

INJUNCTIVE RELIEF FOR DISAPPOINTED BIDDERS ON GOVERNMENT CONTRACTS

William F. Wilke, Inc. v. Department of the Army of the United States,
485 F.2d 180 (4th Cir. 1973)

Plaintiff, second lowest bidder for a government contract for barracks rehabilitation, was denied award of the contract based on a lower bid which had been submitted four minutes after the advertised bid closing time.¹ The district court granted plaintiff's motion for a declaratory judgment,² holding the award "untimely, nonresponsive, contrary to the terms of the invitation, void and of no effect."³ The

1. *William F. Wilke, Inc. v. Department of the Army of the United States*, 357 F. Supp. 988, 990-91 (D. Md.), *aff'd*, 485 F.2d 180 (4th Cir. 1973).

2. Wilke sought declaratory relief under 28 U.S.C. § 2201 *et seq.* (1970) on the ground that the bid was wrongfully considered. The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1970), provides a method for challenging the award, but does not provide for monetary relief. A declaratory judgment, however, entitles a claimant to sue for recovery of bid-preparation costs in the Court of Claims. See *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); *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956).

In actions for damages allegedly incurred because of arbitrary, capricious, or unlawful acts or omissions by an administrative agency's procurement officers, the Court of Claims has evolved a rule that applies to all procurement situations. Requests for bids on government contracts are made with the understanding that each bid will be fairly and honestly considered. See cases cited *supra*. When a *prima facie* case of arbitrariness or capriciousness has been established, a claimant will be allowed to present his claims for payment. The test for arbitrariness requires the bidder to show that there was no reasonable basis for the agency action. See *Continental Business Enterprises, Inc. v. United States*, *supra* at 1021. Violation of a regulation, however, does not automatically establish a bidder's right to damages: "We do not now decide that a violation of any of the regulations . . . is sufficient to permit an aggrieved bidder to recover his bid preparation costs." *Id.* at 1020. This obviously can make recovery more difficult, but, in a case decided by the Court of Claims shortly before *Wilke*, the court granted recovery of bid preparation costs despite a determination by the General Accounting Office that the contracting officer acted reasonably. *McCarty Corp. v. United States*, Civil No. 282-72 (Ct. Cl., Sept. 21, 1973). For a discussion of the role of the GAO in bid protests, see Comment, *The Role of the GAO and Courts in Government Contract "Bid Protests": An Analysis of Post-Scanwell Remedies*, 1972 DUKE L.J. 745. A valuable discussion of the role of the Court of Claims can be found in Note, *Government Contract Bid Protests: Judicial Review and the Court of Claims*, 39 U. CHI. L. REV. 814 (1972).

3. 357 F. Supp. at 995-96. The district court found that defendant had violated the following statutes and regulations: (1) 10 U.S.C. § 2305(c) (1970), which requires

court, however, denied the injunctive relief that would have halted the procurement and compelled award of the contract to plaintiff.⁴ Plaintiff appealed the denial of injunctive relief while defendant argued that a disappointed bidder has no standing to challenge an agency's bid award practices.⁵ The Fourth Circuit Court of Appeals affirmed and *held*: A disappointed bidder on a government contract has standing to contest the award to another whose lower bid was late and wrongfully considered, but plaintiff's relief is limited to recovery of bid preparation costs.⁶

Since *Scanwell Laboratories, Inc. v. Shaffer*⁷ bidders denied a government contract because of alleged illegal activity on the part of the procuring agency have been granted standing⁸ to sue for a determi-

Armed Forces procurement bids to be opened at the time and place stated in the advertisement; and (2) Armed Forces Procurement Regulations, 32 C.F.R. §§ 2.301-305 (1974), which require: (a) that bids comply in all material respects to the invitation, including timeliness of submission, *id.* § 2.301(a); (b) that they be submitted not later than the exact time set for opening, *id.* § 2.302; (c) that bids received after the exact time set for opening be considered "late bids," *id.* § 2.303-1; and (d) that late, hand-carried bids not be considered, *id.* § 2.303-5. Defendant had contended that the lowest bid was not late based on 32 C.F.R. § 2.402-1 (1974) which provides:

The official designated as the bid opening officer shall decide when the time set for bid-opening has arrived, and shall so declare to those present. He shall then personally and publicly open all bids received prior to that time, and when practicable read them aloud to the persons present, and have the bids recorded.

The court rejected this argument because it would grant the bid-opening officer excessive discretion and lead to confusion in the bidding process. 357 F. Supp. at 993-94.

Defendant also claimed that the custom of reading the pre-bid opening announcement had been relied upon by bidders in previous years to enable them to submit bids in the bid-opening room and to have them accepted there by the bid-opening officer. However, neither party mentioned any instance where this practice had been followed. The court therefore rejected the argument that the action of the bid-opening officer was consistent with the long-standing procedures of the Baltimore District, *id.*, and declared the bid void. *Id.* at 995-96.

4. 357 F. Supp. at 995.

5. Defendant's challenge to Wilke's right to judicial review came after the appeal was brought. Defendant, relying on *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), contended that Wilke had no legal interest in the agency's bid-award practices. Based on defendant's failure to raise this issue in the district court, Wilke argued that the defense had been waived. The court of appeals did not reach the waiver issue since it found that Wilke was entitled to declaratory relief. 485 F.2d at 182 n.4.

6. *William F. Wilke, Inc. v. Department of the Army of the United States*, 485 F.2d 180 (4th Cir. 1973).

7. 424 F.2d 859 (D.C. Cir. 1970).

8. The doctrine that a bidder on a government contract has no standing to sue a government agency for alleged violations of legislation regulating that agency's procure-

ment activities is most often attributed to *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). There the Court dealt with a section of the Walsh-Healey Act, 41 U.S.C. § 35(b) (1970), which provides:

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

Plaintiffs, prospective bidders, sought to challenge the wage determination of the Secretary of Labor. The Court of Appeals for the District of Columbia, however, granted an injunction preventing Cabinet officials from proceeding under this statutory program, and by the time the case reached the Supreme Court this injunction had been in effect for over a year. In its decision the Court pointed out that statutes which govern the award of government contracts are for the protection of the Government:

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

310 U.S. at 130. The *Perkins* decision was perhaps an unfortunate precedent for bidders challenging allegedly illegal contract awards. In *Perkins* the bidders were prospective and therefore might never have been injured by the agency action. Also, the injunction had already been in effect for a year and was hampering the Government's procurement of steel during a time of pre-war mobilization. The decision, nevertheless, became authority for courts to deny standing to persons challenging awards of government contracts. *E.g.*, *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *United States v. Gray Line Water Tours*, 311 F.2d 779 (4th Cir. 1962); *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955); *Fulton Iron Co. v. Larson*, 171 F.2d 994 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 903 (1949); *cf. Walter P. Villere Co. v. Blinn*, 156 F.2d 914 (5th Cir. 1946).

The Supreme Court has stated that standing concerns the litigant's personal interest in the outcome of the controversy; it guarantees genuine adversity in the presentation of issues. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The original requirement for standing was a showing that a "legal right" of the plaintiff had been violated. *See L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295 (1940); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (footnote omitted) sheds some light on this legal rights doctrine:

A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be based on an interest created by the Constitution or a statute. . . . But if no comparable common law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.

This original test for standing, however, could be modified by Congress by means of an explicit statutory review provision. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) (Court interpreted § 402(b)(2) of Communications Act of 1934 as granting judicial review to persons aggrieved or adversely affected by FCC actions); *FCC v.*

nation of the validity of the agency's action.⁹ Even after *Scanwell*,

Sanders Bros. Radio Station, 309 U.S. 470 (1940); *National Coal Ass'n v. FPC*, 191 F.2d 462 (1951); *Associated Indus., Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). In *National Coal* the court explained this "person aggrieved" criterion as applied to challenges to administrative actions:

The "person aggrieved" review provision [is] a constitutionally valid statute authorizing a class of "persons aggrieved" to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, *although no personal substantive interest of such persons had been or would be invaded.*

191 F.2d at 465 (emphasis added).

The Supreme Court in recent years has liberalized the law of standing by establishing a standard which requires (1) that plaintiff suffer an injury in fact and (2) that the interest to be vindicated be arguably within the zone of interests protected by the statute which the agency has allegedly violated. In *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the majority opinion pointed out the distinction between the old "legal interest" test of standing and the "injury in fact" test. According to the Court, the "legal interest" test is not a test of standing at all; rather, it looks to the merits of plaintiff's case:

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.

Id. at 153. But the Supreme Court has never explicitly overruled its decision in *Perkins*, and a number of federal courts continue to regard it as binding. See note 9 *infra*.

It should be noted that a person has standing only if he can show that he himself has suffered or will suffer injury, economic or otherwise. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (no personal injury alleged). On the other hand the requirement of a "stake" in the controversy may have been virtually eliminated by *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973), where the "personal impact" of the administrative action was hardly different from that in *Sierra Club*, but the Court granted standing. It is difficult to imagine a situation where one cannot plead around the effect of *Sierra Club*.

9. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), was a suit for a declaratory judgment to nullify an FAA contract award for instrument landing systems. The Government again relied on *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). The court felt this reliance was ill founded, and based its decision on two major points: the passage of legislation altering the effect of *Perkins* and a private attorney general theory. First, the court found that the Fulbright Amendment, 41 U.S.C. § 43a (1970), to the Walsh-Healey Act shows

that the basic approach of the Supreme Court in the *Perkins* case has been legislatively reversed by the Congress and [demonstrates] the Congressional intent that certain matters arising under the Public Contracts Act will be given specific judicial review by Congressional fiat.

424 F.2d at 867.

Some commentators have responded critically to *Scanwell's* reliance on the Fulbright Amendment:

First, the court undoubtedly has over-emphasized the significance of the Fulbright Amendment. That amendment only indicates that Congress intended to reverse the narrow holding of *Perkins* that wage determinations by the Secretary of Labor cannot be contested in court. If Congress had intended to re-

however, bidders have not been successful in obtaining injunctive relief.¹⁰ Courts have refused to grant injunctive relief on the ground

verse the basic approach of *Perkins* and grant standing to unsuccessful bidders, it would have amended Revised Statute 3709 or the more recent procurement statutes enacted in 1947 and 1949 Significantly, it is these later statutes and their implementing regulations which bidders most commonly claim have been violated in the award of government contracts

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, 13-14 (1970) (footnote omitted).

In addition, the *Scanwell* court noted that the Administrative Procedure Act, 5 U.S.C. § 702 (1970), modified the law of standing:

Thus, 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. The undermining of this court's narrow construction of that statute in the *McKay* case through the *Hardin* case and the "hospitable" view which the Court has recently taken of construction of its provisions in *Abbott Laboratories* leads us to believe that a decision for standing is both sound law and in accord with the recent trend of decisions in the Supreme Court.

424 F.2d at 872.

In *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955), *cited in Scanwell*, the Administrative Procedure Act was considered to be merely descriptive of the law of standing at the time of its promulgation and was not regarded as conferring any new access to judicial review. *See generally* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). For a contrary view, see K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 22.08, at 436-37 (3d ed. 1972).

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), on which the *Scanwell* court also relied, Mr. Justice Harlan said for the Court:

[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

Id. at 140.

The *Scanwell* court also applied a "private attorney general" theory. 424 F.2d at 871-73. The court referred to the following language of Judge Frank in *Associated Indus., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943):

[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Despite the liberalization of standing established in *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and the decision in *Scanwell*, not all of the federal courts have chosen to follow the principle that a disappointed bidder for a government contract has standing to contest an allegedly illegal award to another. *See* *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *Gary Aircraft Corp. v. United States*, 342 F. Supp. 473 (W.D. Tex. 1972).

10. Injunctions have been vacated in *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971);

that an adequate remedy in the form of money damages for bid preparation costs is available to the disappointed bidder in the Court of Claims.¹¹ Furthermore, equitable relief has always been discretionary, and when "balancing the equities," courts have generally found that the interests of the Government in being free from judicial interference in its procurement operations outweigh the bidders' interests in obtaining injunctive relief.¹²

*M. Steinthal & Co. v. Seamans*¹³ articulated the criteria courts should

A.G. Schoonmaker Co. v. Resor, 445 F.2d 726 (D.C. Cir. 1971); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970). Injunctions have been denied in 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).

In *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), an injunction was granted to prevent the Secretary of the Interior from canceling a pre-existing contract for the purchase of helium because an environmental impact statement had not been filed. The court attached great weight to the fact that helium, a valuable natural resource, would be wasted if the contract were canceled. Because this factor is not present in most suits by contractors to compel awards, *National Helium* is of little precedential value in such cases.

In one pre-*Scanwell* government contract case in which injunctive relief was granted, the court of appeals affirmed an order of the district court compelling the Secretary of the Interior to issue a lease to a bidder who the court held was entitled to the contract. *Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969). The contract involved millions of dollars, called for long-term performance, and had not been awarded at the time of the injunction. The case is therefore distinguishable from most government contract cases where the performance is routine and short-term, and the award to another may have already taken place. Also, it should be noted that the court found that the Secretary of the Interior did not have the discretion to waive a decision by the contracting officer. *Id.* at 1119. The case thus upheld a decision by the contracting officer and did not interfere with his authority in the procurement process.

11. For a discussion of relief available in the Court of Claims, see note 2 *supra*. In *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1302 (D.C. Cir. 1971) (footnote omitted), the court said:

The availability of a damages remedy in the Court of Claims, which in many cases will compensate the frustrated bidder's realized financial losses (*i.e.*, the bid preparation costs) resulting from the illegal agency action, provides a sound equitable basis for the exercise of this discretion in considering whether to entertain a suit for injunctive relief.

12. *See, e.g.*, *Serv-Air, Inc. v. Seamans*, 473 F.2d 158 (D.C. Cir. 1972); *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970). It is settled that equitable discretion may be exercised to deny relief even when a person cannot be made whole by damages if public interest considerations so require. *See, e.g.*, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Virginia Ry. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Davis v. Ichor*, 442 F.2d 1207, 1218 (D.C. Cir. 1970) (concurring opinion).

13. 455 F.2d 1289 (D.C. Cir. 1971).

consider when entertaining bidders' suits for injunctive relief. With a view toward limiting the instances of judicial interference in the procurement process, the *Steinthal* court stated that petitioners must first show that there was no rational basis for the procuring agency's actions.¹⁴ It also recognized that even when there was a showing of no rational basis, an "overriding public interest" may justify the denial of the injunction.¹⁵ In urging restraint, the court intended to allay any fears that *Scanwell* might result in the judiciary's evaluating bids, applying technical regulations to complicated procurements, and interrupting vital government functions.¹⁶ On the other hand, the *Steinthal* court also noted that recovery of bid preparation costs should not always be considered an adequate remedy at law so as to automatically warrant dismissal of every suit for injunctive relief.¹⁷

In holding that Wilke was not entitled to injunctive relief the majority of the Fourth Circuit relied on *Steinthal*.¹⁸ The court assumed that recovery of bid preparation costs would adequately compensate Wilke for its loss of the contract,¹⁹ and characterized the Army's failure to follow its regulations as a "technical violation" of the

14. The court stated:

[C]ourts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision

Id. at 1301. In establishing this rational basis test, the court cited *Udall v. Tallman*, 380 U.S. 1 (1965); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934).

15. The court stated:

[E]ven in instances where such a determination [no rational basis for the award] 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.

455 F.2d at 1301. See note 12 *supra* and accompanying text.

16. 455 F.2d at 1301.

17. The court explicitly stated:

To avoid any confusion, it is not being stated here that the damages available to the disappointed bidder, which do not comprehend anticipated profit, are automatically an "adequate" legal remedy as to warrant dismissal for want of equity of every injunction action regardless of the strength of plaintiff's claim on the merits.

Id. at 1302.

18. *William F. Wilke, Inc. v. Department of the Army of the United States*, 485 F.2d 180, 182 (4th Cir. 1973).

19. The only discussion in *Wilke* of the availability of relief in the Court of Claims was the brief statement by the court that "Wilke is not denied a remedy altogether. It may still seek recovery of bid preparation costs in the Court of Claims." *Id.*

terms of the invitation for bids.²⁰ The court also stated that the low bidder gained no actual competitive advantage by its late submission.²¹ While accepting the district court's denial of injunctive relief, the majority did not discuss whether refusal to grant the injunction after the bid had been declared void would amount to sanctioning the unlawful award of a contract.²²

The dissenting judge believed that the majority had misapplied *Steinthal*.²³ Judge Knapp argued that *Steinthal* involved an ambiguity in the invitation for bids and that procurement regulations allow the contracting officer to refuse all bids when he determines that such ambiguities exist.²⁴ In *Wilke*, on the other hand, there was no ambiguity in the invitation and the procurement regulations prohibited the contracting officer from varying the time for receipt.²⁵ It was Judge Knapp's belief that *Steinthal* only cautioned against unnecessary judicial intervention; it did not preclude intervention entirely.²⁶ Furthermore, he distinguished *Steinthal* on the ground that injunctive relief for

20. *Id.* As far as the procurement process is concerned, regulations promulgated to implement a statute have the same force of law as statutes. *Paul v. United States*, 371 U.S. 245 (1963); *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

21. 485 F.2d at 182.

22. See note 3 *supra*. In *William F. Wilke, Inc. v. Department of the Army of the United States*, 357 F. Supp. 988, 996 (D. Md. 1973), the district court said:

In support of these requests, the Plaintiff states that it construes the Court's decision not to enjoin the Defendants . . . from proceeding or performing the contract work "to mean that the court sanctions the unlawful, illegal award of a government contract . . ." This is a total misconception by the Plaintiff of what the Court sought to do. The Court *granted* to the Plaintiff declaratory relief, which at least heretofore the Court understood to be one of the objects Plaintiff sought to accomplish by this suit. The Court emphasizes that its decision to deny Plaintiff's petition for injunctive relief, should not be taken to mean that the Court necessarily endorses the awarding of a contract on a bid which it has since declared void. Rather, the Court . . . did not feel on the showing made by the Plaintiff that it should thwart the procurement process already in train by the extraordinary remedy of injunction.

23. *William F. Wilke, Inc. v. Department of the Army of the United States*, 490 F.2d 917 (4th Cir. 1973) (dissenting opinion).

24. Judge Knapp stated:

The case of *Steinthal & Co. v. Seamans* . . . is clearly inapplicable to the facts and the issues raised in the instant case. . . . The court found that the cancellation of bids was reasonable. The regulations permit the contracting officer to cancel bids if he determines that one of certain factors is present including "inadequate or ambiguous specifications cited in the invitation."

Id. at 917-18.

25. See note 3 *supra*.

26. 490 F.2d at 919. See note 17 *supra* and accompanying text.

Wilke would not interrupt a vital government function requiring hasty action.²⁷

While the majority in *Wilke* followed *Steinthal* in recognizing the discretionary nature of injunctive relief in procurement situations, it did not discuss the criteria set forth therein. The majority failed to mention the rational basis test,²⁸ nor did it analyze the public interest considerations expressed in *Steinthal*.²⁹ While relying on *Steinthal*'s admonition against unnecessary judicial intervention in the procurement process, it overlooked equally strong dicta in *Steinthal* suggesting that bid preparation costs might not always be an adequate remedy³⁰ and that when clear violations of "ministerial" duties occur, the courts may properly intervene.³¹ Furthermore, it would appear that the majority in *Wilke* understated the nature of the violation when they referred to it as a "technical violation" of the terms of the bid invitation.³² The violation went not only to the terms of the invitation, but also to the statute and regulations which require that bids received after the

27. The dissent, in discussing *Steinthal*, recognized that the court there was concerned with the period of time that might be taken to settle claims when contracts vital to state functions were held in abeyance. However, the judge did not believe that the time factor was relevant in *Wilke*. 490 F.2d at 918. The majority opinion did not explain why the construction contract in question required hasty action.

It appears that the dissent was more concerned with the conduct of the Government and the lowest bidder, Gregos, after they became aware of possible court action by Wilke.

Although the government was well aware of the pending court action, on the very day that a hearing was set for the issuance of a temporary restraining order the government notified Gregos of its award of the contract. Said notice was sent by telegram. Moreover, after issuance of the temporary restraining order by the district judge on that same day the government sent notice to Gregos by letter. . . . This action by the Government and Gregos, coupled with the government's weak argument that the method of closing the time for receipt of bids was customary for the last twenty years should not be sanctioned or condoned.

Id. at 918-19.

28. See note 2 *supra*; note 14 *supra* and accompanying text.

29. See notes 12 & 15 *supra* and accompanying text.

30. See note 17 *supra* and accompanying text.

31. 455 F.2d at 1303. The court stated:

Only when the court concludes that there has been a clear violation of duty by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits. This principle, as applied in the procurement field, would be an updated analogue of the traditional doctrine that mandamus should be issued to compel performance only when there has been a clear violation of an official duty of what has come to be labeled a "ministerial" duty, a duty not involving any room for discretion.

Id. (footnote omitted).

32. 485 F.2d at 182. See note 20 *supra* and accompanying text.

exact time set for opening *not* be considered.³³ One might also question the court's reliance on the argument that the low bidder gained no advantage by his late submission; he was awarded the contract based on a "void" bid.

It appears that disappointed bidders who lose government contracts because of illegal agency action in making the award to another have little chance to obtain injunctive relief. While judicial interference with government procurement should be discretely applied, the discretion should not become a rubber-stamp to summarily dismiss bidders' suits for injunctions.³⁴ There appear to be no compelling reasons for courts in cases such as *Wilke* to deny injunctive relief when there is no emergency procurement involved, the Government acted illegally in making the award, the regulations do not commit the action to agency discretion, and the interpretation of the applicable regulations does not require any special expertise.³⁵ Granting injunctive relief in such limited circumstances would not obstruct the smooth functioning of government procurement operations, would protect the integrity of the procurement process, would guarantee compliance with legislative mandates, and would provide an adequate remedy for truly aggrieved bidders.

33. See note 3 *supra*.

34. Indeed, frivolous lawsuits can easily be terminated by the summary judgment procedure pursuant to FED. R. CIV. P. 56. It seems that noncolorable suits will not overburden the courts with litigation or disrupt the procurement process, given the tremendous burden of proof on petitioners to obtain relief and their poor prior record of success. See notes 2 & 10 *supra*.

35. In cases denying injunctive relief or reversing the issuance of an injunction, one or more of these criteria were absent. For cases in which there was an emergency or high priority procurement, see *Serv-Air, Inc. v. Seamans*, 473 F.2d 158 (D.C. Cir. 1972); *Pace Co. v. Resor*, 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972). For cases in which the Government did not act illegally because the matter was committed to agency discretion, see *Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166 (D.C. Cir. 1973); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452 (9th Cir. 1971); *National Cash Register Co. v. Richardson*, 324 F. Supp. 920 (D.D.C. 1971); *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970). For cases in which interpretation of the applicable regulations required special expertise, see *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971); *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261 (5th Cir. 1971); *Lombard Corp. v. Resor*, 321 F. Supp. 687 (D.D.C. 1970).