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Federal Courts Improvement Act of 1982 - Legislative History - Equitable Authority in Pre and Post-Award Government Contract Disputes

Joseph A. Hrabik

FEDERAL COURTS IMPROVEMENT ACT OF 1982—LEGISLATIVE HISTORY—EQUITABLE AUTHORITY IN PRE AND POST-AWARD GOVERNMENT CONTRACT DISPUTES—The United States Court of Appeals for the Third Circuit has held that under the Federal Courts Improvement Act of 1982 the district courts retain jurisdiction to consider pre and post-award government contract disputes, and that injunctive relief is properly denied where there is no showing of illegality or irrationality on the part of the awarding agency.

Coco Brothers, Inc. v. Pierce, 741 F.2d 675 (3d Cir. 1984)

On July 2, 1982, the Allegheny County Housing Authority, in conjunction with the Department of Housing and Urban Development (HUD), requested proposals from several contractors for construction of an apartment building for the elderly.[1] The Authority initially accepted the proposal of Coco Brothers Inc., one of the contractors who had submitted a proposal.[2] However, upon subsequent review of the Coco Brothers proposal HUD rejected it as technically "non-responsive," concluding that the proposal provided for "insufficient storage space."[3] On February 14, 1983, the Authority accepted the proposal submitted by another contractor, Crossgates, Inc.[4] The Authority then notified Coco Brothers that HUD had found its proposal "non-responsive" on March 3, 1983.[5] The following day, March 4, 1983, HUD approved the proposal of Crossgates.[6]

On June 9, 1983, Coco Brothers filed a complaint in the District Court for the Western District of Pennsylvania, requesting declaratory relief and an order enjoining the defendant from awarding the contract to another builder.[7] Nevertheless, on December 21, 1983, a contract between the Authority and Crossgates was executed.[8]

At the hearing on the request for injunction, the defendants con-

1. Coco Bros., Inc. v. Pierce, 741 F.2d 675, 676 (3d Cir. 1984). The construction project was authorized by the United States Housing Act of 1937, 42 U.S.C. § 1437 (1982).
2. 741 F.2d at 676.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

tended that the district court lacked jurisdiction because the Court of Claims had "exclusive" jurisdiction over suits commenced prior to the award of a contract under the Federal Courts Improvement Act of 1982 (F.C.I.A.).[9] Reasoning that selection of another contractor constituted a "constructive award" of the contract even without formal execution of an agreement, the district court resolved the jurisdictional problem by characterizing the controversy as a post-award case.[10]

Turning to the merits, the district court reviewed the stringent "irrational or clearly illegal" standard which must be met whenever a disappointed bidder attempts to set aside the award of a government contract, but chose to deny the injunction on other grounds.[11] Because Coco Brothers' alleged loss was compensable in

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9. *Id.* at 677. The Federal Courts Improvement Act, 28 U.S.C. § 1491 (1982) expanded the jurisdiction of the United States Claims Court by authorizing the court to dispense equitable relief in addition to monetary relief: "To afford complete relief on any contract claim brought before the contract is awarded, the Court shall have exclusive jurisdiction to grant declaratory judgment and such equitable and extraordinary relief as it deems proper including but not limited to injunctive relief." 28 U.S.C. § 1491(a)(3) (1982). Plaintiff's actions at the hearing probably helped the district court to identify the jurisdictional issue. The court of appeals noted: "Plaintiff wavered in its approach to whether the dispute was a pre or post-award case. In its complaint and opening remarks at the hearing, plaintiff argued this was a pre-award case, but that position began to shift as testimony was taken." 741 F.2d at 676.

10. 741 F.2d at 676. Because the plaintiff's action was filed after the selection of another contractor, i.e., after "constructive award," the district court held that it could properly exercise post-award jurisdiction and so avoided the issue of district court jurisdiction in pre-award cases. *Id.*

11. *Id.* A more stringent standard for granting or denying injunctive relief was discussed in detail by the district court:

> A preliminary injunction is not granted as a matter of right. Kershner v. Mazurkiewicz, 670 F.2d 440, 443 (3d Cir. 1982) (en banc). Its grant or denial is committed to the sound discretion of the district judge who must balance several factors in reaching a decision. *Id.* In this regard, the moving party must demonstrate (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured pendente lite if relief is not granted. . . . Preliminary injunctive relief may not be granted unless both of these requirements are satisfied. . . . When relevant, the district court should also consider (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest. . . .
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> The above standard applies to requests for preliminary injunctions generally. In the area of government contracts, a more stringent standard governs a determination of the first factor, the reasonable probability of eventual success on the merits. Specifically, a government contract award may not be set aside at the request of a "disappointed bidder" unless the awarding agency's decision was "irrational or clearly illegal."
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> Even evidence of procedural irregularities does not support the issuance of a preliminary injunction if the district court determines that the agency's decision was rational. . . .

damages, the court held that the irreparable injury necessary for a preliminary injunction to be granted had not been demonstrated and that therefore, no discussion of the irrational or illegal standard was necessary.[12]

Upon different reasoning, the Third Circuit Court of Appeals affirmed the district court both in the assertion of jurisdiction and the denial of preliminary injunction. The court held that district courts have jurisdiction to grant or deny injunctive relief in pre-award as well as post-award government contract disputes.[13] This

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Furthermore, even when the movant shows that there was no rational basis for the agency's decision, a court, in the exercise of its discretion, may still refuse injunctive relief because of "overriding public interests."

Coco Bros., Inc. v. Pierce, slip op. (W.D. Pa. Oct. 20, 1983) (citations omitted).

12. Coco Bros., Inc. v. Pierce, slip op. (W.D. Pa. Oct. 20, 1983). The court also elaborated on the nature of irreparable injury:

With regard to the second factor, the irreparable injury pendente lite, the United States Court of Appeals for the Third Circuit has expressly stated that the requisite injury or harm must be irreparable—"not merely serious or substantial":

> The word means that which cannot be repaired, retrieved, put down again, atoned for . . . . Grass that is cut down cannot be made to grow again; but injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation and money cannot atone for it. . . . Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate.

. . . .

The Court of Appeals has also made clear that it will not uphold an injunction where the claimed injury constitutes a loss of money since that is a loss capable of recoupment in a proper action at law. . . .

We need not reach the question of whether HUD's decision in this case was irrational or clearly illegal because we find that Plaintiff will not be irreparably harmed by the denial of injunctive relief. Rather, Plaintiff's alleged injuries are compensable in money damages.

Specifically, Plaintiff may recover its bid preparation costs in an action at law. . . .

It is true that Plaintiff cannot recover expected profits under the lost contract. . . . Inability to recover expected profits, however, is not material to our determination on the issue of irreparable harm. In this regard, issuance of the injunction does not remedy the loss of expected profits since the Court cannot compel Defendants to award the contract to Plaintiff. Thus Plaintiff cannot recover expected profits regardless of whether the injunction is issued or not.

Plaintiff's failure to show irreparable harm precludes the award of injunctive relief regardless of the alleged irrationality or illegality of HUD's decision.

Id. (citations omitted).

13. 741 F.2d at 677, 679. The court recognized that its determination of district court jurisdiction was limited to review of denial of equitable relief. The court explained:

This appeal is solely from the denial of injunctive relief. We need not determine, therefore, whether the case is within the Claims Court's exclusive jurisdiction over damage claims in excess of $10,000. *See* 28 U.S.C. § 1346(a)(2). Although the complaint includes a prayer for the plaintiff's costs and expenses in submitting a bid proposal, that relief is requested "[i]n the alternative," the amount sought is unspecified, and no claim for damages has been addressed by the district court. In the cir-

holding avoided the district court's strained characterization of this case as post-award in the absence of "pertinent facts" needed to determine if an award had ever been made.[14]

Addressing the jurisdictional issue, the court concluded that jurisdiction was founded upon a broad interpretation of the term "exclusive" used in the F.C.I.A.[15] Earlier cases had narrowly interpreted the statutory term to exclude all other courts from jurisdiction over pre-award cases.[16] This interpretation, made in light of legislative history, overturned those earlier interpretations which had strictly applied the literal language of the Act.[17]

As pointed out by the court, the F.C.I.A. had enlarged the jurisdiction of the Court of Claims to afford complete relief on any contract claim brought before the contract is awarded; the Claims Court was granted "exclusive" jurisdiction to grant equitable relief in appropriate circumstances.[18] The court engaged in an in-depth review of the Act's legislative history which explained the grant of equitable power to the Claims Court.[19] The court of appeals resisted a "superficial reading" of statutory language and instead reached its conclusion based on review of legislative history re-

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cumstances of this case, the district court properly exercised jurisdiction over the motion for a preliminary injunction, while postponing a jurisdictional ruling on the damages claim.

741 F.2d at 677 n.1.

14. 741 F.2d at 677. Although HUD notified the Authority to advise Crossgates of its selection in a letter dated March 4, 1983, there was no document or other evidence in the record which indicated that the Authority had sent to Crossgates notice that it had been awarded the contract. Thus, the record failed to show whether Crossgates had ever received official notice that it had been selected, an event which could have been construed as an "award." Moreover, no case law or legislation could be found to support a definition of "award" as the selection of another bidder. Absent factual or legal support for the "constructive award" concept, the court of appeals upheld jurisdiction upon different grounds. *Id.*

15. *See supra* note 9 and accompanying text.

16. 741 F.2d at 677. The court cited two cases:

Relying solely on the literal language of section 1492(a)(3), the District Court for the District of Columbia held that it had been ousted of jurisdiction and that only the Claims Court could grant a pre-award injunction. *Opal Manufacturing Co. v. UMC Industries, Inc.*, 553 F. Supp. 131 (D.D.C.1982). *See also B.K. Instruments*, 715 F.2d at 721 n.4 (dictum). The word "exclusive" was interpreted as applying to any and all other courts.

741 F.2d at 677.

17. *See supra* note 16.

18. *See supra* note 9.

19. 741 F.2d at 678. The court relied heavily upon United States v. John C. Grimberg Co., 702 F.2d 1362, 1369-72 (D.C. Cir. 1983), a case which had affirmed the district court's jurisdiction in post-award disputes under 28 U.S.C. § 1491(a)(3), *as amended by* the Federal Courts Improvement Act, Pub. L. No. 97-164, § 133(a), 96 Stat. 25 (1982).

vealing congressional intent and purposes.[20]

In examining the legislative history of the Act, Judge Weis pointed out that the report of the House Judiciary Committee explained the impact of F.C.I.A. upon the existing jurisdiction of the Board of Contract Appeals.[21] Concurrent jurisdiction to review appeals from disappointed bidders had been vested in the Court of Claims and the Board by the Contracts Disputes Act of 1978.[22] The House Report explained that the word "exclusive" as used in F.C.I.A. modified the earlier law to exclude the administrative board from exercising equitable power.[23] The jurisdiction of district courts was not to be affected by this modification. According to Judge Weis, the House Judiciary Committee contemplated that the F.C.I.A. would preserve a litigant's ability to proceed in district court pursuant to the Administrative Procedure Act in instances of illegal agency action (as was alleged by Coco Brothers).[24]

The court stated that the committee had further grounded its position upon the need for a readily accessible court in equitable relief cases.[25] The committee did not intend to compel lawyers, litigants and witnesses to travel to the Court of Claims in Washington, D.C. to seek equitable relief in pre-award contract actions.[26] The committee, also aware that Claims Court judges could not be expected to travel on short notice, intended to maintain equitable powers in the district courts.[27] Only the boards of contract appeals, the Third Circuit concluded, were to be excluded from exercising equity in pre-award controversies.[28]

The report of the Senate Judiciary Committee, while not as comprehensive or specific, was found by the court to be consistent with the House Report.[29] Under the F.C.I.A., the ability to chal-

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20. 741 F.2d at 679.

21. *Id.* at 678. The court referred to H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981).

22. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C §§ 601-613 (1982)).

23. 741 F.2d at 678. Specifically, the House Report states that "The enlarged authority (of the Claims Court) is exclusive of the Board of Contract Appeals and not to the exclusion of the district court." H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981).

24. 741 F.2d at 678. The House Report continues: "It is not the intent of the Committee to change existing caselaw as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action." H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981).

25. 741 F.2d at 678.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* S. REP. No. 275, 97th Cong., 1st Sess. 23, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 33.

lenge illegal agency action in a district court was to be "left intact," with the Board of Contract Appeals being excluded from equitable jurisdiction.[30]

Finally, the court indicated that it was unlikely that Congress would seek to remove jurisdiction from a district court by mere implication.[31] The court explained, citing examples, that specific congressional pronouncements of a limitation on district court jurisdiction were more typical.[32]

With the jurisdiction of the district court in pre-award cases upheld, the court turned to the merits.[33] The district court's denial of injunctive relief was affirmed not because the plaintiff had failed to demonstrate an irreparable injury, but because the agency actions had not been shown to be irrational or illegal.[34]

The court of appeals then focused closely upon the facts surrounding the rejection of the Coco Brothers proposal.[35] The "insufficient storage space" explanation of HUD in issuing its rejection related to the accessibility of storage space to elderly and disabled persons.[36] In the court's view, this ground for rejection was rationally based.[37]

Further, the court determined that in reviewing an agency action the rationality of the action should always be considered first.[38]

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30. 741 F.2d at 678. The Senate Report states that the doctrine espoused in Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) is to remain intact. *Scanwell* is a leading case under which disappointed bidders may proceed in district court against administrative agencies. The Senate Report continues: "Since the [Claims Court] is granted jurisdiction in this area, boards of contract appeals would not possess comparable authority. . . ." S. REP. No. 275, 97th Cong., 1st Sess. 23, *reprinted in*, 1982 U.S. CODE CONG. & AD. NEWS 11, 33.

31. 741 F.2d at 679.

32. *Id.* The court further explained:

Moreover, we would not expect Congress to remove jurisdiction from the district courts by implication rather than by specific pronouncement. Thus, when the Contract Disputes Act was enacted, Congress specifically eliminated the district courts' authority to consider appeals from contracting officers' decisions and unequivocally left that jurisdiction in the agency boards and the Court of Claims. *See* 28 U.S.C. § 1346(a)(2) (1982) ("the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States . . . in cases . . . which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978."). 741 F.2d at 679.

33. *Id.*

34. *See supra* notes 11 & 12 and accompanying text.

35. 741 F.2d at 680.

36. *Id.* In some parts of the proposal, the storage space indicated was too high for persons confined to wheel chairs. In other parts, closet space deeper than four feet was considered to be inaccessible by HUD. *Id.*

37. *Id.* HUD definitions and standards for classifying the Coco Brothers proposal as technically unresponsive were neither illegal or irrational. *Id.*

38. *Id.*

Due to the "special nature" of the suits brought by disappointed government contract bidders and the fact that review of agency action is limited, the court reasoned that the matter of rationality should always be reached.[39] The court noted further that this review should never be avoided, even when some other basis for denial of equitable relief is apparent.[40]

Though the court of appeals affirmed the district court's jurisdiction and denial of equitable relief,[41] its analysis differed from that employed by the lower court. Critical of the "constructive award" approach to the jurisdiction issue, Judge Weis pursued a course of broad statutory interpretation to uphold district court jurisdiction in pre-award cases.[42] Judge Weis cited *Opal Manufacturing Co. v. UMC Industries, Inc.*[43] and *B.K. Instruments v. United States*[44] as supporting judicial interpretation based solely upon the literal language of the statute.[45] The court then embarked upon a review of the legislative history surrounding the enactment of the F.C.I.A.,[46] but neglected to first consider the important issue of whether, in the case under consideration, a review of the statute's legislative history was an appropriate means of interpretation.

The use of legislative history to interpret statutes affecting broad public interests is well supported by caselaw.[47] Some decisions which allowed the use of legislative history in this manner include, among others, *Committee for Humane Legislation v. Richardson*,[48] and *Viacom International v. Federal Communications Commission.*[49] Also of note, *United States v. John C.*

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 677.

43. 553 F. Supp. 131 (D.D.C. 1982).

44. 715 F.2d at 721 n.4.

45. 741 F.2d at 677. The court indicated that it believed strict construction to be "plausible" but "erroneous." *Id.*

46. *Id.* at 678.

47. *See, e.g.*, Federal Trade Comm'n v. Manager, Retail Credit Co., 515 F.2d 988 (D.C. Cir. 1975), wherein the legislative history was extensively reviewed to interpret the Fair Credit Reporting Act. The consumer's interest in fair credit reporting was at stake. Other statutory construction methods were employed when review of legislative history proved inconclusive. *See also* National Small Shipments Traffic Conf., Inc. v. Civil Aeronautics Bd., 618 F.2d 819 (D.C. Cir. 1980), wherein the legislative history was reviewed to interpret statutes protecting the public interest in fair competition within the air freight industry.

48. 414 F. Supp. 297 (D.D.C. 1976) (legislative history used to interpret a statute affecting the general public interest in the preservation of the marine ecosystem).

49. 672 F.2d 1034 (2d Cir. 1982) (legislative history used to interpret applicable stat-

Grimberg Co.,[50] a case closely related to *Coco Brothers*, permitted the use of legislative history to interpret the F.C.I.A. in a post-award government contract dispute.[51]

The conclusion that legislative history may be reviewed to properly interpret and apply statutes that affect the general public interest raises a question as to whether the F.C.I.A., as it applies to disappointed bidder conflicts, is intended to affect the general public interest or to protect individual private rights. Courts have generally agreed that when individual private rights are at stake, statutory language must be applied literally.[52]

In order to understand the purpose and operation of the F.C.I.A. as it relates to disappointed bidder complaints, some reference to the history of disappointed bidder actions is helpful. The leading case providing standing to disappointed government contract bidders is *Scanwell Laboratories Inc. v. Shaffer*.[53] The court in *Scanwell* emphasized that bidder standing is not granted based upon the rights of the individual bidder.[54] Instead, government contract bidders are granted standing as representatives of the public interest, namely as "private attorney generals."[55] Permitting bidder standing is thought to be an effective means to protect the public interest in the efficient operation of the government procurement process.[56] If the purpose for allowing disappointed bidder litigation to proceed is to protect the general public interest, then legislative history is properly employed to interpret any related statutory provisions.

Once the *Coco Brothers* court permitted review of the legislative history of the Act, the conclusion that the district courts possessed

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utes and to support the broad public interest in promoting diversity of television programming).

50. 702 F.2d 1362 (D.C. Cir. 1983). In *Grimberg*, the court reviewed the legislative history of the F.C.I.A. to affirm the district court's jurisdiction over a post-award disappointed bidder complaint.

51. *Id.*

52. Important cases in this area include Yates v. United States, 354 U.S. 298 (1957) (strict construction of criminal statute); Crooks v. Harrelson, 282 U.S. 55 (1930) (literal construction narrowed the application of a tax statute to protect the property interests of individual taxpayers); Adams Export Co. v. Kentucky, 238 U.S. 190 (1914) (right to eat and drink anything was protected by strict statutory interpretation); United States v. Wiltberger, 18 U.S. (5 Wheat) 37 (1820) (strict construction of criminal statute is required to protect individual rights).

53. 424 F.2d 859 (D.C. Cir. 1970).

54. *Id.* at 863.

55. *Id.* at 864.

56. Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979).

jurisdiction in pre-award contract disputes was inescapable.[57] The reports of the House and Senate Judiciary Committees, when considered in combination with the Contracts Disputes Act, clearly provided overwhelming support for the conclusion that the district courts retained such jurisdiction.[58] In addition, the House Report shed light on certain practical considerations which justify retention of full equitable jurisdiction by the district courts.[59]

With the jurisdiction of the district court firmly established, the question of granting equitable relief in government contract cases remains to be examined. In order to determine whether equitable relief should be granted in government contract cases, the *Coco Brothers* court relied on a test developed in prior judicial decisions. Starting with its generic form which is applicable to all requests for preliminary injunctions, as outlined in *In re Arthur Treacher's Franchisee Litigation,*[60] modifications to the test were developed and implemented in *Princeton Combustion Research Laboratories v. McCarthy*[61] and *Sea-Land Service v. Brown.*[62] These modifications greatly limit the scope of review and the availability of injunctive relief in government contract cases. Thus, high hurdles have been placed upon the disappointed bidder's path to an injunctive remedy.

In its present form, the test to be applied when disappointed contract bidders seek preliminary injunctions involves sequential

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57. Indeed, as Judge Markey, in *Grimberg,* 702 F.2d at 1374 stated:

> Though this is a post-award suit, the parties have engaged in extensive argument over whether the "exclusive" grant of equitable powers to the Claims Court in § 1491(a)(3) in pre-award suits was meant to exclude the district courts from pre-award suits. Because nothing in the statute or its legislative history in any manner denies jurisdiction in the district court over post-award suits, and because this is a post-award suit, we need not and do not here decide whether the district courts are denied jurisdiction . . . over pre-award suits.
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> To the extent that the legislative history could be said to shed light on the jurisdiction of the district court over this post-award suit, it does so by indicating that even the "exclusive" grant in pre-award suits was apparently not meant to take from the district courts whatever jurisdiction they had in those suits. Surely an apparent intent to leave intact a concurrent district court jurisdiction in pre-award actions, the only actions being dealt with in the statute, cannot be viewed as indicating an intent to remove the existing and unmentioned jurisdiction of the district courts over post-award suits.

Id.

58. *See supra* notes 21-24, 29-30 and accompanying text.
59. *See supra* notes 25-28 and accompanying text.
60. 689 F.2d 1137, 1143 (3d Cir. 1982). *See also supra* note 11 and accompanying text.
61. 674 F.2d 1016 (3d Cir. 1982).
62. 600 F.2d 429 (3d Cir. 1979).

consideration[63] of: (1) whether the awarding agency's decision was irrational or clearly illegal;[64] (2) whether the disappointed bidder will be irreparably injured *pendente lite* if relief is not granted;[65] and (3) whether harm will result to other interested persons from the grant or denial of an injunction.[66]

The court in *In re Arthur Treacher's Franchisee Litigation* enunciated the generally accepted test for any grant or denial of preliminary injunctions in the usual case.[67] The first requirement is that the moving party demonstrate a reasonable probability of success on the merits.[68] This first factor is significantly modified in the test applicable to government contract disputes, while the second and third factors remain essentially unchanged.[69] A fourth factor identified in *In re Arthur Treacher's Franchisee Litigation,* the public interest,[70] is effectively incorporated into the three-part balancing test set forth in *Sea-Land Service.*[71]

In *Princeton Combustion,* the court explained the modification of the first factor in the traditional test,[72] and underscored the extremely limited scope of review of agency procurement decisions.[73]

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63. In *Coco Brothers,* the court of appeals ended its analysis after considering only the first factor, and determining that the decision by HUD and the Authority was rational. *See* 741 F.2d at 680.

64. This factor was used in Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979). It was more clearly explained in Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d 1016 (3d Cir. 1982). This factor's weight is further qualified by balancing: (i) the practical considerations of efficient procurement of supplies for continuing government operation; (ii) the public interest in avoiding excessive costs; and (iii) a bidder's entitlement to fair treatment through agency adherence to statutes and regulations. These three considerations were first laid down in Sea-Land Serv. Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979).

65. In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982). *See also supra* note 11.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. 600 F.2d at 434. *See supra* note 64 and accompanying text.

72. 674 F.2d at 1019.

73. *Id.* at 1021. The court explained the scope of review as follows:

> In two recent cases this court has set out the standards governing the grant or denial of a disappointed bidder's motion for preliminary injunction against the award of a government contract. *Allis-Chalmers Corp. v. Friedkin,* 635 F.2d 248 (3d Cir. 1980); *Sea-Land Service, Inc. v. Brown, supra. See also, M. Steinthal & Co. v. Seamans,* 455 F.2d 1289 (D.C. Cir. 1971). In both cases, we have made it clear that the district court's review of an agency's procurement decision is extremely limited in scope. The district court is not to substitute its judgment for the agency's, *but may only act when an agency's decision is found to be irrational.*

674 F.2d at 1021 (emphasis supplied).

The court first reiterated the factors involved in the traditional analysis for granting equitable relief, then proceeded to explain the modification of the first factor in aggrieved bidder cases.[74] The Third Circuit observed that mere probability of success on the merits is not enough. In order to obtain equitable relief, a bidder must first show the agency decision to be irrational or clearly illegal: a more stringent standard that reflects the court's concern with "the strong public interest in efficient procurement and cost minimization."[75] Once a court determines that an agency action is rational or legal, the inquiry ends and equitable relief is denied.[76]

Still further analysis is required when an agency decision *is* shown to be irrational or illegal.[77] Courts are not compelled to deliver equitable relief but should first balance the interests defined in *Sea-Land Service*.[78] The interests to be weighed are the practical considerations of efficient procurement of supplies for continuing government operation, the public interest in avoiding excessive cost, and the bidder's entitlement to fair treatment through agency adherence to statutes and regulations.[79] Balancing of these factors

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74. 674 F.2d at 1018-19. Referring to the opinion of the lower court, Circuit Judge Garth noted:

> In an opinion delivered from the bench, the district court correctly stated the principles governing the grant of preliminary injunctive relief. The district court held that in general, the plaintiff must show that he has a reasonable probability of success on the merits, that he will suffer irreparable harm in the absence of preliminary injunctive relief, and that the interests of other affected persons and the general public weigh in favor of the grant of injunctive relief, or at least do not militate against it. In the area of government procurement contracts, however, the district court correctly noted that a more stringent standard governs a determination of the first factor, the likelihood of plaintiff's prevailing on the merits. Though the bidder has a legitimate interest in fair treatment in accordance with applicable statutes and regulations, the strong public interest in efficient procurement and cost minimization mandates that a procurement contract not be set aside at the behest of a "disappointed bidder" unless the awarding agency's decision was irrational or clearly illegal.

Id.

75. *Id.* at 1019.

76. *Id.* at 1022. The court concluded:

> We hold that as a matter of law, once the district court, having considered allegations that the agency's decision lacked sufficient factual basis, was tainted by procedural irregularities, and so on, nevertheless determines that an agency's procurement decision is rational, its inquiry is at an end; the district court must deny the motion for a preliminary injunction. . . .

Id.

77. *Id. See also Coco Bros.*, 741 F.2d at 680. Even if the agency's decision lacks a reasonable basis, it does not automatically follow that the plaintiff is entitled to injunctive relief, see, e.g., Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d 1016, 1021-22 (3d Cir. 1982); Allis-Chalmers Corp. v. Friedkin, 635 F.2d 248 (3d Cir. 1980).

78. 600 F.2d 429 (3d Cir. 1979).

79. *Id.* at 434.

may indicate that equitable relief should be denied in spite of a finding that an illegal or irrational agency decision was made.[80]

In *Coco Brothers,* the court of appeals denied injunctive relief based upon a determination that the actions of HUD and the Allegheny County Health Authority were rational.[81] The court positioned the three factors of the test in order of priority to emphasize the importance of the irrational or illegal factor.[82]

The *Coco Brothers* court explained that due to the limited review available to disappointed bidder suits, rationality or legality should always be considered.[83] This most important factor should never be avoided by determining the injunctive relief issue based upon secondary factors such as the existence of "irreparable injury" as had been done by the court below.[84]

The *Coco Brothers* opinion provides no further explanation for according the test factors priority and limiting judicial review beyond mention of the "special nature" of suits by aggrieved bidders on government contracts.[85] Therefore, further discussion of *Scanwell Laboratories, Inc. v. Shaffer*[86] is necessary to describe this "special nature."

Scanwell is a leading case in providing standing to disappointed government contract bidders.[87] This standing is unique in that it is not based upon the legal right doctrine.[88] Instead, government con-

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80. 674 F.2d at 1022. The *Princeton Combustion* Court focused upon the nature of a court's discretion and the relationship between the illegality and irrationality aspects of the standard of review:

> A district court's discretion as to whether or not to grant a preliminary injunction cannot be predicated upon just any violation of applicable statutes or regulation; only if the violation, if committed, renders the agency decision *irrational* may the district court go on to consider whether a balancing of the three *Sea-Land* factors justifies the grant of a preliminary injunction with all the attendant disruption of orderly procurement processes.

Id.

81. 741 F.2d at 680.

82. *Id.* The opinion states:

> Lack of irreparable harm is one factor militating against the grant of preliminary injunction and properly supports the district court order here. But the special nature of suits by aggrieved bidders on government contracts, as well as the limited review available in the district court, counsels that the rationality factor be considered first and appropriate findings made on that issue.

Id.

83. *Id.*

84. *Id.*

85. *Id.*

86. 424 F.2d 859 (D.C. Cir. 1970).

87. *Id.* at 872, 876.

88. *Id.* at 863. The court refers back to a line of cases that explains the legal rights

tract bidders are granted standing as representatives of the public interest, specifically, in the capacity of "private attorney generals."[89] "Private attorney general" standing thus provides a workable substitute for an ombudsman system which is used successfully in some jurisdictions.[90] Permitting standing is an effective means to protect the public because the complainants are "natural law enforcers" having sufficient incentive to challenge the government action.[91]

The special standing extended to aggrieved government contract bidders would seem to explain the interest of courts in reviewing

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doctrine. The discussion culminates:

> A clear statement of the bases of this principle is found in the Court's subsequent opinion in Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-138 . . . (1939):
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> > The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for the statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. *The principle is without application 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 v. TVA] held that a private electric producer did not have standing to challenge governmental subsidy of competition. This line of cases securely entrenched the legal right doctrine in the federal law of standing. Inconsistencies resulting from this doctrine are readily apparent.

424 F.2d at 863 (quoting Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939)).

89. 424 F.2d at 864. The court declared:

> [T]here is no right in *Scanwell* to have the contract awarded to it in the event the district court finds illegality in the award of the contract to Cutler-Hammer. Thus the essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

Id.

90. *Id.* at 867.

91. *Id.* at 866. The notion of enlisting "natural law enforcers" to protect the public interest is described by Professor Davis with respect to the case of Perkins v. Lukens Steel Co., 310 U.S. 113 (1940):

> What the court did not inquire into in the *Lukens* opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what "the Government" may do in making contracts; a more refined view would be that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government's proprietary functions, and that the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants like those in the *Lukens* case obtain judicial review of the officers' action.

3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 217 (1958).

agency behavior before making any assessment of the harm inflicted upon the complaining bidder. In the area of government contracts, the public interest lies in efficient operation of the procurement process.[92] Irrational or illegal agency action clearly impairs efficient procurement. As was elucidated by the court in *Scanwell,* detecting irrational or illegal agency action through judicial review, and thus protecting the public interest, is the primary justification for the grant of disappointed bidder standing.[93]

Of secondary importance in these cases is the harm to the individual bidder. Only after considering rationality or illegality and the *Sea-Land Service* factors should a court evaluate the irreparable nature of injuries and the possible impact upon other individuals of granting a particular equitable remedy.[94] Therefore, the aggrieved bidder's interests are secondary to the public interest from the initial grant of standing and throughout the subsequent judicial analysis.

Although Judge Weis followed the reasoning employed in prior caselaw, he virtually omitted explanation of it from his written opinion. Reference to the caselaw of literal statutory interpretation and broad interpretation provides an understanding of when each is appropriate. Proper review of *Scanwell* is needed to comprehend the "special nature" of suits by aggrieved bidders which permits broad statutory interpretation and also limits the scope of review. A thorough examination of the law controlling disappointed bidder actions explains the Third Circuit's reasoning and confirms its resolution of the issues in *Coco Brothers v. Pierce.*

Joseph A. Hrabik

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92. *Sea-Land Serv. Inc.*, 600 F.2d at 434.

93. *Scanwell Labs., Inc.*, 424 F.2d at 865-73.

94. A typical example of an individual who, though not a party, could be significantly affected by the outcome of a disappointed bidder action is the apparent successful bidder. As stated by the district court: "We also note, with respect to an additional factor which may be relevant to our determination, that the issuance of an injunction would undoubtedly harm another interested party, namely, Crossgates." Coco Bros., Inc. v. Pierce, slip op. (W.D. Pa. Oct. 20, 1983).