan. 1971), the Kansas federal district court granted a preliminary injunction pending a hearing on the merits. The plaintiffs sued to enjoin the cancellation of a contract for the sale of helium to the Government. The court found that the plaintiffs showed a reasonable probability of success on the merits because of violations of the Helium Act and the National Environmental Protection Act. Irreparable harm was shown because relevant inquiry and consideration was not given to the effect of the decision to cancel the contracts in light of the National Environmental Protection Act. Although the plaintiff did secure injunctive relief, it should be noted that this suit was on a contract cancellation rather than a bid protest.

have reserved the power to grant mandatory injunctions and thus direct the Government to award a contract to an aggrieved bidder.¹⁷⁰ In so doing, they have held either implicitly or explicitly, as in *Scanwell*, that the particular procurement agency action being challenged is not a subject "committed to agency discretion" within the meaning of section 10 of the APA.¹⁷¹ The *Steinthal* and *Wheelabrator* cases, however, have found that certain areas of government contracting are committed to agency discretion and are, therefore, not subject to judicial review. The obvious effect is to preclude mandatory injunctions in such cases. Even before *Wheelabrator* and *Steinthal*, the chances for equitable relief on government contracts were small. After *Steinthal* and *Wheelabrator* the chances seem even smaller.

B. *The Availability of Damages as Relief*

The prospects for obtaining damages appear slightly better. The two leading cases at present come from the Court of Claims. In *Keco Industries, Inc. v. United States*¹⁷² the court considered an unsuccessful bidder's action for damages against the United States. The bidder sought to recover both its cost of bid preparation and its loss of anticipated profits, alleging that the Government in awarding the contract to the plaintiff's competitor knew that the technical proposal of the plaintiff's competitor, the awardee, could not be accomplished within the price specified in the bid. Therefore, the plaintiff contended that the Government's award of the contract amounted to a breach of its implied contract to consider fairly and honestly the plaintiff's bid. The court relied on *Heyer Products Co. v. United States*.¹⁷³ The court held that *Heyer* was not limited to situations involving bad faith and intentional fraud, favoritism, or discrimination on the part of the Government: "Instead, we find that *Heyer* stated a broad general rule which is that every bidder has the right to have his bid honestly considered by the Government, and if this obligation is breached, then the injured party has the right to come into court to try and prove his cause of action. Thus, even without *Scanwell*, we feel that plaintiff should be allowed to maintain this action based on the decision in *Heyer*."¹⁷⁴

The court therefore viewed *Heyer* as an alternative to *Scanwell* for standing purposes, but stated that *Scanwell* appeared to conclusively settle the standing question. The more important aspect of the court's reading of *Heyer*, however, was that it allowed the plaintiff to recover damages, but only to a limited extent. The court allowed damages for bid preparation costs, but not for the loss of anticipated profits. The rationale was based on *Heyer*—it would be improper to award the plaintiff lost profits since the contract from which it would have made such profits never came into existence. The court bolstered this reasoning by stating that even if the successful awardee's bid had been rejected, there is no certainty that the award would have been made to the

¹⁷⁰ See, e.g., *Keco Indus., Inc. v. Laird*, 317 F. Supp. 1361 (D.D.C. 1970); *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970).

¹⁷¹ Address by William Munves, *supra* note 66.

¹⁷² 428 F.2d 1233 (Ct. Cl. 1970).

¹⁷³ 140 F. Supp. 409 (Ct. Cl. 1956). See notes 26-32 *supra*, and accompanying text.

¹⁷⁴ 428 F.2d at 1237.

plaintiff. Consequently, the plaintiff should be allowed to recover only those costs incurred in preparing its technical proposals and bid.

The Court of Claims also considered the question of damages for disappointed bidders on government contracts in *Continental Business Enterprises, Inc. v. United States*.¹⁷⁵ The plaintiff was seeking to recover damages for the amount expended in preparing a procurement proposal which it contended was not fairly and honestly considered. The court stated the *Heyer* rule "that it is an implied condition of every request for offers that each of them will be fairly and honestly considered,"¹⁷⁶ and held that *Keco* extended the *Heyer* rule "to all procurement situations, and that an aggrieved bidder who makes out a prima facie case of arbitrary and capricious action by the Government is entitled at trial to prove the merits of his claim."¹⁷⁷ The court, relying on *Steinthal*, emphasized the high standard of proof required of a plaintiff to show arbitrary and capricious action, and held that the plaintiff must show that there was *no reasonable basis* for the challenged agency action. The court recognized that the remedy of damages, under the *Keco* and *Heyer* rationale, is an alternative to the equitable remedies available under *Scanwell*. The court emphasized that the remedy of damages can protect the public interest in preventing arbitrary and capricious action without disrupting the procurement process as an injunction does. The court concluded that "[t]he *Heyer* rule was extended in *Keco* to give aggrieved bidders a damages remedy in lieu of the equitable remedies available . . . after *Scanwell* Apparently the necessity for such an alternative remedy is even greater than it was when we decided *Keco* because of the difficulties experienced by the courts in handling *Scanwell*-type cases."¹⁷⁸

The *Continental Business* and *Keco* cases indicate a willingness of the Court of Claims to allow damages, but only to the extent of bid preparation costs and in lieu of injunctive relief. These cases, in conjunction with those denying equitable relief, may forecast the end of the availability of equitable relief and the establishment of damages, limited to bid preparation costs, as the only acceptable form of relief. Certainly from the standpoint of the contractors, this solution would not always be adequate. Damages in *Scanwell*-type cases, however measured, may be viewed by contractors as never being an adequate remedy at law. The primary concern of the contractors is often that they keep their plants and personnel in continuous operation, thereby serving their long-range interests better than any single award of damages in a particular case.¹⁷⁹

The courts have not reached a consensus on the question of whether damages, as defined in *Keco* to include only bid preparation costs, are an adequate remedy at law justifying a refusal to grant equitable relief. Perhaps the most important statement of the issue was made in *Steinthal*: "The availability of a damages remedy in the Court of Claims, which in many cases will compensate the frustrated bidder's realized financial costs (*i.e.*, the bid preparation

¹⁷⁵ 452 F.2d 1016 (Ct. Cl. 1971).

¹⁷⁶ *Id.* at 1019.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1022.

¹⁷⁹ Address by William Munves, *supra* note 66.

costs) resulting from the illegal agency action, provides a sound equitable basis for the exercise of . . . discretion in considering whether to entertain a suit for injunctive relief."¹⁸⁰

At present, the question of the adequacy of the remedy at law remains unanswered. Of course, the question of adequacy of the remedy at law may not be determinative on the issue of injunctive relief. As indicated earlier,¹⁸¹ the most important consideration in the grant or denial of injunctive relief will probably be the undue interference with the smooth functioning of the procurement process which injunctive relief may cause. In addition to the delay, expense, and inconvenience to the Government that may be caused by such interference, there are adverse effects upon the successful bidder. If the procurement is enjoined, he must await the outcome of the litigation, and he cannot take on other business which would hamper his capability to perform the contract while the litigation is pending. If the court orders the award of the contract to another bidder, of course, he loses the contract. Even assuming that the court upholds the original award, the successful bidder's costs may be increased due to the delay.

In any event, most cases since *Scanwell* have not allowed injunctive relief, and the trend may be developing to allow damages for bid preparation costs as the only relief to the aggrieved bidder. The basis for allowing damages will probably be that damages do not unduly interfere with the procurement process while an injunction often does. The courts have undertaken extensive efforts to remedy the problems of judicial intervention created by *Scanwell*. It is interesting to note that one major factor has seemed to permeate the consideration of standing, reviewability, and relief on the merits. That factor is the unacceptable extent to which judicial relief, particularly injunctive relief, may interfere with the expeditious functioning of the government procurement programs. This was a major consideration in *Perkins*, in which prospective bidders were denied standing. It was a major consideration in *Wheelabrator*, in which certain procurement decisions were held nonreviewable because "committed to agency discretion." It was also a major consideration in *Keco*, *National Cash Register*, and *Simpson Electric* which denied equitable relief on the merits. The courts in recent cases have also attempted to limit judicial intervention by deferring to the expertise of the GAO, the traditional forum for bid protests prior to *Scanwell*.

IV. THE ROLE OF THE GAO

Prior to *Scanwell*, disappointed bidders were left to whatever relief they could obtain from the GAO. The Comptroller General moved into the gap left by the courts, which, under the *Perkins* rationale, refused to hear bidders'

¹⁸⁰ 16 CCH Cont. Cas. F. ¶ 80,781, at 85,813 (D.C. Cir. Oct. 14, 1971). See also *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970). But cf. *Gould, Inc. v. Chafee*, 16 CCH Cont. Cas. F. ¶ 80,449, at 85,599 (D.C. Cir. June 30, 1971): "The Government's argument for dismissal [of the complaint for injunctive relief] rested in substantial measure on the assertion that [petitioners] have an adequate remedy at law. But it is questionable whether [petitioner's] legal remedies as aggrieved bidders . . . are adequate enough to justify dismissal of their suit for want of equity."

¹⁸¹ See text following note 133 *supra*.

protests of government contract awards. The Comptroller General, as head of the GAO,¹⁸² consistently asserted the right to review the actions of contracting officers in the competitive bidding area to assure compliance with the applicable statutes and regulations.¹⁸³ The relief which an aggrieved bidder can obtain from the GAO, however, is limited since the Comptroller will generally not direct the award of a contract to a particular contractor.¹⁸⁴ The GAO has no express statutory authority to cancel or prevent awards, and, as a practical matter, its only power to do so rests on the fact that if the agency disregards the GAO's decision, the GAO may later disallow payment on the contract, or the accountable GAO officers may refuse to make or certify payment for fear of personal liability.¹⁸⁵ A major complaint of contractors is that if the protest is not received until after the award of the contract, the Comptroller will generally allow the contract to stand even though he believes the award was improperly made.¹⁸⁶ Additionally, in the case of protests after award, the GAO does not stay performance of the contract pending consideration of the protest. This fact has led to the "Pyrrhic victory,"—GAO determinations of irregularities in contracts that have no practical impact, since the contract is already substantially or fully performed by the time the GAO renders its decision.¹⁸⁷ The GAO has recently adopted changes in its procedures in hopes of correcting some of these problems,¹⁸⁸ but the changes do not remedy what contractors see as the key defect—the inability to enjoin the Government and halt the procurement process.

Considerations such as those apparently led the courts to conclude that a bid protest to the GAO was not a prerequisite to judicial review.¹⁸⁹ Coupled with the corollary principle that a GAO opinion is not binding on the federal courts,¹⁹⁰ the GAO's role as final arbiter of bid protests has been effectively destroyed.¹⁹¹ Although there were a few early post-*Scanwell* cases in which the courts enjoined contract award or performance pending GAO review,¹⁹² the federal courts largely ignored the GAO in the cases decided immediately after *Scanwell*.

This attitude soon changed, however, as the Court of Appeals for the

¹⁸² 31 U.S.C. § 41 (1971).

¹⁸³ See, e.g., 17 COMP. GEN. 554 (1938).

¹⁸⁴ See *NASH & CIBINIC* 963 n.3. 31 U.S.C. § 71 (1971) requires claims for payment on government contracts to be processed through the GAO. As a practical matter, this practice became too unwieldy and the present practice is one of post-transactional audit. *NASH & CIBINIC* 68 n.7.

¹⁸⁵ *Cibinic & Lasken*, *supra* note 35, at 375.

¹⁸⁶ *NASH & CIBINIC* 964 n.4. See, e.g., 44 COMP. GEN. 761 (1965).

¹⁸⁷ "In many . . . cases award is made on the basis of a finding of urgency, sometimes warranted and sometimes not, pending the disposition of a bid protest [by the GAO]. Even in such cases it is rare for the GAO to direct cancellation. Thus, the 'relief' gained by a bid protestor most often turns out to be a pyrrhic victory." *Cibinic & Lasken*, *supra* note 35, at 395.

¹⁸⁸ See 13 GOV'T CONT. REP. ¶ 23,810 (Feb. 12, 1972).

¹⁸⁹ See, e.g., *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970); *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970).

¹⁹⁰ See, e.g., *A.G. Schoonmaker Co. v. Resor*, 319 F. Supp. 933 (D.D.C. 1970), *rev'd on other grounds*, 445 F.2d 726 (D.C. Cir. 1971).

¹⁹¹ Address by William Munves, *supra* note 66.

¹⁹² See, e.g., *Page Communications Eng'rs, Inc. v. Resor* (D.D.C. 1970) (unreported; see 16 CCH Cont. Cas. F. ¶ 80,313); *Aerojet-Gen. Corp. v. Thiokol Chem. Corp.* (N.D. Cal. 1970) (unreported; voluntarily dismissed; see 15 CCH Cont. Cas. F. ¶ 83,786).

District of Columbia Circuit in three cases instituted an attitude of judicial deference to the expertise of the GAO. The first of these cases was *A. G. Schoonmaker Co. v. Resor*.¹⁹³ In *Schoonmaker*, an unsuccessful bidder initiated a bid protest with the GAO, and the GAO decided in his favor. The Army, which was conducting the disputed procurement, decided to rely on the GAO opinion which advised cancellation and readvertisement of the contract. The district court held that the GAO opinion was not a lawful basis for the Army's action and ordered the contract awarded to Schoonmaker. The court of appeals reversed, stating that, if the GAO's opinion was reasonable, the court would not conclude that the Army's reliance on the GAO was arbitrary or capricious.

In *Steinhal* the court recognized that a GAO opinion is not necessarily dispositive, but stressed that "[a] court's reluctance to interfere with the executive procurement process should be particularly strong where, as here, the General Accounting Office has made a determination upholding the procurement of officers on the merits."¹⁹⁴

In *Wheelabrator* the court further emphasized the importance of the GAO. The court stated that district courts may apply the doctrine of primary jurisdiction to the GAO.¹⁹⁵ This doctrine of primary jurisdiction determines whether the court or an agency should make the initial determination on a given issue. Although the doctrine may allow an agency to make the initial decision, the court is not prevented from postponing its decision until after the agency decision, and then deciding to set aside or modify the agency decision if necessary. The idea of administrative expertise contributes somewhat to the doctrine but this idea does not require a transfer of power from courts to agencies. The principal reason behind the doctrine is a coordination of work between the courts and administrative agencies, with the courts deferring to the agencies on matters peculiarly within the agencies' specialized field, particularly where to do otherwise would subject those parties who are under the continuous regulation of an agency to conflicting requirements. The doctrine of primary jurisdiction has been developed in such areas as rate regulation in the transportation and communication industries.¹⁹⁶ The court's use of that doctrine with regard to the GAO suggests a position of substantial importance for the GAO. Although the application of the primary jurisdiction doctrine to the GAO may be somewhat dubious as a matter of law, its use by the court is an indication of the deference which the court accords the GAO.

Wheelabrator emphasized the expertise of the GAO, and pointed out the volume of bid protests which it processes. The court stated that the importance of the GAO had not been undercut by *Scanwell*, and that there has been increasing resort by aggrieved bidders to the GAO, even though *Scanwell* held that exhaustion of the GAO remedy was not necessary when it would be futile. In the court's own language, the use of a preliminary injunction "pending GAO determinations may provide a felicitous blending of remedies and mutual reinforcement of forums"¹⁹⁷

¹⁹³ 319 F. Supp. 933 (D.D.C. 1970).

¹⁹⁴ 16 CCH Cont. Cas. F. ¶ 80,781, at 85,815.

¹⁹⁵ 16 CCH Cont. Cas. F. ¶ 80,780, at 85,803.

¹⁹⁶ See generally K. DAVIS, ADMINISTRATIVE LAW TEXT 373-81 (1972).

¹⁹⁷ 16 CCH Cont. Cas. F. ¶ 80,780, at 85,803.

The *Steintbal* and *Wheelabrator* decisions, although they have not restored the GAO to its position as final arbiter, have given recognition to its expertise and importance. It is likely that the GAO, in response to these cases, will reverse its position taken in recent opinions that it will not consider the merits of protests which are before the courts.¹⁹⁸ The result will probably be to add impetus to the withdrawal of judicial intervention in the area of bidders' suits on government contracts.

V. CONCLUSION

Aggrieved bidders on federal government contracts now have standing to sue, but this has not meant that they have been successful in obtaining judicial review or judicial relief. The federal courts seem to be returning to a renewed emphasis on consideration of the impact of judicial interference with the federal procurement process, a consideration which was basic to the *Perkins* decision. The federal courts have begun to realize that while they may permit aggrieved bidders to bring suit on government contract awards, they must at the same time create stringent requirements for the issuance of preliminary injunctive relief or success on the merits if the public interest in efficient federal procurement is to be maintained. The courts have attempted to accomplish this purpose partly by creating, under the APA, a doctrine of nonreviewability which precludes judicial review of procurement decisions which are "committed to agency discretion." The primary factors on which the courts base a determination that agency action is "committed to agency discretion" are broad agency discretion granted by law, expertise of the agency in complex technical or quasi-technical matters within their specialty, and the unacceptable extent to which judicial review and preliminary or other injunctive relief will interfere with the expeditious functioning of the procurement process.

The District of Columbia Circuit has stated the scope of review in bid protest cases to be that the court will not interfere with the procurement process unless the challenged agency actions are without any rational basis. It has also recognized a sound discretion to deny, for public policy reasons such as the public interest in the smooth functioning of the federal procurement, declaratory or injunctive relief in procurement actions. A judicial trend may be developing to view damages, confined to recovery of bid preparation costs, as the only acceptable form of relief for disappointed bidders since an award of damages, unlike injunctive relief, does not delay or interfere with the award or performance of contracts.

The few reported cases since *Wheelabrator* and *Steintbal* indicate that these two cases will be read rather literally by the lower courts, thereby destroying most disappointed bidder lawsuits. Although other circuits across the country have not yet voiced an opinion on these two cases, it seems that the impact of these cases will be extensive.¹⁹⁹ In addition, the District of Columbia circuit

¹⁹⁸ See, e.g., COMP. GEN. DEC. NO. B-17182 (July 19, 1971).

¹⁹⁹ The Circuit Court for the District of Columbia is the seminal circuit in government contract law, for reasons of both history and geography. Address by William Munves, *supra* note 66.

court has re-emphasized the importance and the expertise of the GAO, indicating a new judicial deference to the GAO in bid protest cases and signalling a further judicial retreat from review of disappointed bidders' suits. Unfortunately, the GAO has not proven to be an effective forum for aggrieved bidders.

If the pendulum swings back to the point of judicial non-interference found in *Perkins*, the public as well as the contractors stand to lose. There are competing factors which must be considered in granting or denying judicial review or relief for aggrieved bidders on government contracts. On the one hand, there is the need for speedy and efficient enforcement of government procurement programs. On the other hand, there are both the individual's interest, as a "person aggrieved" by agency action, in having a claim adjudicated, and the public's interest in seeing that government agencies follow the procurement procedures established by law. It would seem that many government procurements are not so vital to the public interest that any interference with them would be unacceptable. Further, it would seem that the public interest in seeing that procurements are conducted according to law could often outweigh any detrimental effects caused by judicial review, particularly in a routine procurement not vital to the defense, safety, or health of the public. After *Wheelabrator* and *Steinthal*, such instances may rarely be recognized, if at all, by the courts. *Wheelabrator* and *Steinthal* do not overrule the standing holding in *Scanwell*, but the gap between standing and success on the merits has now become so great that the achievement of the right to sue may have proven to be a hollow victory.