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GOVERNMENT CONTRACTS: THE CONSEQUENCES OF AN IMPROPER AWARD

In the field of government contracts, if, after formal advertising and award, it is discovered that the award was improper, what is the legal status of the resultant agreement? Is it void or merely voidable? The situation, which is unique to the field of public contracts, is heightened when the two forums which adjudicate disputes arising from government contracts disagree as to the consequences of the improper award. This problem will be examined here in light of the test furnished by the Court of Claims and the Comptroller General, the primary forums for government contracts. Before one can appreciate the conflict between the two tribunals, however, an introduction to the nature of government contracts and the requirements of formal advertising will be explored; this introduction will include a discussion of the authority of the government agent, with emphasis on the military procurement aspect of government contracts.

THE AUTHORITY TO CONTRACT

“In the absence of constitutional inhibitions, the sovereign can make such contracts as it pleases and no one can object.”¹ While the government has the constitutional authority to contract for its needs,² latitude to contract is limited to the capacity and authority granted to the government contracting officer³ whose authority is exclusive and statutory.⁴ While an agent ordinarily has such general authority as is normally included in a grant of power,⁵ a government contracting officer must limit his actions to the specific grant of authority:

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of

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1. *In re American Boiler Works, Inc.*, 220 F.2d 319, 321 (3rd Cir. 1955).
 2. *Neilson v. Lagow*, 53 U.S. (12 How.) 98, 107 (1851); *United States v. Tingley*, 30 U.S. (5 Pet.) 115, 128 (1831).
 3. *Hooe v. United States*, 218 U.S. 322 (1910); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868); *G. L. Christian & Assoc. v. United States*, 320 F.2d 345 (Ct. Cl. 1963); *United States v. Christensen*, 50 F. Supp. 30 (E.D. Ill. 1943); *United States v. 94.68 Acres of Land*, 45 F. Supp. 1016 (E.D. Mo. 1942); *Armed Services Procurement Regulation § 1-201.3*, 32 C.F.R. § 1.201-3 [hereinafter cited as ASPR].
 4. J. PAUL, *UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS* 208-09 (1964).
 5. *Whiteside v. United States*, 93 U.S. 247, 257 (1876); *cf.* F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 43 (4th ed. 1952).

mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appears that the act was done, or the declaration was made, by the agent in the course of his regular employment; but the government or public authority is not bound in such a case.

. . .⁶

Thus, the capacity of the agent is limited to strict conformity with the authority conferred.⁷ All limitations in the enabling statute apply to any exercise of authority under that legislation;⁸ lack of such authority in the agent renders any purported contract unenforceable against the government.⁹ Moreover, if issued without authority, no contract can arise, and any instrument purporting to be a contract is void.¹⁰ Even where the contracting officer is authorized to award contracts, an award subject to subsequent approval does not confer any right upon the other party to the agreement until such approval is forthcoming.¹¹ When government regulations require that the contracting officer pursue a course of action, failure to do so confers no rights under the instrument upon either party.¹² This principle has been applied where a contracting officer awarded a contract in one fiscal year with funds from another fiscal year,¹³ where an agent entered into an oral contract,¹⁴ where a contracting officer had authority to negotiate but not to contract,¹⁵ where a contracting officer contracted to pay a sum in excess of that limited by Congress for the purpose of such a contract,¹⁶ and where an

6. *Hawkins v. United States*, 96 U.S. 689, 691 (1877).

7. *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868); *Reese v. Virgin Islands*, 277 F.2d 329, 333 (3rd Cir. 1960); *Wildermuth v. United States*, 195 F.2d 18, 24 (7th Cir. 1952); *United States v. Christensen*, 50 F. Supp. 30 (E.D. Ill. 1943).

8. *United States v. 94.68 Acres of Land*, 45 F. Supp. 1016, 1020 (E.D. Mo. 1942).

9. *Baltimore & O.R.R. v. United States*, 261 U.S. 385 (1923); *Hooe v. United States*, 218 U.S. 322 (1910).

10. *Beach v. United States*, 226 U.S. 243 (1912).

11. *Ship Construction & Trading Co. v. United States*, 91 Ct. Cl. 419, 462 (1940), *cert. denied*, 312 U.S. 699 (1941).

12. *United States v. Millsap*, 208 F. Supp. 511 (Wyo. 1962); *See generally* J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 208-12 (1964).

13. *Los Angeles v. United States*, 68 F. Supp. 974 (Ct. Cl. 1946).

14. *United States v. New York & Porto Rico S.S. Co.*, 239 U.S. 88 (1915); *South Boston Iron Co. v. United States*, 118 U.S. 37 (1886); *Clark v. United States*, 95 U.S. 539 (1877).

15. *Wright v. United States*, 86 Ct. Cl. 290, *cert. denied*, 305 U.S. 609 (1938).

16. *Hooe v. United States*, 218 U.S. 322 (1910).

officer used land set aside for other purposes.¹⁷ If an officer without authority of Congress presumes to bind the government, by express or implied contract, the contract is a nullity and no legal obligation to perform arises,¹⁸ for what an agent does or omits to do cannot create a claim against the government.¹⁹

If an officer enters into a contract with a private party, and that action is unauthorized or otherwise improper, the contract is void, and the other party has no right against the government.²⁰ Generally, the doctrine of apparent authority, and therefore estoppel, are inapplicable to the sovereign.²¹ A party entering into an agreement with an agent of the government has the duty to ascertain whether the agent's acts are permitted by his authority.²² There cannot be reliance upon the agent's apparent authority even though the contractor honestly relies to his detriment upon the position taken by the contracting officer.²³ Acceptance of benefits by the government under a public contract which is void does not necessarily effect a ratification.²⁴ Consequently, the duty to ascertain the power of the agent is absolute: "One is charged with knowledge of the extent of the actual authority of the government's contracting agent," and no agent can hold himself out to have any more authority than is sanctioned by law.²⁵ However difficult that process might be, his actual authority may be ascertained,²⁶ and ignorance of the law furnishes no

17. *Loehler v. United States*, 90 Ct. Cl. 158 (1940).

18. *Hooe v. United States*, 218 U.S. 322, 324 (1910).

19. *Id.*

20. *Beach v. United States*, 226 U.S. 243, 256 (1912); *Whiteside v. United States*, 93 U.S. 247 (1876); *Bryne Organization, Inc. v. United States*, 287 F.2d 582, 586 (Ct. Cl. 1961); *Los Angeles v. United States*, 68 F. Supp. 974 (Ct. Cl. 1946); *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 603, *cert. denied*, 292 U.S. 645 (1934).

21. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1916); *Shepard Engineering Co. v. United States*, 289 F.2d 681 (8th Cir. 1961); *Reese v. Virgin Islands*, 277 F.2d 329 (3rd Cir. 1960). See also *Whelan & Dunigan, Government Contracts: Apparent Authority and Estoppel*, 55 GEO L.J. 830 (1967).

22. "Men must turn square corners when dealing with the Government . . ." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920); *Hooe v. United States*, 218 U.S. 322 (1910); *Brubaker v. United States*, 342 F.2d 655, 662 (7th Cir. 1965).

23. *Filor v. United States*, 76 U.S. (9 Wall.) 45 (1869).

24. *Board of Education v. Hall*, 353 S.W.2d 194, 195 (Ky. 1962).

25. *Blake Construction Co. v. United States*, 296 F.2d 393, 396 (D.C. Cir. 1961); *National Electronics Laboratories, Inc. v. United States*, 180 F. Supp. 337, 341-42 (Ct. Cl. 1960); *United States v. Christensen*, 50 F. Supp. 30 (E.D. Ill. 1943); cf. J. PAUL, *UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS* 209 (1964).

26. *Hawkins v. United States*, 96 U.S. 689, 691 (1877); *Blake Construction Co. v. United States*, 296 F.2d 393, 396 (D.C. Cir. 1961).

excuse for any mistake or wrongful act.²⁷ Although these rules appear harsh, the government is too complex and deals through too many agencies for any other policy to be practicable.²⁸ The Supreme Court thought it far "better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which . . . might be turned to the detriment and injury of the public."²⁹

FORMAL ADVERTISING

The presence or absence of authority to contract is especially crucial at the award stage, when it involves an invitation for a bid. The foremost mandate of the Armed Services Procurement Act of 1947³⁰ is that government contracts for the procurement of supplies and services shall be made by formal advertising procedures, and shall be awarded "to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered."³¹ This requirement of formal advertising is the government's means of securing material and services at the lowest possible cost. Formal advertising procedures insure that government spending will be honest and that, through competition, qualified and competent contractors will have a chance to contract for the government on an equal basis.³²

To achieve this equality, a bidding contractor must precisely respond to the invitation for bids.³³ Although a contracting officer may waive a minor deviation,³⁴ any inconsistency which affects price, quantity or quality of the item offered goes to the substance of the invitation for bid.³⁵ This inconsistency makes the offered bid non-responsive, and may

27. *Hooe v. United States*, 218 U.S. 322, 325 (1910).

28. *Blake Construction Co. v. United States*, 296 F.2d 393, 396 (D.C. Cir. 1961).

29. *Whiteside v. United States*, 93 U.S. 247, 257 (1876).

30. 10 U.S.C. §§ 2301-14 (1964).

31. *Id.* § 2305(c) (1964); 41 U.S.C. § 253 (1964).

32. *United States v. Brookridge Farm Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

It need hardly be said that the general requirements of advertising for government contracts is a true rule of necessity to avoid the dangers of overpricing goods or services, with the accompanying dangers of corruption in a governmental organization.

New York Mail & Newspaper Transp. Co. v. United States, 154 F. Supp. 271, 276 (Ct. Cl. 1957).

33. *Wildermuth v. United States*, 195 F.2d 18, 24 (7th Cir. 1952); 44 COMP. GEN. 193 (1964); 8 COMP. GEN. 649 (1929); ASPR 2-404.2(a), 32 C.F.R. § 2.404-2(a) (1969).

34. 30 COMP. GEN. 179, 181 (1950); J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 155 (1964); ASPR 2-405, 32 C.F.R. § 2.405 (1969).

35. *United States v. Ellicott*, 223 U.S. 524 (1912); 43 COMP. GEN. 209 (1963); 39

preclude it from consideration for award.³⁶ Such a deviation would destroy the free competition mandate and the contract accepted under such circumstances would be void; to hold otherwise would be unfair to the other bidders.³⁷ Contracting officers have little discretion; "they must accept the lowest or highest responsive bid or reject all and re-advertise."³⁸

The competitive bidding statutes require that the government set forth in their invitation for bids the exact basis for comparison of bids.³⁹ Permitting the bidders to compete on equal terms requires an invitation for bid sufficiently definite to allow the bidder to prepare,⁴⁰ and the contracting officer to evaluate, the bids on a common basis.⁴¹ The elements for impartial evaluation include specifications which are sufficiently detailed in all essentials,⁴² an award statement which must advise the bidder of the basis upon which his bid will be evaluated,⁴³ and an honest contracting officer, who must maintain absolute objectivity in order to establish a common basis for full and fair competitive bidding.⁴⁴ From time to time, contracting officers and bidders err. If a mistake occurs the most important inquiry is whether or not the mistake has destroyed the balance of full competition and impartiality and has rendered the contract void.

COMP. GEN. 570 (1960); 23 COMP. GEN. 395 (1943). See also ASPR 4-406.2, 32 C.F.R. § 2.406-2 (1969).

36. *Prestex Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963); 44 COMP. GEN. 833 (1965); See ASPR 2-404.2(b), (c), 32 C.F.R. § 2-404.2(b), (c) (1969).

37. *United States v. Ellicott*, 223 U.S. 524, 543 (1912); *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957); *United States v. Tri-State Metal Products, Inc.*, 151 F. Supp. 455, 457 (W.D. Pa. 1957); *Board of Education v. Hall*, 353 S.W.2d 194, 195 (Ky. 1962); 43 COMP. GEN. 209 (1963).

38. 36 COMP. GEN. 94 (1956).

39. 10 U.S.C. § 2305(b) (1964).

40. 42 COMP. GEN. 598, 599-600 (1963); 41 COMP. GEN. 306, 319 (1961).

41. The "basis" of evaluation . . . should be as clear, precise and exact as possible. Ideally, it should be capable of being stated as a mathematical equation. . . . Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the reason that they are not determinable by the bidder at the time his bid is being prepared.

36 COMP. GEN. 380, 385 (1956).

42. 44 COMP. GEN. 302 (1964); 42 COMP. GEN. 598 (1963); 41 COMP. GEN. 306 (1961).

43. 36 COMP. GEN. 380 (1956).

44. This element is manifested by the Gratuities clause which appears in all government contracts. ASPR 7-104.15, 32 C.F.R. § 7.104-16 (1969). See generally 18 U.S.C. §§ 201, 371, 1001 (1964).

This extended introduction into the general principles of formal advertising and government contracts illustrates what is generally considered their rather cut and dried character. It is generally assumed that any action by a contracting officer which exceeds his authority confers nothing on the second party to the contract.⁴⁵ The two primary forums for the application of these rules of law now must be examined to determine how these principles are actually applied.

THE COURT OF CLAIMS

In *Prestex, Inc. v. United States*,⁴⁶ the Army invited bids for cloth for summer uniforms, specifying weight, thread count, and strength. Prestex submitted the lowest bid, enclosing a sample of cloth. Since the contractor had performed a similar contract two years earlier, and the sample resembled the material sought, the contracting officer awarded the contract. The Army ignored Prestex's cryptic words on the face of their bid: "Bidding on enclosed sample."⁴⁷ Prestex submitted the entire 25,000 yards called for under the contract as the pre-production sample required to be approved by the contracting officer. The plaintiff's sample, after being tested by a laboratory, was rejected by the contracting officer, and Prestex was directed to deliver conforming material in lieu thereof. Instead, the plaintiff complained that the contract award was based upon the submitted sample and demanded reinstatement of the contract. The government disagreed, claiming that as the sample attempted to vary the terms of the invitation, there was no valid agreement. The Court of Claims stated that "[t]he law applicable to the issue of validity is clear,"⁴⁸ and later noted that "where the specifications in the invitation to bid are at variance with the contract awarded the successful bidder, the resulting contract may be 'so irresponsible to and destructive of the advertised proposals as to nullify them.'"⁴⁹ If an agent accepted such a bid, competitive bidding would be rendered meaningless. Therefore, because the contracting officer's authority is limited by statute or regulation, an award to a non-conforming bid is improper, and such an award creates no obligation on the part of the

45. *Supra* note 20.

46. 320 F.2d 367 (Ct. Cl. 1963).

47. *Id.* at 369.

48. *Id.* at 371.

49. *Id.* at 372, quoting from *United States v. Ellicott*, 223 U.S. 524, 543 (1912). "Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." 32 C.F.R. § 2.404-2(a) (1969).

government to reimburse the contractor even under a quantum meruit theory.⁵⁰

The *Prestex* court, while recognizing that an improperly awarded contract cannot result in a valid contract, pointed out that "[e]ven though a contract be unenforceable against the Government . . . it is only fair and just that the Government pay for goods delivered or services rendered. . . ." ⁵¹ The court stated that "[i]n certain limited fact situations . . . the courts will grant relief of a quasi-contractual nature when the Government elects to rescind an invalid contract."⁵² Specifically, this quasi-contract theory will be applied, and the contract will be treated as voidable, when the contract is executed and partially performed on either side. Where the contract is still executory and there is no bona fide effort to render performance, as here, the contract will be void and no recovery will be allowed.⁵³ The Court of Claims pointed out that the government has treated contracts as voidable before,⁵⁴ but that the facts in this situation allowed only the conclusion that *Prestex's* contract was void.

Prestex is a strict approach and demonstrates that an obvious material deviation can destroy the validity of the contracting officer's award. This rule is applied when the deviation is major, that is, it affects price, quality, or quantity of the article offered.⁵⁵ Clearly, the contracting officer has no authority to waive these major deviations; hence, the resulting contract is void.⁵⁶ The strict approach, while harsh, "expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury."⁵⁷ Other pressures and realities, however, tend to affect and vitiate this harshness. Among these are urgent need for procurement,⁵⁸ good faith performance of the contractor,⁵⁹ and realization that contracting officers will make mistakes.⁶⁰ Nevertheless, it is evident that the approach in *Prestex* was consonant with traditional government contract rules and with the Comp-

50. 320 F.2d at 373-74.

51. *Id.* at 373.

52. *Id.*

53. *Id.* at 374.

54. *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957).

55. See note 36, *supra*.

56. See note 37, *supra*.

57. 40 COMP. GEN. 679, 683 (1961).

58. 41 COMP. GEN. 599 (1961); 41 COMP. GEN. 242 (1961).

59. 43 COMP. GEN. 761 (1964).

60. 17 COMP. GEN. 53 (1937).

troller General's position.⁶¹ In two 1963 cases, however, the Court of Claims deviated from this position. In *John Reiner & Co. v. United States*,⁶² the court's test to determine an improper award as void or voidable was an inquiry into whether such an award is so illegal that the contractor could not obtain judicial relief.⁶³ It noted that "Courts . . . are restricted . . . to deciding the rock-bottom issue of whether the contract . . . was invalid and . . . not whether another procedure would have been preferable. . . ." ⁶⁴ In *Reiner*, the Army Corps of Engineers advertised for the purchase of generator sets, delivery of which was to begin in September and continue until the following August. The invitation for bid provided that if the "bidder is unable to make deliveries in accordance with the . . . schedule, he shall set forth . . . his proposed delivery schedule."⁶⁵ Immediately below the delivery schedule the following clause was inserted:

Bids offering a proposed delivery schedule which will extend the time for the delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, *may* be cause for rejection of bid. [Emphasis added.]⁶⁶

Reiner's bid contemplated their own delivery schedule which exceeded the government schedule by more than sixty days. Seven other bidders proposed similar delivery schedules. The contracting officer, after awarding the contract to Reiner, cancelled it because "the invitation did not adequately inform bidders as to how they should bid with respect to delivery dates. . . ." ⁶⁷ After an adverse ruling by the Comptroller General, Reiner & Co. appealed to the Court of Claims which held that the validity of the contract should be given the benefit of every reasonable doubt. The court agreed with the contracting officer who had construed the word "may" as meaning "might," instead of the Comptroller General's interpretation of the meaning as "shall."⁶⁸ The court stated that "if the contracting officer . . . viewed the award as lawful, and it is reasonable to take that position under the legislation and regula-

61. 40 COMP. GEN. 679 (1961).

62. 325 F.2d 438 (Ct. Cl. 1963).

63. *Id.* at 440.

64. *Id.*

65. *Id.* at 439.

66. *Id.*

67. *Id.*

68. *Id.* at 441.

tion, the court should normally follow suit.”⁶⁹ The alternative is that the contractor would be placed in a position of proceeding at his own expense or forfeiting his bid bond.⁷⁰ In essence, the *Reiner* test upholds the validity of the award unless the invitation for bid is clearly nullified as a matter of law.

The contract was not breached, since the contracting officer had notified the contractor that the award was cancelled instead of the contract terminated. In this situation the court believed that the contracting officer can, with an *ab initio* effect, terminate the contract for the convenience of the government.⁷¹ Even though the contracting officer disagrees with the Comptroller General’s interpretation of his duty, as manifested by the above clause, to terminate the contract would not indicate subordination to the Comptroller’s dictation, but would be in the best interests of government harmony, “as a means of minimizing a conflict with another arm of Government. . . .”⁷² This is consistent with the general rule that the government can terminate a contract even when the adequate cause is not apparent until later.⁷³ Therefore, to construe the cancellation as a termination, rather than a breach, limits the damages the contractor is able to claim, and he will be allowed costs from the date of award to the date of cancellation.⁷⁴

In another Court of Claims case decided the same day as *Reiner*, *Brown & Sons Electric Co. v. United States*,⁷⁵ the Air Force advertised for electrical and construction work. The invitation called for a basic bid with a number of additive alternative items, and a bid bond guarantee of twenty percent of the total. After bid opening, the apparent low bidder was rejected because his bond was only twenty percent of his basic bid instead of the required twenty percent of the basic bid plus the additive alternative items. Since Brown & Sons was the next lowest bidder, the Air Force awarded the contract to them. Brown immediately placed purchase orders and subcontracts in the amount of \$265,000. Meanwhile, the rejected low bidder made a successful protest to the Comptroller General. The Comptroller ruled that plaintiff’s award was invalid, and directed the contracting officer to cancel the contract. The plaintiff, Brown, appealed to the Court of Claims which

69. *Id.* at 440.

70. *Id.*

71. *Id.* at 442.

72. *Id.*

73. *College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925).

74. 325 F.2d at 444 (Ct. Cl. 1963).

75. *Id.* at 446.

held that the agent's action in rejecting the low bid and awarding the contract to Brown was not unreasonable. Since the contracting officer knew that the Comptroller General had a policy of considering the bid bond a material element of the invitation, and had strictly enforced bond requirements,⁷⁶ it would appear that the contracting officer's actions were not unreasonable. In this case, however, because of unusual circumstances, the Comptroller General came to a different conclusion.⁷⁷ As neither the Comptroller General nor the court found any fault in the invitation, and the contracting officer's action was not clearly illegal, the court could not say that the plaintiff should be deprived of any recovery. Since there was no contract, the "contractor" was entitled to those damages and costs receivable under a termination for convenience.⁷⁸

Reiner and *Brown* are illustrative of the Court of Claims' position on the result of an improper award. This position, according to Judge Davis in *Reiner*, is different from that which would be applied by the Comptroller General:

This inquiry . . . is not precisely the same as that with which the Comptroller General dealt. Because of his general concern with the proper operation of competitive bidding in government procurement, he can make recommendations and render decisions that as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies.⁷⁹

In other words, for the Court of Claims to declare a contract invalid, the award must be so improper, and so obviously deviate, that few contracting officers would have awarded the contract. Judge Davis claims that the Comptroller General's inquiry is to cancel the contract if "another procedure would have been preferable or better attuned to the aims of the competitive bidding legislation."⁸⁰ The court believes

76. 39 COMP. GEN. 827, 829 (1960); 38 COMP. GEN. 532, 537-39 (1959).

77. "The basis of the Comptroller General's ruling is not entirely clear, but . . . he seems to have treated the inclusion of the requirement that bids be measured by the base proposal as an error or mistake rather than an illegality." *Brown & Sons Elec. Co. v. United States*, 325 F.2d 446, 449 (Ct. Cl. 1963).

78. *Id.* at 450.

79. *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963).

80. *Id.*

that the Comptroller General's interpretation of government contract law on improper awards is too strict to be a judicial test. While the prevailing view was that a contract is void if the deviation is material or major, Judge Davis' view falls somewhat short of that test. The first *Reiner* rule is that, if the contracting officer treats the award as valid, there is a strong presumption in favor of validity, and the illegality must be clear. The second part of the *Reiner* test is that, if the Comptroller General applies his test and disagrees with the contracting officer, directing the agent to cancel, the contract becomes voidable: "the Court sets up one standard apparently justifying the Comptroller General's demand that an award be cancelled and a stricter standard to substantiate the judicial determination that the award is invalid. . . ." ⁸¹ Questions immediately arise. Is the Comptroller General applying a different standard than the Court of Claims and other federal courts have traditionally applied? What should be the consequences of an improper award? Is the Court of Claims criteria advisable? To obtain answers to these questions, it will be helpful to review the decisions of the Comptroller General in the area of improper awards.

THE COMPTROLLER GENERAL

It is interesting to note that in recent years the Comptroller General has faced the problem of improper awards more often than the Court of Claims. For example, in one bid protest concerning the procurement of beans for an Indian reservation, ⁸² the agent made a mistake in computing the freight rates. As a result, the contract was actually awarded to the second lowest bidder. After the mistake was discovered the low bidder protested. The Comptroller General ruled that the mistake, if corrected, would not relieve the United States of liability if it cancelled the award. Although the government could probably escape liability, the Comptroller General felt that strict enforcement would be inappropriate since the government insists upon prompt performance of accepted bids or payment of any excess cost for failure to perform, and that the government had made the mistake. "[T]he Government cannot declare a different rule in this matter than that which it enforces in

81. Shnitzer, *Some Limitations on the Validity of Federal Government Contracts Awarded After Formal Advertising*, 25 FED. B.J. 224, 243 n.41 (1965).

82. 17 COMP. GEN. 53, 54 (1937).

its favor against accepted bidders⁸³ . . . therefore, the Comptroller General reinstated the original award.

In another case,⁸⁴ the Air Force advertised for the procurement of bomb racks, using dual delivery schedules which gave bidders who had not produced the items before 525 days to perform, and bidders who had previously furnished the items 105 days to deliver. The award went to a "new" contractor, and one of the experienced bidders protested to Air Force headquarters. The Air Force decided that the invitation should be cancelled, and the requirement readvertised because the variance of 420 days in the bidding schedule did not afford all bidders an equal chance, and destroyed full competition. The Comptroller General disagreed, stating that "instead of price advantage the [Air Force] has chosen to consider the potential advantage of obtaining a new source of supply as an equivalent to a longer delivery time . . ." but using price as a basis for award.⁸⁵ This is legitimate, for the development of new sources of supply is "a material factor in procurement . . ." ⁸⁶ Therefore, since the action was a proper and reasonable exercise of authority, the invitation was not "so contrary to the principles of competitive bidding as to make award of a contract thereunder illegal."⁸⁷

At the first opportunity to consider a situation of improper award since *Reiner*, the Comptroller General contrasted *Reiner* and *Brown*.⁸⁸ In this case, the contracting officer cancelled the contract because the award went to a competitor other than the lowest bidder. The petitioner protested because he had revised the entire set of government drawings after the award in order to begin performance on the contract. The contractor demanded at least the value expended for the work on the drawings, but the government disclaimed any recovery in that no tangible benefit was received. The contracting officer's award of the contract was held to be clearly erroneous by the Comptroller General who voided the contract. By clearly exceeding his authority in awarding the contract contrary to the provisions of 10 U.S.C. 2305(c),⁸⁹ the agent's action could not be considered "reasonable." It is noteworthy that the Comptroller General was applying the principles of *Prestex v. United*

83. *Id.* at 54-55.

84. 41 COMP. GEN. 788 (1962).

85. *Id.* at 791.

86. *Id.*

87. *Id.* at 792.

88. 44 COMP. GEN. 221 (1964).

89. 36 COMP. GEN. 94 (1956).

*States*⁹⁰ in that the contract was said to be void primarily because the contract was still executory upon cancellation.⁹¹ The Comptroller General believed that even the Court of Claims would find this contract "a legal nullity."⁹²

VOID v. VOIDABLE

After analysis, it is difficult to understand why the Comptroller General's position would not be identical to that of the Court of Claims. Both *Reiner* and *Brown*, holding contracts based upon improper awards voidable, however, were appealed from contrary decisions of the Comptroller General.⁹³ The Comptroller General attempted to resolve this inconsistency:

We therefore believe that any variations in the standards which may be applied by our office and by the Court of Claims in determining the enforceability of a contract already awarded result from occasionally differing interpretations of governing statutes and regulations, or different factual conclusions, rather than from any differences in the scope of our respective objectives.⁹⁴

It would appear, however, that Judge Davis has set up different standards; one for the Court of Claims, another for cases appealed from the Comptroller General.⁹⁵ Judge Davis in *Reiner* did not clearly establish that the Comptroller General would always evaluate an improper award situation with the purpose of sponsoring and encouraging the "observance of higher standards by the procuring agencies."⁹⁶ The Comptroller General's characterization of his responsibility under the law is that:

Where a bid acceptance is proposed but not yet consummated by a procuring agency and our Office considers such acceptance undesirable, we may recommend or direct such action as we believe is required by the public policy expressed in applicable statutory enactments to preserve the integrity of the competitive bidding system. However, the sanction for any decision by this

90. 320 F.2d 367 (Ct. Cl. 1963).

91. 44 COMP. GEN. 221, 224 (1964).

92. *Id.*

93. *John Reiner & Co. v. United States*, 325 F.2d 438, 439 (Ct. Cl. 1963); *Brown & Son Electric Co. v. United States*, 325 F.2d 446, 448 (Ct. Cl. 1963).

94. 44 COMP. GEN. 221, 223 (1964).

95. *Schnitzer*, *supra* note 80.

96. *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963).

Office holding that an accepted bid did not result in a valid contract is our authority under the Budget and Accounting Act, 31 U.S.C. 1, *et seq.*, to disallow credits in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract. We do not employ that sanction if we think a resulting claim would be legally justified and payment could be obtained by instituting judicial proceedings. On the contrary, we will advise the contracting agency and its fiscal officers that credit will not be allowed only where we are convinced that the agency has awarded a contract under procurement standards which a court would find so incompatible with governing statutes and regulations.⁹⁷

In light of this statement, it appears that Judge Davis' characterization of the role of the Comptroller General regarding the improper award of a contract is incorrect at least in the opinion of the Comptroller General.⁹⁸

This view of the Comptroller General is supported by examination of his decisions. Before *Prestex* was appealed to the Court of Claims, the Comptroller General denied recovery on the same grounds as did the Court of Claims.⁹⁹ Additionally, where the court and the Comptroller General have held the contract void, as opposed to voidable, the reasons have been the same: the deviation from the specifications or invitation was major,¹⁰⁰ and this precluded full competition;¹⁰¹ the contracting officer lacked the authority to so contract;¹⁰² and no deliveries or payments were made by either party.¹⁰³ The situations where the Comptroller General has held the contract void include situations where

97. 44 COMP. GEN. 221, 223 (1964).

98. 43 COMP. GEN. 761, 767 (1964).

With respect to the *Reimer* case . . . no more need be said than that we are in complete disagreement with the philosophy [of the Court of Claims] that this office applies higher or different standards than are applied by the courts in determining whether a contract award is illegal.

99. 40 COMP. GEN. 679 (1961).

100. 44 COMP. GEN. 833 (1964); 44 COMP. GEN. 193 (1964).

101. 44 COMP. GEN. 302 (1964).

102. 44 COMP. GEN. 221 (1964).

103. *Prestex Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963); *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957); 44 COMP. GEN. 302 (1964); "the primary question . . . is whether a valid and binding contract was consummated by the acceptance of the bid as qualified. In that connection, it would appear from the record . . . that no work had been performed . . ." 44 COMP. GEN. 193, 194 (1964).

the contracting officer had allowed correction of an error not apparent on the face of the bid, and where he had used arbitrary estimates for bid evaluation purposes which were different from the actual anticipated need.¹⁰⁴ Other examples are where the contractor's bid offered one year's performance while the procurement specified five years performance,¹⁰⁵ or where the specifications were drawn so as to "preclude full and free competition, consistent with the needs of the Government. . . ." ¹⁰⁶ In another case of an invalidated contract, the contractor modified his submitted bid by a letter which was sent before bid opening.¹⁰⁷ This modification of the bid rendered it non-responsive to the invitation, and the bid was rejected.

While the Comptroller General invalidated these contract awards on the ground of improper award, he is nevertheless more likely to treat a contract based on an improper award as voidable, and will accept proffered supplies or services. Even where the deviation is obvious and more than "minor," the Comptroller General will enforce the entire contract if the government has accepted deliveries,¹⁰⁸ or made any payment, or if the need is urgent,¹⁰⁹ or if costs would be increased.¹¹⁰ Applying the *Reimer* standards to these cases would lead to the conclusion that Judge Davis' characterization of the Comptroller General's reaction in this area as strict compliance with regulations was misplaced. In the *Prestex* case, in determining whether the contract was void or voidable, both the Comptroller General and the Court of Claims considered it significant that the invalidity was clear and the contract was still executory.¹¹¹ Since Judge Davis participated in the *Prestex* decision, it is clear that, at least on those facts, the Court of Claims and the Comptroller General concur. The difference between the two forums seems to be the equitable argument by which they seek to justify exceptions to the rules of government contracts. While the Court of Claims appears to favor the contractor, the Comptroller General favors the United States but seems to be sympathetic to the problems of the contracting officers.

In analyzing the *Reimer* tests, another important factor is the lack of a

104. 42 COMP. GEN. 257 (1962).

105. 44 COMP. GEN. 302, 305 (1964).

106. *Id.*

107. 44 COMP. GEN. 193 (1964).

108. 42 COMP. GEN. 737 (1963); 41 COMP. GEN. 599 (1962); 37 COMP. GEN. 190 (1957).

109. 45 COMP. GEN. 71 (1965); 41 COMP. GEN. 242 (1961).

110. 44 COMP. GEN. 204 (1964).

111. 320 F.2d 367 (Ct. Cl. 1963); 40 COMP. GEN. 679 (1961).

close appellate relationship between the Court of Claims and the Comptroller General. One is not superior to the other; they are two avenues for the contractor to pursue to the same result. The Court of Claims, like other federal courts, has no jurisdiction until the contractor's administrative remedies are exhausted,¹¹² and the Comptroller General, at least at the award stage, provides one of the principal administrative remedies.¹¹³ While the two tribunals have no more than persuasive effect upon each other, a disagreement between them can cause confusion when government agents try to apply the decisions. This lack of uniformity of decision will also encourage contractors to appeal an adverse decision of the Comptroller General, thus making any decisions by that tribunal merely tentative, and thereby defeating the purposes of the administrative procedures.

CONCLUSION

The rule that has been applied consistently by the Comptroller General is the correct rule; moreover, the rule might be stated as whether or not a contract is void or voidable depends upon the "degree of illegality" and the circumstances surrounding the procurement.¹¹⁴ If the illegality is not clear, and the article procured has been accepted, consumed, or paid for,¹¹⁵ the contract is voidable.¹¹⁶ If not, it is void. Heretofore, the inquiries concerning improper award of advertised procurements were limited to whether the action was a major deviation from the statutory authority: if the deviation on an invitation of bid was serious enough to affect price, quality, or quantity, the contracting officer was required to cancel the contract.¹¹⁷ With the *Reimer* standard, the test is that if any contracting officer feels the award is proper, then it is

112. *United States v. Blair*, 321 U.S. 730, 736-37 (1944). For a capsulized description of contractor remedies, see Witte, *Protesting the Award of Government Contracts*, 12 *PRAC. LAW.*, March 1966, at 59.

113. 31 U.S.C. § 71 (1964). Cf. *Oakland Truck Sales Inc.*, ASBCA No. 778 (21 May 1952) (ASBCA stands for Armed Services Board of Contract Appeals). The remedy for minor bid informalities is ASPR 2-405, 32 C.F.R. § 2.405 (1969).

114. 44 *COMP. GEN.* 221 (1964).

115. "However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits . . ." *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963).

116. 320 F.2d 367 (Ct. Cl. 1963); 45 *COMP. GEN.* 71 (1965); 44 *COMP. GEN.* 221 (1964).

117. *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957); 44 *COMP. GEN.* 883 (1964); 44 *COMP. GEN.* 302 (1964); 44 *COMP. GEN.* 193 (1964).

probably valid.¹¹⁸ Such a standard is too subjective and leaves the individual contracting officer without a necessary ascertainable standard on which to base decisions. The Court of Claims' standard is achieved at the expense of the preservation of the integrity of the bidding system.

Since *Reiner* and *Brown* offer no definite test for either party, they are inadequate for use in government contracting. Even if the Comptroller General's standard, which the writer believes is fair and predictable to both sides, is more strict than the Court of Claims believes it should be, its presence is a means of forcing the contracting officer to resolve those problems that lead to waste and inefficiency in government purchasing such as stilted procurement prose,¹¹⁹ brand name or equal specifications,¹²⁰ and ambiguous award statements.¹²¹ Failure to determine contracts to be void until an illegality is clear might eventually destroy a contracting officer's incentive to turn out an adequate bid package, thus undermining the purpose of the procurement statutes.¹²²

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118. *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963).

119. *Id.* at 441.

120. 41 COMP. GEN. 242 (1961).

121. 36 COMP. GEN. 380, 385 (1956).

122. In his article Shnitzer contends that *Reiner* seems to be an equitable doctrine and can be squared with *Prestex*. However, he admits that this contention is somewhat strained and that there is an abundance of authority to the contrary. Conceding that it is difficult to reconcile *Brown* and *Reiner* with other cases on improper award, Shnitzer states:

The chief objection to the judicial standard . . . is that it completely ignores the prime purpose of the advertising statutes: to protect the interests of the United States. . . . If contracting officers may in exceeding [their statutory] . . . limits, whether in good faith or otherwise, nevertheless bind the sovereign, the protection intended to be provided by law is reduced, and worse, a Government employee has in effect nullified, for that moment at least, an Act of Congress. *Supra* note 80, at 237.