WHY NOT AWARD LOST PROFITS TO A DISAPPOINTED BIDDER?

FREDERICK W. CLAYBROOK, JR.*

It remains a touchstone in federal contracting law that, when the government enters the marketplace, it "contracts as does a private person, under the broad dictates of the common law."[1] As the Supreme Court stated over sixty years ago, "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[2] More recently, in *United States v. Winstar Corp.*,[3] the Supreme Court construed federal contracts by "applying ordinary principles of contract construction and breach that would be applicable to any contract action between private parties."[4]

The law of good faith, an aspect of the common law of contracts, is receiving heightened attention to befit its increasing importance. Professors Steven Burton and Eric Andersen have recently published a book on this subject entitled *Contractual Good Faith: Formation, Performance, Breach, Enforcement*.[5]

While government contracts tribunals have long recognized good faith duties of the government,[6] federal contracts law has not kept pace with the private law of contractual good faith in the area of contract formation. In applying the common law of good faith duties in contract formation cases, the courts should recognize that a breach of good faith duties, as defined by law or regulation, often allows the award of lost profits, as the contours of the aborted final contract can generally be ascertained with reasonable certainty to an even greater extent than in private contracts.

Common Law Good Faith Duties in Contract Negotiation and Formation

> American law imposes no general duty to negotiate a contract in good faith . . . . [American courts] continue to view contract negotiations as, at bottom, an undertaking in which self-interest is the accepted norm. Each party assumes the risk that, despite a heavy investment in the negotiation process, no agreement will be reached.[7]

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*Partner, Crowell & Moring, Washington, D.C. A.B.,Wheaton College (Ill.); J.D., Duke University. This article is largely taken from the author's prior article, *Good Faith in the Termination and Formation of Federal Contracts*, 56 U.Md.L.Rev. 555 (1997).

1 Torncello v. United States, 681 F.2d 756, 762 (Ct. Cl. 1982) (en banc); *see also* United States v. Bostwick, 94 U.S. 53, 66 (1876) ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."); Cooke v. United States, 91 U.S. 389, 398 (1875) (stating that when the federal government "enters the domain of commerce, it submits itself to the same laws that govern individuals there").<REF ID='FN1'>[fm][eb]

2 Lynch v. United States, 292 U.S. 571, 579 (1934); *see also* Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943) ("The United States as drawee of commercial paper stands in no different light than any other drawee."); United States v. Winstar Corp., 116 S. Ct. 2432, 2464-65 (1996) (plurality opinion) (referring to the above-quoted *Lynch* passage as a "general principle").<REF ID='FN4'>[fm][eb]

3 116 S. Ct. 2432 (1996).<REF ID='FN2'>[fm][eb]

4 *Id.* at 2453 (plurality opinion); *see also id.* at 2473 (Breyer, J., concurring) ("[sp10c]`The United States are as much bound by their contracts as are individuals.'" (quoting Sinking Fund Cases, 99 U.S. 700, 719 (1879))).<REF ID='FN3'>[fm][eb]

5 STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995). <REF ID='FN6'>[fm][eb]

6 *See, e.g.*, Malone v. United States, 849 F.2d 1441, 1445 (Fed. Cir.) (noting that a breach of good faith and fair dealing duties can be a material breach of contract), *modified*, 857 F.2d 787 (Fed. Cir. 1988); Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494, 502 (1874) (stating that the government must deal with individuals with whom they contract in "the strictest fairness and justice"), *aff'd*, 91 U.S. 321 (1875).<REF ID='FN16'>[fm][eb]

7 BURTON & ANDERSEN, *supra* note <CITE ID='FN5'>, at 330-31. *See* Burton and Andersen cite as illustrative the following passage from *Feldman v. Allegheny International, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988).

This American rule of law that good faith duties do not pertain during precontract negotiations is often modified by "preliminary agreements" between the parties.[8] A preliminary agreement is "one made during bargaining on the assumption that further negotiations will take place and result in a later, final contract."[9] Burton and Andersen note that, "in most cases, preliminary agreements include at least an implicit obligation to make efforts to reach that further agreement . . . . [S]uch agreements set out procedural rules for subsequent negotiations, or settle (even if only for purposes of negotiation) some of the substantive terms of the final contract, or both."[10] The parties must, of course, intend to be bound by their preliminary agreement for it to have contractual effect,[11] and, even if they intend to be bound, their contract is not enforceable if it is so indefinite that, should the court enforce it, it would lock the parties into "`surprise contractual obligations that they never intended.'"[12] Although Burton and Andersen hold as the "better view . . . that a general duty to negotiate, without more, is too indefinite to be enforced,"[13] the more the parties delineate procedural rules and define specific terms in their preliminary agreement, the more likely the agreement is to be definite and enforceable with attendant good faith duties: "When the parties have agreed to treat some final contract terms as settled, the good faith performance obligation supplies workable boundaries to the general duty to negotiate. It provides a well-developed means of distinguishing performance from breach, satisfying the requirement of definiteness."[14]

In order to calculate the measure of damages for breach of a preliminary agreement, Professor Farnsworth has argued that "expectation" damages (lost profits) are always inappropriate because the parties were foreclosed from entering into the "larger agreement" by the breach of the preliminary agreement.[15] He argues that, as there is "no way of knowing what the terms of the ultimate agreement would have been, or even whether the parties would have arrived at an ultimate agreement, . . . there is no possibility of a claim for lost expectation under such an agreement."[16] Thus, under Farnsworth's rationale, only restitutionary, out-of-pocket damages are available for breach of a preliminary agreement.[17]

Burton and Andersen reject Farnsworth's reasoning as an absolute rule, as does the emerging consensus of common law jurisprudence.[18] Although in many cases lost profits cannot be awarded because the terms of the final contract are too indefinite, Burton and Andersen point out that in many cases "it is practical and appropriate to allow expectation damages based on the potential, but unrealized, final contract."[19] They identify the key issue as being whether a court can determine what economic

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8 BURTON & ANDERSEN, *supra* note <CITE ID='FN5'>, at 347-48. Burton and Andersen also note that the common law rule that there are no good faith obligations in negotiation is policed by the theories of duress, coercion, fraud, misrepresentation, unjust enrichment, and promissory estoppel. *Id.* at 335-47.<REF ID='FN134'>[fm][eb]

9 *Id.* at 348-49.<REF ID='FN135'>[fm][eb]

10 *Id.* at 348.<REF ID='FN136'>[fm][eb]

11 *Id.* at 353.<REF ID='FN137'>[fm][eb]

12 *Id.* at 359 (quoting Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 497 (S.D.N.Y. 1987)).<REF ID='FN138'>[fm][eb]

13 *Id.* at 360 (citing Pinnacle Books, Inc. v. Harlequin Enters. Ltd., 519 F. Supp. 118, 122 (S.D.N.Y. 1989)).<REF ID='FN139'>[fm][eb]

14 *Id.* at 362.<REF ID='FN140'>[fm][eb]

15 *See* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 263 (1987).<REF ID='FN141'>[fm][eb]

16 *Id.*<REF ID='FN141A'>[fm][eb]

17 *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (labeling as "reliance" damages what many courts refer to as the "restitutionary" measure); *see also* Acme Process Equip. Co. v. United States, 347 F.2d 509, 530 (Ct. Cl. 1965) (allowing for reliance damages as defined in *Restatement (Second) of Contracts*, *supra*, yet declaring the damages "restitution"), *rev'd on other grounds*, 385 U.S. 138 (1966).<REF ID='FN142'>[fm][eb]

18 BURTON & ANDERSEN, *supra* note <CITE ID='FN5'>, at 364-66.<REF ID='FN142A'>[fm][eb]

19 *Id.* at 364.<REF ID='FN143'>[fm][eb]

benefit the injured party would have realized had the final contract been executed.[20] "Thus, when the parties have worked out many of the principal economic terms of their final contract in detail, there is no obstacle to allowing expectation damages based on the bargain tentatively agreed to, but not consummated."[21] When expectation interest can be ascertained with certainty, the courts have awarded expectation damages for breach of a preliminary agreement in various settings, including loan agreements,[22] a sale/sale-back of commercial aircraft,[23] a commercial lease,[24] a manufacturing contract,[25] and a subcontract to design and supply radiation detection equipment to the United States Air Force.[26]

Government Contract Formation Law

Unlike common law contracts, federal government contracts are highly regulated in their form, constituent clauses, and procedures for award. With only rare exceptions, a government contractor must accept the contract terms as set out by the agency in the solicitation. Although technical requirements are normally tailored to a particular contract, the large majority of government contracts clauses are specified in the FAR and are uniformly incorporated in government solicitations and contracts.[27] The procedures for awarding a government contract are also highly regulated in order to treat offerors fairly and equally.[28]

Congress recently amended the Tucker Act in the Administrative Dispute Resolution Act of 1996[29] to clarify that the Court of Federal Claims has jurisdiction to hear bid protest actions whether or not a contract has been awarded under the challenged procurement.[30] The recent congressional action has clarified that both the Court of Federal Claims and the district courts have jurisdiction over all types of bid protests, or *Scanwell* actions,[31] at least for now.[32]

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20 *Id.* at 365.<REF ID='FN143A'>[fm][eb]

21 *Id.*<REF ID='FN144'>[fm][eb]

22 *See, e.g.*, Teachers Ins. & Annuity Ass'n of Am. v. Coaxial Communications, Inc., 799 F. Supp. 16, 18-19 (S.D.N.Y. 1992); Teachers Ins. & Annuity Ass'n of Am. v. Ormesa Geothermal, 791 F. Supp. 401, 415-18 (S.D.N.Y. 1991); Teachers Ins. & Annuity Ass'n of Am. v. Butler, 626 F. Supp. 1229, 1236 (S.D.N.Y. 1986).<REF ID='FN145'>[fm][eb]

23 *See, e.g.*, Cauff, Lippman & Co. v. Apogee Fin. Group, Inc., 807 F. Supp. 1007, 1024 (S.D.N.Y. 1992).<REF ID='FN146'>[fm][eb]

24 *See, e.g.*, Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224, 240-45 (N.D. Ill. 1976).<REF ID='FN147'>[fm][eb]

25 *See, e.g.*, Milex Prods., Inc. v. Alra Lab., Inc., 603 N.E.2d 1226, 1235-37 (Ill. App. Ct. 1992).<REF ID='FN148'>[fm][eb]

26 *See, e.g.*, Air Tech. Corp. v. General Elec. Co., 199 N.E.2d 538, 548 (Mass. 1964).<REF ID='FN149'>[fm][eb]

27 *See* FAR, 48 C.F.R. pt. 52 (1997).<REF ID='FN151'>[fm][eb]

28 *See id.* § 15.603(c). The purpose of government contracts award procedures is to treat offerors fairly and equally. *See* Airco, Inc. v. Energy Research & Dev. Admin., 528 F.2d 1294, 1297-99 (7th Cir. 1975) (per curiam); Elcon Enters., Inc. v. Washington Metro. Area Transit Auth., 770 F. Supp. 667, 677 (D.D.C. 1991), *aff'd in part and rev'd in part*, 977 F.2d 1472 (D.C. Cir. 1992); Howard Cooper Corp. v. United States, 763 F. Supp. 829, 837 (E.D. Va. 1991); Dynalectron Corp. v. United States, 659 F. Supp. 64, 68-70 (D.D.C. 1987); Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803, 805-06 (1993); Thomas Creek Lumber & Log Co. v. United States, 22 Cl. Ct. 559, 566 (1991); Cassidy Cleaning, Inc. v. United States, 10 Cl. Ct. 317, 319 (1986).<REF ID='FN157'>[fm][eb]

29 Pub. L. No. 104-320, 110 Stat. 3870.<REF ID='FN801'>[fm][eb]

30 *Id.* § 12(a), 110 Stat. at 3874-75.

31 Prior to amendment of section 1491 in the Administrative Dispute Resolution Act of 1996, the circuit courts were broadly split on whether district courts had concurrent jurisdiction with the Court of Federal Claims to grant injunctive relief in cases filed prior to an award under the challenged procurement or whether the jurisdiction of the Court of Federal Claims was exclusive in such situations.

32 Congress provided in section 12(c) of the Administrative Dispute Resolution Act of 1996 for the General Accounting Office to undertake a study to determine whether concurrent jurisdiction is necessary. Pub. L. No. 104-320, § 12(c), 110 Stat. 3870, 3875 (to be codified at 28 U.S.C. § 1491(b)(4)). In section 12(d), Congress provided that district court jurisdiction will terminate on January 1, 2001, unless extended by Congress. *Id.* § 12(d).

Application of the Common Law to Government Contract Formation Law

In one sense, government contracts law is in step with, and was even at the forefront of, good faith duties being applied to the negotiation and formation of contracts. Since 1956, government contracts law has consistently recognized an implied contractual duty to treat bidders fairly, honestly, and impartially.[33] Although in 1956 it might have been difficult to articulate a contractual basis for this obligation, the present law of contractual good faith provides an ample basis. For example, a bidder entering into precontract arrangements with the government does not, like most parties in the commercial marketplace, begin on a blank slate. Instead, the multiple statutes, rules, and regulations controlling government contracts negotiation, competition, and award inform the parties to a potential government contract how they must structure their precontractual arrangements and when and how a contract must be awarded. This regulatory framework provides the "meat" of the justified expectations of the parties and the substance of their preliminary agreement with respect to the procurement.[34]

1. The "No Lost Profits" Rule.--Both the federal district courts and the Court of Federal Claims have stated repeatedly that the disappointed bidder may not be granted lost profits under the ultimate (or "larger") contract improperly denied.[35] For example, in *Keco Industries, Inc. v. United States*,[36] the Court of Claims stated that "it would be improper for this court to award plaintiff lost profits since the contract under which plaintiff would have made such profits never actually came into existence."[37] The holding of *Keco*, however, no longer reflects the prevailing law of contractual good faith.[38] Rather, when the terms of an improperly prevented contract are reasonably certain, the court may award lost profits based on that improperly prevented contract.[39]

It is hard to imagine a more appropriate situation for applying this principle, now accepted in the common law, than in the highly regulated field of government contracts. As a general matter in federal procurements, contract terms and conditions are not subject to negotiation, but are fixed ahead of time by the government, often in conformity with federal regulatory requirements or other prescribed optional contract clauses. In most solicitations, the contract terms and conditions are certain. In these situations, indefiniteness should not prevent the contractor from suing in the Court of Federal Claims for lost profits on the ultimate contract.[40]

This does not mean that a successful disappointed bidder should always be able to recover lost profits or that injunctive relief should always be denied a disappointed bidder because it has a legal remedy and thus will not be irreparably harmed. Many violations of procurement law do not result in the conclusion that the disappointed bidder would have won the competition, but, rather, that the bidder should be afforded an opportunity to compete for another chance to improve its competitive position.[41]

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33 *See* Heyer Prods. Co. v. United States, 140 F. Supp. 409, 412-14 (Ct. Cl. 1956).

34 *Cf.* BURTON & ANDERSEN, *supra* note <CITE ID='FN5'>, at 347-49 (stating that preliminary agreements may "either set out procedural rules for subsequent negotiations, or settle . . . some of the substantive terms of the final contract, or both").<REF ID='FN181'>[fm][eb]

35 *See Keco*, 428 F.2d at 1240.<REF ID='FN190A'>[fm][eb]

36 428 F.2d 1233 (Ct. Cl. 1970).<REF ID='FN191'>[fm][eb]

37 *Id.* at 1240 (citing Heyer Prods. Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956)). *Compubahn, Inc. v. United States*, 33 Fed. Cl. 677 (1995), provides a recent application of this precedent. In *Compubahn*, the Court of Federal Claims summarily dismissed the disappointed bidder's request for lost profits, ruling that "[c]ontract law . . . does not permit such a genre of recovery." *Id.* at 681.<REF ID='FN192'>[fm][eb]

38 BURTON & ANDERSEN, *supra* note <CITE ID='FN5'>, at 362-65.<REF ID='FN193'>[fm][eb]

39 *Id.* at 364-65.<REF ID='FN194'>[fm][eb]

40 Any action seeking contract breach damages of greater than $10,000 must be brought in the Court of Federal Claims, rather than in the district courts.

41 *See* Dynalectron Corp. v. United States, 659 F. Supp. 64, 69-70 (D.D.C. 1987).<REF ID='FN196A'>[fm][eb]

For example, if the agency's contracting officer conducts negotiations with one or more of the offerors, but not with the aggrieved offeror after "best and final offers" have been submitted, the aggrieved offeror's remedy is normally to have another opportunity to improve its offer, rather than the right to be awarded the contract.[42] Furthermore, many important interests in addition to lost profits are often at stake in a procurement action and have been recognized by the courts in considering the irreparable injury prong of the test for preliminary injunction.[43] Even when recovering lost profits is a potential remedy, these other interests might well dictate the grant of injunctive relief. Lost profits relief would be especially appropriate in these situations, such as when award should have been made to the disappointed bidder but is denied because of the overriding public interest mandating that the illegal procurement of the goods and services continue.[44]

Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt[45] and Pace Co., Division of Ambac Industries, Inc. v. Department of Army[46] illustrate these considerations. In Derecktor and Pace, the government contracting officers made improper responsiveness determinations--in Derecktor, the Coast Guard's contracting officer improperly disqualified Derecktor, the low bidder,[47] and in Pace, the Army's contracting officer unlawfully failed to disqualify the low bidder when Pace was next in line for award.[48] The district courts granted relief in both cases.[49] The contracting officer in Derecktor then found the aggrieved company to be "responsible"--capable of building the Coast Guard cutters--and awarded the contract to the company.[50] Injunctive relief was the appropriate remedy in Derecktor, even if lost profits had been recognized as an available remedy, because it allowed the Coast Guard to correct its error, to act consistently with the procurement laws, and to save money in two ways--by accepting Derecktor's lower price and by avoiding lost profits liability to Derecktor.

A different result was obtained in *Pace*. After issuance of the preliminary injunction, the Secretary of the Army represented that the Vietnam War effort would be materially affected by continuation of the injunction of the procurement of artillery shells.[51] The United States Court of Appeals for the Sixth Circuit ordered the injunction vacated on national defense grounds.[52] Although lifting the injunction was obviously correct in that situation, Pace should not have automatically been foreclosed from any remedy. The Army still had breached its good faith covenant to make an award consistent with the procurement laws,[53] and Pace should have been allowed to recover lost profits on the contract it was improperly denied (assuming it could show it was capable of supplying the shells). The terms of the improperly

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42 *See* Airco, Inc. v. Energy Research & Dev. Admin., 528 F.2d 1294, 1299-1300 (7th Cir. 1975) (per curiam); Blue Cross & Blue Shield of Md., Inc. v. United States Dep't of Health & Human Servs., 718 F. Supp. 80, 87 (D.D.C. 1989); *Dynalectron*, 659 F. Supp. at 69.

43 *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 428-29 (D.C. Cir. 1992) (constitutional violation); Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1124-25 (4th Cir. 1977) (overall effect on business). <REF ID='FN199'>[fm][eb]

44 *See Pace*, 453 F.2d at 891; Aero Corp. v. Department of Navy, 549 F. Supp. 39, 44-45 (D.D.C. 1982); *see also* Delta Data Sys. Corp. v. Webster, 755 F.2d 938, 940 (D.C. Cir. 1985) (per curiam) (finding that the public interest requires setting aside a preliminary injunction and leaving plaintiff with only remedy of bid preparation costs). <REF ID='FN200'>[fm][eb]

45 506 F. Supp. 1059 (D.R.I. 1980).<REF ID='FN202'>[fm][eb]

46 344 F. Supp. 787 (W.D. Tenn.), *rev'd per curiam sub nom.* Pace Co. v. Resor, 453 F.2d 890 (6th Cir. 1971).<REF ID='FN203'>[fm][eb]

47 *Derecktor*, 506 F. Supp. at 1060-61, 1064-66.<REF ID='FN204'>[fm][eb]

48 *Pace*, 344 F. Supp. at 788-90.<REF ID='FN205'>[fm][eb]

49 *Derecktor*, 506 F. Supp. at 1067 (declaring the initial award invalid); *Pace*, 344 F. Supp. at 790 (granting a preliminary injunction).<REF ID='FN206'>[fm][eb]

50 Robert E. Derecktor of R.I., Inc. v. Goldschmidt, 516 F. Supp. 1085, 1090 (D.R.I. 1981).<REF ID='FN207'>[fm][eb]

51 *Pace*, 453 F.2d at 891.<REF ID='FN565A'>[fm][eb]

52 *Id.*<REF ID='FN208'>[fm][eb]

53 *Pace*, 344 F. Supp. at 790.<REF ID='FN208A'>[fm][eb]

denied contract were fixed by the Army's solicitation and by Pace's bid prices and, thus, were not subject to any debilitating indefiniteness.[54]

Finally, the fact that the improperly withheld government contract would have contained a termination-for-convenience clause should not foreclose the disappointed bidder's recovery of lost profits. It should not be assumed that the government would arbitrarily exercise the termination-for-convenience clause to extricate itself from a contract it should have made. Rather, it should be understood that the government could properly exercise the termination-for-convenience clause only if there were changed conditions. Existence of changed conditions should be considered as a question of fact in each case. If, as was the case in *Pace*, the contract that was improperly awarded to another bidder is still in force and has not been terminated in whole or in part, then presumably there would be no reason to assume that the disappointed bidder's contract would have been terminated. On the other hand, if the improperly awarded contract has been terminated for legitimate reasons (and not as a ruse to attempt to avoid the payment of lost profits), then it could normally be assumed that the disappointed bidder's contract would have been terminated for convenience as well.[55] Whether lost profits from a "follow-on" procurement should additionally be awarded should also be a fact-specific inquiry. For instance, if there were renewed competition for the follow-on contract, it would be speculative as to who would win that competition. If, however, the improperly awarded contract has put the winning bidder in a sole-source position, it presumably would have put the aggrieved bidder in a sole-source position, too. If future requirements are projected, then lost profits could be awarded for the follow-on procurement as well.[56]

2. Recent Congressional Action. — Congress, in its recent amendment of section 1491, had the (probably unintended) consequence of stifling the ability of the courts to apply the common law with respect to lost profits. In expanding the scope of section 1491 to include district courts, Congress also extended to district courts the power to "award any relief that the court considers proper."[57] District courts generally do not have authority to grant monetary relief in contract actions,[58] and Congress restricted the ability of both the district courts and the Court of Federal Claims as follows: "[A]ny monetary relief shall be limited to bid preparation and proposal costs."[59] It seems likely that this language will stifle any award of lost profits, even in situations in which they would be granted under the common law.[60]

That conceded, at the same time, nothing in the legislative history indicates a congressional desire to put the government in a position superior to private parties in the marketplace.[61] Rather, the most obvious intent from the face of the revised statute is that Congress did not want to permit an

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54 *Id.* at 788.<REF ID='FN208B'>[fm][eb]

55 If the government determined that it had illegally awarded the contract, it would, of course, be appropriate for the government to terminate for convenience and then to either reprocure or award to the proper bidder. *See* John Reiner & Co. v. United States, 325 F.2d 438, 443-44 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). In taking such action, the government could limit its potential lost profits damages to the contractor initially improperly denied the contract.<REF ID='FN209'>[fm][eb]

56 *See* Rogerson Aircraft Corp. v. Fairchild Indus., Inc., 632 F. Supp. 1494, 1503 (C.D. Cal. 1986) (holding that spare parts sales were reasonably contemplated if the base contract had not been breached and, thus, lost profits on those later expected sales are recoverable).<REF ID='FN210'>[fm][eb]

57 Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3874 (1996) (to be codified at 28 U.S.C. § 1491(b)(2)).<REF ID='FN812'>[fm][eb]

58 *See* 28 U.S.C. §§ 1346(a)(2), 1491 (as amended).

59 § 12(a)(3), 110 Stat. at 3874 (to be codified at 28 U.S.C. § 1491(b)(2)).<REF ID='FN814'>[fm][eb]

60 Arguably, a separate action could be brought in the Court of Federal Claims, not seeking equitable relief, but seeking lost profits in lieu of bid and proposal costs. Such a suit would be analogous to suits litigants now bring for bid and proposal costs under section 1491(a). *See, e.g.*, Finley v. United States, 31 Fed. Cl. 704, 708 (1994) (seeking bid and proposal costs); TRW, Inc. v. United States, 28 Fed. Cl. 155, 162 (1993) (same).<REF ID='FN815'>[fm][eb]

61 *See* 142 CONG. REC. S6156-57, S6161-63 (daily ed. June 12, 1996); H.R. REP. NO. 104-841, *reprinted in id.* at H11108-11 (daily ed. Sept. 25, 1996); *id.* at H11448 (daily ed. Sept. 27, 1996); *id.* at S11848 (daily ed. Sept. 30, 1996); *id.* at H12276 (daily ed. Oct. 4, 1996).<REF ID='FN816'>[fm][eb]

overbroad exception to the generally exclusive jurisdiction of the Court of Federal Claims to award monetary damages for breach of contract.[62] When Congress reconsiders section 1491, it should amend it once again to serve both of these interests.[63] Congress should amend new section 1491(b)(2) to read as follows:

> 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 in such an action shall not be available in the district courts unless under $10,000 in amount.

This language would maintain the traditional division of authority between the district courts and the Court of Federal Claims[64] and, at the same time, would allow aggrieved parties to recover lost profits in circumstances in which it would be appropriate under the common law, once again placing the federal government on an equal footing in the marketplace with the citizens with whom it contracts.

CONCLUSION

When the government enters the marketplace, it should be subject to the same contractual good faith duties as is a private party. Although this principle is adhered to in theory and also in practice with respect to many government contracting performance situations, it has not been uniformly followed in contract formation situations.

Government contracts tribunals and Congress should bring contract formation law in line with common law good faith precedent. They should uniformly recognize that the framework of laws and regulations concerning government procurement form the substance of the justified expectations of the parties which, if violated, also violate the government's good faith duties incorporated in its implied contract to treat bidders fairly, honestly, and impartially. Moreover, in appropriate circumstances, a disappointed bidder in a government contract should be able to recover lost profits on the contract that the bidder was unlawfully denied, similar to disappointed contracting parties under the common law.

When the government enters the marketplace, it "contracts as does a private person, under the broad dictates of the common law."[65] This should be as true with respect to the covenant of good faith as it is with respect to any other contractual duties. It should be as true with respect to the formation of government contracts as it is with respect to their performance.

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62 Congress might also have been reacting to the decision in a Court of Federal Claims case that awarded the costs of litigation, as "bid protest" costs. *See* Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803, 807-10 (1993). The original Senate bill, S.1224, which was incorporated in H.R. 2977 as an amendment, divested the district courts of jurisdiction entirely and did not contain any language limiting the monetary relief that the Court of Federal Claims could grant. *See* 142 CONG. REC. S6161-63 (daily ed. June 12, 1996). The limiting language was inserted without discussion of its purpose in the legislative history. Its absence in the bill when the district courts were divested of jurisdiction and its presence when they were not suggests the language was intended to limit the district courts from granting relief traditionally reserved to the Court of Federal Claims.<REF ID='FN817'>[fm][eb]

63 Congress will be reconsidering its amended section 1491 soon in conjunction with the study it has ordered the General Accounting Office to undertake. *See* § 12(c), 110 Stat. at 3875. Such was the compromise struck between the House, which passed a bill with concurrent jurisdiction of the Court of Federal Claims and the district courts, and the Senate, which passed a bill divesting the district courts of *Scanwell* jurisdiction. *See* 142 CONG. REC. S6156-57, S6161-63 (daily ed. June 12, 1996); H.R. REP. NO. 104-841, *reprinted in id.* at H11108-11 (daily ed. Sept. 25, 1996); *id.* at H11448 (daily ed. Sept. 27, 1996); *id.* at S18848 (daily ed. Sept. 30, 1996); *id.* at H12276 (daily ed. Oct. 4, 1996).[fm][eb]

64 Under the Little Tucker Act, the district courts have concurrent jurisdiction with the Court of Federal Claims of contract actions under $10,000. 28 U.S.C. § 1346(a)(2) (1994). Under new section 1491(b)(2), the $10,000 limit would apparently not apply for district court awards of "bid preparation and proposal costs." § 12(a)(3), 110 Stat. at 3874 (to be codified at 28 U.S.C. § 1491(b)(2)).<REF ID='FN819'>[fm][eb]

65 Torncello v. United States, 681 F.2d 756, 762 (Ct. Cl. 1982) (en banc).<REF ID='FN212'>[fm][eb]