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Contract Formation Jurisdiction of the United States Claims Court

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CONTRACT FORMATION JURISDICTION OF THE UNITED STATES CLAIMS COURT

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On April 2, 1982, President Reagan signed into law the Federal Courts Improvement Act of 1982 (or the Act),¹ merging the United States Court of Claims and Court of Custom and Patent Appeals into a new United States Court of Appeals for the Federal Circuit (CAFC). This new court has jurisdiction over appeals in contract and patent infringement cases.² The Act also replaces the former Court of Claims' trial division with a new United States Claims Court. This court, inter alia, has been invested with the jurisdiction to conduct trials in contract and patent cases.³

Of particular interest to the government contracting community is the provision of the Act regarding the contract formation or pre-award jurisdiction of the new Claims Court. This provision states that, in "contract

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¹ Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified throughout sections of titles 2, 5, 7, 10, 15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, 45, and 50 app. U.S.C. (1982)) [hereinafter cited as Federal Courts Improvement Act].

² For the jurisdiction of the Federal Circuit see Federal Courts Improvement Act, § 127, 28 U.S.C. § 1295.

³ For the jurisdiction of the Claims Court see Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491.

claims brought before the contract is awarded," the Claims Court has "exclusive jurisdiction" to grant declaratory judgments and provide equitable relief, including, but not limited to, injunctive relief.⁴ With this jurisdiction, the Claims Court has the potential to provide the most effective forum for the resolution of protests against the award of federal government contracts. Early decisions by the Claims Court defining both the court's jurisdiction over pre-award issues and the scope of review in cases found to be within the court's jurisdiction, however, raised substantial fears whether that potential ever would be reached.⁵ The March 23, 1983 decision of the new Court of Appeals for the Federal Circuit in *United States v. Grimberg Co.*⁶ and subsequent Claims Court opinions applying that decision now confirm those fears.⁷

I. THE PRE-ACT SITUATION: AN INCOMPLETE REMEDY

Unsuccessful competitors for government contracts long have sought a forum—independent of the procuring agency—in which to protest the agency's disposition of their bids or proposals. As early as 1853, the Department of Justice refused to act as such a forum.⁸ The federal courts also refused to review agency procurement actions, with the Supreme Court concluding in *Perkins v. Lukens Steel Co.*⁹ that the laws regulating federal contract awards were enacted solely for the benefit of the government and, therefore, that violations thereof were not redressable in federal court by unsuccessful bidders.¹⁰

Not until the 1920's was a forum available to protesters. The Comptroller General, in his capacity as the administrative head of the General Accounting Office (GAO), was provided legislative authority to certify government disbursements and to provide advance decisions to government officials relating to the agency's compliance with rules governing federal contracts.¹¹ By the mid-1920's the GAO, under the guise of its legislative authority, began to issue decisions on agency awards at the behest of unsuccessful bidders.

Although federal contractors were happy to find a forum in which to present their protests, the limitations inherent in this non-judicial process

⁴ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491(a)(3).

⁵ See Feidelman, Schnitzer & Ursini, *Claims Court's Ability to Realize Potential in Doubt*, LEGAL TIMES OF WASHINGTON (Nov. 1, 1982); see also Moskowitz, *Alternative Court for Contract Appeals is Confusing Bidders*, Washington Post, Jan. 24, 1983 (Washington Business), at 27, col. 1.

⁶ 702 F.2d 1362 (Fed. Cir. 1983).

⁷ See Feidelman & Ursini, *Federal Circuit Limits Jurisdiction Over Bid Protests*, LEGAL TIMES OF WASHINGTON (Apr. 18, 1983).

⁸ See 6 Op. Att'y Gen. 226 (1853).

⁹ 310 U.S. 113 (1940).

¹⁰ *Id.* at 129.

¹¹ See 31 U.S.C. § 74 (1976).

were recognized. For example, the GAO never had and still has no authority to enjoin contract awards or the performance of contracts awarded while a protest is pending; it had and has no due process procedure for resolving material issues of fact; and it could not and cannot authorize discovery to enable a protester to obtain information necessary to prove its case—information that often is in the sole possession of the government. The GAO thus provided a welcome, but often ineffective, forum for competitors seeking review of agency procurement actions.

Because of the limitations on the remedies available at the GAO, the search for another more effective forum continued even after the GAO bid protest process had become well-established.¹² Success was finally achieved in 1970 with the landmark decision in *Scanwell Laboratories, Inc. v. Shaffer*,¹³ in which the Court of Appeals for the District of Columbia held that “disappointed bidders”¹⁴ on government contracts have standing under section 702 of the Administrative Procedure Act (APA)¹⁵ to seek judicial review of agency procurement actions. This right of potential government contractors to obtain judicial review of agency procurement actions is commonly referred to as the “*Scanwell* doctrine.”

An understanding of the *Scanwell* doctrine must begin with the Supreme Court’s decision in *Perkins v. Lukens Steel Co.*¹⁶ In *Perkins*, the Supreme Court held that disappointed bidders do not have standing to challenge federal procurement actions.¹⁷ The court stressed that federal bidding procedures¹⁸ were established for the benefit of the public generally and not for the benefit of bidders.

Perkins, however, was decided prior to enactment of the APA. In *Scanwell*, the court of appeals held that the doctrine enunciated in *Perkins* did not survive the APA, which was enacted to guarantee federal

¹² The bid protest procedure at the GAO has seen increased use over the years. By way of example, the GAO in fiscal year 1982 handled approximately 2,400 bid protest cases.

¹³ 424 F.2d 859 (D.C. Cir. 1970).

¹⁴ The term “disappointed bidder” is used interchangeably with the term “unsuccessful bidder” or “frustrated bidder” and includes contractors who are “seeking to overturn the Government’s award of a contract to a competing bidder or to enjoin an award yet to be made.” *Simpson Electric Co. v. Seamans*, 317 F. Supp. 684, 685 (D.D.C. 1970). The term apparently was first used by the district court in *United States v. Stewart*, 234 F. Supp. 94 (D.D.C.), *aff’d*, 339 F.2d 753 (D.C. Cir. 1964), a post-award mandamus action in which plaintiff sought to compel award of a contract to it after rejection of its bid. As used throughout this article, the term “bidder,” which generally refers to competitors who submit bids in response to a formally advertised invitation for bids, will be used to refer to both bidders and “offerors” who submit proposals in response to requests for proposals in negotiated procurements.

¹⁵ The APA provides in pertinent part: “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 (1976).

¹⁶ 310 U.S. 113 (1940).

¹⁷ *Id.* at 132.

¹⁸ See, e.g., 10 U.S.C. § 2301 (Supp. V 1981).

court access to plaintiffs injured by the failure of government officials to follow their own regulations.¹⁹ The *Scanwell* court engaged in a lengthy analysis of both the APA and the cases decided under it, paying particular attention to the following language in the Supreme Court's decision in *Abbott Laboratories v. Gardner*:²⁰

[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. . . . [O]nly upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.²¹

The *Scanwell* court then concluded that not only was there no evidence of a contrary legislative intent with respect to judicial review of agency procurement actions, but that "[i]f anything, the legislative intent with respect to the field of government contracting in general seems to run in precisely the opposite direction, that is, in favor of review."²²

Although *Scanwell* appeared to provide a judicial forum for full resolution of bid protests, the Court of Appeals for the District of Columbia Circuit soon developed a tendency to combine the GAO's expertise on the merits with the court's injunctive authority; i.e., the courts issued short-term injunctive relief pending a GAO decision on the merits.²³ While this solution had much to commend it, the GAO procedures—which generally still were used to resolve the substantive issues—lacked provision for formal resolution of factual disputes and provided no effective means similar to discovery by which the protester could obtain the information necessary to develop its case.

The marriage of the GAO protest process and the court's injunctive powers may well have been motivated by the latter's unfamiliarity with government procurement regulations. Congress deemed it important to create a forum combining the power to provide effective relief with the expertise to deal with substantive issues. Indeed, the greater expertise of the Claims Court judges in this area was part of the rationale for the creation of the Federal Courts Improvement Act legislation.²⁴

II. THE FEDERAL COURTS IMPROVEMENT ACT AND CREATION OF AN ALTERNATIVE BID PROTEST FORUM

Congress, recognizing the limitations of the GAO and the reluctance of

¹⁹ 424 F.2d at 866.

²⁰ 387 U.S. 136 (1967).

²¹ *Id.* at 140-41 (citations omitted).

²² 424 F.2d at 866.

²³ See *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971).

²⁴ See S. REP. NO. 304, 96th Cong., 1st Sess. 38 (1979).

the federal courts to interfere with a process about which they knew little or nothing, attempted in the Act to combine the advantages of a forum having both specialized knowledge and the enforcement powers of a federal court. The result was the creation of the United States Claims Court with the new "exclusive" jurisdiction over contract claims "brought before the contract is awarded." Section 133(a) of the Act provides in full:

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.²⁵

Serious questions about the proper interpretation of this language arose during the very first week of the Claims Court's life, resulting in the March 23, 1983, en banc decision by the new Court of Appeals for the Federal Circuit (CAFC) in *United States v. Grimberg Co.*²⁶

A. Background of the Grimberg Co. Decision

The operative facts of *Grimberg Co.* are simple. Briefly, while Grimberg and its co-complainant Schlosser each brought suit under a different solicitation, a third contractor—Parker—had been the low bidder on both General Services Administration (GSA) procurements. Grimberg and Schlosser each filed protests with the contracting officer in mid-September 1982, and the contracting officer on Schlosser's solicitation even stated in writing that Schlosser would be advised of the decision on the protest *before* an award was made.²⁷ When neither Grimberg nor Schlosser had heard from the contracting officers by the end of September, they jointly filed a complaint and motions for declaratory and injunctive relief with the Claims Court on October 4, 1982. A hearing was held on October 5, 1982 at which time the government filed a motion to dismiss for lack of jurisdiction on the ground that the GSA had awarded both contracts to Parker before the complaint had been filed.²⁸ The government's motion to dismiss on October 5 was the first time that the plaintiffs learned that award had been made. Judge Willi of the Claims Court granted the motions for lack of jurisdiction under section 133(a) of

²⁵ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491(a)(3).

²⁶ 702 F.2d 1362 (Fed. Cir. 1983). Although the matter originally was argued before a five-judge panel on November 1, 1982, the court sua sponte determined that the issues presented therein were so important that consideration en banc by the court was required. Reargument before the full court, therefore, was held on February 7, 1983.

²⁷ *Id.* at 1364.

²⁸ *Id.*

the Act and transferred the case to a district court pursuant to section 301(a).²⁹ On October 8, 1982 the government appealed the order of transfer and on October 13, 1982 the plaintiffs filed a cross-appeal and motion to stay the transfer motion pending appeal. On October 18, 1982 the Claims Court granted the stay and the CAFC agreed to expedited briefing and argument of the case.³⁰

The *Grimberg Co.* case raised several important questions of interpretation. For example, is a "claim"—the term used in the Act—the same as a "complaint"? If a "claim" is filed with the contracting officer before award, is that action sufficient to confer jurisdiction on the Claims Court? The plaintiffs argued that since they had filed protests with the contracting officers prior to award, the Claims Court had jurisdiction to review the contracting officer's de facto denial of that protest.³¹ The Claims Court rejected this contention, holding that it has jurisdiction in disappointed bidder actions only where the complaint has been filed with the court prior to award of the contract.³² The Claims Court, however, relying on the legislative history of the Federal Courts Improvement Act, transferred the case to the federal district court pursuant to section 301(a) of the Act,³³ making an express assumption that federal district courts retain jurisdiction over post-award suits for equitable relief.³⁴

The CAFC, in a 6-4-1 decision,³⁵ affirmed the Claims Court's decision. The CAFC's opinion, however, while purporting to define the Claims Court's contract formation jurisdiction, raises so many other issues that the actual parameters of the Claims Court's pre-award jurisdiction are still unclear.

B. Analysis of the *Grimberg Co.* Opinion

The six-member *Grimberg Co.* majority, in an opinion written by Chief

²⁹ *Id.*

³⁰ Expedient consideration of these basic jurisdictional issues was necessary because of the number of bid protest cases that generally are filed in the autumn months. September 30, the end of the government's fiscal year, usually finds agencies conducting numerous procurements where contracts must be awarded by the end of the year or the funds lost. Indeed, in *Grimberg Co.*, the GSA allegedly awarded the contracts to Parker swiftly for just this reason.

³¹ 702 F.2d at 1365.

³² *Grimberg Co. v. United States*, 1 Cl. Ct. 253, 256 (Cl. Ct. 1982).

³³ Section 301(a) of the Act provides express authority for the transfer in situations where the court finds that it does not have jurisdiction. 28 U.S.C. § 1631(a) (1982).

³⁴ 1 Cl. Ct. at 256.

³⁵ Judge Nichols concurred in the majority opinion by Chief Judge Markey but noted that "[t]he main trouble with the statute as construed by our majority is that it achieves an insignificant and absurd result." 702 F.2d at 1378 (Nichols, J., concurring). Two dissenting opinions, joined by all four dissenting judges, were filed. This split of opinion in such an important case may invite Supreme Court review. As of this writing, however, neither party has petitioned the Court for a writ of certiorari.

Judge Markey, affirmed the Claims Court's decision in full and thereby created a bifurcated procedure by which unsuccessful competitors for government contracts may seek redress for improper agency procurement actions. Based on what is referred to as the "strict construction" doctrine of statutory interpretation, the CAFC majority ruled that disappointed bidders may seek relief in the Claims Court only if a complaint is filed *before* award of the contract sought.³⁶ Once award is made by the agency, bidders must seek relief in federal district court.

1. Claims Court Jurisdiction

The majority arrived at its bifurcated conclusion after a lengthy and tortured dissection and analysis of virtually every word of the section 133(a) jurisdictional provision, with the major emphasis on the legislative history—or, more accurately, the CAFC's interpretation of the legislative history—of the Federal Courts Improvement Act. What is disturbing about the court's opinion is that its interpretation of the legislative history evidences some misconceptions about the realities of the government procurement process as a whole, and the nature and scope of judicial intervention in that process in particular.

By way of example, the majority, in determining that Congress intended to limit the Claims Court's injunctive powers to pre-award situations only, relied heavily on section 133(a) which admonishes that, in exercising its new equitable powers, the Claims Court must "give due regard to the interests of national defense and national security."³⁷ The court then made the following statements:

That caution would appear particularly applicable to court-created delays in *awarding* contracts. In a post-award suit, the contract has been awarded, and the procurement process itself is not normally delayed while the court is considering the merits of a disappointed bidder's complaint. . . . In essence, Congress intended to limit exercise of equitable powers by the Claims Court to the pre-award stage (without regard to whether a claim had been filed with a contracting officer), and to avoid the exercise of those powers by that court in the post-award, administration stage.³⁸

These statements show an alarming unfamiliarity with the government procurement process as well as a basic ignorance of the difference between pre-award issues and contract administration issues.

First, these statements ignore the fact that the plaintiffs in *Scanwell* and in numerous other disappointed bidder actions in district courts

³⁶ 702 F.2d at 1374.

³⁷ *Id.* at 1368.

³⁸ *Id.* at 1368-69.

brought suit *after* award had been made, seeking exactly the delay in the procurement process that the CAFC seemed loathe to countenance. The court itself agreed that the district courts still hold a congressional mandate to continue to grant equitable relief in post-award situations. If Congress is willing to permit post-award intervention by the district courts, why not permit post-award intervention by the Claims Court? As Judge Nichols pointed out in his concurring opinion:

There was surely nothing to show that intermeddling by the Claims Court would be more harmful than intermeddling by a district judge, or that intermeddling by the former would be more harmful after award than intermeddling before award, or that intermeddling by a district judge, on the contrary, would be less harmful after award than before.³⁹

Thus, the CAFC's rationale that Congress did not intend that there be judicial intervention in the procurement process after award makes no sense in light of the court's acknowledgement that such intervention may and will continue—with congressional approval, no less—in the district courts.

Second, the majority's statements reveal a misunderstanding of Congress' concern over possible court intervention in contract "administration" matters versus pre-award matters. Simply because a suit is filed after award of a contract does not mean that the court would be interfering with the "administration" of that contract. "Administration" of a contract involves matters related to the *performance* by an awardee under the contract, not to the procurement of the contract itself. The Comptroller General has held in literally hundreds⁴⁰ of cases that a "contract administration" matter is any issue that does not affect the validity of the award.⁴¹ Just as the mere existence of a contract-related issue does not convert every action to a "contract claim,"⁴² the mere fact that a bid

³⁹ *Id.* at 1378-79 (Nichols, J., concurring).

⁴⁰ A quick review of the index of Comptroller General decisions indicates that for the 1980-82 period alone the GAO has held in 163 cases that protests involving issues not relevant to the propriety of award are matters of "contract administration" and not properly for Comptroller General review.

⁴¹ See, e.g., *Tenavision, Inc.*, B-209261, December 15, 1982, 82-2 CPD ¶ 533; *Springhill Printing*, B-206529, March 15, 1982, 82-1 CPD ¶ 244; *Welch Allyn*, B-206193.2, March 2, 1982, 82-1 CPD ¶ 187.

⁴² For instance, in *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982), the circuit court reversed the district court's ruling that it had no jurisdiction to entertain a suit for injunctive relief to restrain the disclosure of technical data. The district court had held that the issues were "contract-related" and, as such were within the exclusive province of the former Court of Claims. The circuit court noted that the plaintiff's suit had contract overtones but that it did not seek the enforcement of rights or expectations bottomed on a contract. *Id.* at 969-70. Cf. *Indian Wells Valley Metal Trades Council v. United States*, 553 F. Supp. 397, 399 n.5 (Cl. Ct. 1982) (court lacked jurisdiction suit to enjoin award of government contract; remedy, if any, was in district court under the APA).

protest claim is filed after award does not convert the matter to one involving "contract administration."

The *Grimberg Co.* majority relied heavily on Congress' alleged concern over protecting contract administration matters from court interference as support for the pre-award/post-award jurisdictional dichotomy. This reliance on congressional concern, however, is suspect in light of the Claims Court's own procedural rules. Under Claims Court Rule 27, a plaintiff may file a brief preliminary complaint which can be amended after discovery is obtained. The complaint need not immediately state a claim for equitable relief. Thus, in *Management and Technical Services Co. v. United States*,⁴³ the plaintiff filed a preliminary complaint before award of the contract to the successful offeror; however, it did not file a motion for injunctive relief until after award. Neither the Justice Department nor the Claims Court in that case seemed to have had any concerns about the court's jurisdiction to grant equitable relief if necessary in that post-award stage. Subsequent Claims Court decisions,⁴⁴ however, have addressed this issue and the question has now been decided by the CAFC.⁴⁵ Indeed, in *Grimberg Co.*, the government even admitted at the November 1, 1982, oral argument that so long as a complaint was filed before award, the Claims Court had jurisdiction to grant equitable relief.⁴⁶ The majority opinion, however, patently ignored this inconsistency in its rationale.

The majority's opinion also is distressing because it indicates a lack of understanding of the scope of a court's equitable powers in general. The majority made the unusual blanket statements that "[t]he court obviously could not 'enjoin the award' of contracts already awarded. Nor would a declaratory judgment be appropriate after award."⁴⁷ The CAFC failed to note that district courts can and will enjoin the award of already-awarded contracts by ordering the procuring agency to issue a suspension of work notice or an order not to proceed until there has been a decision on the merits.⁴⁸ Moreover, if a district court concludes that an agency has acted improperly, it can and will declare the already-awarded contract to be invalid.⁴⁹ Finally, district courts can and will issue declara-

⁴³ No. 531-82C (Cl. Ct. filed Dec. 2, 1982).

⁴⁴ See *infra* notes 57-58 and accompanying text.

⁴⁵ *F. Alderete Gen. Contractors v. United States*, No. 83-1003 (Fed. Cir. 1983) (argued Aug. 4, 1983).

⁴⁶ This admission prompted Judge Davis to note that bidders may be well-advised to file a Rule 27 complaint at the time they submit their bids, in order to assure themselves of the availability of the Claims Court forum.

⁴⁷ 702 F.2d at 1372.

⁴⁸ See *John Carlo, Inc. v. Corps of Eng'rs*, 539 F. Supp. 1075 (N.D. Tex. 1982) (dissolving preliminary injunction issued after award enjoining Corps from issuing a "notice to proceed" and from initiating any performance until issuance of decision by Office of Comptroller General and further order of the court).

⁴⁹ See *Robert E. Derektor of Rhode Island, Inc. v. Goldschmidt*, 506 F. Supp. 1059

tory judgments after award, especially where injunctive relief may be inappropriate, or progress on the contract has so far advanced that injunctive relief is impractical.⁵⁰ In sum, as noted by Judge Kashiwa in his dissenting opinion, "[the] fallacy with the majority's argument lies with its failure to appreciate prior government contract law."⁵¹

2. Federal District Court Jurisdiction

A second major issue raised by *Grimberg Co.* was whether the federal district court retained *Scanwell* jurisdiction even after enactment of the Federal Courts Improvement Act. To its credit—and to the relief of contractors and their counsel throughout the country—the CAFC unanimously held that Congress did not intend to deprive district courts of post-award jurisdiction in disappointed bidder actions. The Justice Department had contended that once award has been made not even the district courts have jurisdiction to review agency procurement actions and grant equitable relief. The Justice Department's position would have given contracting officers the ability to avoid any review whatsoever by making award before notifying the unsuccessful bidders or offerors. The CAFC properly rejected this contention as clearly contrary to congressional intent, noting that the United States District Court for the District of Columbia had ruled twice that post-award suits can be maintained in the district courts.⁵² The CAFC can take comfort in knowing that not only the District of Columbia, but every district court that has considered the issue since passage of the Act, has held that disappointed bidders in post-award situations may seek relief in the district courts.⁵³

Interestingly enough, the majority specifically declined to consider whether district courts, by operation of the "exclusive" language in sec-

(D.R.I. 1980) (award of contract to third- lowest bidder declared invalid as arbitrary, capricious, and without rational basis where lower bids were rejected on basis of improperly interpreted technicality).

⁵⁰ For instance, *Aero Corp. v. Department of the Navy*, 549 F. Supp. 39 (D.D.C. 1982), held that although further affirmative injunctive relief was not in the public interest, the court would consider plaintiff's entitlement to declaratory judgment, damages, attorneys' fees for government misconduct, etc. The final decision in this protracted litigation was issued on February 16, 1983. The court held that the enactment of the Act did not prevent its consideration of Aero's post-award protest and that "declaration of legal rights in this case should deter future violations of the procurement laws." 558 F. Supp. 404, 410 (D.D.C. 1983); see also *Simpson Elec. Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970) (injunctive relief not required in order to maintain integrity of the bid process where a declaration of rights and the corresponding liability for damages would suffice).

⁵¹ 702 F.2d at 1380 (Kashiwa, J., dissenting).

⁵² *Id.* at 1376 n.22 (citing *Opal Mfg. Co. v. UMC Indus.*, 533 F. Supp. 131 (D.D.C. 1982), and *American Dist. Tel. v. Department of Energy*, 555 F. Supp. 1244 (D.D.C. 1983)).

⁵³ See *Dawson v. GSA*, No. 82-2954-G (D. Mass. Oct. 24, 1982); *Goex, Inc. v. Weinberger*, No. 3-82-1645F (N.D. Tex. 1982).

tion 133(a), are denied jurisdiction over *pre-award* suits.⁵⁴

C. *Post-Grimberg Co. Claims Court Decisions and the Effect of the Opinion*

Judge Bennett, in his separate dissenting opinion, astutely pointed out the serious practical problems with the majority's resolution of the *Grimberg Co.* case:

[T]he majority's interpretation would, in many instances, give the contracting officer the power to prevent the contractor from seeking equitable relief in the Claims Court by awarding the contract before rendering a decision on the claim, as happened here. This creates a paradoxical situation in which the contracting officer, whose allegedly illegal action forms the basis for the bid protest, is granted the power to determine for the contractor the forum in which he must press suit.

. . . [T]he ultimate result of the majority's holding that the Claims Court lacks jurisdiction will be greater judicial interference in the contracting process. The arbitrary cut-off or loss of jurisdiction after award will, as noted by Judge Kashiwa, result in a race to the courthouse to file premature litigation to ensure that a bidder is not denied access to the Claims Court.⁵⁵

This pre-award/post-award distinction will have its greatest effect in the negotiated contract arena. As Judge Kashiwa pointed out in his dissent, the largest and most complex contracts are negotiated, not formally advertised.⁵⁶ This is especially true in defense procurements. An unsuccessful offeror frequently has no indication of possible irregularities in the procurement until after the contract is awarded to a competitor. The CAFC's decision thus means that the Claims court will be unavailable for review of large defense and civilian procurements. Ironically, this will bar Claims Court review of the procurements where the most dollars are at stake, and where contractors normally would be willing to seek judicial intervention instead of pursuing the less costly, but more time-consuming, GAO process.

Whether right or wrong, the Court of Appeals for the Federal Circuit's decision in *Grimberg Co.* appeared to have set forth an easy rule of jurisdiction: if the contract sought has not been awarded, the disappointed bidder may obtain equitable relief in the Claims Court; if the contract sought has been awarded, the disappointed bidder may obtain equitable relief in the district courts; and if the bidder is not sure whether the contract has been awarded, *Grimberg Co.* suggests that he would be well-

⁵⁴ 702 F.2d at 1374.

⁵⁵ *Id.* at 1388 (Bennett, J., dissenting).

⁵⁶ *Id.* at 1379 n.1 (Kashiwa, J., dissenting).

advised to file in both forums, or, in the case of a negotiated procurement, file a Rule 27 complaint with the Claims Court when he submits his offer. Unfortunately, however, what at first appeared to be an "easy rule" is now quite difficult in light of post-*Grimberg Co.* jurisdictional interpretations issued by several Claims Court judges.

As if the analysis in *Grimberg Co.* were not tortured enough, subsequent opinions by various Claims Court judges seeking to interpret and apply the *Grimberg Co.* guidelines have evidenced even greater absurdity. These decisions are distressing because they reflect not only an ignorance of judicial precedent in federal procurement law, but also an ignorance of basic federal court practice as well.

Perhaps the most disturbing post-*Grimberg Co.* decisions have been *F. Alderete General Contractors v. United States*⁵⁷ and *Big Bud Tractors, Inc. v. United States*,⁵⁸ in which Judge Merow and Chief Judge Kozinski, respectively, held that the Claims Court had no jurisdiction to enjoin performance of a contract, even if the complaint had been filed prior to the time the contract is awarded. According to these two judges, the Claims Court could be ousted from its equitable jurisdiction by the unilateral act of the government in awarding a contract after the complaint has been filed.

As noted earlier,⁵⁹ even the Justice Department had not been so bold as to suggest that a party may unilaterally take action that would operate to deprive the court of jurisdiction. Several other Claims Court judges had stated, in declining to follow *Alderete* and *Big Bud*, that the basic federal court precedent establishes that once jurisdiction attaches, subsequent actions by a party cannot deprive the court of jurisdiction.⁶⁰ The plaintiff in *Alderete* filed an appeal with the CAFC and the government filed a brief in support of the contractor, stating that the ruling "creates an intolerable procedure for bid protest cases" that is "unfair to litigants, their counsel and the Court."⁶¹ On August 23, 1983, the CAFC reversed the Claims Court holding in *Alderete*,⁶² adopting Judge Harkins' rationale in *Dean Forwarding Co. v. United States*,⁶³ and adding that such a result is necessary so as not to deprive a protestor of any forum in which to bring his claim for equitable relief.

A second group of post-*Grimberg Co.* Claims Court decisions that will wreak havoc on government contractors are those that have focused on

⁵⁷ 2 Cl. Ct. 184 (1983).

⁵⁸ 2 Cl. Ct. 195 (1983).

⁵⁹ See *supra* note 46 and accompanying text.

⁶⁰ *Dean Forwarding Co., Inc. v. United States*, 2 Cl. Ct. 559 (1983); *Systems Architects, Inc. v. United States*, 2 Cl. Ct. 456 (1983); *ATL, Inc. v. United States*, No. 442-83C (Cl. Ct. filed July 18, 1983).

⁶¹ 40 Fed. Cont. Rep. (BNA) 240 (Aug. 15, 1983).

⁶² No. 83-1003 (Fed. Cir. 1983).

⁶³ 2 Cl. Ct. 559 (1983).

the requirement that plaintiffs have a "contract claim" before the court may exercise its equitable jurisdiction. In decisions such as *Ingersoll-Rand v. United States*,⁶⁴ Chief Judge Kozinski noted that Congress referred to two different contracts in the 1491(a)(3) phrase "contract claim brought before the contract is awarded." The first "contract" is the implied-in-fact contract that the government fairly consider a bid or proposal. This contract is to be distinguished from the second "contract" which is that sought to be awarded by the government. According to Judge Kozinski, the implied-in-fact contract arises only upon submission by a bidder of a bid responsive to the solicitation,⁶⁵ and a claim under such implied-in-fact contract can be made only if the government is alleged to have unfairly considered a plaintiff's bid or proposal. Therefore, held Judge Kozinski, a bidder cannot challenge the *terms* of the solicitation because the solicitation comes into existence prior to the implied contract. Thus, under the *Ingersoll-Rand* rationale, a bidder would have *no* judicial forum in which to challenge an alleged impropriety in the solicitation itself.

In another decision, *Downtown Copy Center v. United States*,⁶⁶ Judge Margolis ruled that the Claims Court did not have jurisdiction over a plaintiff's claim asserting unfairness in the solicitation itself because the government owes no *contractual* duty to bidders to comply with procurement regulations—hence, there can be no "contract" claim. Although Judge Margolis acknowledges that there is a *statutory* duty under the APA that the government obey its own regulations, he holds that the Claims Court does not have any jurisdiction over such claims of breach of the statutory duty.⁶⁷ Drawn to its logical conclusion, the decision in *Downtown Copy Center* would mean that the Claims Court has exclusive jurisdiction *only* over contract claims brought before a contract is awarded, but that exclusivity would not extend to *statutory* claims brought before the contract is awarded. In other words, federal district courts would have the same *pre-award* jurisdiction that they had under the APA *Scanwell* doctrine, a result that is totally inconsistent with the CAFC's decision in *Grimberg Co.*, although, ironically, probably quite consistent with congressional intent.

Although it is not possible to discuss here each of the post-*Grimberg Co.* Claims Court decisions in detail, a brief review of these cases indi-

⁶⁴ 2 Cl. Ct. 373 (1983).

⁶⁵ Thus, in *Gibraltar Indus., Inc. v. United States*, 2 Cl. Ct. 589 (1983), the court held that it did not have jurisdiction over a claim filed by a large business under a small-business set-aside procurement because a large business could not be responsive to such a solicitation and, therefore, no implied contract arose between the bidder and the government.

⁶⁶ No. 454-83C (Cl. Ct. filed July 27, 1983).

⁶⁷ The decision is totally contrary to that in *P. Francini & Co., Inc. v. United States*, No. 28-83C (Cl. Ct. filed Mar. 1, 1983), in which Judge White construes "contract claim" to include a claim that the government has violated some procurement regulation.

cates a frightening trend on the part of some members of that court to restrict Claims Court jurisdiction beyond the absurdity noted by Judge Nichols in *Grimberg Co.* Congress' clear intent to create a second alternative forum for disappointed bidders looks like it may be emasculated to the point of having no forum at all for vindication of the rights established under the APA.

III. CONCLUSION

Congress' attempt to establish an alternative but effective bid protest forum has been thwarted for the majority of important procurements. The *Grimberg Co.* court did confirm that the federal district courts still may serve as a forum in which disappointed bidders can seek relief under certain circumstances. However, this remedy is little more than bidders had before enactment of the Federal Courts Improvement Act. To be sure, Judge Nichols was correct in observing that the CAFC's decision "achieves an insignificant and absurd result."⁶⁸ The "race to the courthouse" has begun, and it remains to be seen whether the finish line will be the steps of Congress or the Supreme Court.

⁶⁸ 702 F.2d at 1378.