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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

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Liability of Public Agencies Arising Out of Rejection of Bids And Misaward of Contracts

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Richard W. Bower. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report was written to aid administrators, engineers, and attorneys who have the responsibility of dealing with the award and rejection of competitive bid construction contracts. The report continues NCHRP policy of keeping the departments up to date on contract matters. It is a new study that will be published in Volume 3, Selected Studies in Highway Law.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the

the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text, which totals about 3,000 pages, comprises 67 papers, 38 of which are published as supplements in SSHL. Copies of SSHL have been sent, free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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Liability of Public Agencies Arising Out of Rejection of Bids and Misaward of Contracts

By Richard W. Bower

Assistant Chief Counsel
California Department of Transportation
Sacramento, California

I. INTRODUCTION

An increasingly common problem facing persons charged with the responsibility for the advertising, award, and execution of public construction contracts is that of dealing with protests and claims asserted by disappointed bidders seeking to disqualify another bidder from being awarded the contract, seeking to challenge disqualification of itself as the lowest responsible and responsive bidder, or seeking damages for misaward to another bidder. In spite of the nearly universal rule that the laws requiring that public construction contracts be awarded by competitive bidding are for the benefit of the public, not the bidders, a framework for judicial review of contract awards has developed in most state and federal courts.

With limited time within which to evaluate bid proposals and protests, the public agency must frequently make its decision regarding a questioned bid without the luxury of exhaustive fact-finding and deliberation, knowing that, in many cases, whatever decision is made will result in litigation initiated by one or the other of the bidders being considered for award. Although in most cases the initial issue (if not the only issue) is that of which of two bidders shall be awarded the contract, that issue has the potential of substantially increasing the contract price, of causing substantial delay in the commencement and, consequently, the completion of the work, and of requiring that the project be readvertised. Further, in the event award has already been made, there exists the potential of liability for damages to a bidder whose bid was wrongfully rejected. These and other issues will be discussed below.[1]

II. THE FEDERAL PARALLEL

A. Introduction

Challenges to the award or proposed award of federal contracts bear certain similarities to challenges concerning state and local contracts. Although there are certain jurisdictional and procedural ground rules unique to the federal government, basic matters such as standing, the measure of the public agency's discretion, and the relief available—injunctive or monetary—are shared by state and local agencies as issues, even if the rules for the resolution of such issues may not be the same.

One characteristic of the federal system serves as both an advantage and a disadvantage regarding usefulness to the state or local agency. That characteristic is the volume of decisions generated by the various Boards of Contract Appeals, by the General Accounting Office, by the United States Claims Court, and by the District and Circuit Courts. As a result, innumerable decisions touching upon a myriad of obscure issues and factual situations may be found. These decisions afford a wide variety of analysis of such issues which might not exist outside the federal arena. On the other hand, this volume of decisions will frequently produce support for either side of a dispute, and, in some cases, support for a position neither side would care to take. This may result in part from the vast body of regulations governing the federal procurement process,[2] and in part from the interjection of policy considerations into the discretionary decision-making processes of federal administrative agencies.

Although any nonfederal public agency would be well advised to be cautious in following precedents established by federal agencies, at the very least these decisions may provide a useful analysis of a perplexing issue, even if the conclusions expressed might not be considered appropriate for a nonfederal agency.[3]

With these reservations in mind, the following is a discussion of federal rules and procedures relating to bid protests, and the relief which may be available to bidders on federal contracts.

B. Standing—from *Lukens* to *Scanwell*

For three decades the decision of the United States Supreme Court in the case of *Perkins v. Lukens Steel Co.*[4] was a barrier to the enforcement of rights by disappointed bidders against the federal government in federal courts. In *Lukens*, plaintiffs were prospective bidders on government contracts who sought to restrain the federal government from applying certain wage determinations made under the Public Contracts Act.[5] In a decision which had an impact far beyond that issue, the Supreme Court held that plaintiffs had no standing to enforce the responsibilities of the agents of the federal government, in that the legislation in question was enacted for the benefit of the government, and conferred no enforceable rights on prospective bidders. The court noted that judicial interference with the administration of governmental purchasing would constitute "a departure into fields hitherto wisely and happily apportioned by the genius of our policy to the administration of another branch of Government."[6] The Court reasoned that:

> Courts should not, where Congress has not done so, subject purchasing agencies of the Government to delays necessarily incident to judicial scrutiny at the instance of potential sellers, which ... would create a new concept of judicial controversies. It is ... essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered.[7]

Although the Supreme Court has not again considered the question raised in *Lukens*, the barrier of standing began to erode in the Circuit Courts, in large part because of the enactment of the Administrative Procedure Act in 1946.[8] The "seminal case"[9] which found standing on the part of a disappointed bidder to challenge the award of a government contract was *Scanwell Laboratories, Inc. v. Shaffer*.[10] There, the court found authority for standing in the Administrative Procedure Act,[11] and in cases decided after *Lukens* which found standing on the basis of

public interest, even in the absence of a private right.[12] The interest to be resolved after crossing the threshold of standing, in the context of *Scanwell*, was usually limited to the question of the entitlement of a bidder to be awarded the contract. That question could usually be answered by injunctive relief. However, there were other remedies which disappointed bidders were to seek.

C. The Alternative Remedy—*Heyer* and *Keco*

In spite of the apparent barrier of *Lukens* concerning standing of an unsuccessful bidder to challenge an award to another bidder, there developed a line of cases in the U.S. Court of Claims, even preceding *Scanwell*, to the effect that an unsuccessful bidder may be entitled to recover its bid preparation expenses if the government does not honestly consider the bid for award. The first of such cases was *Heyer Products Company v. United States*,[13] which involved a U.S. Army procurement contract. Plaintiff alleged that, although it was the lowest responsible bidder, the government awarded the contract to a higher bidder in order to retaliate against plaintiff for testifying before a congressional committee concerning an award under similar circumstances to the same higher bidder. The court recognized first (in apparent deference to *Perkins v. Lukens Steel Co.*) that:

> . . . [I]f an award is made to a bidder whose bid was not 'most advantageous to the Government, price and other factors considered', and the Act was, therefore, violated, it is only the public who has a cause for complaint, and not an unsuccessful bidder.[14]

Second, the court noted that "an unsuccessful bidder cannot recover the profit he would have made out of the contract, because he had no contract."[15] However, the court further noted that "this is not to say that he may not recover the expense to which he was put in preparing his bid."[16] The court concluded that there was an implied condition of requests for proposals that they would be honestly considered, and that the offer most advantageous to the government would be accepted. The court reasoned that no one would have bid unless it thought its bid would be honestly considered. The court concluded that if the implied contract had been broken, plaintiff could maintain an action for damages. However, the "implied condition" in *Heyer* required a strong showing to result in a recovery:

> Recovery can be had in only those cases where it can be shown by clear and convincing proof that there has been a fraudulent inducement for bids, with the intention, before the bids were invited or later conceived, to disregard them all except the ones from bidders to one of whom it was intended to let the contract, whether he was the lowest responsible bidder or not.[17]

In a second opinion in *Heyer*,[18] the court considered the question whether plaintiff's bid was rejected in good faith or arbitrarily or capriciously. First, the court reiterated that there was no basis for recovery of [illegible] of profits, adding that plaintiff could not recover its loss of profits on a contract implied in law, because Congress had not consented to suits on such quasi-contracts. Second, the court noted that:

> If, in the instant case the [defendant], in rejecting plaintiff's bid, did not act in good faith, but arbitrarily and capriciously, it breached its implied promise when it solicited bids, for the breach of which plaintiff may recover the expenses it had incurred in submitting its bid.[19]

After review of the circumstances, the court concluded that it could not say that the defendant did not act in good faith, and dismissed the petition.

The Court of Claims was to next consider the issue in *Keco Industries, Inc. v. United States*,[20] in light of both *Heyer* and the recently decided *Scanwell*, stating a less restrictive rule than in *Heyer*:

> We feel that, as a result of *Scanwell* a party, who can make a prima facie showing of arbitrary and capricious action on the part of the Government in the handling of a bid situation, does have standing to sue. At the same time, the decision of this court in *Heyer* also indicated that there were some instances in which a bidder would be allowed to bring an action against the Government. Even though the *Heyer* case was concerned with a situation where there was strong evidence of bad faith and intentional fraud on the part of the Government, we do not feel that *Heyer* was intended to be limited only to such an obvious type case; nor do we feel that *Heyer* was meant to apply only to those situations involving favoritism or discrimination. . . . 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*.[21]

The court rejected defendant's argument that *Scanwell* should be limited to those cases where a plaintiff is seeking to void the award of a contract, concluding that *Scanwell* is broad enough to grant standing to a party seeking personal money damages as well as to one acting for the good of the public. However, the court followed the prohibition against the award of lost profits stated in *Heyer*, finding that such an award would be improper because the contract never actually came into existence. Recovery should include only those costs incurred in preparing the technical proposals and bid.

However, *Keco* was not over. In a second opinion,[22] the court held that plaintiff failed to show arbitrary or capricious action on the part of defendant sufficient to establish liability, setting forth four general criteria.[23] First, "subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs."[24] Second, "proof that there was no 'reasonable basis' for the administrative decision will also suffice, at least in many situations."[25] Third, "the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials."[26] Fourth, "proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery."[27]

The court further noted that application of these principles may depend on the type of error committed by the government, and whether the error occurred with respect to the claimant's bid or that of a competitor, in that the duty to treat a bid fairly runs first to the person submitting the bid.[28]

Two significant qualifications were set forth by the court. First, there is a strong presumption against entitlement of an unsuccessful bidder to damages where the government declared another bidder to be responsible prior to award:

> ...[P]rocurement officials have a great deal of discretion in making this determination (aside from a prior suspension or debarment), and some of the criteria are not readily susceptible to reasoned judicial review.... In addition, correct appraisal of the responsibility of a prospective contractor is clearly in the self-interest of the procuring agency; there is a built-in stimulus against error.... Absent fraud or bad faith, it is not easy, therefore, to conjure up situations in which a disappointed bidder could recover bid preparation expenses under the claim that the defendant wrongly appraised the awardee as 'responsible'.[29]

Second, the court noted that more than simple negligence in the appraisal of a competitor's bid must be shown:

> The mere failure to exercise due diligence in the appraisal of a competitor's bid, when that omission amounts to simple negligence, is not a sufficient showing of arbitrary or capricious conduct to warrant recovery of bid preparation expenses. The Government's duty to exercise care in evaluating the 'price and other factors' of a bid runs first to the proponent of that bid and to the public and its representatives, and only then to another bidder. The responsibility to the latter is too attenuated to justify assessing damages for simple negligence, especially in light of the broad discretion of procuring officials in that aspect of the bid process. Moreover, litigation which second-guesses bid determinations, through efforts to show ordinary lack of due care in appraising competing proposals, should not be encouraged where the award was rational and made in good faith. The interference from such suits, and their impact upon contracting activities, would exact too great a price in the procurement process.[30]

The rule in *Keco* was restated plainly in *Vulcan Engineering Co., v. U.S.*[31] as follows:

> In order for a disappointed contractor to recover based on the erroneous treatment of another bidder's proposal, there must be a showing that the actions of contracting officials demonstrated bad faith or fraud.... In considering the actions of contracting officials, it is well established that regulations confer broad discretion upon a contracting officer in determining who is a responsible bidder.... Many of the criteria used by contracting officials 'are not readily susceptible to reasoned judicial review.'...Accordingly, absent proof of bad faith or fraud, affirmative determinations of responsibility generally are not overturned.
>
> In considering a claim of bad faith against the government, there is a strong presumption that government officials acted properly.... To overcome this presumption, a disappointed bidder must furnish 'well-neigh irrefragable proof' of bad faith.... In the absence of bad faith, the contractor must establish fraud.[32]

D. Federal Legislation

It was not until the Federal Court Improvement Act of 1982[33] that the Congress addressed the question of the judicial resolution of bid protests under federal government contracts. The Act created the U.S. Claims Court to succeed to the contract claim jurisdiction of the U.S. Court of Claims, but with a significant change. The former Court of Claims only had jurisdiction to award money claims. However, the jurisdiction of the new Claims Court included the following:

> To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief....[34]

The Act was not intended to alter the existing substantive law relating to bid protests, i.e., the *Scanwell* doctrine.[35]

Two years after the enactment of the Federal Court Improvement Act of 1982, the Congress again addressed the subject of bid protests, in the Competition in Contracting Act (CICA).[36] In this legislation, the role of the Board of Contract Appeals and, of more significance, that of the General Accounting Office, were codified. The Act established, *inter alia*, ground rules concerning the procedures to be followed, by the General Accounting Office, in the review of bid protests[37] and the relief which could be recommended.[38] However, the Act specifically provided that the jurisdiction of the Comptroller General over bid protests is not exclusive, and that the right of an interested party to file a protest with the contracting agency or to file an action in a U.S. District Court or in the U.S. Claims Court is not affected.[39]

Under the General Accounting Office procedure, a protest may be submitted to the Comptroller General by an "interested party" either objecting to a solicitation for a proposed contract, or objecting to an award or proposed award of a contract of a federal agency.[40] An "interested party" is an actual or prospective bidder whose direct economic interest would be affected by the award or by failure to award the contract.[41]

Protests may be filed with the General Accounting Office. If based on alleged improprieties in the solicitation apparent prior to bid opening, the protest shall be filed prior to bid opening.[42] In other cases, protests shall be filed within 10 days after the basis of the protest is known or should have been known.[43] However, if good cause is shown, a protest that is not timely filed may be considered.[44]

The Comptroller General is required to give the federal agency whose contract is involved notice of the protest within one working day of receipt, after which notice the contract may not be awarded while the protest is pending, unless the head of the procuring activity makes a finding that urgent and compelling circumstances will not permit waiting for the decision of the Comptroller General.[45] If the federal agency receives notice of the protest after award, but within 10 days of award, the agency must suspend performance of the contract while the protest is pending unless the head of the procuring activity makes a finding that performance is in the best interests of the United States, or that urgent

and compelling circumstances will not permit waiting for the decision of the Comptroller General.[46]

The Comptroller General is required to issue a decision on the protest within 90 working days from the date it was filed, unless the Comptroller General has determined, under an "express option," that the protest is suitable for resolution within 45 calendar days.[47]

If the Comptroller General finds that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General may recommend that the federal agency: refrain from exercising options under the contract; recompete the contract; issue a new solicitation; terminate the contract; award consistent with statute and regulation; or such other recommendations determined to be necessary.[48] In addition, the Comptroller General may declare an appropriate interested party to be entitled to bid and proposal preparation costs, and costs of pursuing the protest, including attorneys' fees.[49]

III. THE DECISION OF THE AGENCY PRIOR TO AWARD

A. The Procedure—Due Process

One of the earlier cases discussing the due process—without actually using that term—which must be afforded the low bidder if its responsibility is being questioned is *Housing Authority of Opelousas, La. v. Pittman Const. Co.*[50] There, a higher bidder was awarded a public works contract in large part because of evidence it provided to the awarding authority regarding the low bidder's responsibility. The low bidder was not present when the evidence was presented, and was not given an opportunity to rebut the evidence. The court held that the low bidder was entitled to be informed of, and respond to, the charges against him, but that the awarding authority was not required to "conduct FBI investigations, hold elaborate hearings, adhere to legal rules of evidence, and function as a judicial body."[51]

Petitioner in *City of Inglewood v. Superior Court*[52] contended that *Pittman* required that, prior to awarding a contract to one who is not the low monetary bidder, a public agency must conduct a hearing "which shall include a full panoply of judicial trial procedures, including pleadings, cross-examination of witnesses, and formal findings."[53] In *Inglewood*, a public agency proceeded to award a contract involving construction and construction management[54] to the second low bidder on the basis that its qualifications were relatively superior to those of the low bidder. However, the low bidder was not found to be not responsible. In concluding that the award to the second low bidder was void, the court commented on the due process which must be afforded the low bidder whenever an award to another bidder is proposed on the basis of responsibility:

> We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract. We do not believe, however, that due process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a nonresponsible bidder.[55]

Courts have held that the due process standards of *City of Inglewood* do not apply when the question is not the responsibility of the low bidder. For example, in *Educational & Recreational Services, Inc. v. Pasadena Unified Sch. Dist.*,[56] plaintiff challenged an award of a services contract to a bidder other than itself, the lowest responsible bidder. However, the decision as to award was not based on a determination of responsibility. The court rejected plaintiff's argument that *City of Inglewood* required a hearing before award to another, finding a qualification of the rule in *Inglewood:*

> This rule, however, only permits a low monetary bidder to offer evidence to rebut adverse evidence that might have led the awarding party to believe he was not a 'responsible bidder.' We do not have such a situation here. The trial court properly found (finding No. 11): 'The bids of plaintiff and Brock Bus Lines were not rejected by the Board of Education because of failure to comply with the Invitation for Bids or because they were determined to be non-responsible by the Board.' In the cases cited by ERS, the court was dealing with the type of contract that required an award to the lowest responsible bidder. ERS was considered 'responsible'; thus, a further hearing was not required.[57]

In specifically addressing the question of responsiveness as opposed to responsibility, the court, in *Taylor Bus Service, Inc. v. San Diego Bd. of Education*,[58] further clarified the rule stated in *City of Inglewood*, and the amplifying decision in *Educational & Recreational Services, Inc.*, as follows:

> We believe a determination of nonresponsiveness is more akin to the decision to reject a low bidder than it is to a declaration of nonresponsibility. We hold that a bidder determined to be nonresponsive is entitled to notice of that fact and is entitled to submit materials, in a manner defined by the district, concerning the issue of responsiveness. The district is not required to conduct a hearing, however, and need not produce findings.[59]

The court explained the reason for distinguishing between responsibility and responsiveness:

> A determination that a bidder is responsible is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment. Not only is the process complex, but the declaration of nonresponsibility may have an adverse impact on the professional or business reputation of the bidder. Such circumstances reasonably require the procedures defined in *City of Inglewood.*
>
> A determination of nonresponsiveness on the other hand is less complex. The district or agency has, before soliciting bids, exercised its business and governmental judgment in defining a set of requirements for the work to be done. Responsiveness can be determined from the face of the bid and the bidder at least has some clue at the time of submission that

problems might exist. In most cases, the determination of nonresponsiveness will not depend on outside investigation or information and a determination of nonresponsiveness will not affect the reputation of the bidder. Given the predetermination of bid specifications, and given the more apparent and less external nature of the factors demonstrating nonresponsiveness, less due process is reasonably required with that determination than when nonresponsibility is declared.[60]

The dividing line between formal Administrative Procedure Act procedures and informal agency procedures, used in the revocation of the certificate of qualification of a potential bidder, was discussed in *Capeletti Brothers, Inc. v. State Department of Transportation*,[61] where the court stated:

> Free form proceedings are nothing more than the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business. See H. Levinson, *Elements of the Administrative Process*, 26 Amer. L.R. 872, 880, 926 et seq. (1977).fn Without summary letters, telephone calls, and other conventional communications, the wheels of government would surely grind to a halt. The vast majority of an agency's free-form decisions become conclusive because they are not challenged in [statutory] proceedings.
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> fn Professor Levinson writes: 'Free-form' proceedings are not subject to legal requirements with regard to any of the procedural elements, although legal requirements may exist with regard to nonprocedural elements. In free-form proceedings the agency is therefore at liberty to adopt any procedure it wishes, or no procedure at all. 26 Amer. L. R. 872, 880 (1977).[62]

B. The Effect of Federal Participation

Although in some cases the fact that a state or local project receives federal assistance may provide bidders with a limited right under federal regulations to a bid protest procedure, the presence of federal funding does not affect the substantive rights of the parties.

In *Sovereign Construction Co., Ltd. v. City of Philadelphia*,[63] the City invited bids for a water treatment facility which was to receive 75 percent funding under the Federal Water Pollution Control Act, administered by the Environmental Protection Agency. Because plaintiff's low bid was unbalanced, the City sought to rebid the project. Plaintiff sought intervention of EPA's Regional Administrator, who advised the City that EPA regulations[64] required that the City afford plaintiff an opportunity to express its views. After the City did so, it reaffirmed its initial decision. Plaintiff again went to the EPA, and the Regional Administrator subsequently issued a "Determination," which rejected the City's argument that Pennsylvania law should govern, and purported to "sustain the protest" and "reverse the determination of the City." When the City continued to refuse to award it the contract, plaintiff filed an action seeking to compel the City to award it the contract. The court rejected plaintiff's arguments based on federal law, concluding that under Pennsylvania law a disappointed bidder has no cause of action as a rule of standing, and also as a rule of substantive law. Regarding the federal funding of the project, the court stated:

> . . . I am not persuaded that the injection of federal dollars into a contract between a city and the low bidder requires all issues of procurement law that arise out of that contract to be determined by federal law, absent a federal statute or regulation that expressly or impliedly requires such a result.[65]

Recently adopted Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments[66] may affect procedures for administering protests under certain federally aided projects. The regulations were adopted in two categories—the so-called common rule, containing provisions to be the basic part of each federal agency's regulations,[67] and further regulations as adopted by each of the various federal agencies.[68] Consistent with a recent Executive Order regarding Federalism,[69] the common rule provides that in certain areas, including procurement, states will expend and account for grant funds according to their own laws and procedures.[70] However, the common rule provides for certain basic bid protest procedures to be used by grantees other than states.[71]

C. Responsiveness and Responsibility

Although the consequences from the standpoint of generating a protest for misaward are similar, the concepts of "responsiveness" and "responsibility" are quite different. The former involves the question of whether a bid as submitted properly responds to and meets the requirements of the invitation for bids.[72] The latter involves the question of whether a bidder is deemed fit and qualified, and possessing adequate financial and technical resources, to properly perform and complete the contract. As stated succinctly in *Taylor Bus Service, Inc. v. San Diego Bd. of Education:* "A bid is responsive if it promises to do what the bidding instructions demand. A bidder is responsible if it can perform the contract as promised."[73]

In *James Luterbach Construction Co., Inc. v. Adamkus*,[74] bidding instructions were ambiguous as to whether compliance with Minority Business Enterprise (MBE) reporting requirements was a matter of bid responsiveness or of bidder responsibility. Bidders could provide post-bid documentation on matters of bidder responsibility, but not on matters of bid responsiveness. Because of the low bidder's reasonable belief, based on the ambiguous bidding instructions, that MBE documentation was a matter of responsibility rather than responsiveness, its bid was accepted even though the documentation submitted with its bid was defective.[75]

In *Federal Electrical Corporation v. Fasi*,[76] a responsible bidder was held to be: ". . . one who is not only financially responsible, but who is possessed of the judgment, skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms."[77]

D. Discretion of the Awarding Agency

Statutes and ordinances that require public officers to award a contract to the lowest responsible bidder vest wide discretion in such officials, and a court will not ordinarily interfere with the action taken in the absence of a clear showing of fraud, collusion, or palpable abuse of discretion.

In *Pioneer Co. v. Hutchinson*[78] the court so concluded, stating further: "The trial court attempted in the short time before the bid period expired to determine whether Pioneer was a 'reasonable bidder.' This was the function of the council, not the court. It was not within the authority of the court to substitute its judgment for that of the council."[79]

A similar test was used, in *City Council of Beverly Hills v. Superior Court*,[80] to review the action of a city council in determining the form of contractor's license required to bid a contract. The court concluded that a "clear and convincing showing" is needed to establish an abuse of discretion on the part of the public agency: "Such a showing must be bottomed upon claim of something more than good faith mistake or of an administrative or legislative decision made contrary to one the court might have reached had it been acting as the executive or legislative branch of government. . . ."[81]

Also note, in *State v. Weisz & Sons, Inc.*,[82] where the appellate court held that the trial court erred in not deferring to the judgment and discretion of the state where there was no showing that the state's action in rejecting the low bid for being nonresponsive was arbitrary, fraudulent, or an illegal exercise of discretion.

Federal courts have stated similar rules. See *M. Steinthal & Co. v. Seamans*,[83] where the court stated: "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations."[84]

The court in *Steinthal* went on to state a reason for this rule:

> In the more relaxed context of an action for damages, the court has an effective opportunity to give careful consideration to the controversy at hand, to probe the various and interrelated provisions of regulations, contract terms and specifications, questioning technical witnesses if necessary, reviewing pertinent administrative procedures and practices that give content as well as background to generalized regulations.
>
> But when the court is thrust into the vortex of emergency litigation in which bidders are seeking immediate, injunctive relief, and all parties are seeking expedited determination, it is difficult in the time available for the court to become steeped in the pertinent learning. Consequently, courts should be reluctant to intervene absent a clear showing of illegality by the party attempting to overturn the agency determination.[85]

The degree to which deference is given to the awarding agency's determination regarding responsibility is illustrated by *Baxter's Asphalt v. Department of Transportation*.[86] There, the department's finding of nonresponsibility as to the low bidder on a contract for road work was upheld even though the department had found that same bidder responsible on another contract while the responsibility hearing on the first contract was pending.

1. Irregularities and Errors

The question of whether an irregularity in a bid is minor and immaterial and, therefore, waivable, or substantial and material and, therefore not waivable, and where the discretion of the awarding agency begins and ends, is the frequent subject of litigation.[87] The potential compromise of the integrity of the competitive bidding process balanced against the potential of increased project costs provides the awarding agency with a dilemma; and second low bidders, or rejected low bidders, with a second chance to claim award of a project through protest or litigation.

In determining whether an irregularity is substantial and material, four criteria are generally used: first, whether performance will substantially comply with the requirements of the request for proposals, that is, whether the irregularity is minor, immaterial, or inconsequential;[88] second, whether the irregularity would violate a statutory requirement;[89] third, whether waiver of the irregularity would interfere with the competitive bidding process by giving some bidder an advantage not shared by other bidders;[90] and fourth, whether the irregularity would give the bidder the option of declining to accept the contract without forfeiting its bid bond.[91]

It should be obvious that concluding that a public agency *may* waive an irregularity does not necessarily mean that it *must* waive the irregularity. However, refusal to waive an innocuous mistake could amount to an abuse of discretion, especially in view of the awarding agency's obligation to the public to perform the project for the lowest cost.

For example, see *Centric Corporation v. Barbarossa & Sons, Inc.*,[92] where the City of Cheyenne rejected petitioner's low bid for failure to contain an Affirmative Action Plan, and the trial court denied petitioner's claim. On appeal, the court reversed, stating that: ". . . a minor technical defect or irregularity which does not affect the substance of the bid does not justify the rejection of the bid."[93] Also, see *Marvec Allstate, Inc. v. Gray & Fear, Inc.*,[94] where the court stated: "We emphasize that the Authority does not merely have a ministerial and perfunctory role in dealing with irregularities in the submission of bids, but has an inherent discretionary power and duty to secure the lowest responsible offer through competitive bidding."[95]

Regulations of the Federal Highway Administration also indicate that consideration of waiver of minor irregularities should be given.[96] However, the discretion of an agency in evaluating irregularities may be constrained by the terms of a bid proposal which establish ground rules for the resolution of certain types of irregularities. Such ground rules may convert an otherwise discretionary act into a ministerial duty.

See, for example, *Pozar v. Department of Transportation*,[97] where petitioner submitted a bid which contained an item unit price of $20 per unit, for 90 units, with a corresponding item total price of $18,000, ten times the product of the unit price and the number of units. The proposal

contained a provision stating that in the case of a discrepancy between the unit price and total price for an item, the unit price would prevail, unless ambiguous, unintelligible, or uncertain. Respondent agency, noting that its own estimate was $300 per unit for the item, concluded that the item total price should prevail. That conclusion would displace petitioner as low bidder. The appellate court issued a writ directing the agency to compute the bid using the item unit price, stating:

> This court has no power to direct the award of a public contract to any individual. (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal. App. 2d 377, 381 [301 P.2d 97].) We can, however, direct an agency to follow its own rules when it has a ministerial duty to do so or when it has abused its discretion. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344-345 [124 Cal.Rptr. 513, 540 P.2d 609].) Here, as in the *Glendale* case, we are concerned with a ministerial duty. Caltrans' own rules obligate it to accept the per-unit price in the absence of specified circumstances, none of which are here present. The per-unit price of $20 is neither ambiguous, unintelligible, uncertain, nor otherwise within any exception to the rule.[98]

2. Rejection of All Bids

Public agencies generally have broad discretion in deciding whether to reject all bids.[99] See, for example, *Department of Transportation v. Groves-Watkins Constructors.*[100] There, the State decided to reject all bids and readvertise when the low bid exceeded the estimate by 29 percent—which amounted to $12 million. Following a protest by the low bidder, the matter was referred to a hearing officer, who determined that the State's estimate was erroneous, and the low bidder's cost estimate correct and, on that basis, that the low bidder was entitled to award of the contract. The State declined to adopt the hearing officer's recommended order, and denied the award. After the lower appellate court reversed the State's final order, finding that there was substantial evidence to support the hearing officer's conclusions,[101] the State supreme court reviewed and quashed the lower court's opinion because an incorrect standard of review of the State's action had been applied. After noting the strong judicial deference accorded an agency's decision in competitive bidding situations, and that an agency's decision based upon an honest exercise of its broad discretion cannot be overturned absent a finding of "illegality, fraud, oppression or misconduct,"[102] the court elaborated on the judicially established standard by which an agency's decision on competitive bids for a public contract should be measured:

> This standard conforms to the majority view that, where the agency is authorized to reject all bids, judicial intervention to prevent the rejection of a bid should occur only when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding. 10 E. McQuillin, *Municipal Corporations* § 29.77 (3d ed. 1981); *Sea-Land Service, Inc. v. Brown,* 600 F.2d 429 (3d Cir. 1979) (only showing of clear illegality will entitle an aggrieved bidder to judicial relief); *John J. Brennan Const. Corp. v. City of Shelton,* 187 Conn. 695, 448 A.2d 180 (1980) (Judicial intervention in an agency's decision to reject all bids is limited to those few occasions where fraud or corruption has influenced the conduct of the officials); *Law Brothers Contracting Corp. v. O'Shea,* 79 A.D.2d 1075, 435 N.Y.S.2d 812 (1981) (decision to reject all bids because of budgetary, financial, and planning factors had rational basis and should not be disturbed); *Weber v. Philadelphia,* 437 Pa. 179, 262 A.2d 297 (1970) (if municipality, in connection with competitive bidding, is empowered to do so, it may reject any and all bids in the absence of fraud, collusion, bad faith or arbitrary action).[103]

Whatever the extent the public agency's discretion may be, the Federal Highway Administration considers that its concurrence is appropriate when a state proposes to reject all bids received for a federal-aid project.[104]

The reservation to the public agency of the right to "reject *any* and all bids" does not carry with it the right to selectively reject the low bid in the absence of a question of responsibility or responsiveness. As stated in *Commonwealth v. Gill:*[105] "Although it might appear that the word 'any' in the [competitive bidding statute] would allow rejection of the low bid so as to result in the awarding of the contract to a person not the lowest responsible and eligible bidder, a long line of cases has determined that contracts subject to those provisions cannot properly be awarded to one other than the lowest responsible and eligible bidder."[106]

However, the power to reject all bids is not without limitation. In *City of Rochester v. United States E.P.A.,*[107] the court recognized that, although bidders do not have a vested interest in the contract until their bid is accepted, and that, as against the bidder, the government has an absolute right to reject all bids, the rejection of all bids on the basis of an alleged ambiguity in the contract specifications, which ambiguity the court found did not exist, was arbitrary and capricious.

E. The Effect of MBE/DBE/WBE Requirements

1. Federal Programs

The advent of Disadvantaged Business Enterprise (DBE) Programs, which have introduced a greater element of subjectivity in the determination of to which bidder the award shall be made, has created an entirely new area of award disputes. These disputes typically involve either the low bidder protesting the refusal of the awarding agency to award to it for failure to comply with DBE contract requirements, or the second low bidder protesting a proposed award to the low bidder, on the ground that the low bidder did not comply with DBE contract requirements.[108]

The typical protest by a rejected low bidder involves a challenge of the agency's evaluation of the bidder's good faith efforts to meet DBE contract goals.[109] See, for example, *Gilbert Central Corporation v. Kemp,*[110] where plaintiff was apparent low bidder on a federal-aid highway contract, whose bid was rejected for failure to either meet the DBE goal or show good faith efforts to do so. Plaintiff, whose efforts consisted essentially of 14 letters and 5 phone calls, attempted to submit additional information after bid opening, including the fact that a listed Womens Business Enterprise (WBE) subcontractor planned to subcontract to a

DBE, which information the state refused to consider. The court denied injunctive relief, concluding that the state's interpretation of the controlling regulations was reasonable, and that the standard of review was limited to whether there was a reasonable basis for the state's decision, rather than an independent judgment test. The evaluation of the contractor's good faith efforts, the court concluded, was a matter within the scope of the state's expertise, and was neither arbitrary nor capricious. The court further noted that to permit a bidder to revise information after bid opening would give the bidder the option of whether it would meet the good faith efforts test and therefore be bound to its bid.

The authority of the Federal Highway Administration to exercise its discretion in determining whether to concur in the award of a federal-aid state highway contract on the question of the state's compliance with federal DBE regulations relating to its good faith efforts to achieve DBE goals was affirmed in *Glasgow, Inc. v. Federal Highway Administration.*[111] There, the state originally concluded that the low bidder did not exercise good faith efforts, and proposed to not award to that bidder, with which conclusion the FHWA concurred. However, after challenged by the low bidder, the state reversed its decision, and proposed to award to that bidder. In doing so, the state modified its criteria regarding goals and good faith efforts. FHWA refused to concur in award, and the low bidder sought an injunction, arguing that FHWA's concurrence[112] was ministerial rather than discretionary. The appellate court agreed with FHWA, noting that to allow the state to reverse its decision on the basis of revised criteria would violate the competitive bidding process.[113]

DBE factors other than good faith efforts to achieve DBE goals may also be the cause of rejection of a low bid. The lack of qualification of a DBE joint venture partner, whose DBE status was intended to meet the DBE requirements of the contract, was the basis for rejecting the low bid in *S. A. Healy Co. v. Washington Metropolitan Area Transit Authority.*[114] The minority partner of the joint venture who was to perform 20 percent of a $49,000,000 contract in fact had limited financial capacity, and no obligation to perform any part of the work under the contract. The court upheld the denial of certification of the low bidder on the basis of failure to comply with the DBE good faith effort requirement of the contract. The court adopted the standard of review from *M. Steinthal & Company v. Seamans*[115] to the effect that:

> [Courts] should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision.... [The court's] inquiry must fully take into account the discretion that is typically accorded officials in the procurement agencies by statutes and regulations.... [O]nly 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.[116]

Similar to the decision in *Gilbert Central Corporation v. Kemp,*[117] the court noted that to permit the joint venture to substitute subcontractors after bid opening would give it an advantage by allowing it the option of deciding whether or not to validate its bid after bids were opened.

In *Capeletti Brothers, Inc. v. Department of Transportation,*[118] the low bidder on a state-funded project was deemed nonresponsive because it failed to meet a WBE goal. The bidder sought review on the basis that the administrative code provision authorizing WBE goals went beyond the authorizing legislation, which made reference to disadvantaged groups. Although the appellate court concluded that the administrative code provision was invalid, it did not grant the bidder relief because the bidder failed to comply with bid protest procedures, which required that a protest be filed within 72 hours of receipt of the plans, concluding that failure to protest constituted a waiver.

2. State and Local Programs

The different constraints to which state and local Minority Business Enterprise programs are subject, as opposed to federal programs, were addressed by the United States Supreme Court in *City of Richmond v. J. A. Croson Company,*[119] which has the potential of generating additional challenges of state and local programs, and damage claims for rejection of bids and misaward of contracts. Croson had been the sole bidder for a construction contract with the City of Richmond, which had adopted Minority Business Enterprise (MBE) goals for prime contractors of 30 percent.[120] The plan allowed a waiver if the bidder proved that participation of 30 percent could not be achieved. Concluding that Croson had neither met the goal nor was entitled to a waiver, the City refused to award it the contract. When denied the contract, Croson challenged both the decision of the City and the validity of the program, and sought damages under 42 U.S.C. § 1983.[121] In litigation, which went through the Fourth Circuit twice,[122] the Supreme Court held, in a fragmented opinion,[123] that the program did not meet the standards of the fourteenth amendment as it applies to state and local agencies. Those standards require that the agency make specific findings of past discrimination, and that the remedial plan be narrowly drawn to correct that discrimination.[124]

Of most significance for the purposes of this paper is a statement contained in the first footnote of the opinion: "The expiration of the ordinance has not rendered the controversy between the city and Croson moot. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract pursuant to the ordinance was unlawful and thus entitles Croson to damages."[125]

That controversy—whether Croson may recover damages under 42 U.S.C.§ 1983—has yet to be answered.

IV. THE CONSEQUENCES OF AN ALLEGED MISAWARD

A. The Procedure

It is obvious that litigation seeking to prevent or set aside an award to another bidder must be initiated promptly. In *Richardson Engineering Co. v. Rutgers, The State University,*[126] plaintiff, second low

bidder on part of the work under a construction project advertised by defendant State University, objected to acceptance of the low bid because the low bidder's prequalification was alleged to be inadequate. Defendant concluded that the prequalification statute did not apply, and proceeded to award and execute the contract. Plaintiff subsequently filed suit, 34 days after being told that its objections were not valid, and 27 days after award of the contract. Noting that plaintiff waited almost 4 weeks before filing the action, instead of seeking a prerogative writ, the court stated:

> When a party seeks review of the award of construction contracts for projects of the type involved here, the attack must be made with the 'utmost promptitude.' ... Whenever public money is to be expended or if the successful bidder has made substantial preparations for the work, incurred considerable expenses and obligated himself still further in undertaking to carry out the contract, ordinarily, review of the award will be denied unless sought immediately.[127]

In *Gulf Oil Corp. v. Clark Co.*,[128] a county awarded a construction contract to the second low bidder on the basis of an Attorney General's opinion that the low bidder was not properly licensed. The low bidder sought to enjoin award of the contract, but did not pursue the matter diligently.

Because the project was completed before the matter was submitted, the trial court permitted amendment of the pleadings to seek damages, including lost profits and bid preparation costs. On appeal, the court held that although the low bidder might have had standing to obtain injunctive relief, it could not recover damages after completion of the project.

B. Standing

Standing has usually not been a barrier to review of bid award disputes in nonfederal courts.[129] However, there have been exceptions. For example, in *John R. Baker v. State of Montana*,[130] plaintiff second low bidder sought to have the low bidder declared ineligible. The lower court dismissed on the basis of lack of standing, and the appellate court affirmed, noting first, that competitive bidding statutes are primarily intended for the benefit of the public rather than the bidders and, second, that plaintiff failed to allege standing as a taxpayer.

In *Westinghouse Electric Corporation v. Jacksonville Transportation Authority*,[131] plaintiff was denied standing to protest the bidding process for a transit system because it had not submitted a bid. The court concluded that a nonbidder, who was not excluded from the bidding process, did not have a substantial interest in the process necessary to afford standing.

The court in *M. A. Stephen Construction Co., Inc. v. Borough of Rumson*,[132] concluded that even though a bidder on a public works construction contract had standing to challenge the rejection of his bid or the award of the contract to another bidder, such standing did not create a right to damages against the public agency. The court noted that:

> Nor should it be overlooked that, to allow the lowest responsible bidder to recover damages not only would violate and run counter to sound and long established principles of law, but also would also invert the very policy and reasons which gave rise to the obligation of the public official to accept the bid proposal which best serves the public interest. Thus, where a public authority improperly rejects the lowest bid and awards the contract to the next lowest bidder, who performs the contract work before the ultimate resolution of the legal propriety of the rejection, to permit the low bidder to recover damages would simply twice penalize the public.[133]

In response to plaintiff's suggestion that "just as 'our Supreme Court abolished the obsolete, unjust and archaic idea of a state's sovereign immunity from suit upon contract,' so should be abolished 'any concept that a wronged bidder should not receive monetary damages,' "[134] the court further noted:

> What the contractor-plaintiffs overlook is that the narrowing or elimination of the doctrine of sovereign immunity both in contract and in tort simply imposes upon the sovereign and its agencies the same or similar responsibilities and liabilities as those to which private persons always have been subject—a grant of parity, so to speak. To create in favor of the low bidder for public work, whose bid was improperly rejected, a cause of action for damages against the State or its agencies, would be to prefer the bidder for public work over the bidder for private work, the latter having no such right of action—creating inequality, where parity now exists.[135]

The general rule, however, allows standing. See, for example, *Funderburg Builders, Inc. v. Abbeville County Memorial Hospital*,[136] where the court stated: "Indeed, some courts have held that the statutes create no justiciable rights in those who submit bids.... However, this Court thinks the better view is that the lowest responsible bidder should have access to equitable relief under the statutes."[137]

C. Relief

1. Injunctive Relief vs. Compensation

Courts have shown a preference to injunctive relief, as opposed to damages for misaward, either as an alternative or as a prerequisite to a claim for damages.

In *Sutter Brothers Construction Co. v. City of Leavenworth*,[138] the City rejected plaintiff's bid for highway construction because of deficiencies in the affirmative action plan submitted with its bid, and plaintiff sued for damages. On appeal, the court stated, first, that the competitive bidding statute was for the protection of the public rather than the bidders; second, that a bidder may not base a cause of action for damages solely upon an alleged violation of a competitive bidding statute; and, third, the proper remedy for an unsuccessful bidder is to seek injunctive relief, which plaintiff did not do.

In *James Luterbach Construction Company, Inc. v. Adamkus*,[139]

the court held that the plaintiff should have sought damages before the trial court. There, the low bid for an EPA grant funded project undertaken by a municipality was initially rejected for failure to comply with MBE requirements. After the EPA Regional Administrator concluded that the bid had been improperly rejected, the municipality proceeded to award to the low bidder, and plaintiff second low bidder filed suit, seeking declaratory and injunctive relief, but not damages. Injunctive relief was denied, and after the project was virtually completed, summary judgment was granted to defendants on the merits of the EPA decision, but the court did not address the argument that the action was moot because the project was complete. On appeal, the court concluded that failure to include a claim for damages resulted in the action becoming moot after completion:

> Because Luterbach never asked for damages before the court below, its suit, which asked only for declaratory and injunctive relief, is moot. *See Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 574 (9th Cir. 1984) (completion of contract moots unsuccessful bidder's suit because bidder did not pray for damages); *H. K. Porter Co. v. Metropolitan Dade County*, 650 F.2d 778, 782 (5th Cir. 1981) (award of contract moots unsuccessful bidder's suit because bidder did not seek damages); *see also South East Lake View Neighbors v. HUD*, 685 F.2d 1027, 1039 n. 9 (7th Cir. 1982) (completion of construction deprives plaintiffs who challenge erection of building of standing; mootness analysis would be identical).[140]

2. Liability Based on Tort vs. Contract

Unsuccessful bidders' claims for damages resulting from misaward of contracts have been less successful on theories of tort as opposed to contract. See, for example, *Rubino v. Lolli*,[141] where plaintiff sought a money judgment, alleging that the state had wrongfully rejected his low bid for a public works contract.[142] The state's demurrer was sustained without leave to amend, and plaintiff appealed. On appeal, the court reviewed the issue of liability of the state for wrongful rejection of a bid in the context of the state's statutory tort liability law. Under such law, the named public officer was not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion was abused.[143] Further, a public entity is not liable for an injury resulting from an act or omission of an employee where the employee is immune from liability.[144] The court affirmed the judgment, on the basis of the statutory immunities.

In *Universal By-Products, Inc. v. City of Modesto*,[145] plaintiff, low bidder on a contract for garbage collection with the City, sought damages against the City after it rejected all bids (which it had reserved the right to do) and began negotiating with another party. In an appeal from a judgment following the sustaining of a demurrer, the court affirmed, holding, first, that statutory immunities precluded a tort action; second, that since plaintiff's bid was not accepted, there was no express contract in existence which could give rise to implied covenants allegedly breached; and, third, that unlike the case of misaward to another bidder, there is no promise to consider the bids before rejecting them sufficient to support the theory of promissory estoppel.[146]

After an appellate court concluded, in *City of Inglewood v. Superior Court*,[147] that a public agency had wrongfully awarded a project to the second low bidder, the low bidder, in litigation which was an epilogue to *City of Inglewood*, cross-complained against the agency, seeking, among other things, damages in tort for breach of statutory duty, and in contract based on promissory estoppel. A demurrer to the low bidder's cross-complaint was sustained without leave to amend, and another appeal followed.[148] On appeal, the court followed *Rubino v. Lolli*,[149] concluding that the bidder had no cause of action in tort. However, the court held that a cause of action was stated based on promissory estoppel. Following Restatement section 90,[150] the court stated: "Clearly, the Authority promised in its solicitation of bids to award the contract to the lowest responsible bidder and Argo's reasonable and detrimental reliance upon this promise brings section 90 into play unless the final clause of the section prevents this result."[151] The court noted further:

> It seems to us that injustice to Argo, the promisee, can be avoided only by at least the partial enforcement of the Authority's promise to it to award the contract to it as the lowest responsible bidder.... To hold that Argo was not entitled to rely upon this promise because of the just-mentioned reservation of the right to reject any and all bids would make the Authority's promise an illusory one and render the whole competitive bidding process nugatory. In contract law generally monetary damages for breach of contract may be awarded where specific relief is unavailable because of the discretionary nature of the latter relief.... The public obviously has both an economic and a moral interest in public works contracts being awarded to the lowest responsible bidders. An award of monetary damages to the lowest responsible bidder for the misaward of a public works contract would be in the public interest as well as that of the injured bidder because such an award would deter such misconduct by public entities in the future.[152]

The court then suggested a limitation on the measure of damages:

> It would seem, however, that the damages that Argo may recover in promissory estoppel might well be limited to those it sustained directly by reason of its justifiable reliance upon the Authority's promise—in other words, to the expenses it incurred in its fruitless participation in the competitive bidding process.[153]

However, the court left the final measure of recovery to the trial court:

> But in any event the decision as to the proper measure of damages for breach of the promissory estoppel contract in this case must initially be that of the trial court.... What recovery Argo may attain on such cause of action will give to await the trial of the action and the trial court's consideration of what is just under all of the circumstances....[154]

In *Paul Sardella Construction Co., Inc. v. Braintree Housing Authority*,[155] defendant Authority first decided to award a construction contract to plaintiff, and, then, after that bidder's listed plumbing sub-

contractor claimed a clerical error, concluded that another bid became the lowest general bid. The Authority subsequently rescinded its prior award and awarded the contract to the other bidder. Plaintiff then brought an action for declaratory relief, but did not seek a restraining order or injunctive relief. In an appeal from the trial court ruling that (1) the Authority was liable in damages for unlawfully rescinding its award to plaintiff, (2) the bidder who eventually performed the contract was not liable to plaintiff, and (3) the subcontractor was not liable to plaintiff for refusing to execute a subcontract, the court affirmed, in a decision consistent with *Swinerton*. First, the court recited that there was no question that plaintiff had standing.[156] Second, the court concluded that the revocation of the award to plaintiff was erroneous.[157] Third, the court concluded that plaintiff was not entitled to recover anticipated profits because it never actually entered into the contract under which it would have made such profits.[158] Fourth, the court recognized that courts have held it is an implied condition of invitation for bids that bids submitted be fairly considered in accordance with all statutes and that, if the public agency fails to give such consideration, the implied contract formed by the submission of the bid is broken, and recovery of bid preparation costs is deemed a proper remedy.[159] Finally, plaintiff was not entitled to damages either from the bidder to whom the contract was awarded (on the alleged theory of unjust enrichment, to the extent of profits it received in performing the contract), or from the subcontractor, because there was no contract, express or implied, between it and plaintiff which would give rise to any liability for failure to execute the subcontract.[160]

In *L. E. Zannini & Co. v. Jenkins & Boller Co.*,[161] a rejected low bidder sued the successful bidder, claiming it was unjustly enriched by performing the contract which should have been awarded to it. The court concluded that no cause of action was stated against the successful bidder, noting the dilemma that bidder would face if there were a cause of action—either forfeiture of its bid bond or liability to the low bidder if it incorrectly decided whether the award by the public agency was proper.

3. Liability Under Section 1983

Standing has been the threshold issue in claims by bidders under 42 U.S.C. § 1983[162] for damages for wrongful award of public contracts.[163] In order to establish standing, courts have usually held that state or local laws must confer a property interest on behalf of the affected bidder in the award of a contract.[164]

In *Estey Corporation v. Matzke*,[165] the court considered both plaintiff's standing and its ability to state a claim under § 1983 in its attempt to challenge the award of a state contract. The court held, first, that plaintiff had no standing to challenge the award, citing *Perkins v. Lukens Steel*[166] and, second, that it failed to state a claim under Section 1983:

> This Court does not agree with plaintiff that a bidder on a state contract has a property interest in the contract. Such an interest does not arise until such time as the contract is actually awarded to him. Even assuming, *arguendo*, that plaintiff has been deprived of a property interest, such an interest may *not* be vindicated under 42 U.S.C. § 1983.... Therefore, plaintiff has failed to state a claim for deprivation of property rights which could be brought under 42 U.S.C. § 1983.[167]

In *Hill v. Ford*,[168] plaintiff road contractor brought an action under § 1983 against county road commissioners, alleging that his bid for a project was improperly rejected because defendants did not comply with statutory advertisement requirements. The court concluded that violation of a state statute did not equate to a violation of federal due process or federal civil rights: "It is arguable that [plaintiff] might, with the above proof, show that he was deprived by the defendants of due process of Tennessee law; but, due process of Tennessee law, in so far as it is not identical with federal due process, is not secured to the plaintiff ... by the [F]ederal Constitution or laws."[169]

V. CONCLUSION

It is apparent that there is considerable diversity among the various jurisdictions regarding the remedies available to an unsuccessful bidder on a public construction contract. The extent to which injunctive relief or extraordinary writs may be obtained, or damages recovered, has been neither uniform nor consistent. However, there has been a trend to follow the lead of the federal courts—that is, to allow standing; to defer to the discretion of the awarding agency in the absence of bad faith or abuse of discretion; to prefer injunctive or extraordinary relief to damages; and to limit damages, if awarded, to bid preparation expenses, excluding lost profits. The willingness of states to look to other jurisdictions for precedents as to these issues suggests that a reasonable degree of uniformity and predictability may be expected in this area of the law.

The usually complex and technical factual setting surrounding the bidding process, coupled with the inherent time constraints of the award process, remain barriers to the development of a simplified procedure for the resolution of bidding and award disputes.

[1] Regarding the competitive bidding process generally, see Ross D. Netherton, "Competitive Bidding and Award of Highway Construction Contracts," *Selected Studies in Highway Law*, Vol. 3, p. 1125.

[2] Such regulations are currently found in the Federal Acquisition Regulations, 48 C.F.R. ch. 1–End. Earlier federal procurement regulatory schemes, which were the foundation for much of the federal decision-making referred to above, include the Federal Procurement Regulations, formerly at 41 C.F.R. ch. 1–49, and the Defense Acquisition Regulations, formerly at 32 C.F.R., parts 1–39.

[3] *See, e.g.*, federal cases cited in Paul Sardella Construction Co., Inc. v. Braintree Housing Authority, at note 159, *infra*.

[4] 310 U.S. 113, 60 S.Ct. 869 (1940).

[5] 41 U.S.C. § 35 *et seq.*

[6] 310 U.S. 113, 128; 60 S.Ct. 869, 877.

[7] 310 U.S. at 130; 60 S.Ct. at 878.

[8] 60 Stat. 243 (1946), codified at 5 U.S.C. §§ 701 *et seq.* Section 702 of the Act states: "A person suffering legal wrong because of agency action within the meaning of a relevant statute is entitled to judicial review thereof."

[9] So described in CACI, Inc.—Federal v. United States, 719 F.2d 1567, 1574 (Fed. Cir. 1983).

[10] 424 F.2d 859 (D.C. Cir. 1970). See note, *The Private Rights of a Bidder in the Award of a Government Contract: A Step Beyond Scanwell*, 24 Case W.R.L.R. 559 (1973). *See also*, Annot., *Standing of*

Unsuccessful Bidder for Federal Procurement Contract to Seek Judicial Review of Award, 23 A.L.R. FED. 301.

[11] 424 F.2d at 870.

[12] 424 F.2d at 864.

[13] 140 F.Supp. 409 (Ct.Cl. 1956).

[14] 140 F.Supp. 409 at 412.

[15] *Id.*

[16] *Id.*

[17] 140 F.Supp. 409 at 414.

[18] 177 F.Supp. 251 (Ct.Cl. 1959).

[19] 177 F.Supp. 251 at 252.

[20] 428 F.2d 1233 (Ct.Cl. 1970).

[21] 428 F.2d 1233 at 1237.

[22] Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct.Cl. 1974).

[23] 492 F.2d 1200 at 1203.

[24] *Id.*, citing Heyer Products Co. v. United States, 140 F.Supp. 409 (Ct.Cl. 1956).

[25] 492 F.2d 1200, 1203–1204, citing Continental Business Enterprises v. United States, 452 F.2d 1016, 1021 (Ct.Cl. 1971).

[26] 492 F.2d 1200, 1204, citing Continental Business Enterprises v. United States, *supra* note 25; Keco Industries, Inc. v. United States, 428 F.2d 1233, 1240 (Ct.Cl.1970).

[27] *Id.*, citing Keco Industries, Inc., *supra* note 20.

[28] 492 F.2d 1200, 1204, 1205.

[29] 492 F.2d 1200, 1205–1206.

[30] 492 F.2d 1200, 1206–1207.

[31] 16 Ct.Cl. 84 (1988).

[32] *Ibid.* at 91.

[33] Pub. L. No. 97-164, 96 Stat. 25. *See* Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests*, 16 PUB.CONT.L.J. 47 (Aug. 1986). *See also*, Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB.CONT.L.J. 325 (Jul. 1935).

[34] 28 U.S.C. § 1491(a)(3). The concept that a "contract claim" may exist "before the contract is awarded" is somewhat anomalous. *Compare*, Heyer Products Company v. United States, 140 F.Supp. 409 (Ct.Cl. 1956), *supra* note 15, and 177 F.Supp. 251 (Ct.Cl.1959), *supra* note 18.

[35] See 1982 U.S. CODE CONG. & ADMIN. NEWS 33: "By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the Scanwell doctrine as enunciated by the D.C Circuit Court of Appeals in 1970 is left intact."

[36] Pub.L. No. 98-369, 98 Stat. 494, §§ 2713(a), codified at 31 U.S.C. §§ 3551–3556 and 40 U.S.C. § 759(h). The Act was signed by the President in spite of a "vigorous" objection that it would unconstitutionally delegate to the Comptroller General, an officer of Congress, duties and responsibilities of the Executive branch of the Federal Government. See Crowell and Ralston, *The New Government Contracts Bid Protest Law*, 15 PUB.CONT.L.J. 177 (Jul. 1985). In Ameron v. U.S. Army Corps of Engineers, 809 F.2d 979 (3rd Cir. 1985), the court, on rehearing, held that certain stay provisions of the Act were constitutional.

[37] 31 U.S.C. § 3553.

[38] 31 U.S.C. § 3554. Bid protest regulations of the General Accounting Office appear at 4 C.F.R., part 21.

[39] 31 U.S.C. § 3556.

[40] 31 U.S.C. § 3551.

[41] *Id.*

[42] 4 C.F.R. § 21.2(a)(1).

[43] 4 C.F.R. § 21.2(a)(2).

[44] 4 C.F.R. § 21.2(b).

[45] 31 U.S.C. § 3553(c); 4 C.F.R. § 21.4.

[46] 31 U.S.C. § 3553(d); 4 C.F.R. § 21.4.

[47] 31 U.S.C. § 3554(a); 4 C.F.R. § 21.7.

[48] 31 C.F.R. § 3554(b)(1); 4 C.F.R. § 21.6. Note that the authority of the Comptroller General is to "recommend." The consequences of an agency disregarding that recommendation are unclear.

[49] 31 U.S.C. § 3554(c)(1); 4 C.F.R. § 21.6(d). Note that an award of costs is not a mere recommendation, but "shall be paid promptly by the Federal agency concerned." 31 U.S.C. § 3554(c)(2).

[50] 264 F.2d 695 (5th Cir. 1959).

[51] 264 F.2d at 704.

[52] 103 Cal.Rptr. 689 (Cal. 1972).

[53] *Ibid.* at 695.

[54] Whether the subject contract was even subject to the requirement of competitive bidding was subject to question. The majority opinion held that: "... the management contracting procedure as proposed and followed here is too closely akin to traditional lump sum general construction contracting to be held exempt from the statutory competitive bidding requirements." 103 Cal.Rptr. at 692. *However*, the dissenting opinion concluded that: "... the management contract here at issue was more in the nature of a contract for services as a consultant and supervisor-manager, and that in the award of such contracts the governing board may properly consider a number of factors in addition to the amount bid in discharging its responsibility." 103 Cal.Rptr. at 696.

[55] 103 Cal.Rptr. at 695.

[56] 135 Cal.Rptr. 594 (2nd Dist. 1977).

[57] *Ibid.* at 600–601.

[58] 241 Cal.Rptr. 379 (4th Dist. 1987).

[59] *Ibid.* at 386.

[60] *Ibid.* at 384.

[61] 362 So.2d 346 (Fla.App. 1978).

[62] *Ibid.* at 348.

[63] 439 F.Supp. 692 (E.D.Pa. 1977).

[64] 40 C.F.R. § 35.929(d) (1976).

[65] 439 F.Supp. at 696. The court recognized that: "As a practical matter, the EPA will undoubtedly have the final word in this matter, inasmuch as a federal grant is providing seventy-five percent of the funds needed to complete the Preliminary Treatment Building." Regarding the effect of federal funding on contract procedures of recipients, see also Cappalli, *Federal Grants and Cooperative Agreements*, section 7:01, note 2 (1988 Cumulative Supplement), to the effect that the vast body of regulations governing the federal procurement process (see note 2, *supra*) are not applicable to procurement by grantees and other non-federal parties receiving federal aid, citing Merrill Ditch-Liners, Inc. v. Pablo, 670 F.2d 139 (9th Cir. 1982), and *In re Lametti & Sons, Inc.*, 55 COMP.GEN. 413, 417–18 (1975).

[66] 53 F.R. 8034 (Mar. 11, 1988). These regulations contain much of the matter formerly in Office of Management and Budget Circular A-102, "Grants and Cooperative Agreements With State and Local Governments." A revised and simplified version of Circular A-102 was published on the same day as the Uniform Administrative Requirements. 53 F.R. 8028.

[67] 53 F.R. 8087.

[68] In the case of the Department of Transportation, to appear at 49 C.F.R. part 18. See 53 F.R. 8084.

[69] Exec. Order No. 12,612.

[70] See 53 F.R. 8035. 49 C.F.R. § 18.36, Procurement, provides in part:

> (a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

[71] 49 C.F.R. § 18.36(b)(12) provides:

> Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. *Reviews of protests by the Federal agency will be limited to:*
>
> (i) *Violation of Federal law or regulations* and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and
>
> (ii) *Violation of the grantee's or subgrantee's protest procedures for failure* to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee. (Emphasis added)

See generally, Bid Protests Under Federally Assisted Projects, Construction Briefings No. 88-5 (Apr. 1988).

[72] See Construction Briefings No. 83-7, *Bid Responsiveness Under State Law* (Jul. 1983).

[73] 241 Cal.Rptr. 379, 385 (Cal.App 4 Dist. 1987), citing James Luterbach Const. Co. v. Adamkus, *infra* note 74.

[74] 781 F.2d 599 (7th Cir. 1986).

[75] *Compare*, City of Rochester v. United States E.P.A., 496 F.Supp. 751 (D.Minn. 1980), where the court stated, at 769: "Thus, it is clear from the specifications that responsiveness is satisfied by acknowledging the commitment to exercise positive efforts to attain MBE goals. It is further clear that the demonstration of positive efforts is a matter of responsibility."

[76] 527 P.2d 1284 (Hawaii 1974).

[77] 527 P.2d at 1291.

[78] 220 S.E.2d 894 (W.Va. 1975).

[79] *Ibid.* at 901.

[80] 77 Cal.Rptr. 850 (2nd Dist. 1969).

[81] *Ibid.* at 854.

[82] 713 P.2d 176 (Wyo. 1986).

[83] 455 F.2d 1289 (D.C.Cir. 1971).

[84] *Ibid.* at 1301.

[85] *Ibid.* at 1303.

[86] 475 So. 1284 (Fla.App. 1 Dist. 1985).

[87] For examples of irregularities, see "Competitive Bidding and Award of Highway Construction Contracts," *Selected Studies in Highway Law*, Vol. 3, pp. 1125, 1198, and "Supplementary Material," p. 1214-S48.

[88] See 64 AM.JUR.2d, *Public Works and Contracts* § 59, and 72 C.J.S. Supplement, *Public Contracts* § 13.

[89] See Menefee v. County of Fresno, 210 Cal.Rptr. 99 (5th Dist. 1985).

[90] *See, e.g.*, Bader v. Sharp, 125 A.2d 499 (Del. 1955).

[91] The ability to withdraw a bid without forfeiting the bid security has also been considered "an unfair advantage." Menefee v. County of Fresno, 210 Cal.Rptr. 99, 102 (5th Dist. 1985).

[92] 521 P.2d 874 (Wyo. 1974).

[93] 521 P.2d 874, at 875.

[94] 372 A.2d 1156 (N.J. Super. 1977)

[95] 372 A.2d 1156, at 1161. Note that *Marvec* was "disapproved as precedential authority" in *Contract For Route 280, Section 7U Exit Project*, 444 A. 2d 51 (N.J. 1982); however, in that case the court also dismissed its certification for review of the lower appellate court decision, *Contract For Route 280 Section 7U Exit Project*, 431 A.2d 848 (N.J. Super. 1981), thus letting stand a decision which concluded by stating, at 851: "Accordingly, we remand the matter to the Commissioner [of Transportation] to determine whether, on the facts of this case, he deems it in the public interest to waive the deviation in question. He should bear in mind that public policy favors awards to the lowest responsible bidder so long as fair competition in bidding is not impaired."

[96] See 23 C.F.R. § 635.111(d), which provides:

> (d) If the State highway agency proposes to reject or decline to read or consider an otherwise low bid on the ground that it is irregular because of noncompliance with a bidding requirement, it shall submit justification for not waiving such requirements unless the noncompliance involves one of the following items:
>
> (1) Failure to sign the bid.
>
> (2) Failure to furnish required amount of guarantee.
>
> (3) Failure to include a unit price for each item in the bid schedule.
>
> (4) Failure to include a total amount for the bid.
>
> (5) Bid is not typed or in ink.
>
> (6) Bid contains conditions or qualifications not provided for in the specifications.
>
> (7) Bidder is not prequalified although approved prequalification procedures are in effect.
>
> If such justification is not considered by the division administrator to be sufficient, concurrence will not be given to an award to another bidder on the contract at the same letting.

[97] 193 Cal.Rptr. 202 (1983).

[98] *Ibid.* at 203.

[99] *See generally*, Annot., *Public Contracts: Authority of State or Its Subdivision to Reject All Bids*, 52 A.L.R. 4th 186.

[100] 530 So.2d 912 (Fla. 1988).

[101] Groves-Watkins Constructors v. Department of Transportation, 511 So.2d 323 (Fla. 1st DCA 1987).

[102] Quoting from Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505, at 507 (Fla. 1982).

[103] 530 So.2d at 913–914.

[104] See 23 C.F.R. § 635.111(e), which provides: "(e) Any proposal by the State highway agency to reject all bids received for a Federal-aid project shall be submitted to the division administrator for concurrence, accompanied by adequate justification."

[105] 363 N.E.2d 267 (Mass.App. 1970).

[106] 363 N.E.2d 267, at 270.

[107] 496 F.Supp. 751 (D.Minn. 1980).

[108] DBE programs relating to public construction contracts generally require that in order to be awarded the contract the bidder must either meet percentage goals set in the contract for proposed participation by Disadvantaged Business, or demonstrate that it had made, prior to bid opening, good faith efforts to do so. See 49 C.F.R. § 23.45. The federal regulations allow alternative requirements of equal or greater effectiveness in lieu of good faith efforts. 49 C.F.R. § 23.45(h)(2)(i). The use of the "conclusive presumption" rule—that is, if any bidder who offers a reasonable bid price meets the DBE contract goal, all bidders who fail to meet the goal are presumed to have failed to exert sufficient efforts and are ineligible for award—was approved as an alternative by the court in Nolan Contracting, Inc. v. Regional Transit Authority, 651 F.Supp. 23 (E.D.La. 1986).

[109] The bidder may also challenge the validity of the DBE program and the requirement of goals for DBE participation, a subject beyond the scope of this paper. Such challenges have typically been on constitutional grounds, that is, whether there is a compelling governmental interest for the use of racial classifications (see City of Richmond v. J. A. Croson Company, ___ U.S. ___, 109 S.Ct. 706 (1989), note 119, *infra*), or on the question of whether award to other than the lowest bidder on the basis of DBE contractual requirements in the absence of statutory authorization violates competitive bidding requirements (*see, e. g.*, Associated General Contractors of California v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987)). In at least the case of the constitutional challenges, the element of bad faith or abuse of discretion usually present when liability of the public agency for misaward is found is not likely to be present. But the extent to which this makes a difference is uncertain. See text at note 125, *infra*.

[110] 637 F.Supp. 843 (D.Kan. 1986).

[111] 843 F.2d 130 (3d Cir. 1988).

[112] Such concurrence was required by 23 U.S.C. § 112.

[113] The dissent in C. H. Barco Cont. v. State of Florida, Department of Transportation, 483 So.2d 796 (Fla.App. 1 Dist. 1986) would have reversed a decision of the state rejecting the good faith efforts of a low bidder because the state revised a policy regarding good faith efforts. The majority opinion concluded that that policy was only one of several criteria under which the contractor fell short in its efforts.

[114] 615 F.Supp. 1132 (D.C.D.C. 1985).

[115] 455 F.2d 1289 (D.C.Cir. 1971).

[116] 615 F.Supp. at 1135–1136, quoting 455 F.2d 1289 at 1301, 1303.

[117] *Supra* note 110.

[118] 499 So.2d 855 (Fla.App. 1 Dist. 1986).

[119] ___ U.S. ___, 109 S.Ct. 706 (1989).

[120] Whether the plan involved a "goal" or a "quota" is debatable. The plan was referred to by the Court as a "set aside"; however, the plan did not involve a "set aside" as that term is used by FHWA in its MBE/DBE regulations (49 C.F.R. 23.45(k))—that is, prime contracts that are set aside to be awarded only to MBEs. See 48 F.R. 33437, July 21, 1983.

[121] See note 162, *infra*.

[122] In J. A. Croson v. Richmond, 779 F.2d 181 (4th Cir. 1985) (Croson I), the court affirmed the district court decision, holding that the program was permissible as meeting the test of Fullilove v. Klutznick, 448 U.S. 448 (1980), and University of California Regents v. Bakke, 438 U.S. 265 (1978). On petition for *certiorari*, the Supreme Court noted probable jurisdiction and then remanded the case back to the Fourth Circuit for reconsideration in view of its intervening decision in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). In J. A. Croson v. Richmond, 822 F.2d 1355 (4th Cir. 1987) (Croson II), the Court, following *Wygant*, concluded that the program was impermissible.

[123] Only three of six parts of the Opinion were joined by a majority. There followed three concurring opinions and two dissenting opinions.

[124] The majority opinion distinguished the "unique" power of Congress to take remedial measures under section 5 of the fourteenth amendment, which power is not shared by state and local governments.

[125] 109 S.Ct. at 713.

[126] 238 A.2d 673 (N.J. 1968).

[127] 238 A.2d at 673.

[128] 575 P.2d 1332 (Nev. 1978).

[129] For a discussion of standing to review a public contract award under state law, see note, *Judicial Review of Public Contract Awards in New York: Recording the Effects of Dictaphone*, 45 ALB. L. REV. 1177 (1981); in Dictaphone Corp. v. O'Leary, 41 N.E.2d 68 (N.Y. 1942), the court clarified New York law by finding standing to challenge a public contract award by mandamus. *See also*, Annot., *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency For Nonaward of Contract*, 65 A.L.R.4th 93. For a collection of cases related to standing, see Sands & Libonati, *Loc.Govt.Law*, Vol. 3, § 22.16. Under the MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (American Bar Association 1979), standing would not be an issue. Under the Code, aggrieved bidders would have the right to protest to the contracting agency (§ 9-101), and seek judicial review of the solicitation or award of a contract (§ 9-401).

[130] 707 P.2d 20 (Mont. 1985).

[131] 491 So.2d 1238 (Fla.App. 1 Dist. 1986).

[132] 308 A.2d 380 (N.J. Super. 1973)

[133] 308 A.2d 380 at 385, citing Molloy v. City of New Rochelle, 92 N.E. 94, 96 (Ct.App. 1910).

[134] 308 A.2d 380, at 385.

[135] *Id.*

[136] 467 F.Supp. 821 (D.S.C. 1979).

[137] 467 F.Supp. 821, at 823–824, citing Seanwell Laboratories Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970); Richardson Engineering Co. v. Rutgers State University, 238 A.2d 673 (N.J. 1968); Quincy Ornamental Iron Works, Inc. v. Findlen, 228 N.E.2d 453 (Mass. 1967); Sternberg v.

Board of Commissioners, 105 So. 352 (La. 1925); Carpet City, Inc. v. Stillwater Municipal Hospital Authority, 536 P.2d 335 (Okl. 1975); City of Phoenix v. Wittman Contracting Co., 509 P.2d 1038 (Ariz.App. 1973); City of Inglewood v. Superior Court, 500 P.2d 601 (Cal. 1972); Gulf Oil Corp. v. Clark County, 575 P.2d 1332 (Nev. 1978).

[138] 708 P.2d 190 (Kan. 1985).

[139] 781 F.2d 599 (7th Cir. 1986).

[140] 781 F.2d 599, at 603. *See also,* Gulf Oil Corp. v. Clark Co., 575 P.2d 1332 (Nev. 1978).

[141] 89 Cal.Rptr. 320 (3rd Dist. 1970).

[142] In a separate proceeding, plaintiff unsuccessfully sought a writ of mandate, but no action was taken to restrain award of the subject contract.

[143] CAL. GOV'T CODE § 820.2.

[144] CAL. GOV'T CODE § 815.

[145] 117 Cal.Rptr. 525 (5th Dist. 1974).

[146] The court concluded with unsympathetic words for the bidder: "Moreover, we see no injustice in requiring appellate to bear the expense of preparing its bid; it entered into the bidding procedure with full knowledge of respondent's right to reject the bids if it should choose to do so. As an experienced business entity, appellant must be deemed to have assumed the risk that respondent might act in accordance with its legal right; such a risk is a cost of seeking to do business with a governmental body." 117 Cal.Rptr. at 532–533.

[147] 103 Cal.Rptr. 689 (Cal. 1972). See text at note 52, *supra.*

[148] Swinerton & Walberg Co. v. City of Inglewood-Los Angeles County Civic Center Authority, 114 Cal.Rptr.834 (2nd Dist. 1974).

[149] 89 Cal.Rptr. 320 (3rd Dist. 1974).

[150] Restatement section 90 reads: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[151] 114 Cal.Rptr. 834, at 838.

[152] *Id.*

[153] *Id.* The MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS, *supra* note 129, would similarly limit recovery in the event of wrongful award to "the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees." MODEL PROCUREMENT CODE § 9-101(7).

[154] *Ibid.* at 839. Subsequently, the trial court found in favor of the low bidder for bid preparation costs and expenses, but not loss of profits. In addition, the trial court granted a nonsuit as to a cause of action alleging a conspiracy between the agency and the second low bidder to award it the contract. On appeal by both plaintiff low bidder and defendant second low bidder, the judgment was affirmed in an unpublished opinion. 2 Civ. (No. 49,606) (Sept. 14, 1977).

[155] 329 N.E.2d 762 (Mass.App. 1975).

[156] 329 N.E.2d at 764, note 3, citing Quincy Ornamental Iron Works, Inc. v. Findlen 228 N.E.2d 453 (Mass. 1967), and Interstate Engr. Corp. v. Fitchburg 329 N.E.2d 128 (Mass. 1975), note 6.

[157] *Id.*

[158] 329 N.E.2d at 766, citing Excavation Construction, Inc. v. United States, 494 F.2d 1289, 1290 (Ct.Cl. 1974); Matter of Allen v. Eberling, 262 N.Y.S.2d 121 (N.Y. 1965); William A. Berbusse, Jr. Inc. v. North Broward Hospital Dist., 117 So.2d 550, 552 (Fla.App. 1960).

[159] Citing federal and state court cases: Heyer Prod. Co. v. United States, 140 F.Supp. 409, 412–413 (Ct.Cl. 1956); Keco Indus. Inc. v. United States, 428 F.2d 1233, 1240 (Ct.Cl. 1970); William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180, 183 (4th Cir. 1973); *contra,* Rapp v. Salt Lake City, 527 P.2d 651, 654–655 (Utah 1974). Regarding recovery of bid preparation costs, M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1302 (C.A.D.C.1971); Merriam v. Kunizg, 476 F.2d 1233, 1241 (3d Cir. 1973); William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180, 181–182 (4th Cir. 1973); McCarty Corp. v. United States, 499 F.2d 633, 637–638 (Ct.Cl. 1974); Cincinnati Electronics Corp v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975); Armstrong & Armstrong, Inc. v. United States, 356 F.Supp. 514, 521 (E.D.Wash. 1973) (with footnote reference to Swinerton & Walberg Co. v. City of Inglewood-Los Angeles County Civic Center Authy., 40 Cal.App.3d 98, 103–105 (1974)).

[160] 329 N.E.2d at 768.

[161] 512 N.E.2d 89 (Ill.App. 2 Dist. 1987).

[162] 42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." The question of liability under § 1983 was involved in City of Richmond v. J. A. Croson Company, ___ U.S. ___, 109 S.Ct. 706 (1989), note 119, *supra,* but was not addressed by the court. See text at note 125, *supra.*

[163] *See,* Annot., *Standing of Disappointed Bidder on Public Contract to Seek Damages Under 42 USCS § 1983 for Public Authorities' Alleged Violation of Bidding Procedures,* 86 A.L.R. FED. 904.

[164] *Ibid.*

[165] 431 F.Supp. 468 (N.D.Ill. 1976).

[166] 310 U.S. 113, 60 S.Ct. 869 (1940). See text at note 4, *supra.*

[167] 431 F.Supp. at 470.

[168] 449 F.Supp. 27 (E.D.Tenn. 1978).

[169] 449 F.Supp. at 29.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation officials, their legal counsel, and state highway and transportation employees in dealing with protests and claims of disappointed bidders under the competitive bidding system required in highway construction contracts.