THE INITIAL EXPERIENCE OF THE COURT OF FEDERAL CLAIMS IN APPLYING THE ADMINISTRATIVE PROCEDURE ACT IN BID PROTEST ACTIONS – LEARNING LESSONS ALL OVER AGAIN

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Congress in the Administrative Dispute Resolution Act of 1996[1] amended the Tucker Act[2] to clarify the jurisdiction of the Court of Federal Claims (CFC) to hear "bid protest actions," *i.e.*, challenges to agency contract awards and other procurement actions. Such amendment was necessary because Congress's initial statutory attempt was ambiguous and had engendered a number of questionable rulings of the CFC and the circuit courts interpreting the scope of the jurisdiction and remedial powers of the CFC in such cases. As part of its 1996 revisions to the Tucker Act, Congress specified that the CFC in bid protest actions "shall review the agency's decision pursuant to the standards set forth in section 706 of title 5,"[3] which is the judicial review section of the Administrative Procedure Act (APA), section 10(e).[4]

Congress's 1996 clarification of CFC jurisdiction in bid protest cases has resulted in an exponential increase in the number of protest cases that court has heard and decided.[5] Unfortunately, the CFC in its initial application of the APA's judicial review standard has made missteps in a number of areas. It would not be difficult for the CFC to return to the path of successful application of the APA standard, however. The CFC only need fix on the reference point of the overriding congressional intent that the CFC exercise concurrent, coextensive jurisdiction with the district courts in bid protest cases and avail itself of the half century of precedent under the APA in other federal courts.

This article will sketch the background that resulted in Congress's 1996 amendment of the CFC's bid protest jurisdiction and its mandate that the CFC use APA review procedures in procurement review cases. It will then discuss five areas in which the CFC has not yet consistently applied the revised statute and APA principles: (1) the CFC's jurisdictional basis to hear bid protests; (2) the proper standard of review of agency procurement decisions; (3) the appropriate record to review; (4) the required prejudice showing; and (5) the definition of an "interested party" to participate in bid protest cases.

I. Background: From *Scanwell* to the Revised Act

The history of the CFC's bid protest jurisdiction cannot be divorced from that of the district courts, for the district courts first held that disappointed bidders have standing under the APA to complain about

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1 Pub. L. No. 104-320, 110 Stat. 3870.

2 28 U.S.C. §§ 1491 *et seq.* (Supp. II 1996).

3 Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3875, *codified at* 28 U.S.C. § 1491(b)(4) (Supp. II 1996).

4 5 U.S.C. § 706 (1994).

5 *See* 71 FED. CONTRACTS REP. (BNA) 41 (1999) (reporting that the CFC set records in 1998 for the number of post-award bid protest cases heard and decided).

agency procurement actions. After twelve years of experience in the district courts, Congress in 1982 gave the CFC (then called the Claims Court[6]) jurisdiction in such cases as well.[7]

Congress in 1982 intended the CFC and the district courts to provide concurrent jurisdiction and identical relief in bid protest cases, but a combination of ambiguous drafting and unfortunate judicial interpretations frustrated that goal in several significant respects. To remedy the situation, Congress revised the Tucker Act in 1996 to clarify its intent that the CFC is to exercise the same jurisdiction and standard of review in the bid protest cases as have the district courts.[8]

It is always important that a statute be correctly interpreted; that is particularly true for the recently revised bid protest provisions of the Tucker Act, for two reasons. First, Congress revised the statute to clarify that, for the time being, the CFC has bid protest jurisdiction concurrent with that of the district courts. Second, Congress has provided for the sunset of district court jurisdiction in bid protest cases, leaving court jurisdiction exclusively in the CFC as of January 1, 2001, unless Congress acts to extend district court jurisdiction.[9]

A. Review Denied: From *Perkins* to *Scanwell*

In 1940, the Supreme Court ruled in *Perkins v. Lukens Steel Co.*[10] that Congress enacted procurement laws for the protection of the government, rather than for those contracting with the government, and denied standing to a private party alleging a violation of procurement law.[11] For 30

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6 As originally enacted, the Court of Federal Claims was called the Claims Court. *See* 28 U.S.C. § 1491 (1982). Congress changed the court's name in 1992 in the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516 (codified as amended in scattered sections of titles 28 and 41).

7 Federal Courts Improvement Act of 1982, Pub.L.No. 97-164, § 133(a), 96 Stat. 25, 40-41, *codified at* 28 U.S.C. § 1491(a)(3) (1982) (repealed).

8 Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3875, *codified at* 28 U.S.C. § 1491(b) (Supp. II 1996).

9 In section 12(c) of the Administrative Dispute Resolution Act of 1996, Congress required the General Accounting Office to study whether concurrent jurisdiction in the CFC and the district courts is necessary. Pub. L. No. 104-320, § 12(c), 110 Stat. 3870, 3875. In section 12(d), Congress provided that district court jurisdiction will terminate on January 1, 2001, unless extended by further legislation. *Id.* § 12(d).

Prior to new section 1491(b), 28 U.S.C. § 1491(b)(1) (Supp. II 1996), the district courts uniformly found federal courts jurisdiction in *Scanwell* cases under section 1331, *id.* § 1331 (1994). *See*, *e.g.,* Chem Serv., Inc. v. Environmental Monitoring Sys. Lab., 12 F.3d 1256, 1261 (3d Cir. 1993); Mark Dunning Indus., Inc. v. Perry, 877 F. Supp. 1541, 1541-42 (M.D. Ala. 1995); Action Serv. Corp. v. Garrett, 790 F. Supp. 1188, 1189 (D.P.R. 1992). Arguably, district courts will continue to have jurisdiction to hear bid protest cases under section 1331, even if their jurisdiction under section 1491(b) expires as currently planned on January 1, 2001. That result, however, does not seem to be consistent with Congressional intent as expressed in the Administrative Dispute Resolution Act of 1996.

Another unresolved question is whether the recent amendment of section 1491 has vested bid protest jurisdiction in the boards of contract appeals through the Contract Disputes Act of 1978. 41 U.S.C. §§ 601 *et seq.* (1994). In the former section 1491(a)(3), 28 *id.* § 1491(a)(3) (repealed), Congress provided that the CFC had "exclusive jurisdiction" over pre-award cases, and the legislative history makes clear, as will be discussed in somewhat more detail *infra*, that the exclusivity was meant to prevent the boards of contract appeals from handling bid protests, because otherwise they would have had the same powers as the CFC pursuant to section 8(d) of the Contract Disputes Act of 1978, 41 *id.* § 607(d). *See* Coco Bros. v. Pierce, 741 F.2d 675, 677-79 (3d Cir. 1984) ("[T]he House Report endeavored to make it clear that the word 'exclusive' and the statute meant the exclusion of the boards of contract appeals . . . ."). However, when Congress revised section 1491, it did not provide that the jurisdiction of the CFC and the district courts is "exclusive." While probably not intended by Congress, reading the two statutes together potentially vests jurisdiction of bid protests in the boards of contract appeals as well as in the CFC and district courts. *But see* Contract Disputes Act of 1978, §§ 8(d), 10, 41 U.S.C. §§ 607(d), 609 (1994) (providing that boards only have jurisdiction of an appeal from a contracting officer's decision as elsewhere defined in the Contract Disputes Act.) *See generally* Frederick W. Claybrook, Jr., *Why Not Bring a Bid Protest in the GSBCA – or in the ASBCA, for That Matter?*, 69 FED. CONTRACTS REP. (BNA) 602 (1998).

10 310 U.S. 113 (1940).

11 *Id.* at 125-32.

years following this decision, it was assumed that that "disappointed bidders"[12] lacked standing to complain of violations of procurement laws and regulations.[13] But in 1970, the United States Court of Appeals for the District of Columbia Circuit ushered in a new era.

In *Scanwell Laboratories, Inc. v. Shaffer*,[14] the District of Columbia Circuit ruled that *Perkins* was no longer good law, for two basic reasons:[15] the demise of the "legal rights doctrine" of standing upon which the Supreme Court had based its *Perkins* rationale[16] and passage of the APA in 1946.[17] The court noted that Congress in the judicial review provisions of section 10 of the APA had dictated that courts be "hospitable" to persons allegedly aggrieved by agency violations of substantive law.[18] After finding that the APA also waived the government's sovereign immunity in bid protest actions,[19] the District of Columbia Circuit in *Scanwell* declared that the district courts were open for business to hear allegations by disappointed bidders that agencies had violated procurement laws or regulations or had acted arbitrarily and capriciously in their procurement decisions.[20] With only one early holdout,[21] a majority of the other circuit courts promptly adopted the *Scanwell* rationale and opened the district courts in their circuits to disappointed bidder actions under the APA.[22] These suits became commonly known as "Scanwell" actions.

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12 This article uses the term *disappointed bidder* to include all private parties having standing to challenge any procurement-related agency decision. More technically, a *bidder* is a party responding to a type of solicitation, commonly called an Invitation for Bids (IFB) or Request for Quotations (RFQ), in which the award is made on the basis of low price alone as revealed at bid opening (assuming the bidder is "responsible" and "responsive," themselves terms of art). *See* Federal Acquisition Regulation (FAR), pt. 14, 48 C.F.R., pt. 14 (1998). By the same token, an *offeror* is a party responding to a type of solicitation, commonly called a Request for Proposals (RFP), in which price is considered along with other evaluation factors, such as technical merit and past performance. FAR, pt. 15, *id.*, pt. 15. In some situations, the party bringing a bid protest may not have been permitted to submit a proposal or may not yet have submitted a response to a solicitation (*e.g.,* a party challenging a sole-source contract award, *see* Aero Corp. v. Department of Navy, 540 F. Supp. 180 (D.D.C. 1982); Control Data Sys., Inc. v. United States, 32 Fed. Cl. 520, 524-26 (1994)), or may be challenging cancellation of a procurement (*e.g.*, Ace-Fed. Reporters, Inc. v. Federal Energy Reg. Comm'n, 734 F. Supp. 20, 23-26 (D.D.C. 1990); R.R. Donnelley & Sons, Co. v. United States, 40 Fed. Cl. 227, 283-84 (1998)).

13 *See generally* Cincinnati Elecs. Corp. v. Kleppe, 508 F.2d 1080, 1083-86 (6th Cir. 1975) (canvassing precedent relevant to *Perkins*).

14 424 F.2d 859 (D.C. Cir. 1970).

15 The Supreme Court has recently cautioned lower courts not to assume that it has overruled its precedent by implication, *see* Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997), but the District of Columbia Circuit in *Scanwell* did so with impunity and with its efforts later sanctioned by Congress, as explained *infra*. The *Scanwell* court, in relying on the APA, did avail itself of an opening the Supreme Court gave it in *Perkins*: "Courts should not, *where Congress has not done so,* subject purchasing agencies of the Government . . . to judicial scrutiny . . . ." 310 U.S. at 130 (emphasis added).

16 *Id.* at 861-65.

17 *Id.* at 865-73.

18 *Id.* at 870 (*citing* Curran v. Laird, 420 F.2d 122, 126 (D.C. Cir. 1969) (en banc)).

19 *Id.* at 873-74. The *Scanwell* court also discussed whether the agency action challenged was committed to agency discretion by law and whether administrative remedies had been exhausted. *Id.* at 874-76.

20 *Id.* at 876.

21 The Sixth Circuit initially declined to follow the *Scanwell* rationale and required continued adherence to *Perkins* unless there was an explicit statutory policy that encompassed the interest of the disappointed bidder. *See* Cincinnati Elecs. Corp. v. Kleppe, 509 F.2d 1080, 1083-86 (6th Cir. 1975); *see also* Hoke Co. v. TVA, 854 F.2d 820 (6th Cir. 1988). The Sixth Circuit now applies the *Scanwell* rationale. *See* Diebold v. United States, 947 F.2d 787, 803-804 (6th Cir. 1991). The First and Second Circuits initially reserved ruling on the issue. Davis Assocs., Inc. v. Secretary of Housing and Urban Dev., 498 F.2d 385, 390 (1st Cir. 1974); Spencer, White & Prentis, Inc. v. EPA, 641 F.2d 1061, 1065-66 (2d Cir. 1981). However, both circuits now recognize the *Scanwell* rationale.

22 All circuits ruling on the issue have now accepted the *Scanwell* rationale. *See* Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1057 (1st Cir. 1987); B.K. Instrument, Inc. v. United States, 715 F.2d 713, 717-23 (2d Cir. 1983); Merriam v. Kunzig, 476 F.2d 1233, 1240-43 (3rd Cir. 1973); William F. Wilke, Inc. v. Department of Army, 485 F.2d 180, 182-83 (4th Cir. 1973); Hayes Int'l Corp. v. McLucas, 509 F.2d 247, 254-58 (5th Cir. 1975), *cert. denied,* 423 U.S. 864 (1975); Diebold v. United States, 947 F.2d 787, 803-04 (6th Cir. 1991); Rossetti Contracting Co. v. Brennan, 508 F.2d 1039, 1042 (7th Cir.

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B. Review Validated: From *Scanwell* to the Federal Courts Improvement Act of 1982

In 1982, Congress validated the *Scanwell* rationale. Prior to that date, Congress had withheld from the Court of Claims (and, by application, its successor courts, the CFC and the Federal Circuit) jurisdiction to grant declaratory or injunctive relief in breach of contract (and other) cases.[23] Injunctive relief is exactly the remedy a disappointed bidder usually seeks in a Scanwell action, however – in the typical case, unless the Court enjoins the alleged wrongful award or performance under it, performance under the challenged contract will soon moot any effective relief.[24]

In section 133(a) of the Federal Courts Improvement Act of 1982,[25] Congress for the first time granted equitable jurisdiction to the CFC, and it did so in the context of bid protest actions:

> 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. In exercising this jurisdiction, the court shall give due regard to the interest of national defense and national security.[26]

Congress knew full well when it enacted this provision that it was validating the *Scanwell* decision and its progeny. The House Report on the bill stated,

> It is not the intent of the Committee to change existing caselaw [*sic*] as to the ability of parties to proceed in the District Court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action. *See*, *e.g.*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).[27]

The Senate Report had similar language:

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1975); Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975); Choctaw Mfg. Co. v. United States, 761 F.2d 609, 615-16 (11th Cir. 1985). *See also* Lakota Contractors Ass'n v. United States Dep't of Health and Human Servs., 882 F.2d 320 (8th Cir. 1989) (applying without discussing the *Scanwell* rationale); Lewis v. Babbitt, 998 F.2d 880 (10th Cir. 1993) (same); United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1982) (en banc) (recognizing *Scanwell* rationale in district courts).

[23] United States v. King, 395 U.S. 1 (1969); United States v. Alire, 6 Wall. 573, 575, 73 U.S. 573, 575 (1867). The Court of Claims could only grant declaratory relief incident to its jurisdiction to award damages. Gentry v. United States, 546 F.2d 343 (Ct. Cl. 1976); *see also* National Air Traffic Controllers Ass'n v. United States, 160 F.3d 714, 716 (Fed. Cir. 1998).

[24] *See generally* B.K. Instrument, Inc. v. United States, 715 F.2d 713, 730 (2d Cir. 1983); Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1316 (D.C. Cir. 1971); Buffalo Cent. Term. v. United States, 886 F. Supp. 1031, 1036 (W.D.N.Y. 1995); *see, e.g.*, Delta Data Sys. Corp. v. Webster, 755 F.2d 938, 939-40 (D.C. Cir. 1985) (denying relief due to performance by awardee). Contractors cannot recover lost profits under a government contract improperly denied it. O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 428 (D.C. Cir. 1992); *Delta Data*, 755 F.2d at 940; Keco Indus., Inc. v. United States, 428 F.2d 1233, 1240 (Ct. Cl. 1970); Informatics Corp. v. United States, 40 Fed. Cl. 508, 518 (1998). Bid preparation costs are not an adequate legal remedy for lost profits. Motor Coach Indus. v. Dole, 725 F.2d 958, 967-68 (4th Cir 1984); Bean Dredging Corp. v. United States, 19 Cl. Ct. 561, 583 (1990). Thus, injunctive relief is appropriate if the traditional four-part test is met. *See, e.g.*, Magnavox Elec. Sys. Co. v. United States, 26 Cl. Ct. 1373, 1379 (1992). *But cf.* Frederick W. Claybrook, Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555, 596-602 (1997) (suggesting lost profits should be recoverable in appropriate bid protest cases, although now prevented by new codified section 1491(b)(2), 28 U.S.C. § 1491(b)(2) (Supp. II 1996)).

[25] Act of April 2, 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40.

[26] *Codified at* 28 U.S.C. § 1491(a)(3) (1982) (repealed).

[27] H.R. REP. NO. 97-312, 97th Cong. 43 (1981).

> By conferring jurisdiction upon the [CFC] 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 in tact [*sic*].[28]

Congress thought it particularly appropriate to grant the CFC bid protest jurisdiction because that forum specializes in government contract claims:

> This provision will for the first time give the court specializing in certain claims against the Federal Government the ability to grant litigants complete relief.[29]

C. Initial CFC Experience: From the Federal Courts Improvement Act of 1982 to the Administrative Dispute Resolution Act of 1996

This writer[30] and others[31] have documented how the combination of ambiguous statutory language and restrictive interpretations of that language by various circuit and district courts quickly frustrated the congressional purpose reflected in the Federal Courts Improvement Act of 1982 that the CFC and the district courts should exercise concurrent and coextensive jurisdiction in bid protest cases. This occurred principally in three areas.

First, shortly after Congress enacted the statute, the United States Court of Appeals for the Federal Circuit in *United States v. John C. Grimberg Co*.[32] interpreted the statutory language "before the contract is awarded"[33] to mean, "before the contract is awarded *to a competitor*," rather than as simply a definition of bid protest actions, *i.e.*, cases brought before the contract is awarded *to the plaintiff-disappointed bidder*.[34] As a result, the CFC only exercised jurisdiction in bid protest cases if the suit was filed prior to the award of the challenged contract to the awardee; that court refused to hear bid protest actions when the agency had already made the challenged award.[35] The district courts continued to have jurisdiction in "post-award" cases, but exclusive of, rather than concurrent with, the CFC.[36]

Second, the circuit and district courts split over whether the "exclusive jurisdiction" Congress granted to the CFC in actions "brought before the contract is awarded"[37] divested district courts of their

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28 S. REP. NO. 97-275, 97th Cong. 43, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 11, 33.

29 127 CONG. REC. 514, 694 (daily ed. Dec. 8, 1981).

30 *See* Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment,* 21 PUB. CONTRACT L.J. 1 (1991).

31 Villet, *Equitable Jurisdiction in Government Contract "Bid Protest" Cases: Discerning the Boundaries of Equity,* 17 PUB. CONTRACT L.J. 152 (1987); Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests,* 16 PUB. CONTRACT L.J. 47 (1986); Sumsion, *Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?,* 17 PUB. CONTRACT L.J. (1987); Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities,* 15 PUB. CONTRACT L.J. 325 (1985); Hopkins, *The Universe of Remedies for Unsuccessful Offerors on Federal Contracts,* 15 PUB. CONTRACT L.J. 365 (1985); Dees & Churchill, *Government Contracts Disputes and Remedies: Corrective Legislation Is Required,* 14 PUB. CONTRACT L.J. 201 (1984); Anthony & Smith, *The Federal Courts Improvement Act of 1982: Its Impact on the Resolution of Federal Contract Disputes,* 13 PUB. CONTRACT L.J. 201 (1983).

32 702 F.2d 1362 (Fed. Cir. 1983) (en banc).

33 28 U.S.C. § 1491(a)(3) (1982) (repealed).

34 *Grimberg*, 702 F.2d at 1365-72. *See generally* Claybrook, supra note ___, at 6-11.

35 *See, e.g.*, Kinetec Structures Corp. v. United States, 2 Cl. Ct. 343, 344 (1983); Big Bud Tractors, Inc. v. United States, 2 Cl. Ct. 195, 196 (1983).

36 *See Grimberg*, 702 F.2d at 1374-77.

37 28 U.S.C. § 1491(a)(3) (1982) (repealed).

traditional Scanwell jurisdiction in those cases.[38] The legislative history is unambiguous that Congress's purpose in specifying that the CFC's jurisdiction would be "exclusive" was to foreclose jurisdiction from the boards of contract appeals,[39] which otherwise might have gained such jurisdiction by virtue of the provision of the Contract Disputes Act of 1978, as that act provides that boards of contract appeals may grant all relief available at the CFC.[40] But the Fourth and Ninth Circuits held that the statute is unambiguous on its face and excluded the district courts from exercising jurisdiction concurrently with the CFC in "pre-award" cases (*i.e.*, in bid protest cases brought before the agency had awarded the challenged contract to anyone).[41] The Third and First Circuits disagreed, relying on the legislative history to explain that Congress had not intended to divest district courts of concurrent jurisdiction, but only the boards of contract appeals.[42]

Third, and perhaps the most puzzling development under the statute, the Federal Circuit ruled in *Grimberg* that, when Congress gave the CFC "exclusive jurisdiction" over a "contract claim brought before the contract is awarded,"[43] Congress did not mean what it said. It did not give the CFC "jurisdiction" to decide bid protest cases, but only the "power" to give declaratory and injunctive relief in situations in which the CFC already had jurisdiction under another provision of the Tucker Act.[44] This other jurisdiction, the Federal Circuit elucidated, was the CFC's jurisdiction under codified section 1491(a)(1)[45] to hear an alleged breach of an implied contract to treat the bidder's proposal fairly and equally and consistently with the agency's solicitation of bids.[46]

The upshot of this ruling was that, unlike district courts under the APA, the CFC could not entertain challenges to the legality of the solicitation provisions and other alleged illegalities that affected all bidders equally.[47] Thus, for example, as the Federal Circuit explained in probably the last decision it will hand down interpreting the bid protest provision of the Federal Courts Improvement Act of 1982, the CFC could not entertain an allegation based on the violation of procurement law when the agency concededly acted in conformity with applicable procurement regulations:

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38 *See generally* Claybrook, supra note ____, at 11-16.

39 *See id.* at 5-6 (*quoting* H.R. REP. NO. 97-312, 97th Cong., 1st Sess. 43 (1981); S. REP. NO. 97-275, 97th Cong., 1st Sess. 23, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 11, 33)).

40 Contract Disputes Act of 1978, § 8(d), 41 U.S.C. § 607(d) (1994). This section provides in part, "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims."

41 Rex Sys., Inc. v. Holliday, 814 F.2d 994 (4th Cir. 1987); J.P. Francis & Assocs., Inc. v. United States, 802 F.2d 740 (9th Cir. 1990). The Second Circuit allied itself with the Fourth and Ninth Circuits in dicta. *See* B.K. Instrument, Inc. v. United States, 750 F.2d 713, 721 & n.4 (2nd Cir. 1983). District courts finding themselves divested of concurrent jurisdiction over "pre-award" cases under now-repealed section 1491(a)(3) were multiple. *See, e.g.*, Commercial Energies, Inc. v. Cheney, 737 F. Supp. 78, 79-80 (D. Colo. 1990); Metric Sys. Corp. v. United States Dep't of Air Force, 673 F. Supp. 439, 440-41 (N.D. Fla. 1987); Arrow Air, Inc. v. United States, 649 F. Supp. 993, 998 & n.8 (D.D.C. 1986); Caddell Constr. Co. v. Lehman, 599 F. Supp. 1542, 1545-48 (S.D. Ga. 1985); Opal Mfg. Co. v. UMC Indus., Inc., 553 F. Supp. 131, 132-33 (D.D.C. 1982).

42 *In re* Smith & Wesson, 757 F.2d 431, 433-35 (1st Cir. 1985); Coco Bros. v. Pierce, 741 F.2d 675, 677-79 (3rd Cir. 1984). The Federal Circuit and the Sixth Circuit agreed that the CFC and the district courts had concurrent jurisdiction in "pre-award" cases. *See* Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991); *Grimberg*, 702 F.2d at 1376; *see also* North Shore Strapping Co. v. United States, 788 F. Supp. 344, 345-47 (N.D. Ohio 1992) (finding concurrent jurisdiction).

43 28 U.S.C. § 1491(a)(3) (1982) (repealed).

44 *Grimberg*, 702 F.2d at 1366-68; *see generally* Claybrook, supra note ___, at 16-19.

45 28 U.S.C. § 1491(a)(1) (1982).

46 *Grimberg*, 702 F.2d at 1366-68.

47 *See generally* Claybrook, supra note ___, at 18; *see, e.g.*, Alabama Metals Products, Inc. v. United States, 4 Cl. Ct. 530, 534 (1984); Eagle Constr. Corp. v. United States, 4 Cl. Ct. 470 (1984); Ingersoll-Rand Co. v. United States, 2 Cl. Ct. 373, 375-77 (1983).

> The government promises to comply with duly promulgated regulations in conducting a procurement. The regulations preexist the implied-in-fact contract and therefore constitute part of the [implied] agreement [between the bidder and the agency]. That the regulations under which the government conducts a procurement may be an invalid implementation of a governing statute does not mean that the government has breached its duty to be fair and honest to a particular bidder.
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> . . . If a bidder wishes to challenge the validity of a regulation governing a procurement, a proper method of doing so is to bring an action in federal district court under the Administrative Procedure Act . . . .[48]

According to the Federal Circuit's rationale as articulated in *Grimberg* and as later applied, even in "pre-award" situations the CFC could not provide a remedy for many violations of law for which the district courts could.[49]

These decisions frustrated Congress's overriding purpose to establish concurrent and coextensive jurisdiction over bid protest actions in the district courts and the CFC. The result has been splits of authority,[50] much negative commentary, and varied suggestions for amendment of the statute to clarify Congress's intent.[51] In particular, this writer in an earlier article suggested that Congress could best accomplish its original legislative intent by specifying that the CFC would review an agency's procurement actions under the same standard as that employed by the district courts, the APA.[52] The American Bar Association Section of Public Contract Law supported this suggestion,[53] and, ultimately, Congress adopted it.

In the Administrative Dispute Resolution Act of 1996,[54] Congress repealed its formulation of bid protest jurisdiction in the Federal Courts Improvement Act of 1982[55] and replaced it with the following new section 1491(b) of title 28:

> (b)(1) Both the Unites [*sic*] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of

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48 Southfork Sys., Inc. v. United States, 141 F.3d 1124, 1135 (Fed. Cir. 1998).

49 *Id.* A disappointed bidder did state a permissible cause of action under now-repealed section 1491(a)(3) in the CFC in a "pre-award" case if the allegation was that the agency had violated a regulation when evaluating its offer under the solicitation (and the solicitation itself did not permit that deviation). *Id.* at 1134-35.

50 As another example of a split of authority, some CFC judges had ruled that any violation of procurement regulation was actionable in the CFC if the case was brought "pre-award." *See* McMaster Constr., Inc. v. United States, 23 Cl. Ct. 679 (1991); Planning Research Corp. v. United States, 4 Cl. Ct. 283 (1983). The Federal Circuit in *Southfork Systems* found that line of cases to be in error. 141 F.3d at 1132-35. *See also* Central Ark. Maint., Inc. v. United States, 68 F.3d 1338, 1342 (Fed. Cir. 1995).

51 *See, e.g.*, Villet, supra note ____, at ___; Day, supra note ___, at ___.

52 Claybrook, supra note ___, at 20-21.

53 *E.g.,* Testimony of John D. Miller, Chair, ABA Section of Public Contract Law, Before the Committees on Government Reform and Oversight and National Security on H.R. 1038, H.R. 1670, and S. 699 at 6-7 (May 25, 1995) (copy in author's files).

54 Pub. L. No. 104-320, 110 Stat. 3870.

55 *Codified at* 28 U.S.C. § 1491(a)(3) (1982) (repealed).

> statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.
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> (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal cost.
>
> (3) In exercising jurisdiction under the subsection, the courts shall give due regard to the interest of national defense and national security and the need for expeditious resolution of the action.
>
> (4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.[56]

Congress in this new statutory language addressed the major frustrations of its purpose in the prior bid protest provision by clarifying that (a) new section 1491(b) is jurisdictional for both the district courts and the CFC; (b) the CFC, like the district courts, may hear a bid protest action, whether or not the challenged award has already taken place[57]; and (c) the CFC's authority is coextensive with that of the district courts, in that the CFC is not limited to actions in which a bidder alleges it was treated unequally in comparison to the other bidders. Reinforcing its desire that the CFC and the district courts exercise concurrent and coextensive jurisdiction, Congress also made explicit that the CFC was to apply the same standard of review as the district courts have applied since *Scanwell* – the judicial review provisions of section 10(e) of the APA, which are codified at section 706 of title 5.[58]

II. The CFC's Inconsistent Application of the APA in Bid Protest Actions

In 1983, the first full year the CFC exercised what turned out to be limited bid protest jurisdiction, the CFC issued reported decisions in 34 bid protest cases.[59] Recourse to the CFC by disappointed bidders quickly plummeted, however, coincident with the Federal Circuit's restricting the CFC's jurisdictional reach in *Grimberg*.[60] The year 1984 saw reported decisions in 24 cases,[61] but from 1985 through 1996 there were reported decisions in ten or less bid protest cases each year,[62] with a low water mark of two in 1996.[63]

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56 Administrative Dispute Resolution Act of 1996, § 12(a), 110 Stat. at 3874-75, *codified at* 28 U.S.C. § 1491(b) (Supp. II 1996).

57 *See* Hewlett-Packard Co. v. United States, 41 Fed. Cl. 99, 102 (1998) ("The purpose of this measure was to give this court the same power in pre-award bid protest actions that the district courts exercised under the Scanwell doctrine.").

58 28 U.S.C. § 1491(b)(4) (Supp. II 1996) (specifying application of "section 706 of title 5").

59 Those decisions were reported in volumes 1 through 4 of the Claims Court Reporter.

60 702 F.2d at 1365-74 (decided March 23, 1983).

61 These decisions were reported in volumes 4 through 7 of the Claims Court Reporter.

62 These decisions were reported in volumes 7 through 26 of the Claims Court Reporter and volumes 27 through 36 of the Court of Federal Claims Reporter.

63 Firth Constr. Co. v. United States, 36 Fed. Cl. 268 (1996); PCI/RCI v. United States, 36 Fed. Cl. 761 (1996).

With new section 1491(b) effective on December 31, 1996,[64] and with its clarification of Congress's intent that the CFC and district court bid protest jurisdiction is to be coextensive, the CFC has seen a rapid increase in its bid protest activity. In 1997, the CFC issued reported decisions in 20 bid protest cases[65] and, in 1998, in another 17.[66]

Unfortunately, the CFC's application of new section 1491(b) and the APA review provision it incorporates has included some wrong turns. In all of the problem areas discussed below, recourse to APA precedent of the district and circuit courts could redirect the CFC to the congressionally-mandated path.

A. Is New Section 1491(b) a Source of Jurisdiction?

One of Congress' principal purposes in enacting new section 1491(b) was to clarify the confused state of the case law relating to court jurisdiction over procurement challenges. The initial results in the CFC have not reflected the desired clarity in several respects.

1. New Section 1491(b) Is an Independent Source of CFC Jurisdiction

One of the obvious purposes of new section 1491(b) is to overturn the result of *Grimberg* and its misguided, but faithful, progeny that, because jurisdiction in bid protest cases is grounded exclusively on implied contract, the statute limited the CFC in what types of bid protest cases it could hear and, consequently, the CFC could not review many categories of procurement cases that the district courts have routinely entertained under the APA in the exercise of their federal question jurisdiction.[67] Thus, in a lengthy passage in new section 1491(b) Congress comprehensively catalogues, by both example and definition, the different types of "bid protests," including those that, following *Grimberg*, the CFC had previously refused to hear:

> an action . . . objecting to a solicitation . . . for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement . . . without regard to whether suit is instituted before or after the contract is awarded.[68]

It seems so evident as hardly to require analysis that Congress in new section 1491(b) gave the CFC and the district courts "jurisdiction" over all bid protest actions. Indeed, Congress states twice in new subsection 1491(b)(1) that it is conferring *jurisdiction*:

> Both the Unite[d] States Court of Federal Claims and the district courts of the United States *shall have jurisdiction* to render judgment on [a bid protest] action . . . . Both the United States Court of Federal Claims and

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64 Administrative Dispute Resolution Act of 1996, § 12(b), 110 Stat. 3875.

65 These cases are reported in volumes 37 through 39 of the Court of Federal Claims Reporter.

66 These cases are reported in volumes 40 through 42 of the Court of Federal Claims Reporter. Protesters filed 28 "post-award" cases under new section 1491(b) in 1997, 68 FED. CONTRACTS REP. (BNA) 553 (1998), and 33 such cases in 1998, 70 *id.* 610 (1999).

67 See notes __ *supra* and accompanying text.

68 28 U.S.C. § 1491(b)(1) (Supp. II 1996).

> the district courts of the United States *shall have jurisdiction* to entertain such an action . . . .[69]

The problem is that old section 1491(a)(3), which new section 1491(b) replaced, also spoke twice of giving the CFC "jurisdiction" to grant equitable relief in bid protest actions.[70] That did not stop the Federal Circuit in *Grimberg* from reading the term "jurisdiction" out of the statute[71] and, unfortunately, the legislative history of the 1996 revision is not explicit in stating Congress's desire to overturn that result. Nevertheless, the language of new section 1491(b) is more expansive and much more directly ties the jurisdiction Congress confers to "an action" than did the original language.[72] Nor did Congress repeat its prior language about allowing the CFC to "afford complete relief on any contract claim,"[73] which is the language on which the *Grimberg* court focused in holding that the source of jurisdiction for a bid protest action was the implied contract the government gives to a bidder that its bid will be evaluated in conformity with the government's solicitation.[74]

The results in the CFC under new section 1491(b) have been mixed so far.[75] Several judges on the court have appropriately recognized that the source of bid protest jurisdiction is new section 1491(b).[76] However, some judges of the court have continued to cite the pre-repeal law that the source of jurisdiction in a bid protest case is a disappointed bidder's implied contract under section 1491(a)(1) of the codified Tucker Act[77] – in other words, the *Grimberg* rationale.[78] Those judges continuing to assert

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69 *Id.* (emphasis added).

70 *Id.* § 1491(a)(3) (1982) (repealed). The repealed section stated, in part, "the court shall have exclusive *jurisdiction* to grant declaratory judgments and such equitable and extraordinary relief as deems proper . . . . In exercising this *jurisdiction*, the court shall give due regard to the interest of national defense and national security." (Emphasis added.)

71 702 F.2d at 1366-68.

72 *Compare* new section 1491(b)(1), 28 U.S.C. § 1491(b)(1) (Supp. II 1996) (the courts "shall have jurisdiction to render judgment on an action" and "shall have jurisdiction to entertain such an action") *with* repealed section 1491(a)(3), *id.* (a)(3) (1982) ("the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper").

73 *Id.*

74 702 F.2d at 1366-68.

75 The district courts have to date been largely oblivious to new section 1491(b), neglecting to cite it in a single Scanwell case through 1998. *But see* Information Sys. & Networks Corp. v. United States Dep't of Health and Human Servs., 970 F. Supp. 1, 10 (D.D.C. 1997) (recognizing in non-Scanwell case that new section 1491(b) provides jurisdiction to the district courts in bid protest actions).

76 *E.g.*, Marine Hydraulics Int'l, Inc., v. United States, __Fed. Cl. ___, ___ (1999) (Hewitt, J.) ("This court has jurisdiction over [this] post-award bid protest action under the 1996 amendments to the Tucker Act."); Miller-Holzwarth, Inc. v. United States, 42 Fed. Cl. 643, 649 (1999) (Miller, J.) ("In 1996 Congress expanded the jurisdiction of the [CFC] to include post-award bid protests."); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306, 310 (1998) (Futey, J.) (amended act grants "jurisdiction" to hear post-award bid protest actions); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281, 283, 291 (1998) (Bruggink, J.) (citing new section 1491(b)(1) as jurisdictional provision); Ramcor Servs. Grp., Inc. v. United States, 41 Fed. Cl. 264, 268 (1998) (Miller, J.) (implied contract jurisdiction "obviated" by new statute); W&D Ships Decks Works, Inc. v. United States, 39 Fed. Cl. 638, 640-41 (1997) (Weinstein, J.) (implied contract jurisdiction eliminated); CC Distribs., Inc. v. United States, 38 Fed. Cl. 771, 775 (1997) (Horn, J.) (new section 1491(b)(1) "confers post-award bid protest jurisdiction" on the CFC); ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489, 494 (1997) (Andewelt, J.) (same).

77 *E.g.*, ECDC Envtl., LC v. United States, 40 Fed. Cl. 236, 237, 241 (1998) (Futey, J.) (articulating implied contract theory); Hewlett-Packard Co. v. United States, 41 Fed. Cl. 99, 102 (1998) (Tidwell, J.) (same); Aero Corp., S.A. v. United States, 38 Fed. Cl. 739, 748-49 (1997) (Futey, J.) (same).

78 Judge Futey in *Aero* provides a good example of continuing to cite *Grimberg* precedent for cases subject to new section 1491(b):

> Whenever defendant [United States] solicits bids, an implied-in-fact contract is created between defendant and the bidders on the underlying contract. *Ingersoll-Rand Co. v.*

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implied contract theory as the source of bid protest jurisdiction have not expressly rejected new section 1491(b) as a source of jurisdiction; nor have they used the *Grimberg* rationale to restrict the scope of their review of potential relief unduly.[79] It seems quite possible, then, that these citations to pre-repeal jurisdictional law are not the result of careful deliberation. The CFC should no longer reference *Grimberg's* implied contract jurisdiction as the basic source of its authority to hear bid protest cases.

2. The CFC Retains Its Implied-Contract Jurisdiction

All this is not to say that Congress, in making clear in new section 1491(b) that the CFC has been given jurisdiction over bid protest actions by that provision itself, has intended to overturn the longstanding precedent of the CFC and its predecessor courts that disappointed bidders may bring an implied contract action against the government if the agency does not fairly and properly evaluate its bid.[80] Congress in the Federal Courts Improvement Act of 1982 demonstrated no intention of eliminating

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> *United States*, 2 Cl. Ct. 373, 375 (1983). Under this implied-in-fact contract, the government guarantees that it will fully and fairly consider all bids submitted in accordance with these solicitations. *E.W. Bliss Co. v. United States*, 77 F.3d 445, 447 (Fed. Cir. 1996); *see also Cincom Sys., Inc. v. United States*, 37 Fed. Cl. 663, 671 (1997); *Ingersoll-Rand*, 2 Cl. Ct. at 375. "It is this implied contract which forms the jurisdictional basis for an exercise of this court's equitable authority." *Ingersoll-Rand*, 2 Cl. Ct. at 375; *see also Keco Indus. Inc. v. United States*, 192 Ct. Cl. 773, 428 F.2d 1233, 1237 (1970). Thus, the court's authority to grant relief is limited to determining whether the government breached its implied contract of fair dealing with the complaining bidder. *Cincom*, 37 Fed. Cl. at 671; *see also Central Ark Maintenance, Inc. v. United States*, 68 F.3d 1338, 1341-42 (Fed. Cir. 1995); *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1373 (Fed. Cir. 1983). Further, the court's review of an agency's procurement decision is limited in scope. *Shields Enters. v. United States*, 28 Fed. Cl. 615, 622 (1993). Indeed, "[i]t is through a narrow lens that this court is charged with determining whether the government has satisfied the implied contractual condition that each offer received by the government in response to a request for proposals will be fairly and honestly evaluated." *Id.*

38 Fed. Cl. at 748-49; *see also* United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 318 (1998); *ECDC Envtl.*, 40 Fed. Cl. at 240-41.

79 For example, Judge Futey in *Aero* gave extensive consideration to all of the allegations raised by the disappointed bidder. 38 Fed. Cl. at 749-70. That consideration included alleged violations of statute and regulation. *Id.* at 766-70. Even though repeating the implied contract standard of review when it stated that a violation of statute or regulation "must be sufficient to deny plaintiff 'the impartial consideration to which it was entitled under the implied contract obligations of the government,'" *id.* at 767 (*quoting* Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 714 (1985)), the court gave full consideration to those allegations and it did not engage in a *Grimberg*-like analysis of whether the violations alleged were redressable. *Id.* at 766-70. In *ECDC Environmental*, Judge Futey repeated the implied contract mantra of prior years, but then went on to discuss the merits in full and to rule in favor of the disappointed bidder. 40 Fed. Cl. at 240-46. The issues in that case, however, did not implicate the restrictions on bid protest jurisdiction that the Federal Circuit imposed in *Grimberg*. The same can be said for Judge Futey's decision in *United International Investigative Services*, in which he granted relief. *See* 41 Fed. Cl. at 319-24.

In *Hewlett-Packard*, Judge Tidwell recited the implied contract theory of jurisdiction. This was especially odd given that the question decided was whether procurement decisions of the United States Postal Service fell under new section 1491(b). 41 Fed. Cl. at 100. However, the implied contract theory jurisdiction did not play into the merits of the decision. *See id.* at 102-06.

80 The lead case espousing that disappointed bidders may bring an implied contract action against the government if the agency does not evaluate its bid fairly and properly is *Keco Industries, Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). The Court of Claims in *Keco* adopted the Scanwell rationale for standing and reiterated "a broad general rule . . . 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." *Id.* at 1236-38. In a later appeal in the same case, the Court of Claims set out four criteria that a disappointed bidder may use to show that the agency acted arbitrarily and capriciously such that it may recover its bid preparation costs:

> One is that 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. A second is that proof that there was "no reasonable basis" for the administrative decision will also suffice, at least in many situations. The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of

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that preexisting jurisdiction; it only added a further source of jurisdiction and equitable remedial powers in bid protest cases.[81] The *Grimberg* court erred when it earlier treated the jurisdictional question as an either/or proposition.[82]

It is even clearer under new section 1491(b) that Congress does not intend to eliminate a disappointed bidder's implied contract recovery. The traditional remedy for such a cause of action is monetary recovery of bid preparation costs.[83] Congress in new section 1491(b) expressly provides that the CFC and the district courts in bid protest actions may award the monetary relief of "bid preparation and proposal costs."[84] Thus, Congress explicitly sanctions the implied contract theory of jurisdiction and its traditional remedy, even granting it to the district courts with no monetary limit.[85]

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> discretion entrusted to the procurement officials by applicable statutes and regulations. The fourth is that proving a violation of pertinent statute or regulation can, but need not necessarily be a ground for recovery. The applications of these four general principles may well depend on (1) the type of error or dereliction committed by the Government, and (2) whether the error or dereliction occurred with respect to the claimant's own bid or that of a competitor.

Keco Indus., Inc. v. United States, 492 F.2d 1200, 1204 (Ct. Cl. 1974) (citations omitted); *accord* E.W. Bliss Co. v. United States, 77 F.3d 445, 447-78 (Fed. Cir. 1996); CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Burroughs Corp. v. United States, 617 F.2d 590, 597-98 (Ct. Cl. 1980).

The applicability of the *Keco* standard under new section 1491(b) is highly questionable, because the court did not develop it under the APA. Nevertheless, several CFC judges have continued to cite use its formulation to define "arbitrary and capricious." *E.g.,* Marine Hydraulics Int'l, Inc., v. United States, ___Fed. Cl.___, ___ (1999) (Hewitt, J.); Int'l Investigative Servs., Inc. v. United States, 42 Fed. Cl. 73, 81 (1998) (Weinstein, J.); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306, 310 (1998) (Futey, J.); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281, 291 n.20 (1998) (Bruggink, J.); United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 318 (1998) (Futey, J.). The fourth *Keco* standard – violation of pertinent statute or regulation – is merely a restatement of the APA. *See* 5 U.S.C. § 706(2)(A), (C), (D). The third *Keco* standard – the degree of proof varies with the discretion involved in the challenged decision – states neither a standard nor a degree of proof, but it is true to the extent that it states that a court's latitude for review lessens as the agency's discretion increases. The second *Keco* standard – no reasonable basis – is an established reformulation of the "arbitrary and capricious" standard in APA cases. The fourth *Keco* standard – subjective bad faith, which the Federal Circuit has otherwise held must be proven by "well-nigh irrefragable" proof – has a counterpart in discovery in APA bias cases, although the burden of proof is out of conformity with APA case law. *Compare* Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995) (requiring well-nigh irrefragable proof to prove bad faith), *with Overton Park*, 401 U.S. at 420 (requiring "strong showing" of bad faith to permit discovery beyond the administrative record but not ruling on the ultimate burden of proof or otherwise altering standards of 5 U.S.C. § 706). Federal Circuit case law is clear that not all of the *Keco* standards need be met to justify relief, but only one. *See* Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 n.5 (Fed. Cir. 1988); R.R. Donnelley & Sons, Co. v. United States, 40 Fed. Cl. 277, 282 (1998).

81 Congress when it repealed section 1491(a)(3) in the Administrative Dispute Resolution Act of 1996 did not amend section 1491(a)(1), the source of implied contract jurisdiction: "the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States found . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491 (1994).

82 *Grimberg*, 702 F.2d at 1366-68. In contrast to the Federal Circuit's improper treatment in *Grimberg*, the predecessor Court of Claims held in *Keco* when discussing a disappointed bidder's right under the implied contract theory to recover bid preparation costs, "even without *Scanwell*, we feel that plaintiff should be allowed to maintain this action based on the decision in" Heyer Products Co. v. United States, 140 F.2d 409 (Ct. Cl. 1956), in which case the Court of Claims first established the rule that a bidder had an implied contract to have its bid honestly considered by the government. Keco Indus., Inc. v. United States, 428 F.2d 1233, 1237 (Ct. Cl. 1970).

83 *See* E.W. Bliss Co. v. United States, 77 F.3d 445, 447 (Fed Cir. 1996); *see generally* Coflexip & Servs., Inc. v. United States, 961 F.2d 951, 952-54 (Fed. Cir. 1992); Delta Data Sys. Corp. v. Webster, 755 F.2d 938, 940 (D.C. Cir. 1985); Stapp Towing, Inc. v. United States, 34 Fed. Cl. 300, 311-12 (1995); Finley v. United States, 31 Fed. Cl. 704, 706-07 (1994); *cf.* Concept Automation, Inc. v. United States, 41 Fed. Cl. 361 (1998) (awarding bid protest costs under implied contract jurisdiction).

84 28 U.S.C. § 1491(b)(2) (Supp. II 1996).

85 Under the Little Tucker Act, Congress has given the district courts concurrent jurisdiction with the CFC of contract actions under $10,000. *Id.* § 1346(a)(2) (1994). Prior to new section 1491(b)(2), it had been the rule that district courts could not

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In fact, Congress in new section 1491(b) apparently extended the traditional implied contract remedy, at least as construed in *Grimberg*. The Federal Circuit in *Grimberg* had disallowed certain implied contract actions based solely on violations of law or regulation, as opposed to violation of the solicitation provisions themselves.[86] Congress, however, in new section 1491(b) allows the district courts and the CFC to grant bid preparation and proposal costs in "such an action,"[87] *i.e.*, in any action it defined in subsection (1) of section 1491(b).[88] "Such actions" include those alleging a "violation of statute or regulation in connection with a procurement or a proposed procurement."[89] Hence, under new section 1491(b) both the CFC and the district courts may now grant restitutionary, monetary relief under an implied contract theory even when the agency has violated only procurement law or regulation and even when the agency has acted consistently with its solicitation.

3. The CFC Has Jurisdiction Over Challenges to CICA Stay Overrides

The CFC has unduly restricted its expanded jurisdiction under new section 1491(b) in one type of bid protest case. In the Competition in Contracting Act of 1984 (CICA),[90] Congress imposed an automatic stay of contract award or contract performance of a procurement challenged at the General Accounting Office, provided the bid protest was filed at GAO either before or within a certain number of days after the contract award.[91] The "head of the procuring activity" may override the automatic statutory stay if she finds it in the "best interests" of the United States to do so or that urgent and compelling circumstances require the procurement to go forward.[92] When an agency has overridden the automatic stay, the district courts have entertained challenges under the APA to determine whether the override was arbitrary and capricious or contrary to law.[93]

The CFC in *Ramcor Services Group, Inc. v. United States*[94] addressed the first override action under CICA filed in the CFC. Judge Miller dismissed the action for lack of jurisdiction.[95] Finding that an

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award monetary damages in actions falling under the CFC's jurisdiction if the damages involved are over $10,000. *Cf.* Department of Army vs. Blue Fox, Inc., 119 S. Ct. 687, 690-91 & n.3 (1999) (holding district court lacked jurisdiction to grant relief of money damages over $10,000). Under new section 1491(b)(2), the $10,000 limit apparently would not apply for district court awards of "bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2) (Supp. II 1996). This writer has suggested that this was an unintended consequence of new section 1491(b) and that Congress amend new section 1491(b)(2) to reimpose that $10,000 limit and to remove the limitation that monetary damages are limited to bid preparation costs. Frederick W. Claybrook, Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555, 600-02 (1997).

86 702 F.2d at 1366-68; *see* Southfork Sys., Inc. v. United States, 141 F.3d 1134, 1135 (Fed. Cir. 1998).

87 28 U.S.C. § 1491(b)(2) (Supp. II 1996).

88 *Id.* (1).

89 *Id.*

90 Act of July 18, 1984, Pub. L. No. 98-369, 98 Stat. 1175-203 (codified in various sections of titles 10, 31, 40, 41, and others).

91 31 U.S.C. § 3553 (1994).

92 *Id.* §§ (c)(2), (d)(3)(C). If the head of the procuring activity makes a "best interests" finding to permit continued performance, the GAO in making its recommendations in a successful protest is to give no regard "to any cost or disruption from terminating, recompetiting, or reawarding the contract." *Id.* 3554(b)(2).

93 *See, e.g.*, DTH Mgmt. Group v. Kelso, 844 F. Supp. 251 (E.D.N.C. 1993); Dairy Maid Dairy, Inc. v. United States, 837 F. Supp. 1370 (E.D. Va. 1993); Samson Tug & Barge Co. v. United States, 695 F. Supp. 25 (D.D.C. 1988); Universal Shipping Co. v. United States, 652 F. Supp. 668 (D.D.C. 1987). *But see* Topgallant Group, Inc. v. United States, 704 F. Supp. 265-66 (D.D.C. 1988) (finding the best interests override determination committed to agency discretion by law).

94 41 Fed. Cl. 264 (1998) (Miller, J.).

95 *Id.* at 272.

override action was neither a typical bid protest action nor one expressly called out in the statute as revised, and after looking in vain in the legislative history for reference to override litigation, she concluded that Congress had not desired to grant the CFC such jurisdiction.[96] Her conclusions misread new section 1491(b) and contradict the statute's policy.

Congress in new section 1491(b) gives the CFC jurisdiction of an action in which an interested party objects to "any alleged violation of statute or regulation in connection with a procurement . . . ."[97] The facial analysis required is elementary: (1) Does a litigant asserting that CICA does not sanction an override by the head of a procuring activity alleging a "violation of statute or regulation"? Obviously, yes. (2) Is that alleged violation "in connection with a procurement"? Of course, it is.

That should be the end of the analysis, but the CFC neglected even to begin it. Instead, Judge Miller labeled the new statute as "unclear" in this respect, apparently because Congress did not expressly reference override actions.[98]

The CFC in *Ramcor* also neglected the obvious policy of Congress in new section 1491(b) – to make the jurisdiction of the district courts and the CFC coextensive. It runs directly contrary to that policy to hold, as Judge Miller did, that for an override action a litigant must still go to the district courts and cannot seek the same relief in the CFC.[99] Indeed, because Congress has provided that district court jurisdiction in such cases will end in 2001,[100] Judge Miller's opinion in *Ramcor*, if correct, would mean that there no longer would be jurisdiction in any court to review override decisions once the CFC's jurisdiction becomes exclusive of that of the district courts.[101] This obviously was not what Congress intended when it expanded the CFC's jurisdiction over procurement challenges in new section 1491(b).

B. Is the Appropriate Burden of Proof a Preponderance, or Clear and Convincing Evidence, or Neither?

Prior to new section 1491(b), the judges of the CFC were split over the issue of the disappointed bidder's burden of proof. Some judges required disappointed bidders to prove their case by "clear and convincing evidence."[102] Others rejected this standard and applied the typical civil standard of "preponderance of the evidence."[103] In describing the burden of proof in cases under new section

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96 *Id.* at 268-70.

97 28 U.S.C. § 1491(b)(1) (Supp. II 1996). Judge Miller makes an oblique, footnote reference to this portion of the revised act, but she does not explain its significance (or lack of significance). 41 Fed. Cl. at 269 n.3.

98 *Id.* at 268-69.

99 Judge Miller quoted, but effectively ignored, statements in the legislative history such as, "Each court system [the Court of Federal Claims and the district courts] would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system." *Id.* at 269 (*quoting* 142 CONG. REC. S11849 (statement of Sen. Levin)).

100 Pub. L. No. 104-320, § 12(d), 110 Stat. 3874.

101 The suggestion in *Ramcor* that override actions, even though they deal with bid protests, are not "bid protest" or "Scanwell" actions because they do not involve the merits of the procurement decision itself is untenable. *See* 41 Fed. Cl. at 268-69. *Scanwell* established that disappointed bidders have standing to challenge agency actions involving procurements, 424 F.2d at 865-73, and override determinations certainly qualify as agency actions involving procurements, as they allow awards and performance under challenged awards to proceed, despite a pending GAO protest. Whether such performance will be allowed to proceed is often the most critical aspect of a bid protest action. *See* Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1316 (D.C. Cir. 1971).

102 *E.g.*, 126 North Point Plaza Ltd. Partnership v. United States, 34 Fed. Cl. 105, 107 (1995); Durable Metal Prods., Inc. v. United States, 27 Fed. Cl. 472, *aff'd without op.*, 11 F.3d 1071 (Fed. Cir. 1993).

103 *E.g.,* R.R. Donnelley & Sons, Co. v. United States, 38 Fed. Cl. 518, 521-23 (1997); Magellan Corp. v. United States, 27 Fed. Cl. 446, 447, 451 (1993); Magnavox Elec. Sys. Corp. v. United States, 26 Fed. Cl. 1373, 1378 & n.6 (1992); Logicon, Inc. v. United States, 22 Cl. Ct. 776 (1991); Reel-O-Matic Sys., Inc. v. United States, 16 Cl. Ct. 93, 99 (1989); Quality Transport Servs., Inc. v. United States, 12 Cl. Ct. 276, 281 (1987); DLM&A, Inc. v. United States, 6 Cl. Ct. 329, 331 (1984).

1491(b), some CFC judges continue to cite the clear and convincing evidence test as the appropriate standard,[104] while other judges cite the preponderance standard.[105] One decision cites both.[106]

Applying the clear and convincing evidence standard had no persuasive justification prior to Congress's revising the bid protest jurisdiction of the CFC;[107] it has even less now. New section 1491(b) specifies that both the CFC and the district courts are to review bid protest actions under the APA standards "set forth in section 706 of title 5."[108] The question is resolved, therefore, by examination of the standard the district courts apply in APA decisions under section 706.[109]

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104 *E.g.,* ECDC Envtl., LC v. United States, 40 Fed. Cl. 236, 240-41 (1998); Delbert Wheeler Constr., Inc. v. United States, 39 Fed. Cl. 239, 251 (1997), *aff'd without op.*, 155 F.3d 566 (Fed. Cir. 1998); Aero, S.A. v. United States, 38 Fed. Cl. 739, 748-50, 766-67 (1997); Day & Zimmerman Servs. v. United States, 38 Fed. Cl. 591, 597 (1997); Minor Metals, Inc. v. United States, 38 Fed. Cl. 16, 19 (1997); Cincom Sys., Inc. v. United States, 37 Fed. Cl. 663, 671-72 (1997).

105 *E.g.,* Marine Hydraulics Int'l, Inc. v. United States, ___Fed. Cl.___, ___ (1999); Miller-Holzwarth, Inc. v. United States, 42 Fed. Cl. 643, 649 (1999); Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215, 220 (1998), *rev'd on other grounds,* ___F.3d ___ (Fed. Cir. 1999).

106 *See* Analytical & Research Tech., Inc. v. United States, 39 Fed. Cl. 34, 42, 52 (clear and convincing evidence), 55 (preponderance of the evidence) (1997).

107 Judge Nettesheim in *Logicon, Inc. v. United States*, 22 Cl. Ct. 776 (1991), noted that, although "quite a few judges" of the CFC had adopted the "clear and convincing evidence" standard upon the repeated urgings of the Department of Justice, "the standard is bereft of any support in precedent or policy. . . . Short of a permanent injunction, the accepted standard is proof of a strong likelihood of success on the merits. The standard for a permanent injunction is a preponderance of evidence . . . ." *Id.* at 783 (citations omitted); *see also* Isratex, Inc. v. United States, 25 Cl. Ct. 223, 227-228 (1992) (Nettesheim, J.) ("after urging this standard with some success at the trial level for nine years, defendant [United States] has not succeeded in creating binding precedent making an already exacting burden of proof virtually unsurmountable, as well as incomprehensible"); R.R. Donnelly & Sons, Co. v. United States, 38 Fed. Cl. 518, 521-22 (1997) (Miller, J.); Reel-O-Matic Sys., Inc. v. United States, 16 Cl. Ct. 93, 99 (1989) (Nettesheim, J.). The original source in the Claims Court for the purported "clear and convincing evidence" standard in bid protest cases was *Goldammer v. Fay*, 326 F.2d 268 (10th Cir. 1964). *See* Baird Corp. v. United States, 1 Cl. Ct. 662, 664 (1983); s*ee also DLM&A*, 6 Cl. Ct. at 331. While the court in *Goldammer* speaks of injunctive relief being a "drastic remedy," it does not apply a clear and convincing evidence standard. 326 F.2d at 270.

108 28 U.S.C. § 1491(b)(4) (Supp. II 1996); *see* United Int'l Investigative Servs., Inc. v. United States, 42 Fed. Cl. 73, 80 (1998).

109 Section 10(e) of the APA as currently codified in section 706 of title 5 reads as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency actions, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

(continued...)

Judge Nettesheim of the CFC correctly observes, "No federal appellate or other federal trial court requires a government contractor to prove entitlement to pre- or post-award injunctive relief by clear and convincing evidence."[110] By and large, however, the whole issue as framed by the CFC is a false one. The CFC has failed to appreciate that, when reviewing bid protest actions, it sits in more of an "appellate" capacity than in a trial court's traditional role, where such burdens of proof typically come into play. The CFC should follow the lead of Judge Weinstein in *Advanced Data Concepts, Inc. v. United States,*[111] by eschewing any standard other than that given by Congress in the APA: "An agency procurement decision . . . will be set aside only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[112]

The Supreme Court and the lower courts in a variety of circumstances have imposed the more onerous "clear and convincing" evidence standard on underlying *agency* actions covered by the APA.[113] For example, the Immigration and Naturalization Service must meet this "higher degree of proof," rather than a preponderance, in denaturalization[114] and deportation proceedings.[115] Similarly, the Federal Circuit requires a serviceman to prove that his discharge is arbitrary, capricious, or contrary to law by "cogent and clearly convincing evidence."[116] But once the agency has made its determination, the reviewing court is to apply the standards of section 10(e) of the APA, which do not impose a "clear and convincing evidence" test. Instead, they require an assessment of whether the agency acted in an arbitrary or capricious manner or in violation of law.[117]

No CFC judge has yet analyzed the issue of which standard properly applies under new section 1491(b).[118] It is likely, therefore, that the continued recital of the clear and convincing evidence test by some members of the CFC is only the result of habit, not reasoned analysis.[119]

(...continued)

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1994).

110 *Logicon*, 22 Cl. Ct. at 783; *see also* Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1135-36 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992) (applying preponderance standard).

111 ___ Fed. Cl. ___ (1999).

112 *Id.* at __ (*quoting* 5 U.S.C. § 706(2)(A) (1994)).

113 Section 7(c) of the APA provides, "[T]he proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (1994). This has reference to the underlying proceedings of the agency, not to judicial review of the agency's action, the APA provisions concerning which are codified in chapter 7 of title 5. *Id.*, ch. 7.

114 Woodley v. INS, 385 U.S. 276, 285 (1966); *see also* Nowak v. United States, 356 U.S. 660, 663 (1958).

115 *Woodley*, 385 U.S. at 286.

116 *See* Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed. Cir. 1986); *see also* Whitney v. SEC, 604 F.2d 676, 680-81 (D.C. Cir. 1979) (suspending broker requires clear and convincing evidence); Collins Securities Corp. v. SEC, 562 F.2d 820, 826 (D.C. Cir. 1977) (revoking license for fraud requires clear and convincing evidence).

117 *See* 5 U.S.C. § 706 (1994); Espinoza-Espinoza v. INS, 554 F.2d 921, 924 (9th Cir. 1977) (holding that the clear and convincing evidence test established by the Supreme Court for deportation hearings applies only to the agency hearing, not to the court review; the court reviews under the standards in 5 U.S.C. § 706).

118 *E.g., Marine Hydraulics,* ___ Fed. Cl. at ___; *Miller-Holzwarth*, 42 Fed. Cl. at 649; *ECDC Envtl.*, 40 Fed. Cl. at 240-41; *Delbert Wheeler*, 39 Fed. Cl. at 251; *Analytical & Research Tech.*, 39 Fed. Cl. at 42-52 (clear and convincing), 55 (preponderance); *Aero*, 38 Fed. Cl. at 748-50, 766-67; Hydro Eng'g, Inc. v. United States, 37 Fed. Cl. 448, 464 (1997).

119 Judge Miller of the CFC, while not analyzing the issue in terms of new section 1491(b) and the APA, noted in *R.R. Donnelley & Sons, Co. v. United States*, 38 Fed. Cl. 518 (1997), that "no direct authority" supports application of the clear and convincing evidence test to claims of unreasonableness or violations of applicable statutes or regulations. *Id.* at 522 n.5. She also noted that claims of bad faith conduct, which require "well-nigh irrefragable proof" under earlier, non-APA Federal Circuit case law, require clear and convincing evidence. *Id.*

(continued...)

Similarly, district courts should continue to eschew the "clear and convincing evidence" standard when reviewing procurement decisions under the APA. Early on, in one of the leading Scanwell cases, *M. Steinthal & Co. v. Seamans*,[120] the District of Columbia Circuit stated that, in order to obtain injunctive relief, the disappointed bidder should be able to show a "clear violation" of procurement law or regulation,[121] and other circuits repeated that formulation.[122] This is not inconsistent with APA law, but there is some suggestion in *Steinthal* and cases of its ilk that a somewhat heightened standard of review is advisable in procurement cases than in other APA review cases because government contracts often involve important public interests, such as the national defense.[123]

These cases, when read in context, do not impose a clear and convincing burden of proof. *Steinthal*'s "clear violation" standard is best seen only as an awareness that courts in bid protest cases must consider any public interests a given procurement implicates.[124] Indeed, Congress has provided in new 1491(b) that, in deciding what relief to grant, the courts "shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action" – largely tracking its original formulation in section 1491(a)(3). [125] It is directly after providing this reminder that Congress states that the courts "shall review" an agency's procurement decision by the APA standard.[126] It is apparent, then, that Congress does not believe the basic APA review standard and due concern for the public interest are in conflict. *Steinthal* and its progeny should be read consistently with other precedent that, even while forbidding reviewing courts to second-guess and requiring a "clear error of judgment" by the agency,[127] the APA does not impose a clear and convincing burden of proof for judicial review of agency action.[128]

(...continued)

There is some support for this latter suggestion, in that claims of bad faith often extend past the administrative record compiled by the agency to support the challenged agency decision, and so a bad faith claim might often require more trial-type proceedings by the CFC or district court, including fact finding. However, "well-nigh irrefragable proof" is more closely akin to the criminal "beyond a reasonable doubt" standard; it is not the equivalent of clear and convincing evidence. In addition, while the Supreme Court in *Overton Park* required a "strong showing" of bad faith or improper behavior to permit *discovery* beyond the normal administrative record, 401 U.S. at 420, the Supreme Court has not imposed anything other than the normal preponderance standard for the ultimate issue of whether an agency acted in bad faith or improperly. Indeed, the Court in *Overton Park* cautioned that, despite the "presumption of regularity" which attaches to agency action, courts must conduct a "thorough, probing, in-depth review," *id.* at 415, "under the applicable standard," *id.* at 420, *i.e.*, the judicial review standard of section 10(e) of the APA. 5 U.S.C. § 706 (1994).

120 455 F.2d 1289 (D.C. Cir. 1971).

121 *Id.* at 1303.

122 *E.g.*, Allis-Chalmers Corp. v. Friedkin, 635 F.2d. 248, 253 (3d Cir. 1980); Kinnett Dairies, Inc. v. Farrow 580 F.2d 1260, 1271-72 (5th Cir. 1978); *see also* Kentron Hawaii, Ltd. v. Warner, 480 F.2d. 1166, 1169 (D.C. Cir. 1973) (requiring a "clear and prejudicial violation of applicable statutes or regulations").

123 No CFC judge to date has relied on *Steinthal* in adopting a clear and convincing evidence burden of proof.

124 *See Steinthal*, 455 F.2d at 1300-04. Considerations of the public interest are one part of the traditional four-pronged standard for injunctive relief, along with likelihood of success on the merits, irreparable injury to the movant, and harm to third parties. *E.g.*, Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983); Mason County Med. Ass'n v. Knebel, 563 F.2d 256, 264 (6th Cir. 1977); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977). The public interest always comes into play in a bid protest action. *See* Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1124 (4th Cir. 1977); Geo-Con, Inc. v. United States, 783 F. Supp. 1, 2 (D.D.C. 1992); Magellan Corp. v. United States, 27 Fed. Cl. 446, 447, 451 (1993). Indeed, considerations of the public interest can foreclose injunctive relief to a litigant otherwise entitled to it. *See Steinthal,* 455 F.2d at 1301 ("in the presence of overriding public interest considerations" relief otherwise due the disappointed bidder may be denied); *e.g.*, Pace Co. v. Resor, 453 F.2d 890 (6th Cir. 1971).

125 28 U.S.C. § 1491(b)(3) (Supp. II 1996); *compare id.* § 1491(a)(3) (1994) (repealed).

126 *Id.* (b)(4) (Supp. II 1996).

127 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); *see* Chemung County v. Dole, 781 F.2d 963, 971 (2d Cir. 1986) (applying standard in Scanwell case context). The Supreme Court in *Overton Park* also requires courts

(continued...)

Even those *Scanwell* courts applying the "clear violation" standard recognize that the basic formulation of the standard of review is that articulated in codified section 706 of the APA.[129] To the extent that the "clear violation" language of those courts is (improperly) construed either to add to or modify the APA standard, it should not be followed, especially in light of Congress's specifying in new section 1491(b) that the APA standard found in section 706 of title 5 is the controlling one.[130]

A disappointed bidder must show a clear violation of applicable statutes or regulations or unreasonable, arbitrary conduct by the agency, but not by a clear and convincing standard of evidence.[131] Layering that evidentiary standard over the APA standard of review is improper and serves no purpose.[132] It confuses an evidentiary standard with the judicial review standard set out under the APA and called out in new section 1491(b).

C. Must Review Be Based on the "Whole" Administrative Record?

A basic issue in all APA review cases is, on what record is the review to be based? Section 10(e) of the APA provides a simple answer:

> In making the foregoing determinations [of whether to compel agency action unlawfully withheld or to hold unlawful and set aside agency action for the enumerated reasons], *the Court shall review the whole record or those parts of it cited by a party . . . .*[133]

In informal agency decision making, such as that involved in procurement decisions, a fully defined administrative record does not exist.[134] Thus, it is up to the agency, in the first instance, to collect the materials that define the agency record.[135] As Judge Bruggink of the CFC stated in *Cubic Applications, Inc. v. United States*,[136] the concept of an "administrative record" in a procurement context is

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to conduct a "thorough, probing, in-depth review" under the APA. 401 U.S. at 415; s*ee* Marine Hydraulics Int'l, Inc. v. United States, ___ Fed. Cl. ___, ___ (1999).

128 *See* Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1135-36 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

129 *Steinthal,* 455 F.2d at 1298-99 (citing APA precedent); *see also Chemung County*, 781 F.2d at 971; Choctaw Mfg. Co. v. United States, 761 F.2d 609 (11th Cir. 1985).

130 28 U.S.C. § 1491(b)(4) (Supp. II 1996).

131 *See* Metric Sys. Corp. v. United States, 42 Fed. Cl. 306, 311 (1998) (demonstrating an appropriate statement of the APA standard without articulating either a preponderance or a clear and convincing evidence standard); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281, 291-92 & n.20 (1998) (same).

132 *See* Isratex, Inc. v. United States, 25 Cl. Ct. 223, 227 (1992) (rejecting a proffered standard of "proof by clear and convincing evidence of a clear and prejudicial violation" as a "virtually unsurmountable" burden of proof, "as well as incomprehensible").

133 5 U.S.C. § 706 (1994) (emphasis added).

134 *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971) (comparing administrative records developed in adjudicatory-type agency proceedings and informal agency decision making); *see generally* Richard C. McMillan, Jr. & Todd Peterson, *The Permissible Scope of Hearings, Discovery and Additional Fact Finding During Judicial Review of Informal Agency Action,* 1982 DUKE L.J. 333.

135 *See* Florida Power & Light Co. v. Lorion, 470 US 729, 743-44 (1985) (basing review "on the record the agency presents to the reviewing court"); *Overton Park*, 401 U.S. at 419 (referring to the record "compiled by the agency"); Bar MK Ranches v. Yuetter, 994 F.2d 735, 739-40 (10th Cir. 1993).

136 37 Fed. Cl. 345 (1997).

"somewhat of a fiction," and it "certainly cannot viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review."[137]

As of yet, there has been no dispute among the CFC judges in applying the APA review standard that the administrative record, as a general proposition, includes all documents and materials the agency directly or indirectly considered in making its findings and decision.[138] That includes materials over which the ultimate decision maker may not have cast his eye.[139] This is entirely consistent with established APA precedent.[140]

Nor has there been disagreement among the CFC judges over the fact that, particularly in informal decision making situations, discovery or trial may well be appropriate to test the completeness of the record compiled by the agency and to have the agency explain its process.[141] The CFC judges have adopted, without dissent, the District of Columbia Circuit's formulation as to those situations in which additional fact finding in an APA review case is appropriate:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.[142]

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137 *Id.* at 350; *accord* Pikes Peak Family Housing, LLC v. United States, 40 Fed. Cl. 673, 676-77 (1998); Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215, 220 n.6 (1998), *rev'd on other grounds* ___ F.3d ___ (Fed. Cir. 1999); Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 156 (1997); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408, 411 (1997); GraphicData, LLC v. United States, 37 Fed. Cl. 771, 779-80 (1997).

138 *See Aero*, 38 Fed. Cl. at 748; Cubic Application, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997) (*citing* Camp v. Pitts, 411 U.S. 138, 142 (1973)).

139 *Cubic*, 37 Fed. Cl. at 343; *see* Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989).

140 Bar MK Ranches v. Yuetter, 994 F.2d. 735, 739 (10th Cir. 1993) (defining record to include "all documents and materials directly or indirectly considered by the agency"); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) ("'The whole record' includes everything that was before the agency pertaining to the merits of its decision."); Miami Nation of Indians v. Babbitt, 979 F. Supp. 771, 777 (N.D. Ind. 1996); Clairton Sportsmen's Club v. Pennsylvania Turnpike Comm'n, 882 F. Supp. 455, 464 (W.D. Pa. 1995); Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 317 ("complete administrative record consists of all the documents and materials that were directly or indirectly considered").

141 *E.g.,* Marine Hydraulics Int'l, Inc. v. United States, ___ Fed. Cl. ___, ___ (1999) (documents added to the administrative record compiled by the agency); United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 317 & n.29 (1998) (discovery and trial); *Pikes Peak,* 40 Fed. Cl. at 676-79; Wetsel-Oviatt Lumber Co. v. United States, 40 Fed. Cl. 557 (1998) (four-day trial); *Alfa Laval*, 40 Fed. Cl. 220 & n.6 (three-day trial), *rev'd on other grounds*, ___ F.3d ___ (1999); CCL, Inc. v. United States, 39 Fed. Cl. 780, 790-91 (1997); W&D Ships Deck Works, Inc., v. United States, 39 Fed. Cl. 638, 648 nn.8, 9 (1997); Delbert Wheeler Constr., Inc. v. United States, 39 Fed. Cl. 239, 244 n.10, 247 (1997), *aff'd without op.*, 155 F.3d 566 (Fed. Cir. 1998); *Mike Hooks,* 39 Fed. Cl. at 154-55; *Aero,* 38 Fed. Cl. at 749; Day & Zimmerman Servs. v. United States, 38 Fed. Cl. 591, 599-607 (1997) (trial); R.R. Donnelly & Sons, Co. v. United States, 38 Fed. Cl. 518, 523-24 (1997); *GraphicData*, 37 Fed. Cl. at 779-80.

142 Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (*quoting* Stephen Stark & Sara Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984)). Multiple CFC decisions have cited the *Esch* statement of exceptions with approval. *E.g.*, Marine Hydraulics Int'l, Inc. v. United States, ___ Fed. Cl. ___, ___ (1999); United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 319 (1998); CRC Marine Servs., Inc. v. United States, 41 Fed. Cl. 66, 84 (1998); Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997); Stapp Towing, Inc. v. United States, 34 Fed. Cl. 300, 307-08 (1995); IMCO, Inc. v. United States, 33 Fed. Cl.

(continued...)

Under this last category, it is also often important for a disappointed bidder to put on evidence of prejudice, which frequently will not appear in the agency record.[143]

So far so good. The rub comes because the Department of Justice (DOJ) in bid protest cases filed at the CFC under the revised statute has consistently resisted discovery beyond the "administrative record" the agency itself assembles after litigation has begun. That record consists of only those materials the agency considers "relevant" to the causes of action the disappointed bidder has already asserted.[144] This has the obvious advantage to the agency of shielding from scrutiny significant parts of the procurement process which, due to the need to conduct a fair competition, the agency performs in secret.[145] The disappointed bidder, on the other hand, cannot, consistent with its and its counsel's obligations under Rule 11,[146] assert illegalities for which it has no factual basis, even though those bases for complaint may be apparent in the undisclosed record.

The CFC in its General Order No. 38,[147] issued in May 1998, has apparently sanctioned DOJ's practice of submitting a truncated administrative record. Although the CFC in the general order provides that the "United States will be required to identify and provide" the administrative record in a bid protest case[148] and encourages the agency to make available the "core documents" of the procurement, of which it gives several examples, on an expedited basis,[149] the court in the related annotation states, "The General Order does not mandate production of all core documents in every protest. Rather, the documents to be produced are those core documents *that are relevant to the protest as filed*."[150]

If the principle suggested by this annotation in General Order No. 38 prevails, as it has in some cases already,[151] the government will have successfully resisted providing a full record of a challenged

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312, 317 (1995), *aff'd*, 97 F.3d 1422 (Fed. Cir. 1996); Bradley v. United States, 26 Cl. Ct. 699, 701 (1992); Simons v. United States, 25 Cl. Ct. 685, 694 n.17 (1992).

The frequently stated exception to prove bad faith or unrecorded ex parte contact falls within the first exception articulated in *Esch*. *See* Aero Corp., S. A. v. United States, 38 Fed. Cl. 739, 749 (1997). For other articulations of the exceptions allowing discovery in APA review cases by other circuits, *see*, *e.g.*, Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1137 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992); Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988); *see also* Sakaogan Chippewa Community v. Babbitt, 929 F. Supp. 1165, 1172-73 (W.D. Wis. 1996); Apex Constr. Co. v. United States, 719 F. Supp. 1144, 1446-47 & n.1 (D. Mass. 1989).

143 *See, e.g.*, Strategic Analysis, Inc. v. United States Dep't of Navy, 939 F. Supp. 18, 23-24 (D.D.C. 1996) (relying on affidavit of disappointed bidder to prove prejudice); Candle Corp. v. United States, 40 Fed. Cl. 658, 665-66 (1998) (denying relief in meritorious claim because disappointed bidder did not submit any evidence of prejudice).

144 *E.g.,* CCL, Inc. v. United States, 39 Fed. Cl. 780, 791 (1997); Defendant's Opposition to Plaintiff's Motion for Expedited Discovery, Talton Holdings, Inc. v. United States, No. 98-409C (filed May 7, 1998); *see also* Planning Research Corp. v. United States, 4 Cl. Ct. 283, 298 (1983) (pre-APA case).

145 Proposal information agencies receive from bidders is tightly controlled in order to assure a fair and evenhanded competition. *See, e.g.*, FAR § 3.104-5(a), 48 C.F.R. § 3.104-5(a) (1988) ("no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized . . ."). A contractor's proprietary or trade secret information is also protected from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905 (1994).

146 R.C.F.C. 11 (signing pleading "constitutes a certificate . . . that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . .").

147 CFC Gen. Order No. 38 (May 7, 1998).

148 *Id.*, app. I, ¶ 16.

149 *Id.* ¶ 17.

150 *Id.* ¶¶ 16-19, annot. (emphasis added). The annotation goes on to provide, "A minority of the Bid Protest Group [who worked on formulating this general order] believed that, because they are part of the administrative record, all core documents from a procurement should be produced in every protest."

151 *E.g.*, *Aero*, 38 Fed. Cl. at 412; W&D Ships Deck Works, Inc. v. United States, 39 Fed. Cl. 638, 648 (1997); Talton Holdings, Inc. v. United States, Order, No. 98-409C (filed May 13, 1998).

procurement decision. The Department of Justice has convinced the court, in general, to allow agencies to produce only those documents "that are relevant to the protest as filed."[152] This result, however, is inconsistent with the APA's requirement that review be based on the full record, as reflected in the statute's language, legislative history, precedent, and purpose.

1. A Facial Reading of the Statute Requires Review Based on the Whole Record

The APA on its face answers the question of whether an agency may withhold parts of the record on which it either directly or indirectly relied in making the challenged determination. The answer is in the negative. After listing the grounds upon which a reviewing court is to "hold unlawful and set aside agency action, findings, and conclusions"[153] – including, of most relevance to informal agency decision making such as is involved in procurement actions, because it is

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
>
> (D) without observance of procedure required by law . . .[154]

– Congress continued in section 706 of title 5 as follows:

> In making the foregoing determinations, the Court shall review the whole record or those parts of it cited by a party . . . .[155]

This latter sentence is the controlling one, and it is not difficult to interpret. The initial phrase, "the foregoing determinations,"[156] unambiguously refers to the different potential grounds for holding unlawful and setting aside agency action listed in subsections (A) through (F) of the section and that appear immediately before in the text.[157]

Just as unambiguous is the critical phrase, "the whole record."[158] Obviously, the "whole record" is the totality of the record that the agency considered in any way when it was making its challenged determination.

The last phrase, "or those parts of [the record] cited by a party,"[159] gives the only room for argument that an agency is allowed to provide only selected parts of the record to the challenging party.

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152 CFC Gen. Order No. 38, app. I, ¶¶ 16-19, annot. (May 7, 1998).

153 5 U.S.C. § 706 (1994).

154 *Id.* The Supreme Court in *Overton Park* explained that, in reviewing informal agency decision making, the "substantial evidence" standard of subpart (E) of section 706 and the "*de novo*" review standard of subsection (F) are inapplicable. 401 U.S. at 414-15.

155 5 U.S.C. § 706 (1994).

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

The argument can be made that (a) the statute reads in the alternative – the whole record *or* parts of it cited by a party; (b) the agency is "a party"; and (c) thus, in an appropriate situation an agency, as a party to the litigation, may select only parts of the record for review by the challenging party and the court.

This argument cannot withstand a facial analysis. Congress wisely recognizes that, in some situations, it will not be necessary to burden the reviewing court with the entire administrative record, because the issues involved do not require it.[160] Nevertheless, Congress does not leave it in the hands of the agency to determine what parts of the records would be relevant in any given review proceeding. Congress frequently uses the term "agency" in the APA,[161] including in other places in section 10(e),[162] and defines "agency" in section 2(a).[163] Similarly, Congress often uses the term "party" in the APA[164] and also defines it in section 2.[165] "Party" includes "any person or any named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."[166] Although a court proceeding is not an "agency proceeding" as defined in the APA,[167] it is clear that the term "party" as used in section 10(e) is not restricted to the agency, but includes those aggrieved by agency action, such as disappointed bidders.

A disappointed bidder cannot determine what parts of the record it intends to cite to the court reviewing a challenged procurement action unless and until it has seen the whole record. That leaves only two options to an agency under section 10(e) in a bid protest action: *either* the agency must file the whole record with both the court and the other parties to the litigation (the awardee or announced awardee will typically intervene in a bid protest action[168]) *or* the agency must file those parts of the record it believes to be relevant to the issues with the court and must serve the remainder of the whole record on the other parties so that they can file other portions of the record with the court if they so desire.

The task of the court is easy. Congress has already decided, by statute, that "the whole record" is relevant when an agency decision is challenged under the APA. The reviewing court does not have discretion to whittle down the administrative record based on relevancy objections, whether or not the court views the documents the agency seeks to withhold *in camera*.[169] Congress has left in the hands of the parties the decision of which parts of the record to bring before the court, and only if *all* the parties agree can a part of the administrative record be withheld from the court.

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160 This will more readily be known after an adjudicatory hearing, where everything the agency had before it is public knowledge, rather than in an informal decision making situation as a contract award decision, where much is hidden from public view.

161 *E.g.*, *id.* §§ 702 ("agency action," "agency . . . acted or failed to act"), 703 ("brought against the . . . agency," "agency action"), 704 ("agency action," "agency . . . requires by rule"), 705 ("agency finds," "agency action").

162 *Id.* § 706 (referring on three occasions to "agency action" and on one occasion to an "agency hearing").

163 *Id.* § 551(1).

164 *E.g., id.* §§ 554(a), 554(b)("interested parties"), 702 ("indispensable party").

165 *Id.* § 551(3); *see also id*. § 701(b)(2).

166 *Id.*

167 *Id.*

168 *E.g.,* Veda, Inc. v. United States Dep't of Air Force, 111 F.3d 37, 38 (6th Cir. 1997); Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995 (Fed. Cir. 1996); SRS Techs. v. United States, 894 F. Supp. 8, 9 (D.D.C. 1995); Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 269 (1996); Vanguard Sec., Inc. v. United States, 20 Cl. Ct. 90 (1990).

169 While trumped by statute in this instance, Rule 26(b)(1), which reads the same for both the district courts and the CFC, is consistent with the APA's dictate that the agency must provide the whole record relating to a challenged agency decision. *See* FED. R. CIV. P. 26(b)(1); R.C.F.C. 26(b)(1). This rule permits parties to "obtain discovery regarding any matter . . . which is relevant to the *subject matter*" of the action and that "appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added.) The "subject matter" of a bid protest action is the procurement decision challenged, and discovery is not limited under Rule 26(b)(1) to the causes of action initially pled.

2. The Statute's Legislative History Requires Review Based on the Whole Record

The legislative history of section 10(e) of the APA reinforces the facial reading of the section. As originally enacted in 1946, section 10(e) did not admit to any potential ambiguity about whether the agency alone could designate only parts of the record for review. The section initially read as follows:

> In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by *any* party . . . .[170]

In this original formulation, Congress made it doubly clear – by using the word *any* as well as by using the term *party* instead of *agency* – that the right of designating what parts of the whole record the court would see was not restricted to the agency, but that aggrieved and other interested parties have the right to make designations from the whole record as well. When Congress recodified the statute in 1966 and altered the language from "*any* party" to "*a* party,"[171] it intended only stylistic changes, not changes of substance.[172]

The language of section 10(e) as originally enacted in 1946 – "or such portions thereof as may be cited by any party"[173] – was modified in the very last stages of the legislative process. In S.7 of the 79th Congress, the Senate bill that principally formed the basis for the APA as enacted, the language had read, "or such portions thereof as may be cited *by the parties*."[174] This left an implication on a facial reading that perhaps *all* parties, including the agency, had to consent to the contents of the record in order to have it be considered by the reviewing court.[175] The House bills that spoke to this point did not suffer from this same implication, because they all provided that reviewing courts would consider "the whole record or such parts thereof as may be cited *by any of the parties*."[176] Congress in the final drafting eliminated any implication of S.7 that *all* parties had to agree on the content of the administrative record when it adopted the wording of several House bills to give "*any* party" the right to designate what parts of the "whole record" the court would review.[177]

That Congress did not intend to give an agency the exclusive right to control what parts of the record the court would review is also made clear by the very purpose of providing for "whole record" review. Congress with that term desired to eliminate judicial precedent that only those parts of the record that were *favorable* to the agency determination needed to be considered when reviewing whether the agency had had before it sufficient evidence to make the challenged determination.[178] Congress

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170 Act of June 11, 1946, ch. 324, § 10(e), 60 Stat. 237, 243-44, *codified at* 5 U.S.C. § 1009(e)(1946) (emphasis added).

171 Act of Sept. 6, 1966, Pub. L. 89-554, tit. 5, ch. 7, 80 Stat. 378, 393.

172 *See* 5 U.S.C. § 706 (1970), historical and revision notes.

173 60 Stat. 243-44, *codified at* 5 U.S.C. § 1009(e) (1946).

174 S.7, 79th Cong. § 10(e), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong., 1944-46, at 223.

175 Even with the language "by the parties," the better facial reading would not have left in the agency's control the parts of the record to be presented for review. If "the parties" could not agree, the other choice – "whole record" review – would have become operable.

176 *See* H.R. 339, 79th Cong. § 9(f) (reviewing "the whole record or such parts thereof as may be cited by any of the parties"); H.R. 1117, 79th Cong. § 9(f) (same); H.R. 1206 79th Cong. § 310(e) (same). All of these bills are reproduced in Administrative Procedure Act, Legislative History, 79th Cong., 1944-46.

177 60 Stat. 243-44, *codified at* 5 U.S.C. § 1009(e)(1946) (emphasis added).

178 This precedent had largely developed in the labor area under the Wagner Act, which provided, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10(e), 49 Stat. 449, 454, *codified at* 29 U.S.C. § 160(e) (1940). *See*, *e.g.*, NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105, 106-07 (1942); NLRB v. Columbia Products Corp., 141 F.2d 687, 688 (2d Cir. 1944); NLRB v. Standard Oil Co., 138 F.2d 885, 887 (2d Cir. 1943); Wilson & Co. v. NLRB, 126 F.2d 114, 117 (7th Cir. 1942); *see generally* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-91 (1951).

specified review on "the whole record" to override that precedent and to require a reviewing court to consider *all* parts of the record, both pro and con:

> The requirement of review upon "the whole record" means that courts may not look only to the case presented by one party, since other evidence may weaken or even undisputedly destroy that case.[179]

The Supreme Court in *Universal Camera Corp. v. NLRB*,[180] shortly after the APA's enactment, reviewed the legislative history of this provision (and a similar "whole record" review provision of the Taft-Hartley Act[181]) and reached the following conclusion:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting [an agency] decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirements in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority view of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.[182]

Although the requirement for "whole record" review found its origins in the "substantial evidence" test, Congress did not limit the requirement for review on the whole record to that review standard. In one of the bills presented in the 79th Congress, the requirement for "whole record" review was only attached to the substantial evidence standard.[183] That view did not carry the day, however, as all other bills in that session,[184] and the statute as enacted,[185] required whole record review for *all* types of judicial review, including whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[186] Obviously, to allow an aggrieved party to cite all parts of the record which may support its challenge to the agency action about which it complains, the agency must give the aggrieved party access to the entire record.

3. Precedent Requires Review Based on the Whole Record

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179 S. Rep. No. 752, Report of the Comm. on the Judiciary on S.7, 79th Cong. 214, *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong., 1944-46, at 214; *see also* H. Rep. No. 1980, Comm. on the Judiciary on S.7, *reprinted in id.* at 280.

180 340 U.S. 474 (1951).

181 Congress amended the act in 1947 to provide that the NLRB's findings would be conclusive "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) (1952). It had previously only required findings to be "supported by evidence." *Id.* (1946).

182 340 U.S. at 487-88.

183 H.R. 1203, 79th Cong. § 10(e), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong., 1944-46, at 160.

184 *E.g.*, H.R. 339, 79th Cong. § 9(f), *reprinted in id.* at 146; H.R. 1117, 79th Cong. § 9(f), *reprinted in id.* at 154; H.R. 1206, 79th Cong. § 310(e), *reprinted in id.* at 176; H.R. 2602, 79th Cong. § 4(d), *reprinted in id.* at 179-80; S.7, 79th Cong. § 10(e), *reprinted in id.* at 222-23.

185 60 Stat. 243-44, *codified at* 5 U.S.C. § 1009(e) (1946).

186 *Id.*

Courts construing the "whole record" requirement of section 10(e) of the APA have consistently rejected the notion that the agency whose decision is being challenged has exclusive rights to define the record on review. As the Tenth Circuit held in *Bar MK Ranches v. Yuetter*,[187] "an agency may not unilaterally determine what constitutes the Administrative Record . . . ."[188] The District of Columbia Circuit has elucidated that information an agency has considered in making its decision "must be disclosed to the parties for adversarial comment" to determine whether the agency's decision is "biased, inaccurate, or incompetent."[189] An incomplete record is "a fictional account of the actual decisionmaking [*sic*] process" and a reviewing court "must perforce find [the agency's] actions arbitrary" when it does not have a complete record before it.[190] The Fourth Circuit, in rejecting an agency's attempt to limit the court's review of its decision to a tailored record, commented that any such review would be a "meaningless gesture" that would reduce the process to a game of blindman's bluff.[191] Other circuits, consistent with the Supreme Court's injunctions in *Overton Park*,[192] have required review of an agency determination to be made on the full administrative record.[193]

The district courts, consistent with Supreme Court and circuit court guidelines, have consistently rebuffed agency attempts to limit the administrative record the district court is to review under section 10(e) of the APA.[194] To allow an agency to decide unilaterally what the Court should review is inconsistent with the Supreme Court's ruling in *Overton Park* that the APA requires a court to perform a "searching and careful" inquiry.[195] Without the whole record, a reviewing court cannot determine whether the agency has considered all relevant factors or whether it has considered improper factors.[196] Courts conducting APA review of agency action have consistently explained as follows:

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187 994 F.2d 735 (10th Cir. 1993).

188 *Id.* at 739.

189 Home Box Office v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977).

190 *Id.* at 54, 55; *accord* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993). Although the courts in both *Home Box Office* and *Portland Audubon Society* dealt with *ex parte* contacts not reflected in the written record submitted for review by the agency, their rationale commands the same conclusion when the agency arbitrarily restricts the parties and the court from viewing the whole record reflected in documentary or other tangible form. "When it appears the agency has relied on documents or materials not included in the record, supplementation is appropriate." *Id.* (*citing* Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982)).

Of course, the Supreme Court ruled in *Overton Park* that the court's review of informal decision making under section 10(e) of the APA must be based on the "full record" and that limiting consideration to the four corners of the documentary record produced by the agency can frustrate meaningful judicial review. 401 U.S. at 419-20. It further emphasized in *Camp v. Pitts*, 411 U.S. 138 (1973), that when the record produced by the agency is incomplete, the remedy is to "obtain from the agency either through affidavits or testimony, such additional explanation . . . as may prove necessary." *Id.* at 143. The CFC has appropriately applied these admonitions to bid protest cases: "a judge confronted with a bid protest case should not view the administrative record [produced by the agency] as an immutable boundary that defines the scope of the case." GraphicData, LLC v. United States, 37 Fed. Cl. 771, 780 (1997); *see also* Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) ("it is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record" provided in documentary form by the agency).

191 Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973) (*citing* First Nat'l Bank v. Saxon, 352 F.2d 267, 274 (Sobeloff, J., dissenting) (4th Cir. 1965)).

192 401 U.S. 402 (1971).

193 *E.g.*, Bradley v. Weinberger, 483 F.2d 410, 414 (1st Cir. 1973); Dry Colors Mfg'rs Ass'n, Inc. v. Department of Labor, 486 F.2d 98, 104 n.8 (3rd Cir. 1973); Chrysler Corp. v. Department of Transp., 472 F.2d 659, 669 (6th Cir. 1972).

194 *E.g.,* National Wildlife Fed'n v. Burford, 677 F. Supp. 1445, 1457 (D. Mont. 1985); Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 32 (N.D. Tex. 1981) ("The whole administrative record is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record") (emphasis in original) (*quoted in* Thompson v. United States Dep't of Labor, 885 F.2d. 551 (9th Cir. 1989)); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978).

195 401 U.S. at 416.

196 Lloyd v. Illinois Reg'l Transp. Auth., 548 F. Supp. 575, 590 (N.D. Ill. 1982) (*citing* U.S. Lines v. Federal Maritime Comm'n, 584 F.2d 519, 533-34 (D.C. Cir. 1978)).

> If a Court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision. . . . To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of the "whole record."[197]

To allow an agency to "preclude judicial access to materials relied upon by an agency in taking whatever action is then being subject to judicial scrutiny would make a mockery of judicial review."[198] Judge Gibson of the CFC has recognized the same: "Effective judicial review of an agency's exercise of discretion is irreconcilably at odds with the notion that the reviewing court's inquiry must be confined to an administrative record that is likewise the product of the agency's sole discretion."[199]

4. Policy Considerations Support Review Based on the Whole Record

The obvious, though unstated, purpose of an agency's desire to restrict the court's review to only those parts of the record that relate to particular issues the disappointed bidder has identified in its pleadings is to prevent the complaining party from finding more in the undisclosed administrative record about which to complain. Of necessity, much of the procurement process is conducted internal to the agency, as provided by law and regulation.[200] Thus, unless a disappointed bidder is able to review the whole record following the agency's award decision, it will have no assurance that it has identified arbitrary and capricious actions, abuses of discretion, and failures to observe procedures required by law relevant to the agency action about which it complains.[201]

Allowing an agency to limit the record to issues that the disappointed bidder can identify on a truncated record does have the advantage that it simplifies review actions by limiting the grounds of complaint.[202] But this interest in simplification and judicial economy cannot carry the day. The basic and

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197 Public Citizen v. Heckler, 653 F. Supp. 1229, 1236 (D.D.C. 1986) (*quoting* Walter O. Buswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984)).

198 Smith v. FTC, 403 F. Supp. 1000, 1008 (D. Del. 1975).

199 Pikes Peak Family Housing, LLC v. United States, 40 Fed. Cl. 673, 677 (1998).

200 The Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (Supp. II 1996), prohibits disclosure of procurement-sensitive information and imposes criminal and civil penalties for a knowing violation. *Id.* (a), (d). Similarly, the FAR prohibits an improper disclosure of contractor bid or proposal information or "source selection information" before award. FAR §§ 3.104-4(a), 3.104-5(a), 48 C.F.R. §§ 3.104-4(a), 3.104-5(a)(1998); *see also id.* § 3.104-3 (defining "source selection information" as information prepared for use by an agency to evaluate a bid or proposal if that information has not already been publicly disclosed, including bid prices, evaluation plans, particular evaluations of proposals, rankings of proposals, and other evaluation materials). The Trade Secrets Act, 18 U.S.C. § 1905 (1994), also prohibits disclosure by agency personnel of a contractor's proprietary information.

201 Upon written request, an agency must give a bidder a "debriefing" to explain the contract award decision. FAR § 15.506(a)(1), 48 C.F.R. § 15.506(a)(1) (1998). During a debriefing, the disappointed bidder is not provided with the record. However, the agency, at a minimum, must give the contractor (1) an identification of what the agency considered the bidder's significant weaknesses, (2) the evaluated cost and technical ratings of the successful bidder versus the debriefed bidder, (3) the overall rankings of all offerors, (4) a summary of the rationale for award, and (5) "reasonable responses to relevant questions" about the source selection process and whether the agency followed applicable procedures. *Id.* (d). While information it receives at a debriefing often forms the basis for a bidder's bid protest, it is very common for a protester to add grounds to its complaint once it has been able to view all or part of the documentary administrative record. GAO bid protest practice most clearly demonstrates this, as the Comptroller General designates supplemental grounds of protest filed after the initial protest grounds with ".1," ".2," ".3," etc. *See, e.g., Rohmann Servs., Inc.*, B-280154.2, 98-2 CPD ¶ 134 (1998); *GTS Duratek, Inc.,* B-280511.2, B-280511.3, 98-2 CPD ¶ 130 (1998); *Acepex Mgmt. Corp.*, B-279173.5, 98-2 CPD ¶ 128 (1998).

202 One judge of the CFC in a non-APA bid protest case, while allowing discovery in the particular circumstances of the case before him, expressed concern that allowing discovery of the whole record could expand the number of bid protests filed: "The court believes that it would be opening a Pandora's box of frivolous law suits intended only to gain access to the full administrative record or to delay or unduly burden agency actions were the court to rule that *any* disgruntled, unsuccessful bidder could gain access to the record merely by alleging some irregularity in the procurement process." Planning

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sufficient response is that Congress rejected this interest in the APA when it required judicial review to be based on "the whole record."[203] More generally, the APA reflects Congress's desire that agency action – which even when Congress enacted the APA in 1946 was seen to be intruding ever more into public life[204] – would be subject to effective policing by those with a direct interest, *i.e.*, aggrieved parties suffering injury in fact from the agency action about which they complained.[205] Congress did not limit that review to only the public, "formal" aspects of an agency's work. It also extended judicial review to an agency's informal decision making which, as in procurement actions, can largely be internal to the agency.[206] Unless the full record is disclosed to the aggrieved party, many internal agency actions would be insulated from effective review, contrary to Congress's express will.

Congress has also established an express policy in favor of review of procurement decisions in the Competition in Contracting Act of 1984.[207] Under that act, Congress validated the practice of the United States General Accounting Office to review bid protest matters,[208] but specified that the GAO's review was not to the exclusion of court review on the administrative record.[209] Far from limiting the administrative record in court review cases, Congress in CICA added portions of the GAO proceedings to the record the court is to review.[210] Thus, over and above the general public policy set out in the APA that agency action be subject to judicial review,[211] Congress has dictated that there should be plenary review

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Research Corp. v. United States, 4 Cl. Ct. 283, 298 (1983) (Seto, J.) (emphasis in original). Similar concerns caused the Federal Circuit to limit standing to disappointed bidders "in the zone of active consideration" in a non-APA context. CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983). Courts applying the APA have followed suit. *See, e.g.*, Wilcox Elec., Inc. v. FAA, 119 F.3d 724, 728 (8th Cir. 1997); Look v. United States, 113 F.3d 1129, 1131 (9th Cir. 1997); Energy Transp. Group, Inc. v. Maritime Admin., 956 F.2d 1206, 1211 (D.C. Cir. 1992). Although perhaps normally correct in result, the "zone of active consideration" is an improper accretion to APA standing law. Instead, courts applying the APA should recognize that the disappointed bidder has suffered injury in fact and has standing as an interested, aggrieved party, although it will have difficulty proving prejudice if it was not within the zone of active consideration. In some cases, early summary judgment may be appropriate on prejudice grounds.

203 5 U.S.C. § 706 (1994).

204 *See generally* James C. Thomas, *Fifty Years with the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 TULSA L.J. 259, 278-87 (1996); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

205 Section 10(a) of the APA as originally enacted stated, "Any person suffering legal wrong because of any action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 60 Stat. 243, *codified at* 5 U.S.C. § 702 (1994).

206 *See Overton Park*, 401 U.S. at 413-17; *see generally*, McMillen & Peterson, supra note __, at 333-34.

207 Act of July 18, 1984, Pub. L. No. 98-369, 98 Stat. 1175-203 (codified in various titles).

208 31 U.S.C. § 3552 (Supp. II 1996) ("A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.").

209 *Id.* § 3556 (1994) ("This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States [Court of Federal Claims]."). In both the district courts and the CFC, GAO decisions are entitled to weight but are not binding. Delta Chem. Corp. v. West, 33 F.3d 380, 382-83 (4th Cir. 1994); Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994); Diebold v. United States, 947 F.2d 787, 804-05 (6th Cir. 1991); Irvin Indus. Canada, Ltd. v. United States Air Force, 924 F.2d 1068, 1071 n.30, 1077 n.88 (D.C. Cir. 1990); Sea-Land Serv. Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979); E.W. Bliss Co. v. United States, 33 Fed. Cl. 123, 134-35 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996).

210 *Id.* ("In any such action . . ., the reports required by [this subsection] . . . and any decision or recommendation of the Comptroller General . . . shall be considered to be part of the agency record subject to review."). The CFC has explained that the reports filed in a prior GAO protest will be viewed "not as evidence, but as argument. Their only potential utility, other than as a key to the agency record, is to demonstrate what issues were raised or not raised at the GAO." Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 344 (1997); *accord* Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 157-58 (1997).

211 While judicial review of agency actions is the normal rule, Congress in the APA forecloses judicial review when a particular action is "committed to agency discretion" by law. 5 U.S.C. § 701(a)(2) (1994). Courts on several occasions in Scanwell actions have found that particular agency actions related to procurements are committed to agency discretion by

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of the government's procurement decisions. These public policies militate against a review circumscribed by the agency withholding from a disappointed bidder parts of the record of its actions because the agency wants to prevent the disappointed bidder from discovering other grounds upon which the challenged action may be set aside.[212]

Congress in new section 1491(b), carrying forward a provision it had originally included in the Federal Courts Improvement Act of 1982,[213] requires the district courts and the CFC to "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."[214] It could be argued that this stated policy is furthered by limiting the record on review to those issues which a disappointed bidder can identify without recourse to the full record. Of course, it would be true in some instances that less discovery and less grounds of complaint would reduce the time to decision.

But the argument proves too much. If these policies were the dominant ones, Congress would permit no review at all. This policy cannot be used as a blunt instrument to limit a party's right under the APA to have the agency's procurement decision reviewed on the basis of "the whole record" or such parts of the whole record as that party chooses to bring to the court's attention.[215] Many procurements have little, if anything, to do with the national defense or the national security,[216] and many procurements are not time-sensitive.[217] For those that are, consideration of the national defense or national security or the need for expeditious resolution does not require that access to the whole record be limited. Indeed, the contrary is true. Unless the reviewing court is apprised of all the appropriate issues, it cannot properly

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law. *E.g.*, Hoke Co. v. TVA, 854 F.2d 820, 825-26 (6th Cir. 1988) (TVA contract); Pace Co. v. Resor, 453 F.2d 891 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972) (national defense determination); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 454-56 (9th Cir. 1971) (determination to readvertise timber sale); Varicon Int'l v. Office of Personnel Mgmt., 934 F. Supp. 440, 443-44 (D.D.C. 1996) (public interest exception determination); Sun Ship, Inc. v. Hidalgo, 484 F. Supp. 1356, 1360 (D.D.C. 1980) (national defense determination). Other decisions have rejected assertions that agency decisions affecting procurements are committed to agency discretion by law. *E.g.*, Diebold v. United States, 961 F.2d 97, 98-99 (6th Cir. 1992) (decision to contract out); C C Distribs., Inc. v. United States, 883 F.2d 146, 153-56 (D.C. Cir. 1989) (decision not to contract out); Federal Food Serv., Inc. v. Donovan, 568 F.2d 830, 832-33 (D.C. Cir. 1981) (debarment determination); Robert E. Derecktor of R.I., Inc. v. Goldschmidt, 516 F. Supp. 1085, 1091-94 (D.R.I. 1981) (affirmative responsibility determination).

212 The remedy which a disappointed bidder seeks more often than not is for another opportunity to bid on the contract under lawful procedures. Thus, both the disappointed bidder and its competitors has a continuing interest during the pendency of a protest to keep its competition-sensitive information in its proposal protected from its competitors. Moreover, information in proposals often contains proprietary information which companies wish to keep secret more generally than in a particular procurement. Both the GAO and the courts have handled this situation by issuing protective orders which limit the receipt of companies' confidential information (and often some portions of the agency's internal evaluations) to the attorneys involved in the protest proceeding. The GAO has issued regulations concerning protective orders, 4 C.F.R. § 21.4 (1998), and has published a sample protective order and sample applications for access to materials under a protective order. *Id.*, apps. I, II. Similarly, in General Order No. 38, the CFC has set out similar procedures and sample materials. CFC Gen. Order No. 38, app. I, ¶¶ 11-15 & apps. II-IV (May 7, 1998); *see also id.*, app. I, ¶¶ 4-7 (filing under seal). District courts in Scanwell cases issue protective orders on an ad hoc basis.

213 *See* § 133(a), *codified at* 28 U.S.C. § 1491(a)(3) (1982) (repealed) ("In exercising this jurisdiction, the Court shall give due regard to the interests of national defense and national security.").

214 *Id.* (b)(3) (Supp. II 1996). To the expressed concerns for the national defense and national security, Congress in 1996 added that "the courts shall give due regard to . . . the need for expeditious resolution of the action." *Id.*

215 5 U.S.C. § 706 (1994).

216 *E.g.,* Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1 (D.C. Cir. 1998) (concerning cancellation of draperies contracts due to contractor's suspension); Ocoto Blacktop and Paving Co. v. Perry, 942 F. Supp. 783 (N.D.N.Y. 1996) (concerning preference to local contractors when decommissioning Air Force base); 126 Northpoint Plaza Ltd. Partnership v. United States, 34 Fed. Cl. 105 (1995) (concerning lease of office space).

217 *E.g.,* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *on remand from* 515 U.S. 200 (1995) (concerning constitutionality of minority set-aside program); Dairy Maid Dairy, Inc. v. United States, 837 F. Supp. 1370 (E.D. Va. 1993) (overturning override of automatic CICA stay because incumbent could continue to supply the government while the protest was pending).

balance the various public and private interests involved in a particular case.[218] After all, Congress has also adopted an express policy that procurement actions be stayed, absent sufficient countervailing public interests certified by the head of a procuring activity, while it is reviewed by GAO,[219] a public policy also appropriately relied upon by the courts when considering whether to grant injunctive relief pending expedited review of the merits.[220]

This is not to say that there are not occasions in which the interests of the national defense or other public interests will trump a disappointed bidder's right under the APA to have arbitrary and capricious or otherwise unlawful agency action set aside, even though those situations have been few and far between since *Scanwell* began court review of agency procurement actions in 1970.[221] Even in those situations, the aggrieved bidder is not left without some remedy – it can recover its bid preparation and proposal costs (*i.e.*, its restitutionary remedy).[222] To recover these costs, however, a disappointed bidder must prevail on the merits.[223] Obviously, the disappointed bidder's chances of prevailing on the merits are improved by its being able to review the whole record, as the APA provides.[224] In providing this monetary relief to a disappointed bidder, the public interests that surface in particular procurements concerning the national defense, national security, and urgency are simply not implicated. Therefore, there is no reason to withhold any part of the record of a procurement decision from a disappointed bidder, even when overriding public policies may prevent the disappointed bidder from having a particular procurement decision set aside.

5. Summary

The courts should give short shrift to agency attempts in bid protest cases to restrict review of all documents and other materials relevant to the challenged procurement decision. Unfortunately, CFC General Order No. 38 governing bid protest cases indicates that the CFC will be responsive to agency attempts to limit the record to only those parts relevant to the initial allegations of illegality,[225] even though those allegations are not based upon a review of the whole record. This approach is directly contrary to

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218 This makes it advisable for agencies to collect and disclose the entire record as promptly as possible in the protest process, even if that means providing the record in several parts. Both the GAO and the CFC formally encourage agencies to produce as much of the administrative record as early in the process as possible, but that guidance is not mandatory. *See* GAO Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide* 29 (6th ed. 1996) ("GAO encourages agencies to voluntarily release to the parties documents which are relevant to the protest prior to the filing of the agency report."); CFC Gen. Order No. 38, app. I, ¶ 17 (May 7, 1998) ("Early production of relevant core documents [in the administrative record] may expedite final resolution of the case."); *id.* ¶ 18 ("Because a protest case cannot be efficiently processed until production of the administrative record, the Court expects the United States to produce the core documents and the remainder of the administrative record as promptly as circumstances will permit.").

219 31 U.S.C. §§ 3553(c), (d) (Supp. II 1996).

220 *See Dairy Maid Dairy*, 837 F. Supp. at 1381; M.W. Kellogg Co./Siciliana Appalati Costruzioni, S.p.A. v. United States, 10 Cl. Ct. 17, 18 (1986).

221 *E.g.,* Pace Co. v. Resor, 453 F.2d 891 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); *see generally* William F. Wilke, Inc. v. Department of Army, 485 F.2d 180, 182 (4th Cir. 1973); Aero Corp. v. Department of Navy, 549 F. Supp. 39, 45 (D.D.C. 1982); Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 711 (1985).

222 *See* 28 U.S.C. § 1491(b)(2) (Supp. II 1996); Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 846 n.10 (D.C. Cir. 1982); Cincinnati Elecs. Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975); *Wilke*, 485 F.2d at 182; R.R. Donnelley & Sons, Co. v. United States, 40 Fed. Cl. 277, 281-84 (1998). Under established precedent, a disappointed bidder may not be granted lost profits under the contract it was improperly denied. O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 428 (D.C. Cir. 1992); Delta Data Sys. Corp. v. Webster, 755 F.2d 938, 940 (D.C. Cir. 1985); Keco Indus., Inc. v. United States, 428 F.2d 1233, 1240 (Ct. Cl. 1970); Compubahn, Inc. v. United States, 33 Fed. Cl. 677, 681 (1995) ("Contract law . . . does not permit such a genre of recovery."). *But see* Claybrook, supra note ___, at 596-602 (arguing that the "no lost profits" rule is inappropriate and that contract law does permit such recovery in appropriate cases).

223 *See* E.W. Bliss Co. v. United States, 77 F.3d 455 (Fed. Cir. 1996); Finley v. United States, 31 Fed. Cl. 704 (1994).

224 *See* 5 U.S.C. § 706 (1994).

225 CFC Gen. Order No. 38, app. I, ¶¶ 16-19, annot. (May 7, 1998).

section 10(e) of the APA,[226] which Congress expressly made applicable to the CFC and the district courts in bid protest actions;[227] to that section's legislative history and precedent interpreting it; and to the public policies involved in agency review actions generally and in bid protest actions particularly. When a disappointed bidder challenges an agency's procurement action, the agency must make available to the protester "the whole record," and the court must be provided with either the whole record or those parts of the record that any party, including the disappointed bidder, puts before it.[228]

D. What Is the Required Prejudice Showing?

Another important issue now before the CFC in bid protest actions, but one that so far has received scant attention, involves the appropriate prejudice standard that the CFC should apply. The CFC must also give heed to whether a presumption of prejudice will apply when it finds that the agency has committed error in the procurement process.

1. Under the APA, Error Is Prejudicial When It Affected or Was Otherwise Causally Related to the Adverse Decision

The issue of the appropriate prejudice standard under new section 1491(b) arises because the Federal Circuit, in non-APA cases applying the now-repealed grant of bid protest jurisdiction in a limited class of procurements to the General Services Board of Contract Appeals under the Brooks Act,[229] reiterated a requirement that, to prevail, a protester had to demonstrate a "substantial possibility" (or "reasonable likelihood") that, but for the improper agency action, it would have received the contract.[230] This is not the equivalent of a "but for" test,[231] but it does require more than a "mere possibility."[232]

In *Alfa Laval Separation, Inc. v. United States,*[233] the Federal Circuit for the first time addressed prejudice under new section 1491(b). Without analysis, the court applied the "substantial chance" standard it had articulated in non-APA bid protest cases.[234]

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226 *Codified at* 5 U.S.C. § 706 (1994).

227 28 *id.* § 1491(b)(4) (Supp. II 1996).

228 *See* 5 *id.* § 706 (1994).

229 40 *id*. § 759; *see id.* (Supp. II 1996) (repealed).

230 *See* Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). The Federal Circuit in *Statistica* noted that it had articulated the "substantial chance" standard in previous bid protest cases not covered by the Brooks Act (but also not decided under the APA). *Id.* at 1581 (*citing* CACI, Inc.–Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983); Morgan Bus. Assocs., Inc. v. United States, 619 F.2d 892, 896 (Ct. Cl. 1980). The Federal Circuit in *Statistica* also observed that an earlier panel's articulation of the prejudice standard in *Data General Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996) – that the aggrieved bidder must show a "reasonable likelihood that [it] would have received the award" – is identical in substance to the "substantial chance" standard. 102 F.3d at 1581-82; *see* Candle Corp. v. United States, 40 Fed. Cl. 658, 665 (1998) (citing both formulations as equivalent); *see also* Marine Hydraulics Int'l v. United States, ___ Fed. Cl. ____ (1999); Analytical Research Tech. v. United States, 39 Fed. Cl. 34, 53-54 (1997).

231 *Data General*, 78 F.3d at 1562 ("To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract.").

232 *Id.*; Allied Tech. Group, Inc. v. United States, 39 Fed. Cl. 125, 133 (1997); Analytical & Research Tech., Inc. v. United States, 39 Fed. Cl. 34, 53-54 (1997).

233 __ F.3d ___ (Fed. Cir. 1999).

234 *Id.* at ___ (citing *Statistica, Data General,* and *CACI* to require a "substantial chance" that the bidder would receive the award, *i.e.*, that it was "within the zone of active consideration," and rejecting a "but for" test). The Federal Circuit reversed the CFC's ruling of no prejudice, holding that the CFC had put too much reliance on pricing when the agency should have disqualified the awardee for noncompliance with a mandatory technical requirement. *Id.* at ___-___.

The CFC judges have also uncritically applied this standard under new section 1491(b), without analysis of whether this standard used in Brooks Act cases is the equivalent of the APA prejudice standard.[235] The APA itself does not require a litigant who has shown agency error to prove "substantial prejudice," but only that the error was "prejudicial."[236] Courts applying this APA standard have rejected the "substantial possibility" test for a "mere possibility" test.[237] The leading case articulating the standard of review for Scanwell actions in the District of Columbia Circuit, *Kentron Hawaii, Ltd. v. Warner,*[238] the language of which many other circuits have adopted,[239] only requires the agency's procurement error to have "affected" or otherwise to have been "causally related" to the decision.[240] This articulation of the prejudice standard, and rejection of the "substantial possibility" standard, strikes the appropriate balance between Congress's overriding goal in the APA to allow aggrieved parties to police agency action[241] and its subsidiary purpose not to require corrective action when the error was trivial or clearly had no impact on the ultimate decision challenged.[242]

The Federal Circuit in *Data General Corp. v. Johnson* [243] opined that, if the "mere possibility" standard were adopted, "the requirement of prejudice would be virtually eliminated."[244] The Federal Circuit did not say why, and experience does not prove out its assumption. The APA prejudice requirement is alive and well in Scanwell actions the district courts have decided under the APA.[245]

The citation and application of the pre-section 1491(b) case law requiring a "substantial possibility" prejudice showing in the Federal Circuit and in several CFC decisions seem to have been more a result of continuing past practice than of analyzed decision making.[246] Congress in new section 1491(b) has required the CFC, along with the district courts, to apply the APA prejudice standard as found in section 706 of title 5.[247] That standard, under established precedent, does not require a

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235 *E.g.*, Advanced Data Concepts, Inc. v. United States, ___ Fed. Cl. ___, ___ (1999); United Int'l Investigative Servs. v. United States, 42 Fed. Cl. 73, 80-81 (1998); Informatics Corp. v. United States, 40 Fed. Cl. 508, 513 (1998); *Candle*, 40 Fed. Cl. at 665; Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215, 234 (1998), *rev'd,* ___ F.3d ___ (Fed. Cir. 1999); Wackenhut Int'l, Inc. v. United States, 40 Fed. Cl. 93, 106 n.7 (1998); Aero Corp., S.A. v. United States, 38 Fed. Cl. 739, 767 (1997); Day & Zimmerman Servs. v. United States, 38 Fed. Cl. 591, 597 (1997).

236 5 U.S.C. § 706 (1994).

237 *See* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983) ("substantial likelihood" appears stricter than the APA standard); Evans v. Perry, 944 F. Supp. 25, 29 (D.D.C. 1996). Unfortunately, the district court in at least one case, without principled analysis, has adopted the Federal Circuit's "reasonable likelihood" standard in an APA-controlled Scanwell case. *See* Strategic Analysis, Inc. v. United States Dep't of Navy, 939 F. Supp. 18, 23 (D.D.C. 1996) (*quoting Data General*, 78 F.3d at 1562).

238 480 F.2d 1166 (D.C. Cir. 1973).

239 *See*, *e.g.*, Choctaw Mfg. Co. v. United States, 761 F.2d 609, 616 (11th Cir. 1985); Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1271-72 (5th Cir. 1978).

240 480 F.2d at 1180-81.

241 *See* 5 U.S.C. §§ 702, 706 (1994); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-91 (1951) ("The legislative history of [the APA] demonstrates a purpose to impose on courts a responsibility which has not always been recognized. . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.").

242 5 U.S.C. § 706 (1994).

243 78 F.3d 1556 (Fed. Cir. 1996).

244 *Id.* at 1562.

245 *E.g.*, *Kentron Hawaii*, 480 F.2d at 1181 (finding no prejudice); Marwais Steel Co. v. Department of Air Force, 871 F. Supp. 1448, 1454 (D.D.C. 1994) (same); Harvard Interiors Mfg. Co. v. United States, 798 F. Supp. 565, 573-74 (E.D. Mo. 1992) (same); Single Screw Compressor, Inc. v. United States Dep't of Navy, 791 F. Supp. 7, 10-11 (D.D.C. 1992) (same); Technology for Communications Int'l, Inc. v. Garrett, 783 F. Supp. 1446, 1451 (D.D.C. 1992) (same); Saratoga Dev. Corp. v. United States, 777 F. Supp. 29, 38-39 (D.D.C. 1991) (same), *aff'd*, 21 F.3d 445 (D.C. Cir. 1994).

246 No CFC judge has analyzed the appropriate prejudice standard under APA law and precedent. Neither has the Federal Circuit.

247 28 U.S.C. § 1491(b)(4) (Supp. II 1996).

substantial possibility of prejudice, but only a mere possibility, based on a showing that the error affected or otherwise was causally related to the decision.[248]

2. Reasonable Doubts Must be Resolved in Favor of a Finding of Prejudice

Once an aggrieved party has shown an error, its burden to demonstrate prejudice should not be onerous, for two principal reasons. First, the protester serves important public interests in policing improper agency action.[249] The CFC has shown some positive signs in this regard. In one case, the CFC has adopted the GAO precedent that, when a disappointed bidder has shown error by the procuring agency, the CFC will give the bidder the benefit of any reasonable doubt when determining whether prejudice occurred.[250]

Second, established APA law prohibits the reviewing court from taking the place of the agency and substituting its judgment for a decision entrusted to the agency.[251] In the context of a prejudice analysis, this means that a court may not, once finding error, substitute its judgment of what the agency likely would have done if the agency had performed its duties properly; instead, it must set aside the agency action and send the matter back to the agency for redetermination.[252] Absent reasonable doubt that the error complained of would have had no affect on the challenged decision, the CFC must find prejudice and return the matter to the agency to perform the challenged action anew. Nor may the agency substitute *post-hoc* analyses during the litigation to demonstrate lack of prejudice instead of remanding to the agency for correction of the error and redetermination.[253]

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248 *See Kentron Hawaii*, 480 F.2d at 1180-81.

249 In *Scanwell*, the District of Columbia Circuit identified disappointed bidders as performing a "private attorneys general" function. 424 F.2d at 864; *accord* National Fed'n of Fed. Employees v. Chaney, 883 F.2d 1038, 1052 (D.C. Cir. 1989), *cert. denied*, 496 U.S. 936 (1990); Ulstein Maritime Ltd. v. United States, 833 F.2d 1052, 1059 (1st Cir. 1987); Merriam v. Kunzig, 476 F.2d 1233, 1240 (3rd Cir.), *cert. denied*, 414 U.S. 911 (1973); Delbert Wheeler Constr., Inc. v. United States, 39 Fed. Cl. 239, 245 n.11 (1997), *aff'd without op.*, 155 F.3d 566 (Fed. Cir. 1998); C C Distribs., Inc. v. United States, 38 Fed. Cl. 771, 775-77 (1997). Many other courts have noted the important public interests protected by disappointed bidders in ensuring the integrity of the government's procurement process. *E.g.,* Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 206 (D.C. Cir. 1984); S.J. Amoroso Constr. Co. v. United States, 981 F.2d 1073, 1076 (9th Cir. 1992); Shoals Am. Indus., Inc. v. United States, 877 F.2d 883, 889 (11th Cir. 1989); National Maritime Union of Am. v. Commander, Military Sealift Command, 824 F.2d 1228, 1237 (D.C. Cir. 1987); Clark Constr. Co. v. Pena, 930 F. Supp. 1470, 1478-79, 1491-92 (M.D. Ala. 1996); Dairy Maid Dairy, Inc. v. United States, 837 F. Supp. 1370, 1382 (E.D. Va. 1993); Georgia Gazette Publ'g Co. v. United States Dep't of Defense, 562 F. Supp. 1004, 1011 (S.D. Ga. 1983); Day & Zimmerman Servs. v. United States, 38 Fed. Cl. 591, 610 (1997); Minor Metals, Inc. v. United States, 38 Fed. Cl. 16, 21 (1997); Essex Electro Eng'rs, Inc. v. United States, 3 Cl. Ct. 277, 288 (1983).

250 *Day & Zimmerman,* 38 Fed. Cl. at 609 (*quoting* The Jonathan Corp., 93-2 CPD ¶ 174 at 16 (1993): "Where . . . an agency clearly violates procurement requirements, we will resolve *any* doubts concerning the prejudicial effect of the agency's action in favor of the protestor." (Emphasis in original.)

251 *Overton Park*, 401 U.S. at 416; *Steinthal*, 455 F.2d at 1201; Keene Corp. v. United States, 584 F. Supp. 1394, 1400-01 (D. Del. 1984).

252 *Compare* Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976) (finding agency's failure to consider mitigating circumstances in debarment action to be arbitrary and capricious but remanding to agency for further proceedings in conformity with law), *with* Shane Meat Co. v. United States Dept. of Defense, 800 F.2d 334 (3d Cir. 1986) (reversing district court that substituted its judgment of the appropriate debarment tenure due to mitigating circumstances for that of the agency).

253 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983); *Overton Park*, 401 U.S. at 419 (holding that litigation affidavits that are *post-hoc* rationalizations of agency action "have traditionally been found to be an inadequate basis for review"); *accord* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 318 U.S. 80, 87 (1943); IMS, P.C. v. Alvarez, 129 F.3d 618, 623-24 (D.C. Cir. 1997); Lewis v. Babbitt, 998 F.2d 880, 882 (10th Cir. 1993); ATA Defense Indus. Inc. v. United States, 38 Fed. Cl. 489, 498-99, 502 (1997); Cubic

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The Federal Circuit properly applied these principles when reversing the CFC in *Alfa Laval*.[254] The CFC, after finding error in the agency's technical evaluation, had weighed the relative cost differences between the offers to find that the agency would not have awarded to the protester even if it had performed the technical evaluation properly.[255] The Federal Circuit reversed, finding that the CFC had overstepped its bounds by deciding the issue itself instead of remanding to the agency, because there was a substantial chance that the agency would have come to a different conclusion.[256]

The CFC in *Advanced Data Concepts, Inc. v. United States*[257] either overstepped its bounds or came perilously close to doing so. In that case, the disappointed bidder had the lower proposed price by over $3 million, or 26 percent. The CFC found error in two and potentially three aspects of the technical evaluation, which would have possibly increased the disappointed bidder's technical score by 18 percent, but would have still left its technical point score 27 percent lower than that of the awardee.[258] The CFC concluded, in part based on a "supplemental statement" by the source selection official,[259] that a 27 percent higher technical score "outweighs [the disappointed bidder's] 26 percent cost advantage."[260] But this is a decision for the agency to make, not the court, especially given that point scores themselves, by law, are not dispositive in a best value evaluation such as that involved in *Advanced Data Concepts,* but are only to be used as guidance by the source selection official in making a qualitative trade-off decision.[261]

In summary, courts applying the APA's prejudice standard in procurement cases must give the benefit of all reasonable doubts to the disappointed bidder. This advances the purposes of the APA that aggrieved parties monitor agency action, furthers the purposes of CICA that disappointed bidders police the procurement system, and prevents reviewing courts from substituting their judgments for those to be made by the agency in conformity with lawful procedures.

E. Who Is an "Interested Party"?

The issue of who qualifies as an "interested" party under new section 1491(b) is not free from doubt. The answer has implications for both standing and the right to intervene.

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Applications, Inc. v. United States, 37 Fed. Cl. 345, 355-57 (1997). The GAO, although giving "little weight" to *post hoc* agency statements, does not apply the APA rule of giving them no consideration. *See, e.g.,* Boeing Sikorsky Aircraft Support, B-277263, 97-2 CPD ¶ 91 (1997).

254 ___ F.3d ___ (Fed. Cir. 1999).

255 40 Fed. Cl. at 234-35.

256 ___ F.3d at ___. Again, the proper APA standard would be a mixture of *Statistica*'s "substantial chance" and *Data General*'s "reasonable likelihood" formulations – a "reasonable chance." The Federal Circuit in *Alfa Laval* applied an improper but heightened standard for prejudice, but still found that standard met and properly remanded to the agency.

257 ___ Fed. Cl. ___ (1999).

258 *Id.* at ___.

259 The source selection official in the supplemental statement addressed one of the agency's evaluation errors and stated that he would have reached the same award decision if the agency had properly performed the evaluation in that respect. Although the CFC rejected the suggestion that this was a *post-hoc* rationalization, *id.* at ___, its conclusion is not persuasive.

260 *Id. at* ___.

261 *See* FAR §§ 15.501-1, 15.308, 48 C.F.R. §§ 15.501-1, 15.308 (1998); TRW, Inc. v. Unisys Corp., 98 F.3d 1325, 1327-28 (Fed. Cir. 1996) (observing that the source selection authority in a best value procurement is not bound by quantitative scoring but must make qualitative trade-off to determine if the superior technical offer justifies the higher cost); Marine Hydraulics Int'l, Inc. v. United States, ___ Fed. Cl. ___, ___ (1999).

1. The CFC Should Review Standing Under the APA Standard

An issue the CFC has noted but not resolved is whether Congress intended in new section 1491(b) to adopt APA standing law to define who may bring a bid protest action or to restrict standing to those whom the Competition in Contracting Act of 1984 defines as an "interested party."[262] The better view is that the Congress intended the regular APA standing rules to apply.

The ambiguity arises from the fact that, in new section 1491(b), Congress speaks of a bid protest "action by an interested party."[263] "Interested party" is a defined term under CICA for GAO bid protest actions, as follows:

> an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.[264]

This standard is more stringent than the normal APA standing requirements.

The recent Seventh Circuit decision in *American Federation of Government Employees, Local 2119 v. Cohen* (*"AFGE"*)[265] provides a case in point. In that case, a union of federal employees challenged the government's procurement actions under several procurement statutes, including CICA, after the effective date of new section 1491(b).[266] If the court had applied CICA's "interested party" definition, the analysis of whether the union had standing would have been simple – the union was not "an actual or prospective bidder or offeror" and so it did not qualify as an "interested party" under CICA.[267] However, the Seventh Circuit did not apply either new section 1491(b)(1) or the CICA definition of "interested party." Instead, it applied traditional APA standing law and found the union to present a challenge within the zone of interests promoted by one of the three procurement statutes under which it brought its case.[268] As a result, the Seventh Circuit found that the union had standing to bring its claim in that respect.[269] One CFC judge has also suggested that a disappointed *sub*contractor may be aggrieved by agency action and "interested" in the award,[270] and thus have standing under the APA and new section 1491(b)(1), even though it is not "an actual or prospective bidder" and thus does not qualify under the CICA definition of "interested party."[271] And the Supreme Court has found an association of precluded

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262 *See* ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489, 494 (1997); *see also* Delbert Wheeler Constr., Inc. v. United States, 39 Fed. Cl. 239, 245 n.11 (1997); C C Distribs., Inc. v. United States, 38 Fed. Cl. 771, 789 (1997).

263 28 U.S.C. § 1491(b)(1) (Supp. II 1996).

264 31 U.S.C. § 3551(2) (1994). A similar definition of "interested party" appeared in the Brooks Act to define what parties had standing to bring bid protest actions in certain types of computer procurements in the General Services Board of Contract Appeals. 40 U.S.C. § 759(f)(9)(b) (1994). Congress has now repealed those provisions. *Id.* (Supp. II 1996).

265 ___ F.3d ___ (7th Cir. 1999).

266 *Id.* at ___. The Seventh Circuit in *AFGE* did not discuss new section 1491(b).

267 *See* 31 U.S.C. § 3551(2) (1994).

268 ___ F.3d at ___. The Seventh Circuit relied principally on the Supreme Court's decisions in *Clinton v. City of New York*, 118 S. Ct. 2091, 2099 n.15 (1998); *National Credit Union Administration v. First National Bank and Trust*, 118 S. Ct. 927, 932-36 (1998); *Air Courier Conference v. Postal Workers*, 498 U.S. 517 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990); and *Clarke v. Securities Industry Association*, 479 U.S. 388, 399-400 (1987).

269 ___ F.3d at ___.

270 *See* 5 U.S.C. § 702 (1994) (requiring plaintiff to have been "adversely affected or aggrieved by agency action within the meaning of the relevant statute"); *see generally* Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) (requiring injury in fact and interest within the zone of interests protected by the relevant statute).

271 31 U.S.C. § 3551(2) (1994); *see ATA Defense*, 38 Fed. Cl. at 494 (Andewelt, J.). Despite the dicta in *ATA Defense*, Scanwell courts have not been particularly receptive to subcontractor standing, generally allowing it only in limited

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contractors has standing to complain of a set-aside that eliminated those companies' participation in procurements.[272]

The argument in favor of adopting the CICA definition of "interested party" is that both CICA and section 1491(b) are procurement statutes dealing with bid protests and Congress must have intended the term "interested party" to have the same meaning as defined in CICA when it inserted it into the new statute, ensuring consistency of treatment in the courts and GAO.[273] This argument carries some force, but the counterarguments are weightier.

First, Congress could have easily specified that it intended to adopt the CICA definition of "interested party" in new section 1491(b), but it did not.[274] Congress in section 1491(b) specified other statutory provisions it wished to incorporate,[275] and it could have just as easily have specified CICA, if it had so intended.[276]

Second, the general purpose of Congress, expressed in the statutory language of new section 1491(b) itself, that APA review should apply lends support to the view that bid protest actions at the CFC should be treated like every other APA action. Congress's primary motivation in enacting new section 1491(b) was to have the CFC and the district courts provide identical forums for bid protest actions, rather than to standardize CFC and GAO practice. The CFC was to adopt the *Scanwell* rationale as the district courts had developed under the APA. Sen. Levin, the primary sponsor of new section 1491(b), stated, "Each court system [the CFC and the district courts] would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system."[277] Conforming CFC practice to that of the GAO was not a stated purpose of new section 1491(b).

Third, there is no indication that Congress intended to alter the standing rules applied by district courts in Scanwell cases. District courts would have to do so if they interpreted section 1491(b)(1) to incorporate CICA's "interested party" definition. It is unlikely that Congress would have intended to work this change to the basic *Scanwell* rationale without express comments to that effect.[278]

Fourth, the term "interested party" is not so peculiar that it must be afforded the CICA statutory definition or none at all. To the contrary, the logical interpretation is that it means the same as the APA's

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(...continued)

situations as outlined in GAO precedent. *See* Contractors Eng'rs Int'l, Inc. v. United States Dep't of Veterans Affairs, 947 F.2d 1298, 1300-02 (5th Cir. 1991); Coyne-Delany Co. v. Capital Dev. Bd., 616 F.2d 341 (7th Cir. 1980); Information Sys. & Networks Corp. v. United States Dep't of Health and Human Servs., 970 F. Supp. 1, 7-9 (D.D.C. 1997); Amdahl Corp. v. Baldrige, 617 F. Supp. 501, 504-08 (D.D.C. 1985); *see also* Phoenix Eng'g, Inc. v. MK-Ferguson of Oak Ridge Co., 966 F.2d 1513, 1525-26 (6th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

272 Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993). Surprisingly, the Seventh Circuit in *AFGE* did not deal with *Jacksonville*, the one Supreme Court standing decision related to procurements.

273 The CFC adopted this view in *C C Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 778-79 (1997) (Horn, J.); *see also* WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 756 (1998).

274 Neither the text nor the legislative history of section 1491(b) speaks expressly to this issue.

275 *See* 28 U.S.C. § 1491(b)(4) (Supp. II 1996) (referencing 5 U.S.C. § 706).

276 *See generally* Norman J. Singer, SUTHERLAND STAT. CONSTR. § 47.23 (5th ed. 1994).

277 142 CONG. REC. S11849.

278 Of some relevance in this respect are Congress's express statements in the legislative history of the Federal Courts Improvement Act of 1982, when it first granted bid protest jurisdiction to the CFC, that it intended to adopt the *Scanwell* rationale for the CFC. *See* H.R. REP. NO. 97-312, 97th Cong. 43 (1981); S. REP. NO. 97-275, 97th Cong. 43, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 11, 33.

"adversely affected or aggrieved party," *i.e.,* a party with standing to complain about the agency's decision as Congress specified it in the APA.[279]

It could be argued that the term "interested party," on its face, is broader than the APA's "adversely affected or aggrieved" person formulation, *i.e.*, that Congress is permitting suit to the maximum constitutional limit by allowing any person interested enough to bring suit and constitutionally able to do so.[280] Once again, it seems unlikely that Congress would intend this result without a whisper to that effect in the legislative history. Indeed, there is no indication that Congress intended to allow standing for review of this particular type of agency action to be broader than that of other agency action subject to APA review but, rather, to apply to normal APA standing standards to agency procurement actions.

The court in *Information Systems & Networks Corp. v. United States Department of Health and Human Services*,[281] in determining whether a subcontractor had standing under the APA to raise a CICA illegality, brought the CICA "interested party" definition through the back door under an APA analysis. To determine if a subcontractor's claim was within CICA's zone of interests, the court looked, not to CICA's substantive provisions, but to its "interested party" definition for GAO protest cases and found that, because a subcontractor is not "an actual or prospective bidder or offeror,"[282] a subcontractor does not fall within CICA's zone of interests.[283] A zone-of-interests analysis requires an examination of a statute's substantive provisions and purposes, not its procedural ones, especially when those procedural provisions pertain to a completely different forum. If the Seventh Circuit had employed the type of analysis in *AFGE*[284] that the district court did in *Information Systems & Network Corp.*, it would have quickly concluded that a union is not an "interested party" under CICA because the union was not "an actual or prospective bidder or offeror," and, thus, could not have standing. Instead, the Seventh Circuit looked to the substantive purposes of CICA.[285]

Although the issue is certainly not free from doubt, the better view is that the CFC and the district courts should apply normal standing principles applied in all APA cases when deciding bid protest actions. This view more closely conforms to Congress's expressed intent that bid protest actions be subject to review under the APA as are other agency actions and that the CFC and the district courts afford coextensive relief in bid protest actions based on the prior *Scanwell* case precedent of the district courts.

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279 "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1994). The Supreme Court has stated repeatedly that standing under this provision of the APA is to be construed liberally. *E.g.,* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 394-400 (1987); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 156 (1970).

280 Congress can afford standing to any party that meets the constitutional requirements for standing. Wilcox Elec., Inc. v. FAA, 119 F.3d 724, 727 (8th Cir. 1997); *see Lujan*, 504 U.S. at 560.

281 970 F. Supp. 1 (D.D.C. 1997).

282 31 U.S.C. § 3551(2) (1994).

283 970 F. Supp. at 7-9. Similar language can be found in *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.,* 966 F.2d 1513, 1524-26 (6th Cir. 1992). In that case, the issue was whether CICA was implicated when a prime contractor entered into a project labor agreement with a local union. In supporting its decision that CICA did not reach that agreement, the Sixth Circuit in dicta found that the subcontractors challenging the agreement were not "interested parties" under the CICA definition and relied on Federal Circuit law interpreting that definition in a context in which it was directly applicable, a General Services Board of Contract Appeals bid protest proceeding. *Id.* at 1525-26 (*citing* US West Communications Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991)). Instead, the Sixth Circuit's analysis should have ended when it found that CICA did not reach the challenged agreement because it was not a solicitation of a federal agency. *See* 966 F.2d at 1526 (*citing* 31 U.S.C. § 3551(1)).

284 ___ F.3d ___ (7th Cir. 1999).

285 *Id.* at __. In applying that analysis, the Seventh Circuit found the union's interest in continued employment for its members was not within CICA's zone of interests and that the union had to have standing in its own right and could not promote the interest of its employer in being able to compete for government work. *Id.* at ___ (*citing* Air Courier Conf. v. Postal Workers, 498 U.S. 517, 528 n.5 (1991)).

The CFC (and district courts) should apply the same standing rules as the district courts have traditionally done in bid protest actions under the APA. They should not apply the CICA definition of "interested party," either directly or derivatively.[286]

2. The CFC Should Grant Intervention to Awardees

Standing alone, Judge Weinstein of the CFC has held in bid protest cases that the awardee of a challenged contract may not intervene, but may only appear as amicus curiae in bid protest actions under new section 1491(b).[287] This holding is out of harmony with CFC Rule 24, "Intervention,"[288] which tracks its counterpart of the Federal Rules of Civil Procedure.[289] Under CFC Rule 24, it is clear that an awardee may intervene both as of right[290] and by permission.[291] This holding is also out of step with the consistent practice in the district courts, which have uniformly permitted intervention by the awardee in Scanwell cases,[292] and, indeed, with the consistent practice in the CFC – both before and after enactment of new section 1491(b) – to permit the awardee or potential awardee of a challenged contract to intervene.[293]

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286 The history of *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), reinforces this conclusion In that case, a group of computer manufacturers contested a proposed rule on the grounds that it was tailored to their competitor IBM and effectively foreclosed them from federal procurements. The District of Columbia Circuit foreclosed relief by denying standing, in part because they were only potential bidders and were not absolutely foreclosed from the market. *Id.* at 292-93. The Supreme Court denied certiorari in the case, but in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), it expressly disapproved of the *Control Data* rationale to the extent it required there to be an express indication of congressional purpose in the statute or its legislative history to benefit the would-be plaintiff. *Id.* at 400 n.15.

287 *See* Anderson Columbia Envtl., Inc. v. United States, Opinion and Order, No. 98-759C (Fed. Cl. Feb. 19, 1999); Advanced Data Concepts, Inc. v. United States, Order, No. 98-495C (Fed. Cl. June 18, 1998); United Int'l Investigative Servs., Inc. v. United States, Order, No. 98-153C (Fed. Cl. March 25, 1998).

288 R.C.F.C. 24.

289 FED. R. CIV. P. 24.

290 CFC Rule 24(a), reads as follows:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

291 CFC Rule 24(b), reads as follows:

> Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

292 *E.g.*, QualMED, Inc. v. OCHAMPUS, 934 F. Supp. 1227 (D. Colo. 1996); SRS Techs. v. United States, 894 F. Supp. 8 (D.D.C. 1995); Buffalo Cent. Term. v. United States, 886 F. Supp. 1031, 1035 (W.D. N.Y. 1995); TEAC Am., Inc. v. United States Dep't of Navy, 876 F. Supp. 289, 291 (D.D.C. 1995); Marwais Steel Co. v. Department of Air Force, 871 F. Supp. 1448, 1450 (D.D.C. 1994); Single Screw Compressor, Inc. v. United States Dep't of Navy, 791 F. Supp. 7 (D.D.C. 1992); Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992); Professional Bldg. Concepts, Inc. v. Central Falls Hous. Auth., 783 F. Supp. 1558, 1559 (D.R.I.), *aff'd sub nom.*, Professional Bldg. Concepts, Inc. v. Central Falls, 974 F.2d 1 (1st Cir. 1992); Ripides Reg'l Med. Ctr. v. Derwinski, 783 F. Supp. 1006, 1007 (W.D. La. 1991), *rev'd sub nom.*, Ripides Reg'l Med. Ctr. v. Secretary, Dep't of Veterans Affairs, 974 F. Supp. 565 (5th Cir. 1992), *cert. denied*, 508 U.S. 939 (1993); Atlantic Research Corp. v. Department of Air Force, 716 F. Supp. 904 (E.D. Va. 1989); National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. 1104, 1106 (D.N.J. 1998), *aff'd without op.,* 879 F.2d 858 (3d Cir. 1989); Cox Cable Communications, Inc. v. United States, 699 F. Supp. 917, 924 (N.D. Ga. 1988).

293 *E.g.*, Marine Hydraulics Int'l, Inc. v. United States, ___ Fed. Cl. ___ (1999); Miller-Holzwarth, Inc. v. United States, 42 Fed. Cl. 643, 645 (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306, 307 (1998); Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673 (1998); Candle Corp. v. United States, 40 Fed. Cl. 658 (1998); ECDC Envtl., LC v. United States, 40 Fed. Cl. 236 (1998); Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215 (1998) *rev'd on other*

(continued...)

Judge Weinstein gives the fullest explication of her rationale in *Anderson Columbia Environmental, Inc. v. United States.*[294] She finds that, under the mandatory intervention standards, the government adequately represents an awardee's interest and the disposition of the action will not "as a practical matter impact or impede an applicant's ability to protect that interest"[295] because the awardee can bring a protest itself if its award is set aside and it loses the recompetition.[296] Under the permissive intervention standards, she adds that an awardee may "unduly delay or prejudice the adjudication of the rights of the original parties"[297] by filing "a counterclaim or motions on extraneous issues or by opposing and preventing a settlement between the original parties."[298] This rationale is wanting in at least the following respects.

First, it is internally inconsistent. By admitting that an awardee might oppose a settlement the government would otherwise adopt, Judge Weinstein implicitly admits that the awardee and the government do not have a perfect overlap of interests and that the government may not adequately defend the interests of the awardee.

Second, the government's interests are both broader and narrower than an awardee's. The government must consider public policies, and both politics and procurement exigencies may encourage it to take the path of least resistance, or at least a path other than the awardee wishes it to trod.[299] An awardee's interests are focused only on obtaining or keeping its contract award. The particular bid protest action may also present issues concerning which the contractor has more direct knowledge and a more direct interest than does the government.[300]

Third, the suggestion that an awardee's interests are adequately protected if the agency loses the court action by its right to file another protest if it loses the subsequent recompetition is erroneous. If the government does not recompete, but only reawards (*e.g.*, after the protester overturns an agency nonresponsiveness finding), the findings in the initial decision would be law of the case in a later

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grounds, ___ F.3d ___ (Fed. Cir. 1999); Wackenhut Int'l, Inc. v. United States, 40 Fed. Cl. 93 (1998); Allied Tech. Group, Inc. v. United States, 39 Fed. Cl. 125 (1997); IMS Servs., Inc. v. United States, 33 Fed. Cl. 167 (1995); Logicon, Inc. v. United States, 22 Cl. Ct. 776, 778 (1991); Blount, Inc. v. United States, 22 Cl. Ct. 221, 226 (1990); Vanguard Sec., Inc. v. United States, 20 Cl. Ct. 90 (1990); Carothers Constr., Inc. v. United States, 18 Cl. Ct. 745, 748 (1989); Drexel Heritage Furnishings, Inc. v. United States, 7 Cl. Ct. 134, 137-38 (1984), *aff'd without op.,* 809 F.2d 790 (Fed. Cir. 1986); Planning Research Corp. v. United States, 4 Cl. Ct. 282, 285 (1983); Southwest Marine, Inc. v. United States, 4 Cl. Ct. 275, 276 (1984); Gibraltar Indus., Inc. v. United States, 2 Cl. Ct. 589, 590 (1983).

294 No. 98-759C, Order and Opinion (Fed. Cl. Feb. 19, 1999). Judge Weinstein adopted the "interested party" definition of CICA for section 1491(b)(1) and found that an awardee is not a party as of right because it does not qualify under that definition or the requirement of section 1491 that the party be "objecting" to an award. *Id.* at ___; *see* 28 U.S.C. § 1491(b)(1) (Supp. II 1996). The same result would obtain under the APA, because an awardee is not an aggrieved party. *See* 5 *id.* § 702 (1994).

295 R.C.F.C. 24(a).

296 Opinion and Order at ___.

297 R.C.F.C. 24(b).

298 Opinion and Order at ___.

299 For instance, the agency may decide another round of competition may give it a chance to get better pricing.

300 For instance, the disappointed bidder may allege that the awardee made material misrepresentations to the agency in its proposal. *E.g.*, Planning Research Corp. v. United States, 971 F.2d 736, 740-43 (Fed. Cir. 1992); Ralvin Pac. Properties, Inc. v. United States, 871 F. Supp. 468, 473 (D.D.C. 1994). The agency record will not contain all the necessary information for such a challenge, and the awardee may well have more at stake than the agency in defending against assertions of lack of integrity that also might affect the awardee's position in future procurements. *See, e.g.*, Action Serv. Corp. v. Garnett, 797 F. Supp. 82, 85 (D.P.R. 1992) (bidder that misrepresented its financial condition lacked necessary integrity to be responsible and to qualify for award).

protest.[301] If there is a recompetition and the awardee loses, it now must shoulder the burden of overturning the agency's decision, rather than the much easier task of defending it.[302] The awardee also has an interest in avoiding the expense, delay, and risk of a recompetition.[303] Thus, the right of the awardee to file a later protest action is not an acceptable substitute for intervention.

Fourth, this ruling is inconsistent with analogous case law under Federal Rule of Civil Procedure 19(a),[304] which tracks the language of Rule 24 in requiring an assessment of whether disposition of the action will "impair or impede" an absent party's interest in the subject matter of the action.[305] Judge Friendly of the Second Circuit in *B.K. Instruments, Inc. v. United States*[306] held that an awardee of a challenged contract is party "to be joined if feasible" under Federal Rule of Civil Procedure 19(a).[307] If an awardee qualifies under Rule 19(a), it also qualifies to intervene under Rule 24(a), because the substantive standards are identical.[308]

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301 *See* Handi Inv. Co. v. Mobil Oil Corp., 653 F.2d 391, 392 (9th Cir. 1981); *see generally* Bollinger Mach. Shop & Shipyard, Inc. v. United States, 594 F. Supp. 903, 910-11 (D.D.C. 1984) (addressing res judicata in bid protest); John A. Glenn, Annotation, *Propriety of Federal District Judge's Overruling or Reconsidering Decision on Order Previously Made in Same Case by Another District Judge*, 20 A.L.R. FED. 13 (1974).

302 *See Overton Park*, 401 U.S. at 415 (describing presumption of regularity in agency action).

303 For example, the delay a recompetition causes might lead to an agency's reassessment of its needs and a less advantageous scope of work for the awardee in the reprocurement, increasing the awardee's risk to receive any contract. If it had received the initial award, a change or reduction in scope of effort most likely would only have meant an alteration in its contract, not a reprocurement.

304 FED. R. CIV. P. 19(a). CFC Rule 19 tracks its district court counterpart and reads in relevant part as follows:

> (a) Persons To Be Joined If Feasible. . . . [A] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if: . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. . . .
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

R.C.F.R. 19.

305 *Id.* (a).

306 715 F.2d 713 (2d Cir. 1983).

307 *Id.* at 730-32; *accord* Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342, 1354 (11th Cir. 1994) (magistrate found awardee to be an indispensable party and was joined); Howard Cooper Corp. v. United States, 763 F. Supp. 829, 832 n.4 (awardee meets requirements of Rule 19(a)(2) of having an identity of interest that will be impaired or impeded by the action); A. & M. Gregos, Inc. v. Robertory, 384 F. Supp. 157, 193-94 (E.D. Pa. 1974) (same). At the same time, no district court has found that, if an awardee cannot be joined, it must dismiss the action under Rule 19(b). *See Howard Cooper*; Capital Eng'g & Mfg. Co. v. Weinberger, 695 F. Supp. 36, 40 (D.D.C. 1988) (not indispensable in circumstances); *A. & M. Gregos*, 384 F. Supp. at 194; *cf.* Onan Corp. v. United States, 476 F. Supp. 428, 432 (D. Minn. 1979) (holding potential small business awardees are not indispensable or necessary parties in challenge to propriety of setting aside a procurement for small businesses).

308 *Compare* R.C.F.C. 19(a) *with id.* 24(a). The only exception in Rule 24(a) is intervention as of right may be denied if representation is otherwise adequate. *Id.*

Fifth, the suggestion of Judge Weinstein that awardees will bring counterclaims or motions on extraneous issues is a red herring. In the published Scanwell case law in both the CFC and the district court, counterclaims have been nonexistent and motions on irrelevant issues never a noted problem.[309] While the potential for "extraneous" motions can never be completely eliminated, there is certainly no evidence that awardee-intervenors in bid protest actions bring more extraneous motions than potential intervenors in other types of cases.

It seems highly unlikely that the ruling in *Anderson Columbia Environmental* will be followed, and it should not be. Both the district courts and the CFC should continue to grant intervention to awardees in bid protest actions as a matter of course.

CONCLUSION

Congress in its 1996 revisions to the Tucker Act clarified the CFC's bid protest jurisdiction. In so doing, it overturned several unfortunate precedents of the Federal Circuit construing the previous and now-repealed jurisdictional grant of bid protest jurisdiction to the CFC. Congress in new section 1491(b) reemphasized its twin purposes that district court and CFC jurisdiction over bid protest cases be coextensive and that the CFC adopt the *Scanwell* precedent the district courts have developed under the APA.

During the initial two years of its work in bid protest cases under new section 1491(b), the CFC in several areas has neglected to apply APA precedent. In particular, the CFC should recognize (a) new section 1491(b) provides an independent source of jurisdiction, not to the exclusion of the CFC's implied contract jurisdiction, that requires procuring agencies to treat bidders fairly, evenhandedly, and consistent with law, regulation, and the solicitation; (b) the CFC has jurisdiction to hear CICA stay override challenges under new section 1491(b); (c) the disappointed bidder's burden is to prove agency error under the specified APA standards, not by clear and convincing evidence; (d) the appropriate record for review is the "whole record," and the entire record must be made available to the disappointed bidder, not just parts selected by the agency or parts that might be relevant to the issues a disappointed bidder has raised based on a limited review of a partial record; (e) once it has established error, a disappointed bidder does not have to prove a "substantial possibility" of prejudice, but only a mere possibility; (f) interested party standing should be equated with aggrieved party standing under the APA in the district courts, not with CICA standing for bid protests at the GAO; and (g) awardees should be allowed to intervene in actions under new 1491(b).

The fractured jurisprudence of the CFC and other courts regarding bid protest actions under the Federal Courts Improvement Act of 1982 was tortured and unfortunate. Congress remedied the situation with its repeal of its initial jurisdictional formulation and the substitution of new section 1491(b). The CFC in cases under new section 1491(b) should be especially alert to recognize the procedures and policies Congress has established to remedy the CFC's unfortunate prior jurisprudence; the CFC should be especially careful not to repeat the errors of the past.

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309 Under CFC Rule 13(a), a counterclaim is compulsory if it arises out of the same transaction or occurrence. R.C.F.C. 13(a). By definition, this would only entail an issue involved in the procurement, but the awardee has no cause of action against the United States dealing with the procurement and could only raise compulsory claims against the protester along the lines of additional reasons why the protester could not be awarded the contract as a matter of law. Judicial economy would generally favor all such issues being handled at one time in one action, but the court would have discretion to sever such a claim if it is so desired. *Id.* 13(i), 42(b).