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Due Process In Public Contracts: Pre-Award Hearings To Determine Responsibility Of Bidders

The process of competitive bidding in government contract law differs significantly from the principles inherent in general contract law. Normally, one is entitled to an award of the government contract when he is the lowest responsible bidder, but this is not always the result. In balancing the interests of the public as a whole against the interests of the individual bidders, courts have held that the competitive bidding system exists primarily for the benefit of the public. Consequently, bidders' rights are often overlooked in furtherance of this policy, especially in the areas of bid protests and application of the standard of "lowest responsible bidder." This comment attempts to explain the inequities inherent in the system of government contracting and to propose one solution to the problem by a system of pre-award responsibility hearings designed to assure the due process rights of the bidders and to protect the public from inefficiency and waste of taxpayer funds.

COMPETITIVE BIDDING PROCEDURES

Two methods are used for awarding government contracts—negotiation between government officials and potential contractors, or advertisement for competitive bids. Of these methods, the preferred procedure is the competitive bidding process.¹ Inherent in competitive bidding are the interests of the individual bidder and of the public as a whole. The bidder desires fair treatment, consideration of his bid, and award of the contract if his bid qualifies. The public, on the other hand, wants the government to make the most efficient use of its tax monies. In considering these interests, courts have weighed public interests more heavily and have held that the system of competitive bidding exists to protect taxpayers from fraud, corruption, care-

1. *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016, 1021 (Ct. Cl. 1971). See also 41 C.F.R. §1-2.102(a) (1972) which maintains that formal advertising is to be used whenever possible, even if the circumstances would also satisfy the requirement under which a contract may be negotiated.

lessness of public officials, and waste of public funds.² Therefore, the system exists primarily for the benefit of the public and not the bidder.³ These policy decisions have important consequences which will become apparent as the bidding systems are discussed further.

In general, the same basic rules of contract law apply to government contracts as apply to contracts between private individuals.⁴ Public contracts require the normal offer, acceptance, and consideration;⁵ however, several significant modifications of general contract law occur when the government becomes a contracting party.

Initially, the private party to the public contract must be aware that a governmental agency may only enter into those contractual relations which are within the scope of its statutory powers.⁶ In private contracts where a contract is found to be illegal, a party may receive restitutionary recovery for benefits conferred upon the other party.⁷ However, if a public agency enters into a contract outside the parameters of its statutory authority,⁸ that contract is null and void from the outset and imposes no *quantum meruit* liability upon the government for work accomplished pursuant to the contract.⁹ This result will apply even though a great hardship is worked upon the contractor.¹⁰

An additional problem which a contractor faces is the rule that a state may not be held liable under an estoppel theory for representing to the bidder, by making an award, that the contract is legal.¹¹

2. *Miller v. McKinnon*, 20 Cal. 2d 83, 88, 124 P.2d 34, 37 (1942).

3. *Rubino v. Lolli*, 10 Cal. App. 3d 1059, 1062, 89 Cal. Rptr. 320, 322 (1970); *Judson Pacific-Murphy Corp. v. Durkee*, 144 Cal. App. 2d 377, 383, 301 P.2d 97, 102 (1956); *Charles L. Harney, Inc. v. Durkee*, 107 Cal. App. 2d 570, 580, 237 P.2d 561, 567-68 (1951).

4. *Refining Associates, Inc. v. United States*, 109 F. Supp. 259, 261 (1953); *Chapman v. State*, 104 Cal. 690, 694, 38 P. 457, 458 (1894). See also *Trowbridge vom Baur*, *Differences Between Commercial Contracts and Government Contracts*, 2 PUB. CON. L.J. 5 (1969).

5. H. COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW 44-45 (1961).

6. *Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348, 353, 291 P. 839, 842 (1930).

7. 6A A. CORBIN, CONTRACTS §1540 (1962) [hereinafter cited as CORBIN].

8. See for example CAL. GOV'T CODE §14256.

9. *Miller v. McKinnon*, 20 Cal. 2d 83, 88, 124 P.2d 34, 37 (1942); *Reams v. Colley*, 171 Cal. 150, 153-54, 152 P. 293, 294 (1915); *Zottman v. San Francisco*, 20 Cal. 97, 99 (1862).

10. *Reams v. Colley*, 171 Cal. 150, 157, 152 P. 293, 295 (1915).

11. *Merco Const. Eng., Inc. v. Los Angeles Unified Sch. Dist.*, 274 Cal. App. 2d 154, 160, 162, 79 Cal. Rptr. 23, 26, 28 (1969). In this case, plaintiff delayed correcting a bid mistake upon advice of the agency that such correction could be made after the award, which in fact it could not. Concerning estoppel, the court stated,

Estoppel may be invoked against a governmental agency only when the agency has the power to do that which it promised to do or which it led the opposing party to reasonably and justifiably believe it would do.

Moreover, the court stated,

[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.

This rule results from the premise that persons dealing with public agencies are presumed to know the law of public contracts and therefore act at their peril if there is a violation of the required procedures.¹² In *Miller v. McKinnon*¹³ a taxpayer brought suit to recover monies paid to a contractor for work he performed for the city. Rather than following the competitive bidding procedures mandated by statute for such contracts, the city had awarded the contract by negotiation with the contractor. The contractor was presumed to know that improper procedures were employed in awarding the contract. Thus, the court held that the city could recover monies paid to the contractor under the invalid contract. The *Miller* court believed that the continued veracity of the bidding system required that bidders not profit by improper procedures.¹⁴ This rationale appears to be faulty since restitutionary recovery is not profit, but merely the value of the benefit conferred upon the other party. As a result of the lack of restitutionary remedies and the inability to enforce an estoppel theory, the private contractor has, in effect, the burden to scrutinize the agency actions to see that proper procedures are followed.¹⁵

Another departure from private contract law concerns control of the offer. It is a maxim of general contract law that the offeror controls his offer as to its terms and the manner of its acceptance.¹⁶ In a competitive bidding context the bid is generally considered an offer.¹⁷ However, in public contract law the public agency controls the form and content of the bid and the means of its acceptance.¹⁸ This control of the offer manifests itself both in the requirement that the bidder be responsible¹⁹ and that the bid be responsive.²⁰

12. *Miller v. McKinnon*, 20 Cal. 2d 83, 89, 124 P.2d 34, 38 (1942); *Santa Monica Unified Sch. Dist. v. Persh*, 5 Cal. App. 3d 945, 952, 85 Cal. Rptr. 463, 468 (1970).

13. 20 Cal. 2d 83, 124 P.2d 34 (1942).

14. *Id.* at 89-90, 124 P.2d at 38.

15. *Zottman v. San Francisco*, 20 Cal. 97 (1862).

16. 1 A. CORBIN, *supra* note 7, at §56.

17. *Id.* at §23.

18. A bid will not be accepted which does not conform to the bid invitation. See for example, 32 C.F.R. §1-2.301(a) (1972) (Armed Services Procurement Regulations); CAL. STATE DEP'T OF PUBLIC WORKS—DIVISION OF HIGHWAYS, STANDARD SPECIFICATIONS §3-1.01 (1973).

19. For an examination of the factors determining responsibility, see the text accompanying notes 31-55 *infra*.

20. Responsive generally means that the work, product, or service offered conforms to the agency's specifications as to quality and quantity. 41 C.F.R. §§1-2.301(a), 1-2.404-2(a) (1972). Illustrating the combination of responsibility and responsiveness required of a bidder, CAL. GOV'T CODE §14807 states in part,

[A]ll contracts and purchases of supplies in an amount of one thousand dollars (\$1,000) or more shall be made or entered into with the lowest responsible bidder meeting specifications

Deviations from a responsive bid will cause it to be rejected by the agency. STANDARD SPECIFICATIONS, *supra* note 18, at §2-1.06. Moreover, mistakes in the bid making it unresponsive may not be corrected after the bids are opened. Refining Associates,

Even if the bidder avoids these dangers of public contract law and submits the lowest bid which is both responsible and responsive, there is no guarantee that his bid will or must be accepted.²¹ For example, in *Stanley-Taylor Co. v. Board of Supervisors*²² the California Supreme Court held that even though plaintiff was the lowest bidder and had complied fully with the requirements of the charter, his bid and all others could be rejected without a showing of reasons or findings. The agency need only maintain that the "public interest" demands rejection of all bids submitted.²³ This position is based upon the premise that when an agency by statute or contractual provision reserves the right to reject all bids, it may do so even though one or more of the bids conforms to the bid invitation.²⁴ The ramifications of this ability to reject all bids will be discussed further in connection with a disappointed bidder's remedies.

DETERMINATIONS OF RESPONSIBILITY

A. Federal

As has been stated earlier, the process of competitive bidding theoretically exists to protect the public from mismanagement of its tax monies while providing required services and construction.²⁵ The requirement that a bidder be responsible fits naturally within this general policy framework. Regardless of the fact that a bid is the lowest, the public policy bases of competitive systems are not satisfied unless that bid is submitted by a responsible bidder. Both state and federal procedures recognize this requirement and incorporate the responsibility aspect into the bid procedures.²⁶

Within the federal system of public contract law, the factors comprising responsibility are established by statute.²⁷ Federal procurement is controlled by the Armed Services Procurement Act of 1947,²⁸ the Federal Property and Administrative Services Act of 1949,²⁹ and

Inc. v. United States, 109 F. Supp. 259, 261 (1953); *Kemper Const. Co. v. Los Angeles*, 37 Cal. 2d 696, 700, 235 P.2d 7, 10 (1951). For examples of factors constituting responsiveness see generally, CONTINUING EDUCATION OF THE BAR, GOVERNMENT CONTRACT PRACTICE §§3.60-3.67 (1964).

21. *Judson Pacific-Murphy Corp. v. Durkee*, 144 Cal. App. 2d 377, 382, 301 P.2d 97, 102 (1956).

22. 135 Cal. 486, 488, 67 P. 783 (1902).

23. CAL. GOV'T CODE §14335.

24. *Stanley-Taylor Co. v. Board of Supervisors*, 135 Cal. 486, 488, 67 P. 783 (1902); *Charles L. Harney, Inc. v. Durkee*, 107 Cal. App. 2d 570, 237 P.2d 561 (1951).

25. *Housing Authority v. Pittman Const. Co.*, 264 F.2d 695, 697 (5th Cir. 1959).

26. 32 C.F.R. §1.900 *et seq.* (1972); 41 C.F.R. §1-1.1200 *et seq.* (1972); CAL. GOV'T CODE §§14330, 14807, 25454.

27. GOVERNMENT CONTRACT PRACTICE, *supra* note 20, at §3.77.

28. 10 U.S.C. §2303 *et seq.* (1970).

29. 40 U.S.C. §471 *et seq.* (1970).

regulations promulgated thereunder.³⁰ The elements of responsibility set forth in these regulations include: adequate financial resources;³¹ ability to comply with delivery schedules;³² satisfactory records of performance;³³ and ability to conform to required fair employment practices.³⁴ Procedures for responsibility determinations are also outlined in the regulations. These procedures involve evaluation of information on file with the agency,³⁵ inquiries directed to the contractor,³⁶ and a pre-award survey of the contractor's facilities.³⁷ However, no formal pre-award hearing in which the prospective contractor may appear is required in making a pre-award survey.³⁸

B. California

Contrary to the federal system, California agencies have no single source of statutory standards or procedures regarding the determination of bidder responsibility which apply to public contracts.³⁹ There are, however, similar processes which apply to individual agencies. For example, the Department of Public Works operates under methods outlined for it in the State Contract Act.⁴⁰ Government Code Section 14310 requires that where the project is to exceed \$50,000 the Department shall request prospective bidders to answer questions contained in a questionnaire and financial statement.⁴¹ Within the financial statement there is to be included an outline of the bidder's experience with public works projects.⁴² Based upon these documents, the Department, pursuant to Government Code Section 14311, shall adopt and apply a uniform system of rating bidders according to the size of contracts each is qualified to bid upon.⁴³ This rating system, in effect, is a pre-qualification program indicating the types of contracts for which a prospective bidder may submit a proposal.⁴⁴ Absent,

30. 32 C.F.R. §1.100 *et seq.* (1972) (Armed Services Procurement Regulations);
41 C.F.R. §1-1.000 *et seq.* (1972) (Federal Procurement Regulations).

31. 41 C.F.R. §1-1.1203-1(a) (1972); 32 C.F.R. §1.903-1(a) (1972).

32. 41 C.F.R. §1-1.1203-1(b) (1972); 32 C.F.R. §1.903-1(b) (1972).

33. 41 C.F.R. §1-1.1203-1(c) (1972); 32 C.F.R. §1.903-1(c) (1972).

34. 41 C.F.R. §1-1.1203-1(e) (1972); 32 C.F.R. §1.903-1(e) (1972).

35. 41 C.F.R. §1-1.1205-1(b) (1972); 32 C.F.R. §1.905-3(c) (1972).

36. 41 C.F.R. §1-1.1205-3(b) (1972); 32 C.F.R. §1.905-3(b) (1972).

37. 41 C.F.R. §1-1.1205-4 (1972); 32 C.F.R. §1.905-4 (1972).

38. 32 C.F.R. §1-1.310-9 stated until 1972 that no hearing was required. This section, however, was removed in 1972 leaving the code silent regarding pre-award hearings. It can be assumed that no hearing is required since the remaining procedures are still specifically outlined in the regulations.

39. Report of the Committee on Bids and Protests, *Survey of State Procurement and Protest Procedures*, 4 PUB. CON. L.J. 99, 110 (1970).

40. CAL. GOV'T CODE §14250 *et seq.*

41. CAL. GOV'T CODE §14310.

42. *Id.*

43. CAL. GOV'T CODE §14311.

44. See the language of CAL. GOV'T CODE §§14311, 14313.

however, from these procedures are the elements to be considered in rating bidders.⁴⁵

Another important agency, the Department of General Services, employs a system of contracting somewhat different than that used by the Department of Public Works.⁴⁶ As with other agencies, the Department of General Services must award its contracts to the lowest responsible bidder and must establish a uniform system for rating bidders.⁴⁷ The California Administrative Code includes several factors that are to be considered.⁴⁸ Among these factors are specific requirements of the state, geographic limitations, compliance with standards, experience of the bidder, inventories available to the bidder, and post-purchase service and technical assistance.⁴⁹

In addition to the guidelines set out in the Government and Administrative Codes for government contracting, the State Administrative Manual published by the Department of Finance (hereinafter referred to as "Manual") has certain requirements that must be satisfied in regard to contract formation. Section 1204 of the Manual requires that the state make all efforts to secure at least three competitive bids on each project.⁵⁰ Moreover, the Manual specifies provisions that must be included in the bid which require the contractor's compliance with Labor Code provisions on Workman's Compensation⁵¹ and the contractor's acquisition of performance bonds.⁵² The Manual also requires that the bidder be able to comply with the Fair Employment Practices Act, including permitting the agency access to the bidder's employment records and requiring that he give notice to all subcontractors of their responsibility under the Act.⁵³ Furthermore, the Manual states that the contract must be let to the lowest responsible bidder;⁵⁴ any bidder striving to be successful in receiving an award must conform to the Manual's requirements.⁵⁵

45. These elements have generally been supplied by case law. See for example, *West v. Oakland*, 30 Cal. App. 556, 560-61, 159 P. 202, 204 (1916).

46. CAL. GOV'T CODE §14780 *et seq.*

47. CAL. GOV'T CODE §14807 (lowest responsible bidder), §14810 (uniform rating system).

48. CAL. ADMIN. CODE tit. 2, §§1890-1895.

49. CAL. ADMIN. CODE tit. 2, §1890(b), (c):

(b) The purpose of this rule is to establish a method whereby all responsible vendors who wish to sell to the State and receive bid invitations pursuant to Government Code Sections 14807 and 14809, are assured an equal opportunity to sell their products to the State.

(c) Vendors seeking to pre-qualify to receive bid invitations shall present evidence that they have the ability, resources, and facilities to adequately supply the State

50. CAL. STATE DEP'T OF FINANCE, ADMINISTRATIVE MANUAL §1204 (1972).

51. *Id.* at §1242(b)(8).

52. *Id.* at §1242(b)(7).

53. *Id.* at §1240.1.

54. *Id.* at §1240.

55. *Id.* at §1204.1.

Thus to be responsible, a bidder must conform to several different sets of criteria. He must not only be financially qualified and have a satisfactory performance record, but must also conform to requirements contained in the Administrative Manual. In total, responsibility means that a bidder has complied with all the prerequisites which the state feels are essential to further the public's interest in regard to government contracting.

REVIEW OF BID PROCEDURES

A. Federal

1. Standing

Until recently, judicial review of contract awards and bidding procedures was not available to a disappointed bidder. The rationale for not allowing review rested on the previously accepted doctrine that an invasion of a legally protected right was a prerequisite to standing to assert one's cause in court. In *Perkins v. Lukens Steel Co.*⁵⁶ the United States Supreme Court held that bidding procedures were designed to benefit the public, not the bidder; consequently, a bidder on public contracts had no "right" to the contract and thus no right which supported judicial review of the award.

The "legal rights" theory of standing in relation to bid protests was significantly modified in 1970 when the Circuit Court of Appeals for the District of Columbia decided the case of *Scanwell Laboratories Inc. v. Shaffer*.⁵⁷ *Scanwell* involved an invitation from the Federal Aviation Administration to bid on a contract for instrument landing systems. The bid invitation specified that the bidder must have an operational model of his system installed in at least one airport. *Scanwell Laboratories* had such a model but was the second lowest bidder. The award was made to the lowest bidder despite its lack of an installed model. *Scanwell* protested that the award was improper and outside the F.A.A.'s authority. In reaching its decision that *Scanwell* had the requisite standing, the court relied heavily upon Section 10 of the Federal Administrative Procedures Act, which states that "persons aggrieved" by agency action may contest such action.⁵⁸ The court held that a frustrated bidder for a government contract who alleges the use of improper procedures is sufficiently "aggrieved" under the statute to have standing to protest the award.

56. 310 U.S. 113 (1940).

57. 424 F.2d 859 (D.C. Cir. 1970).

58. See 5 U.S.C. §702 (1970).

Subsequent to the *Scanwell* decision, several cases refined the standing concept. For example, in *Ballerina Pen Co. v. Kunzig* three criteria for standing were established:

First, the party must allege that the challenged action has caused him injury in fact, in order to satisfy the Article III requirement. . . . The plaintiff must further allege that the agency has acted arbitrarily, capriciously, or in excess of its statutory authority, so as to injure an interest that "is arguably within the the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." . . . Finally, there must be no "clear and convincing" indication of a legislative intent to withhold judicial review.⁵⁹

In *Blackhawk Heating and Plumbing Co. v. Driver*⁶⁰ it was held that a disappointed bidder had standing to contest the award procedures even in the absence of an aggrieved persons statute such as Section 10 of the Federal Administrative Procedures Act. The court cited with approval *Scanwell* and *Ballerina* and stated,

[O]ne who alleges that an agency has acted arbitrarily or in excess of its authority in denying him a government contract is a proper party to "satisfy the public interests in having agencies follow the regulations which control government contracting."⁶¹

Following these guidelines, standing has been granted to challenge varying aspects of public contract procedures, from review of the rejection of all bids⁶² to an attack upon the use of a formal advertising procedure where a negotiation was called for.⁶³

2. Judicial Remedies

Although a disappointed bidder (hereinafter used in the context of a low bidder contesting an administrative determination of non-responsibility) may be afforded judicial review, the remedies available in conjunction with such review have proven less than adequate.⁶⁴ Initially, the courts seemed willing to allow injunctions against the award.⁶⁵ However, the exercise of injunctive power is discretionary and, as stated in *Simpson Electric Co. v. Seamans*, is "a remedy that should be sparingly used."⁶⁶ The *Simpson* court faced a situation

59. 433 F.2d 1204, 1207 (D.C. Cir. 1970).

60. 433 F.2d 1137, 1140 (D.C. Cir. 1970).

61. *Id.*

62. *Schoonmaker v. Resor*, 455 F.2d 726 (D.C. Cir. 1971).

63. *Wheelabrator Corp. v. Chaffee*, 455 F.2d 1306 (D.C. Cir. 1971).

64. See generally, Comment, *The Role of G.A.O. and Courts in Government Contract "Bid Protest": An Analysis of Post-Scanwell Remedies*, 1972 DUKE L.J. 745.

65. Speidel, *Judicial and Administrative Review of Government Contract Awards*, 37 LAW & CONTEMP. PROB. 63, 81 (1972).

66. 317 F. Supp. 684, 686 (D.C. 1970).

where although the award was arbitrarily and improperly made, the recipient of the award had already commenced work. Had the court enjoined the award, progress under the contract would necessarily have halted.⁶⁷ The court did not expressly assert this stoppage of government business as a basis for not issuing the injunction, but stated that the bidders had sufficient remedies by damage actions in the Court of Claims.⁶⁸ Because of this available remedy and the court's belief that the *Scanwell* decision did not contemplate continued and direct interference by the courts in contracting procedures, the court chose to exercise its discretion by refusing to grant injunctive relief.⁶⁹

The desire to avoid interference with the day-to-day business of government contracting, as implied in the *Simpson* holding, was expressly considered in determining whether or not to overrule a temporary injunction in *Lind v. Staats*:

It does not require much imagination to anticipate . . . the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision.⁷⁰

After weighing the harm to the plaintiff-bidder and the consequences to the public, the court stated,

The Court further concludes that the evidence of irreparable injury is very slight when compared with the damage to the delaying of the government contract, and further that there has been no evidence to show that the public interest would not be harmed if that injunction were maintained in effect.⁷¹

Thus it appears that courts will be hesitant to grant injunctive relief where such relief hampers the progress of government contracts.⁷²

With the decline in availability of injunctive remedies, money damages have become a more frequently pursued remedy. The measure of damages in bid protests, however, has been limited to recovery of only the cost of the bid preparation. In *Keco Industries, Inc. v. United States* it was held that to recover even these preparation damages there must be a successful showing that the bidder's proposal was not honestly and fairly treated by the governmental agency.⁷³ To

67. Other factors to be considered include harm to the defendant, harm that denial of the injunction would cause the plaintiff, and the effect on the public. Comment, *Government Contract Bid Protest: Judicial Review and The Role of the Court of Claims*, 39 U. CHI. L. REV. 814, 829 (1972).

68. 317 F. Supp. at 686.

69. *Id.*

70. 289 F. Supp. 182, 186 (N.D. Cal. 1968).

71. *Id.*

72. For the California position on damages and injunctive relief, see the discussion concerning *Rubino v. Lolli*, text accompanying notes 82-91 *infra*.

73. 428 F.2d 1233, 1240 (Ct. Cl. 1970).

show that an agency has not fairly treated a bid, a disappointed bidder must show that the agency acted without a reasonable, rational basis.⁷⁴ The result of limiting the damage recovery of a disappointed bidder in this manner is that he is effectively left without an adequate remedy in the courts. As one author has stated,

An award decision will stand unless it is without "any rational basis" and, even if that conclusion is probable, the court should exercise extreme caution in enjoining the award process⁷⁵

3. *Administrative Remedies*

For many years prior to the *Scanwell* decision there have existed procedures by which bid protests may be made to the General Accounting Office. The remedies accompanying review by the General Accounting Office, however, are very limited; neither award of the contract to a specific bidder nor allowance of damages to a disappointed bidder is available. Re-advertisement for bids appears to be the most a bidder can hope to receive.⁷⁶ Moreover, within the protest procedure there is no opportunity for oral presentation of evidence to the agency.⁷⁷ The most common action taken by the General Accounting Office is to dismiss the protest.⁷⁸

The leading case on the question of whether an administrative hearing is required prior to a determination of responsibility is *Housing Authority v. Pittman Construction Company*.⁷⁹ In *Pittman* the Housing Authority was required by statute to award its contracts to the lowest responsible bidder. Pittman submitted the lowest bid but was denied the award on the grounds that it was a non-responsible bidder. The Authority's finding of non-responsibility, however, was predicated upon information supplied *ex parte* to the Authority by Pittman's major competing bidder. The circuit court held this method to be an unfair means of determining responsibility. Furthermore, the court held that prior to an award a low bidder should be given an opportunity to rebut evidence reflecting adversely upon his responsibility.⁸⁰ The court did not expect, however, "such a Board to conduct FBI investigations, hold elaborate hearings, adhere to legal rules of evidence and function as a judicial body."⁸¹

74. *Id.* See also, *Heyer Products Co. v. United States*, 177 F. Supp. 251, 252 (D.C. Cir. 1971).

75. Speidel, *supra* note 65, at 77.

76. Comment, *supra* note 64, at 751-52.

77. *Id.* at 753.

78. COMPTROLLER GENERAL, ANNUAL REPORT 36 (1972). Only 52 of 1227 protests were sustained in 1972, while 706 were denied.

79. 264 F.2d 695 (5th Cir. 1959).

80. *Id.* at 704.

81. *Id.*

Thus it appears that presently a disappointed bidder on a federal contract has no opportunity to be heard in a formal hearing prior to an administrative determination of responsibility.

B. California

1. Judicial Remedies

A major case concerning California bid procedures and bidder remedies is *Rubino v. Lolli*.⁸² In *Rubino* the plaintiffs were the low bidders on a public works project; however, the award was made to a competitor whose bid was \$11,836 higher than plaintiff's bid. The court of appeal believed the major issue to be

whether in a case where the state is required to award its contract to the lowest responsible bidder, such bidder acquires a cause of action for money damages against the state and its responsible officers when they award the contract to a higher bidder for reason which constitutes an abuse of discretion.⁸³

In resolving this issue the court brought into focus some of the previously discussed peculiarities and dangers of public contract law. First, the court held that Government Code Section 14335, which allows the agency to reject all bids, precludes a writ of mandamus to require acceptance of plaintiff's low bid. Under this statute, since the agency has no duty to accept any bids, it cannot be said to have a duty to accept the low bid.⁸⁴ Secondly, the court held that although mandamus will not lie, the disappointed bidder can ask for and receive an injunction of the award where such an award would be made in abuse of the administrative discretion.⁸⁵ Lastly, it held that since an award is a discretionary act, Government Code Section 820.2⁸⁶ prohibited the low bidder from recovering damages from either the individual state employee or the state, even though there was an abuse of discretion.⁸⁷ The result of these holdings is that the low bidder, or in fact any bidder, cannot compel award of the contract nor recover damages for its loss. The bidder may enjoin the award, but this is

82. 10 Cal. App. 3d 1059, 89 Cal. Rptr. 320 (1970).

83. *Id.* at 1061, 89 Cal. Rptr. at 321.

84. *Id.* at 1062, 89 Cal. Rptr. at 321.

85. *Id.*

86. CAL. GOV'T CODE §820.2:

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Under California law the state or other public entities are liable only when the individual employee would be personally liable. See CAL. GOV'T CODE §815.2. Thus once the employee's immunity is established under Section 820.2, the state becomes relieved of any liability through Section 815.2 and the bidder has lost his action for damages.

87. 10 Cal. App. 3d at 1062, 89 Cal. Rptr. at 322.

an ineffective remedy for both the state and the individual⁸⁸—work under the contested contract must be suspended, yet the bidder remains no closer to receiving the award.

Deserving of further discussion in reference to the *Rubino* case is the court's holding that mandamus will not lie since the agency may reject all bids. It can be argued that this holding is basically unsound. Public policy requires that the competitive bidding system be used to procure the lowest responsible bidder, not that the consummation and performance of government contracts be stayed by rejection of all bids on the pretense of "public interest."⁸⁹ Hence, the agency should be charged with a duty to ascertain the lowest responsible bidder and to award the contract to such a bidder if one is in existence. Moreover, where an agency makes an award to one other than the low bidder, it is manifesting an intent to not exercise its right to reject all bids. If subsequent to the award a disappointed bidder is found by the courts to be responsible, the agency should not be allowed to prevent mandamus by interposing the argument that it can reject all bids, for it has previously displayed an intent to do the contrary.⁹⁰ Public policy further demands that each bid be given proper and fair treatment and that a bidder have a reasonable expectation of the application of the proper procedures to his bid.⁹¹ Such policy ends are frustrated if agencies are allowed to improperly administer contract procedures and then assert the right to reject all bids if a disappointed bidder seeks judicial relief.

2. Administrative Remedies

a. Current Procedures

There are no bid protest procedures uniformly applicable to public

88. [T]he system is often too expensive and time-consuming for efficient and fair resolution of claims. Small businesses, or any business with a relatively small claim, often find that the money required to pursue a claim equals or exceeds the amount of the claim. The result is that contractors with enough money to finance litigation under the system may recover; contractors without enough money cannot. Even if recovery of a small claim is made, the relative cost of that recovery represents a waste of resources.

4 REPORT OF THE COMMISSION OF GOVERNMENT PROCUREMENT 3 (1972) [hereinafter cited as COMMISSION]. The bidder in California would be even less inclined to pursue a bid protest since under the *Rubino* case he cannot recover even an inadequate amount of damages.

89. Various cases maintain that the competitive bidding systems are for the benefit of the public. See cases in note 3 *supra*. The alternative of rejecting all bids should be used after no responsible bidder is found. It appears that the primary "public interest" is to find a responsible bidder; when this is impossible, only then should the public interest require a rejection of all bids.

90. *But cf.* *Laurent v. San Francisco*, 99 Cal. App. 2d 707, 222 P.2d 274 (1950). In *Laurent* the court allowed rejection of all bids after one bid had been accepted. In that case, however, there was a dispute as to who had authority to accept a bid.

91. *Keco Industries, Inc. v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970).

contracting agencies in California. Within the Department of General Services, however, there are procedures by which a disappointed bidder may initiate a bid protest prior to the contract award.

Under Government Code Section 14813, a bidder may file a protest with the Board of Control on the grounds that he was the lowest responsible bidder meeting specifications and therefore was entitled to the award. This protest procedure begins when, pursuant to Section 14813, the Office of Procurement sends a telegram to the lowest bidder stating that the award will be made to someone else.⁹² If a protest is filed, the award is held in abeyance pending withdrawal of the protest by the bidder, or until the Board of Control rules on the protest.⁹³ While notice by telegram is routine, very few protests result.⁹⁴ One possible reason for this may be the lack of knowledge by the contractor as to the exact nature of the telegram and the procedures that he must follow to submit a protest. A second reason is that the Board of Control has limited the action it will take on bid protests—the most a bidder has received is an order that the agency must re-advertise for bids.⁹⁵

b. *City of Inglewood v. Superior Court*

To date, the California courts have not ruled directly upon the question of whether or not a pre-award hearing is required where an award is to be refused a bidder on the grounds he is not responsible. The latest and most important case on the subject of such hearings is *City of Inglewood v. Superior Court*⁹⁶ wherein a city board, charged under Government Code Section 25454 with granting a contract for a civic center to the lowest responsible bidder, granted the contract to the second lowest bidder. The board justified its action on the contention that the second lowest bidder was more qualified than the lowest bidder.⁹⁷ The lowest bidder sued to enjoin execution of the contract. There was

92. Interview with Bob Vance, Assistant Purchasing Manager, Department of General Services, Office of Procurement, Sacramento, Calif., Sept. 18, 1973 [hereinafter cited as *Vance*].

93. CAL. GOV'T CODE §14813.

94. *Vance*, *supra* note 92. Between January 1969 and September 1973 only 34 protests had been taken to the Board of Control under the provisions of Section 14813. This figure of course reflects only those protests concerning the Department of General Services.

95. *Vance*, *supra* note 92 (only six protestors have received a re-advertisement).

96. 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972).

97. *Id.* at 867, 500 P.2d 604-05, 103 Cal. Rptr. at 693. The bidders were rated on a scale of 0 to 61 with a score of 30 considered acceptable. The lowest bidder rated 42 whereas the second lowest bidder rated 55. In disallowing the award, the court held that determining responsibility by the relative scores of the bidders was improper and had no place in competitive bidding procedures. *But cf.* *West v. Oakland*, 30 Cal. App. 556, 561, 159 P. 202, 204 (1916) (comparison of the quality of goods offered by bidders).

no disagreement between the parties as to the factors constituting responsibility; the dispute arose over the method by which the factors were to be evaluated.⁹⁸ The plaintiff contended that the *Pittman* holding mandated a hearing prior to an award of the contract. Although the court held the award to be improperly made to the second lowest bidder, it did not uphold plaintiff's interpretation of *Pittman*.

In the course of its decision, the court made several important findings regarding public contract procedures. The first holding concerned awards to the lowest bidder: "[T]he contract for a public construction project must be awarded to the lowest monetary bidder as commanded by section 25454 unless it is found that the lowest bidder is not responsible."⁹⁹ Such language as "must be awarded" and "unless it is found that he is not responsible" strongly indicates that a low monetary bidder has a "right" to the contract award subject to defeasance upon a showing of non-responsibility. Recognition of such a right is a significant departure from prior case law and has important ramifications regarding the availability of a pre-award hearing for a disappointed low bidder.¹⁰⁰

The court did not reach a decision on the issue of whether a hearing was required prior to the contract award since it held that the contract was void by failure to follow the procedures commanded by Section 25454.¹⁰¹ It was held, however, that due process required that whenever a contract award is to be made to one other than the low monetary bidder, that bidder must be given notice of evidence concerning his non-responsibility and an opportunity to rebut such evidence.¹⁰² As to the form of rebuttal or presentation of evidence, the court maintained by dictum that due process does not require a full quasi-judicial proceeding to determine responsibility.¹⁰³

The *Inglewood* case did not go so far as to settle the issue of pre-award hearings as might be believed, for its true holding was merely that statutory procedures relating to the awarding of contracts must be followed. As the law presently exists, the bidder has no opportunity to be heard by the agency prior to the award, with the possible exception of the procedures under Government Code Section 14813.¹⁰⁴

98. 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692.

99. *Id.* at 867, 500 P.2d at 607, 103 Cal. Rptr. at 693.

100. See text accompanying note 56 *supra*.

101. 7 Cal. 3d at 870, 500 P.2d at 607, 103 Cal. Rptr. at 695.

102. *Id.* at 871, 500 P.2d at 607, 103 Cal. Rptr. at 695.

103. *Id.*

104. Under this section and CAL. ADMIN. CODE tit. 2, §§870-872, a hearing may be "requested;" it is not guaranteed and indeed may be refused if the agency determines the protest to be unworthy of a hearing.

ARGUMENTS FOR A RIGHT TO A PRE-AWARD HEARING

The initial argument to be made for pre-award hearings revolves around the fact that the present systems do not provide adequate remedies for a disappointed bidder. Both the public and the bidder have substantial interests in seeing that abuses of the system are effectively rectified. The public's interest rests largely on the requirement that the competitive bidding system be truly competitive. Competitive systems exist to provide the public with "the efficient, economical and timely acquisition of goods and services."¹⁰⁵ Commenting on the relationship between the competitive system and the danger of inadequate remedies, the Commission on Government Procurement stated,

Government procurement is based primarily on open competition, but without sufficient incentive to compete, competition cannot be achieved. It is essential to the competitive system that there be a sufficient number of prospective or actual competitors in the procurement process. If the concerns about inequities and inefficiencies in disputes-resolving procedures cause potential contractors to avoid Government work, the procurement process will suffer.¹⁰⁶

Speaking more specifically of the award protest systems, the Commission continued, "A system that will not assure a damaged protestor an adequate remedy unnecessarily creates a lack of confidence in the integrity of the methods by which Government contracts are awarded."¹⁰⁷

The most important ramification of the present procedures is a possible loss of faith in the system by the contractors. This loss of faith may, in turn, result in decreasing competition for public contracts. Allowing the contractor, prior to award, to present his position to the agency and to resolve disputes prior to the process of involved and expensive appeals would seemingly help provide the needed faith in the system.¹⁰⁸

In addition to the problem of a protestor's present lack of remedies, there are constitutional due process arguments that may be presented in favor of pre-award hearings. It is a general rule of constitutional law that the procedural requirements of due process arise whenever there is a deprivation of property or liberty by state action.¹⁰⁹ However, there has been much discussion that hearings are not required

105. COMMISSION, *supra* note 88, at 7.

106. *Id.* at 3.

107. *Id.* at 7.

108. *Id.* at 8, 48. The Commission reflects this belief by recommending more efficient and equitable pre-award bid protest procedures.

109. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

by due process unless there has been a constitutionally "protected" right infringed upon.¹¹⁰ Further complicating the problem in terms of administrative due process is the distinction between quasi-legislative and quasi-judicial functions of agencies and whether the agency acts are of a discretionary nature. Quasi-judicial actions are subject to due process considerations to a greater extent than are quasi-legislative functions.¹¹¹ The determination of "responsibility" may be classified as a quasi-judicial act since it adjudicates a set of facts and makes a decision concerning an individual party.¹¹² To receive a hearing before an agency, a disappointed bidder must establish a sufficiently protectable right or interest.¹¹³

Protectable rights are more easily found and recognized by the courts where governmental acts terminate an existing relationship between the individual and the state. For example, *Goldberg v. Kelly*¹¹⁴ recognized that an individual on welfare had a right to a hearing prior to termination of his benefits and that decisions on due process rights do not rest on the right-privilege distinction.¹¹⁵ With decisions such as *Goldberg* eliminating the "right" versus "privilege" dichotomy, the emphasis now rests upon whether there is a deprivation of a property interest in a benefit received from the government.¹¹⁶ In *Board of Regents v. Roth* the United States Supreme Court maintained,

To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.¹¹⁷

Applying the language in *Roth* to a low bidder's situation, it may be argued that he has a sufficiently legitimate entitlement to the con-

110. K. DAVIS, ADMINISTRATIVE LAW TEXT §§7.12, 7.13 (3rd ed. 1972).

111. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §1.15 (1970).

112. Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent. Adjudicative facts are roughly the kind of facts which go to a jury in a jury case.

K. DAVIS, ADMINISTRATIVE LAW TEXT §7.03 (3d ed. 1972).

113. The most important principle about the requirement of opportunity to be heard . . . is that a party who has a sufficient interest or right at stake in a determination of governmental action is ordinarily entitled to opportunity for a trial type of hearing on issues of adjudicative facts.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.11 (1958).

114. 397 U.S. 254 (1970).

115. Similarly, one who has no right to sell liquor, in the sense that the state may prohibit the sale of liquor altogether, may nevertheless have a "right" to fair treatment when state officers grant, deny, suspend or revoke liquor licenses.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.12 (1958).

116. "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

117. *Id.* at 577.

tract to require a hearing. Although a party generally has no "right" to contract with the government,¹¹⁸ the language of *Inglewood* indicates that the low monetary bidder has a right to the contract subject to defeasance by a finding of non-responsibility.¹¹⁹ At the least, this language indicates that the bidder has a legitimate claim of entitlement to the award. Moreover, under the procedures outlined for the California Departments of Public Works and General Services, bidders are pre-qualified.¹²⁰ Thus it may be argued that since the state has previously acknowledged the bidder's qualifications, there is an implied finding of responsibility which the state cannot terminate without a hearing. Similarly, to terminate the claim of entitlement of the low bidder deprives that bidder of a property interest of sufficient status so that a hearing is required. It does not appear from the *Roth* case that a right must be *vested*, but rather that the interest be *more than merely* a "unilateral expectation."

Countering the argument that the low bidder has a right to the contract is the contention that a bidder has no right to compel an award to himself. Even assuming the basis of this position to be sound, a right to a hearing does not conflict with a right to compel the award as they are two different concepts. The right to a hearing does not force acceptance of a bid, but merely insures that the individual will have an opportunity to be heard before the award is made to another. The decision as to whom to award the contract would *result* from the hearing, not be *compelled by it*.

Besides the legitimate claim of entitlement theory, the bidder has a legitimate expectation that his bid will be fairly and properly handled. A California court has recently stated in *People ex rel. Department of Public Works v. McNamara Corporation Ltd.*¹²¹ that there is an implied covenant of fair dealing in government contracts. It is not unreasonable to extend such a covenant to the bidding process, for if the government must deal fairly in performance of a contract, so should it deal fairly in awarding that contract.¹²² Beyond the fair dealing covenant, there would be no question that disqualifying a low bidder on the basis of race or religion would be violative of due process, regardless of arguments concerning a right to contract with the government.¹²³ A prospective contractor has a "right not to be invalidly denied equal opportunity under applicable law to seek con-

118. See text accompanying note 56 *supra*.

119. See text accompanying note 100 *supra*.

120. See text accompanying notes 43-44 *supra*.

121. 28 Cal. App. 3d 641, 649, 104 Cal. Rptr. 822, 826-27 (1973).

122. COMMISSION, *supra* note 88, at 7.

123. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.12 (1958).

tracts on government projects.”¹²⁴ The courts are in effect saying that bidders have an entitlement to due process—that public officers may not operate arbitrarily with regard to a bid.¹²⁵ The right to fair consideration of a bid, in the abstract, may be insufficient to compel a hearing. However, when coupled with the ease of abuse of unchecked administrative discretion and the difficulties in remedying such abuse, the argument for a right to procedural safeguards is strengthened. It is ironic that past cases have held that bids are irrevocable upon opening and that the state has a contract right in each bid of which it cannot be deprived,¹²⁶ whereas the bidder has no right to contract with the state even if his bid is low and he can prove he is responsible.¹²⁷

Beyond the consideration of rights inherent in the mechanics of public contract law, the bidder has other rights which deserve protection. It has been held that where government action damages a person's good name or reputation, a hearing must be held prior to that action.¹²⁸ California courts have stated that there exists a “constitutional right to procedural due process when the state accompanies its action with charges which might seriously damage the individual's reputation or career.”¹²⁹

Of course, it may be contended that denial of a contract to a low bidder does no damage to his reputation. The court in *Inglewood* stated, however, that regardless of whether an “express finding of non-responsibility is required, if a contract is awarded to one other than the lowest monetary bidder, the ineluctable implication is that the latter is not responsible.”¹³⁰ Certainly a finding that a contractor is not responsible would damage his reputation with present and potential clients and in the eyes of members of the particular trade or profession.

The problem of damaged reputation is clearly akin and complementary to the argument that due process requires a hearing where an individual's right to engage in an occupation or profession is interfered with by state action.¹³¹ The basis for this hearing requirement

124. *Cooper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 371 (D.C. Cir. 1961). See also *Gonzalez v. Freeman*, 334 F.2d 570, 574, 575 (D.C. Cir. 1964).

125. “The Board has the right to be wrong; dead wrong; but not unfairly, arbitrarily wrong.” *Housing Authority v. Pittman Const. Co.*, 264 F.2d 695, 703 (5th Cir. 1959).

126. *Kemper Const. Co. v. Los Angeles*, 37 Cal. 2d 696, 235 P.2d 7 (1951).

127. See text accompanying notes 21-22 *supra*.

128. *Wisconsin v. Constantineau*, 400 U.S. 433, 437-38 (1970).

129. *Zumwalt v. Trustees*, 31 Cal. App. 3d 611, 623, 107 Cal. Rptr. 573, 582 (1973).

130. *City of Inglewood v. Superior Court*, 7 Cal. 3d 861, 867, 500 P.2d 601, 604, 103 Cal. Rptr. 689, 692 (1972).

131. *Endler v. Schutzbank*, 68 Cal. 2d 162, 169, 178, 436 P.2d 297, 302, 308, 65 Cal. Rptr. 297, 302, 308 (1968).

is the concept that one's liberty to engage in an occupation is an interest sufficient to compel due process protection.¹³² Accordingly, it has been held that prior to refusing a doctor access to practice in a public hospital, the doctor is entitled to an opportunity to be heard.¹³³ Similarly, a hearing is also required prior to a denial of admission to the bar.¹³⁴ These two situations can be easily analogized to a contractor's position in regard to his opportunity to participate in government contracts. Moreover, in *Goldsmith v. United States Tax Board*¹³⁵ the United States Supreme Court held that prior to denying admission to practice before the Tax Board, the applicant must be given a hearing. This situation is even closer to that of the prospective bidder since in both instances the applicant practices directly with the government and in accordance with rules established by the government.

When combined, the arguments concerning damage to reputation and damage to one's liberty to practice an occupation present a strong position for asserting a right in the contractor to a pre-award hearing on his responsibility. On both national and state levels, government contracting is big business¹³⁶ upon which many contractors depend for the survival of their enterprises.¹³⁷ Since contract awards are to be made only to responsible bidders, a determination that a bidder is not responsible may effectively bar him from the pursuit of his occupation. Such a result should not occur without at least permitting the individual affected an opportunity to be heard.

Also analogous to the contractor's situation is the problem of application for a license to engage in a business. Like a determination of responsibility, issuance of licenses on specified conditions is a quasi-judicial function involving factual determinations and the exercise of discretion by the agency.¹³⁸ Because of the quasi-judicial character of such agency functions, it has been held that an applicant must be given an opportunity to be heard prior to issuance or refusal.¹³⁹

132. *Id.* at 179, 436 P.2d at 309, 65 Cal. Rptr. 309.

133. *Alport v. Board of Governors*, 145 N.Y.S.2d 534 (1955).

134. *Wilner v. Committee on Character & Fitness*, 373 U.S. 96, 102, 103 (1963).

135. 270 U.S. 117 (1926).

136. See Comment, *supra* note 64, at 745.

137. *Gonzalez v. Freedman*, 334 F.2d 570, 574 (1964). This case involved a situation where a bidder was debarred. Debarment means that the individual or corporation cannot be awarded a government contract and cannot submit a bid on such contracts. 32 C.F.R. §1.601-1 (1972). The court noted that the power to debar a business from participating in government contracts may be tantamount to a power of life or death over a business.

138. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §§1.15-1.16 (1970).

139. *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952) (license to operate amusements); *Andrews v. State Board of Registration*, 123 Cal. App. 2d 685, 267 P.2d 352 (1954) (license for an electrical engineer); *Martin v. Board of Supervisors*, 135 Cal. App. 96, 26 P.2d 843 (1933).

This is true even though there exists no constitutional right to engage in the activity for which the license is sought.¹⁴⁰ The court in *Martin v. Board of Supervisors* held that a hearing on the merits is required where an administrative agency has a duty to issue a license on specified conditions.¹⁴¹ Similarly, under the responsible bidder statutes and statutes allowing rejection of all bids in the "public interest," public agencies are charged with a duty to determine responsibility in relation to specific conditions of qualification. Thus, arguably, an agency has a duty to award a contract if certain specifications are met; in so exercising that duty a hearing should be required just as it is for applications for licenses.¹⁴²

In summary, both the bidder's interests and the public's desires may be furthered by use of pre-award hearings in relation to responsibility determinations. Present protest and appeal procedures provide inadequate remedies for both the bidder and the state. It may still be argued that judicial review adequately vindicates the interests of the parties to a bid dispute where such review is speedily provided after an agency decision. In other words, summary action could be permitted on condition that the individual could quickly exercise his judicial remedies.¹⁴³ Summary action, however, must be based on two elements—the urgency of immediate action and protection of the public from injury.¹⁴⁴ Examples of situations containing these elements include suspension of a driver's license,¹⁴⁵ seizure and destruction of dangerous materials,¹⁴⁶ and destruction of diseased animals.¹⁴⁷ Clearly, the award of a contract cannot be classified as requiring summary action. Government contracts, while needing prompt attention, are not generally in the nature of situations requiring immediate action. In the event that such action was mandatory, there are statutory provisions by which an agency director may cause work to proceed on a day-to-day basis.¹⁴⁸

CONCLUSION

Within a competitive bidding system, disputes will surely arise. The

140. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §7.12 (1958).

141. 135 Cal. App. 96, 100, 26 P.2d 843, 845 (1933).

142. The concept of issuing a license on specified conditions is not unlike a determination of responsibility on specified qualifications. Both evaluations require meeting criteria established by the state and conducting operations according to state rules.

143. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-99 (1950); *Steward v. San Mateo*, 246 Cal. App. 2d 273, 54 Cal. Rptr. 599 (1916).

144. *Steward v. San Mateo*, 246 Cal. App. 2d 273, 287, 54 Cal. Rptr. 599, 607 (1966).

145. *Hough v. McCarthy*, 54 Cal. 2d 273, 353 P.2d 276, 5 Cal. Rptr. 668 (1960).

146. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

147. *Alfonso Bros. v. Brock*, 29 Cal. App. 2d 26, 84 P.2d 515 (1939).

148. CAL. GOV'T. CODE §14335.

problem facing agencies and bidders is how to expeditiously and equitably resolve such disputes. In the area of bid protests regarding responsibility, a pre-award hearing appears to be the best method to deal with contests between the agency and the bidder. As has been seen, judicial review is time-consuming, expensive, and often frustrating for both parties.¹⁴⁹ Administrative hearings could more efficiently decide the issue of responsibility due to the expertise of the agencies in the particular area. Moreover, allowing contractors to present their views prior to a determination of responsibility or award of the contract may reasonably be expected to help build confidence in the contractor that he will be fairly treated.

Establishing the proper procedures and boards to hear such responsibility contests will no doubt result in some additional expense to the public. However, this expense should not automatically outweigh both the bidder's and the public's interest in the hearing. As was stated by the Commission on Government Procurement,

[P]ublic interest, it is contended, often overrides the personal interests of the protestor when to dispense a remedy would unduly delay or increase the cost of procurement. Overlooked, however, is the greater overall benefit that can be gained by dealing fairly with contractors and encouraging them to deal with the Government in the future.¹⁵⁰

To alleviate problems in bid protests, the Commission recommended establishment of pre-award protest procedures "aimed at bringing complaints quickly to the attention of management officials before they are channeled into the independent award protest-resolving forums."¹⁵¹ In summarizing its recommendations, the Commission emphasized a process which would better inform the protestor of the necessary steps in resolving his complaint, which would contain a time structure within which protests would be processed, and which would generally offer more protection for the protestor.¹⁵²

The need for better pre-award procedures was also recognized by the General Accounting Office in its Annual Report in 1972:

In essence the new procedures differ from the previous rules in that they impose strict time limits on all parties, limit circumstances in which awards can be made pending our decision on a protest, provide for dissemination of information to all parties

149. COMPTROLLER GENERAL, ANNUAL REPORT 35 (1972).

150. COMMISSION, *supra* note 88, at 7.

151. *Id.* at 48.

152. *Id.* at 8.

concerned, and reduce the opportunity for *ex parte* communication.¹⁵³

Perhaps the best method of implementing the use of pre-award hearings would be to establish a uniform program of protest procedures applicable to all public contracting bodies. Since responsibility is a trait relatively consistent regardless of the agency, city, county, or political subdivision, a uniform system could be devised, not to define responsibility, but rather to determine by what steps such a definition may be formulated. Moreover, this uniform system would help to alleviate protestor confusion as to what steps are required to process his complaint since he could refer to a single source of rules regardless of which agency was involved.

Regarding the actual form a hearing should take, it is significant that responsibility requires an adjudicative function by the agency. Generally, adjudicative hearings must conform more closely to trial-type requirements concerning rights of confrontation, cross-examination, and technical rules of evidence, than do hearings of a legislative nature. It would, therefore, be desirable that the hearing be of an adjudicative type so as to help prevent the danger recognized in *Housing Authority v. Pittman Construction Co.*¹⁵⁴ of improper *ex parte* communications being a factor in determining responsibility. On the other hand, expediency is also an important factor, and procedures inducing long trial-type hearings should be avoided if possible. If, however, expediency is to be balanced against the bidder's rights, the weight should favor an adjudicatory hearing—the ramifications to the bidder from a finding of non-responsibility are too great to sacrifice his right to be heard.¹⁵⁵ In contrasting the problems of speed and a protestor's rights, the Commission on Government Procurement stated, "[T]he present system often fails to provide the procedural safeguards and other elements of due process that should be the right of litigants."¹⁵⁶

Implicit in the concept of a hearing prior to governmental action is the belief that acts done in the public light will be conducted more fairly than those left solely to clandestine intra-governmental processes. This belief is also the basic contention behind requiring a hearing before a determination of responsibility. In government contracting, the proper functioning of the award procedures is vital to the

153. COMPTROLLER GENERAL, ANNUAL REPORT 35 (1972).

154. 264 F.2d 695 (5th Cir. 1959).

155. For a good discussion of due process and administrative hearings, see Endler v. Schutzbank, 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968).

156. COMMISSION, *supra* note 88, at 3.

interests of both the public and the bidder. It would appear that if the public can scrutinize this process, the rules governing it will be more closely adhered to. It was thought in the *Scanwell* case that the availability of judicial review by the courts would be sufficient to protect the rights of the parties.¹⁵⁷ This, however, has not proved to be the case. It is this author's opinion that protection must be provided closer to the point of possible abuse by allowing the bidder an opportunity to be heard before an administrative determination of responsibility.

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157. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).