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ADMINISTRATIVE DISCRETION IN THE AWARD OF FEDERAL CONTRACTS

*Arthur S. Miller**

ONE result of the recent tremendous increase in national governmental activities is the growth in importance of federal purchases. Emerging from a relatively insignificant position, those purchases are today one of the most important national economic factors.¹ Purchases by the military establishment alone have a far-reaching effect on the national economy. "For over a decade, military appropriations and expenditures have been the principal exogenous factors affecting the levels of employment, output, and expenditure in the economy," an economist observed in 1951.² And with the enhanced importance of federal procurement, the technique of purchase—the government contract—has taken on a highly significant role. Not only are large segments of American business dependent, at least in part, on the award of federal contracts for their very livelihood, but the government contract has been frequently utilized as an instrument of social control.³ Federal contracts thus have both a buying and a social function; and it seems to be entirely accurate to characterize them as "an institution playing a major part in the economic, social, and political life of the nation. . . ."⁴

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¹ Compare a recent statement of Chief Justice Arthur T. Vanderbilt: ". . . [F]ederal purchases are coming to dominate the national economy. Of our gross national product in 1929 of \$103.8 billion, purchases of goods and services by state and local governments accounted for 6.9%, the federal government merely 1.3%; but of our \$327.8 billion of gross national product in 1951 the state and local governments accounted for only 6%, the federal government 12.7%. In other words, in the span of 22 years the direct effect of purchases by state and local governments fell off about 14%, while that of the federal government mounted almost 1000%." VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 64 (1953).

² J. P. Miller, "Military Procurement Policies: World War II and Today," 42 *AM. ECON. REV.*, PAPERS AND PROCEEDINGS, No. 2, p. 453 (May 1952).

³ For a discussion, see the present writer's recent article, Miller, "Government Contracts and Social Control: A Preliminary Inquiry," 41 *VA. L. REV.* 27 (1955).

⁴ Braucher, Book Review, 3 *J. PUB. L.* 247 at 248 (1954).

If what has been said has any validity, then it becomes important to determine the basic principles governing award of those contracts. Of particular importance is the extent to which the government is free to choose those with whom it will contract. For the social and economic importance of federal purchases generally and the dependence of many firms on government business in order to stay financially viable would seem to require that award of contracts should not be left to the whim or uncontrolled discretion of procurement officers. This article will discuss aspects of contract award by federal procurement officials, attention being given both to the general question of freedom of procurement officers to choose or reject firms as potential contractors and to the specific question of the power of the procurement agencies to "blacklist" certain business concerns. Since the military establishment is the largest purchaser and also has the most detailed set of procurement regulations, references to practices and procedures of the government will be to those followed by the Department of Defense, unless otherwise noted.

To place the government contract in its proper perspective, it may be well at the outset to sketch briefly certain developments in private contracting. The very essence of traditional contracting between private individuals is that an individual has freedom of choice in making an agreement. The core of contract, at least historically, is that one may choose the other party with whom he deals and, at the same time, has a large area of maneuver in which dickering over terms may take place.⁵

That concept must now be qualified. For little doubt exists that there is a large difference between contract law in theory and as it appears in the textbooks and the "agreement process" as it actually operates in the community.⁶ The consensual nature of "agreement" becomes, on realistic analysis, something other than consent in important areas where contract is used. In those areas, the act of consent is not to terms bargained over and agreed to by equals. It is an act of submission to one in a superior position. The relationship between the parties, thus, is often one of *power*, not contract in its traditional sense. In many of the transactions between individuals in society, it is ap-

⁵ Compare this statement: ". . . [t]he two primary aspects of liberty of contract [are] (1) there can be no contracts by compulsion, and (2) the parties are free as to the content of their contracts." KESSLER AND SHARP, *CONTRACTS: CASES AND MATERIALS* 36 (1953).

⁶ It has been noted that there is "a pathetic contrast between the law of contract as it is taught in most textbooks, and modern contract as it functions in society." FRIEDMANN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* 34 (1951).

parent that freedom of choice has been significantly narrowed, so much so that often the choice one has is not between alternative means to attain an end or to fulfill a desire. Rather, the choice is to contract in a standardized "no bargaining" atmosphere or not to contract at all. While it is usually possible to select the other party (although this is not always true), under many agreements which the law calls "contracts" there is no bargaining, no dickering over terms. Freedom of choice has thus degenerated to the freedom to choose from among those able to exert a dominating power from a superior bargaining position.

All of this is illustrated by the fact that many so-called contracts have become "compulsory" or "standardized" or have become "contracts of adhesion."⁷ Examples where individual choice plays little or no part are easily found: in insurance agreements, in conditional sales, in public utility sales, in collective bargaining agreements (here the individual worker has given up his bargaining to the more powerful group, the union). American law subsumes these and similar agreements under the generic term "contract," but the relationship, again, is not that, but one of power involving an act of submission.⁸ Traditional contract law still speaks in terms of private volition, of complete freedom of choice. But in actual operation, something quite different often appears in the form of "a counterprinciple of control over private volition."⁹ Not entirely, of course, for as Roscoe Pound has pointed out, "We have gone no further in America than supplementing the law of contracts. We have not wholly discarded it."¹⁰

This development has significance as a background against which the government contract may be viewed. For it has often been stated

⁷ For discussions of the various aspects of the changing nature of contracts, see Isaacs, "The Standardizing of Contracts," 27 *YALE L.J.* 34 (1917); Pound, "The New Feudalism," 16 *A.B.A.J.* 553 (1930); Lenhoff, "The Scope of Compulsory Contracts Proper," 43 *COL. L. REV.* 586 (1943); Patterson, "Compulsory Contracts in the Crystal Ball," 43 *COL. L. REV.* 731 (1943); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," 43 *COL. L. REV.* 629 (1943); Llewellyn, "What Price Contract?—An Essay in Perspective," 40 *YALE L.J.* 704 (1931); Kahn-Freund, Introduction, in *RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* (1949).

It may be well to indicate that the point to be noted here is not that increasing standardization of contracts is either "good" or "bad" per se, but the fact that modern transactions called "contracts" often vary significantly from what was traditionally viewed as contractual agreements. The modern agreement, even if standardized, is certainly a convenient and perhaps a necessary method of operating in an industrial society. Cf. COHEN, *LAW AND THE SOCIAL ORDER* 107 et seq. (1933).

⁸ Cf. Kahn-Freund, Introduction, in *RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* (1949).

⁹ KESSLER AND SHARP, *CONTRACTS: CASES AND MATERIALS* 36-37 (1953).

¹⁰ Pound, "The Rule of Law and the Modern Social Welfare State," 7 *VAND. L. REV.* 1 at 8 (1953).

by courts that the contracts of the federal government are to be construed and interpreted in accordance with the same principles as those controlling contracts between private individuals. An example of this came in 1947 when the United States Supreme Court said: "It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law."¹¹ (Just what "general contract law" means was left unsaid by the majority of the Court. However, Justice Black, in dissenting, made much of the ambiguous nature of the term.) In 1954 the Court of Claims reaffirmed that position in this fashion: "... In the absence of some applicable federal statute to the contrary, the Government, when it contracts with its citizens, subjects itself to the same rules of law that govern private individuals."¹² Such broad statements leave much to be desired and, in fact, do little to solve knotty problems in the construction of federal contracts. But the quoted statements are typical and serve to point up some basis for comparing those contracts with those of private individuals.

The basic principles guiding government procurement are set out in legislation enacted by Congress over the years, in court decisions, and in administrative decisions (chiefly those of the Comptroller General of the United States). For the military departments, the Armed Services Procurement Act of 1947¹³ is the chief legislative statement, although other statutes have importance in relatively limited areas. For the other procurement agencies, no such systematic statutory statement has been made. Their procedures are governed, so far as Congress is concerned, by a series of relatively helter-skelter enactments, chiefly Revised Statute 3709.¹⁴ In addition, the General Services Administration has been invested with authority to prescribe rules and regulations governing procurement by the nonmilitary agencies.¹⁵ Court decisions, principally those of the Court of Claims and the lower fed-

¹¹ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 at 411, 68 S.Ct. 123 (1947). Compare *United States v. Bostwick*, 94 U.S. 53 at 66 (1876): "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf."

¹² *Hughes Transportation, Inc. v. United States*, (Ct. Cl. 1954) 121 F. Supp. 212 at 228.

¹³ 62 Stat. L. 21 (1948), 41 U.S.C. (1952) §151 et seq.

¹⁴ Originally enacted in 1861, the present statute is set out in 41 U.S.C. (1952) §5, the pertinent part of which reads as follows: "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made . . . only after advertising a sufficient time previously for proposals. . . ."

¹⁵ Pursuant to §201 of the Federal Property and Administrative Service Acts of 1949, 63 Stat. L. 383 (1949), 40 U.S.C. (1952) §481.

eral courts, also play an important part. But the judicial role is overshadowed in this area by the General Accounting Office, which has built on its statutory mandate with the result that it has become the most pervasive influence on the procuring agencies.¹⁶

Whatever law is applied by courts and agencies construing government contracts, it is clear that the national government, while contracting, operates from a superior bargaining position. This enables it to impose its desires, to a large extent at least, upon its contractors. The "agreement" process in contracting with the federal government is only partially consensual. Significant aspects of the agreements are representative of an act of submission to the superior power of the government. In like fashion, then, to many contracts between private individuals, contracts of the United States usually contain major areas where the agreement is purely nonconsensual. No bargaining takes place, for example, over such contract clauses as that imposing minimum labor standards on the contractor or that requiring him to "buy American" or that giving the government a unilateral right of termination.¹⁷ The principal area of maneuver, in which some dickering may take place, is in the price field, and the determination of the firm to get the award usually involves price considerations to the exclusion of other factors.¹⁸ ("Sole source" situations may alter that statement to the extent that the government may be willing to bend and alter normal procedures if a contractor, who is the only source of some required item, is obdurate and refuses to take the contract unless those procedures are changed to his liking. To that extent, a "sole source" reverses the normal situation and approaches the government at least on an equal plane, if not from a superior position. Power being roughly equal, the sole source may force desired modifications in terms and conditions imposed upon other contractors not so fortunately situated.)

¹⁶ The main apparent aim of the Comptroller General is that of saving money for the government. But the activities of the General Accounting Office may have their unfortunate results. "While the General Accounting Office has without doubt done much to insure care and honesty upon the part of federal purchasing agencies and industry, the rulings of the Comptroller General have often interfered with expeditious and efficient purchasing practices." J. P. MILLER, *PRICING OF MILITARY PROCUREMENTS* 29 (1949). See also, Ramey and Erlewine, "Mistakes and Bailouts of Suppliers under Government Contracts and Subcontracts—A Study of Doctrine, Practice and Adhesions," 39 *CORN. L.Q.* 634 (1954).

¹⁷ For a general discussion of contract clauses in government contracts, see LUPTON, *GOVERNMENT CONTRACTS SIMPLIFIED*, c. 5 (1953). Risik, "Federal Government Contract Clauses and Forms," 23 *GEO. WASH. L. REV.* 125 (1954).

¹⁸ This is true in the case of "negotiated" as well as "advertised" procurements, but more so in the latter type.

For our present purposes, the point to be seen is that while this article is inquiring into the question of choice of contractor, the government is largely in control of the other chief attribute of traditional liberty of contract: the terms and conditions of the contract itself. We may thus summarize a first conclusion in the inquiry under consideration in this manner: *the government is under no restraint as to many of the terms and conditions of its contracts and may impose those conditions it deems necessary.* These are imposed as a result of a statute (an example of the Walsh-Healey Public Contracts Act) or an executive order (for example, the nondiscrimination in employment clause) or administrative regulation (one of the more important is that allowing termination of the contract for "convenience of the government"). The Supreme Court has furnished explicit support for that conclusion: "Like private individuals and businesses, the Government enjoys the unrestricted power . . . to fix the terms and conditions upon which it will make needed purchases."¹⁹ What limitations, if any, exist as to choice of contractor by federal procurement agencies? This half of the traditional liberty of contract concept is not so easily answered.

I. A BIDDER MUST BE "RESPONSIBLE"

One way of looking at the question under inquiry is to ask this question: when, and under what circumstances, may a contracting officer refuse to do business with a particular firm? A complete answer to that question should reveal the fundamental principles governing choice of contractor by the government.

At the outset it should be noted that Congress has insisted that it be a fundamental proposition of government purchasing that competition be obtained, if at all possible, before award of a contract. This principle finds expression, for example, in the Armed Services Procurement Act of 1947, section 3(a) of which directs that the basic method of procurement is that of formally advertising the proposed purchase. Under this system sealed bids are received and award made to the lowest responsible bidder. The advertising is to be conducted in a manner which will permit "full and free competition . . . consistent with the procurement of types of supplies and services necessary to meet . . . requirements. . . ."²⁰

¹⁹ Perkins v. Lukens Steel Co., 310 U.S. 113 at 127, 60 S.Ct. 869 (1940). The present status of this case may be doubtful. See discussion on pp. 803-804 *infra*.

²⁰ 62 Stat. L. 22-23 (1948), 41 U.S.C. (1952) §152(a).

Congress, however, made provision for procurement without use of the sealed bid system by allowing use of the relatively informal "negotiation" procedure in specific instances. In seventeen exceptions set out in the Armed Services Procurement Act, formal advertising need not be utilized. The key exception here is that in section 2(c)(1), allowing blanket use of negotiation techniques in times of national emergency. In effect a word of art, negotiation is perhaps best definable as the procedure followed when contracts are awarded after less formalized methods; greater flexibility is possible since the stringent requirements which have developed in formal advertising need not be followed.

Inherent inadequacies in the formal bid system²¹ plus the presidential declaration of national emergency in December 1950, which allowed blanket use of section 2(c)(1), has resulted in the great majority of military contracts since 1950 being awarded after negotiation.²² To a large extent, the congressional mandate in this regard has been superseded by administrative determination. The act contemplates that the great volume of purchases would be made under the sealed bid system. Probably Congress did not visualize that the emergency declared following the outbreak of hostilities in Korea would continue in effect long after the cessation of combat. Probably, also, the shortcomings of the formal bid system will continue to result in the widespread use of negotiation with its greater flexibility and capacity for use in any situation.

While different stricter rules and regulations apply for the award of contracts under formal advertising procedures than for those awarded following negotiation techniques, for present purposes no differentiation need be made. The question under inquiry may be developed and conclusions drawn without regard to the procedure followed.²³

A second conclusion may be stated in this fashion: *a firm must be a responsible bidder in order to receive award of a federal contract.*

²¹ See J. P. Miller, "Military Procurement Policies: World War II and Today," 42 AM. ECON. REV., Papers and Proceedings, No. 2, p. 453 (May 1952).

²² In the fiscal year ending June 30, 1954, for example, the Department of Defense entered into 2,792,473 procurement actions within the United States. Of these, 2,590,345 were negotiated (92.8%) and 202,128 (7.2%) were advertised. The net value of military prime contracts awarded in the same period within the United States was \$11.7 billion, of which \$9.9 billion represented negotiated contracts and \$1.8 billion advertised contracts. See Report of Assistant Secretary of Defense (Supply and Logistics) entitled: "Military Prime Contracts with Small Business," dated 27 October 1954.

²³ And it makes no difference for the present discussion that the final contract may be "fixed price," "cost-plus-fixed-fee," or whatever other type is decided upon by the procurement officials.

Military contracts, by statute, are to be made to that "responsible bidder whose bid . . . will be most advantageous to the Government, price and other factors considered. . . ." ²⁴ That is a statutory requirement of what had been case law. ²⁵

Who, then, is a responsible bidder? It has been said that the term "responsible" means "something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity." ²⁶ This statement of the criteria of responsibility finds similar expression in the administrative regulations implementing the Armed Services Procurement Act. Paragraphs 2-406.1 and 1-307 of the Armed Services Procurement Regulation (ASPR) indicate that the matters to be considered in deciding whether a potential supplier is responsible include (a) the status of the bidder as a manufacturer or regular dealer, (b) financial responsibility, (c) skill and experience, and (d) prior conduct and performance. ²⁷

Decision as to who is or is not a responsible bidder is made by the individual procurement officer, operating under internal administrative directives issued by the agency whose employee he is. To aid that officer in making that determination, it is not unusual for a so-called "business clearance" or "facility capability report" to be made. Mandatory for military buying, under such a procedure the firm in question is surveyed by a team of experts and its capacity to produce analyzed. A judgment is then made of its ability to perform the proposed contract in the required time and in consonance with the desired quality standards. Failure to meet any of the criteria for responsibility will normally result in the denial of a contract, even in those cases where the firm in question has submitted the lowest price. This foreknowledge is an

²⁴ 62 Stat. L. 23 (1948), 41 U.S.C. (1952) §152(b).

²⁵ See, e.g., *O'Brien v. Carney*, (D.C. Mass. 1934) 6 F. Supp. 761; *Scott v. United States*, 44 Ct. Cl. 524 (1909); 20 Comp. Gen. 862 (1941). "The question whether a particular bidder is a 'responsible bidder' requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors." S. Rep. 571, 80th Cong., 2d sess. (1947), reprinted in 2 U.S. Code Cong. Serv. 1048 at 1064 (1948).

²⁶ *O'Brien v. Carney*, (D.C. Mass. 1934) 6 F. Supp. 761 at 762.

²⁷ The Armed Services Procurement Regulation (hereinafter cited ASPR) is published in the *Federal Register* and the *Code of Federal Regulations*. Both of those sources are usually months in arrears. A handier, though unofficial, source which keeps up-to-date with new developments is CCH, *Government Contracts Reporter*, a loose-leaf service. Paragraph 2-406.1 of the Armed Services Procurement Regulation appears at 32 C.F.R. §400 (1952), 1A CCH, GOVT. CONTRACTS REP. ¶29,086 (1954).

ASPR 2-406.3 lists the following as other factors besides price that may be considered in making an award: judgment, skill, and integrity of a bidder; reputation and experience of a bidder; foreseeable costs or delays attributable to differences in manufacturing methods; changes requested by the bidder; restrictions or conditions imposed in the bid; and possible advantages that might result from making multiple awards.

educated guess of capability; it provides the basis for the elimination of certain firms from consideration for contract award. That determination, however, is often difficult to make.

The criterion of manufacturer or regular dealer probably causes least trouble. The Walsh-Healey Public Contracts Act contains a similar provision which limits award of contracts for supplies over \$10,000 in amount to manufacturers or regular dealers. Under that statute the Secretary of Labor regularly issues determinations that certain firms do not meet the standards to qualify as either. The job of the procurement officer is simplified since, for most purposes at least, he need only check the list of firms so designated by the Secretary of Labor.²⁸

But more difficulty is involved in cases of alleged financial inadequacy. Ways exist to cure some such inadequacies. While it is certainly not desirable to award a contract to a firm lacking sufficient financial resources to complete it, still the cost to the government may be significantly increased if award is made to other than the lowest bidder. An additional judgment thus is in order: will alternative procedures, such as the requirement of a performance bond, adequately protect the interests of the government? If so, then perhaps the financial weakness should be waived.²⁹ But performance bonds do not, if default is made, give delivery of the desired items; for the military at least, this is often all-important. In that case, the procurement officer will often explore the possibility of government financing, particularly along the line of progress payments or advance payments, and thus curing the firm's financial troubles.³⁰ A government-sponsored loan is another possibility, one made, for example, by the Small Business Administration.³¹ For major prime contractors, such as large airplane manufacturers, still other financial arrangements may be made.³²

²⁸ See LUPTON, *GOVERNMENT CONTRACTS SIMPLIFIED* 195, 299 (1953) for a brief discussion of the manufacturer-regular dealer requirement. And see 10 Comp. Gen. 314 (1931) for a ruling that "advertisements for supplies . . . may properly limit competition to manufacturers of, or regular dealers in, such supplies. . . ." Definitions of the Secretary of Labor of manufacturers and regular dealers may be found in 3 CCH LAB. LAW REP. ¶26,200 (1953).

²⁹ Cf. 6 Comp. Gen. 557 (1927); 13 Comp. Gen. 274 (1934).

³⁰ See 18 Comp. Gen. 330 (1938).

³¹ Authorized in the Small Business Act of 1953, 67 Stat. L. 233, 15 U.S.C. (Supp. I, 1954) §§631-633.

³² For a description of one such financial arrangement, see Cary, "Government Financing of Essential Contractors: The Reorganization of the Glenn L. Martin Company," 66 HARV. L. REV. 834 (1953).

Over that hurdle, the element of skill and experience still causes major difficulty. Here, as in cases of financial irresponsibility, the nature and magnitude of the subject matter of the contract may be an important consideration. Contracts for research and development and for items of technological complexity must go to those companies which have demonstrated their ability to do the required work. But performance bonds can be used to protect against nonperformance in the routine procurement. The result is that except in contracts involving unusual technical skills, little authority exists for further limiting competition by eliminating firms under this criterion.³³ The interest of obtaining needed supplies at the most economical price will outweigh lack of previous experience in most, if not all, contracts involving work not calling for unusual skills.³⁴ Again, however, the military services are not interested in recovery under performance bonds; rather, they desire the timely delivery of needed equipment.

Past unsatisfactory service by a contractor will not ordinarily be considered adequate cause for the rejection of a low bid from an otherwise responsible bidder. A default, for example, on a previous contract will not allow refusal of the award of a new contract.³⁵ On the other hand, repeated failures to perform or repeated attempts to avoid proper performance of work may serve to justify rejection of the lowest bid.³⁶ And a bidder's reputation and his ethics may be grounds for refusing to do business with him.³⁷

In broad general terms the foregoing outline develops the requirement of responsibility for a firm to be eligible to receive a federal contract. One additional question is of interest in that connection: to what extent, if at all, is administrative discretion in determining the lowest responsible bidder subject to judicial review? Discussion of this ques-

³³ See 6 Comp. Gen. 210 (1926); 6 Comp. Gen. 557 (1927); 20 Comp. Gen. 862 (1941); 30 Comp. Gen. 235 (1950).

³⁴ See 14 Comp. Gen. 305 (1934); 8 Comp. Gen. 252 (1928); 7 Comp. Gen. 181 (1927). Cf. 27 Comp. Gen. 343 (1947).

³⁵ Cf. 25 Comp. Gen. 859 (1946); and see 7 Comp. Gen. 547 (1928); 1 Comp. Gen. 304 (1921).

³⁶ See Comp. Gen. Dec. A-70057 (Feb. 1, 1936) (unpublished). See, also, ASPR 1-604.1, allowing debarment of a bidder for a history of failure to perform or of unsatisfactory performance on one or more contracts. 1A CCH, GOVT. CONTRACTS REP. ¶29,049E (1955).

³⁷ The Facility Capability Report of the Air Force is an example. One of the questions to be answered by the survey team is: Are the business practices of the firm considered satisfactory insofar as is known or can be determined without benefit of a complete investigation? See DEPT. OF THE AIR FORCE, AIR FORCE PROCUREMENT INSTRUCTIONS ¶52-103 (1954).

tion will be undertaken more fully below; suffice it at this time to say that an extremely broad discretion is exercised by the buying agency in the determination and that that discretion has not as yet been subjected to judicial second-guessing. This coincides with the apparent congressional intent.³⁸ Some relief may be available, however, to a disappointed bidder in the form of a protest lodged with the Comptroller General. That official will entertain a protest against award and make a decision as to the propriety of the rejection of complainant's bid.³⁹

II. SOME OTHER FACTORS LIMITING COMPETITION

Many other considerations go into the award of military contracts. For example, the procurement officer usually must buy from a domestic, i.e., American, firm to the exclusion of a foreign bidder (or an American import firm handling foreign-made products) unless the prices of the domestic firms are clearly unreasonable.⁴⁰ Congress has often stated its policy of insuring that small business obtain a fair share of government spending; in some instances, thus, a firm termed "big" will be denied an opportunity to get a contract.⁴¹ Geographical areas where a condition of substantial unemployment exists may be favored under Defense Manpower Policy No. 4, with the result that firms in those areas will be awarded contracts provided that they can meet the price of firms from outside those areas.⁴² Dispersal of industry, the desirability of developing additional sources for the production of critical items, and the avoidance of concentration of contracts in a few suppliers are other policies which may, in particular instances, serve to limit competition.⁴³

³⁸ See *O'Brien v. Carney*, (D.C. Mass. 1934) 6 F. Supp. 761; *Walter P. Villere Co. v. Blinn*, (5th Cir. 1946) 156 F. (2d) 914.

³⁹ See 32 Comp. Gen. 251 (1952); 16 Comp. Gen. 497 (1936); 13 Comp. Gen. 315 (1934).

⁴⁰ Required by the Buy American Act, 47 Stat. L. 1520 (1933), as amended, 41 U.S.C. (1952) §§10a-d, and other legislation incorporating the anti-foreign principle. Section VI of the ASPR contains a statement of the prohibitions. See 1A CCH, *Govt. CONTRACTS REP.* ¶¶29,300 to 29,323 (1954). See also 30 Comp. Gen. 384 (1951).

⁴¹ An example is §2(b) of the Armed Services Procurement Act of 1947, a portion of which reads as follows: "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts . . . for the Government shall be placed with small business concerns." 62 Stat. L. 21 (1948), 41 U.S.C. (1952) §151(b). See 31 Comp. Gen. 347 (1952); 30 Comp. Gen. 441 (1951); 28 Comp. Gen. 662 (1949).

⁴² Defense Manpower Policy No. 4 was promulgated February 7, 1952. 17 *FED. REG.* 1195 (1952). For the present form of the policy and its implementation, see 1 CCH, *Govt. CONTRACTS REP.* ¶2261.

⁴³ On December 7, 1954, the Secretary of Defense directed the military services to procure equipment and supplies in accordance with the following criteria: (a) maintaining multiple sources of supply; (b) geographic dispersal; (c) avoidance of undue concentration

Most, perhaps all, of those situations are inconsistent with what is perhaps the most fundamental principle of government procurement: that of getting the required goods at a decent price at the time desired.⁴⁴ In each instance a policy objective is furthered at the expense of normal procurement goals. A third statement may, accordingly, be summarized in this fashion: *certain firms may be denied contracts even if otherwise fully qualified and responsible, and other firms awarded those contracts, for reasons which are considered by Congress or the President or the buying agency to override normal procurement objectives.* That, in operation, this may be inconsistent with the second statement made above has not seemed to trouble government officials unduly, including members of Congress.

III. UNRESPONSIVE BIDS

Another category may be made of those situations where the bidder is not responsive to the terms of the invitation for bids. This group involves only formally advertised procurements because defects in proposals in response to the request for proposals by which negotiated procurements are begun may be cured during the process of negotiation.

In contrast to the flexible negotiation procedures, in the formally advertised procurement situation the bidder must adhere rigidly to the terms of the invitation by the government to submit bids or lose out for not being "responsive." A fourth statement may be made, therefore, in this manner: *those firms will be denied contracts which fail to abide by the requirements of the invitation for bids.* And this is true even if the bidder makes an honest mistake or inadvertently overlooks some requirement. Moreover, in event of mistake the result may be that the bidder will be held to the terms of his bid as made and that he will not be allowed to modify or withdraw it.

Several situations illustrate the concept of unresponsiveness in bidding. First of all, a bid may fail to conform to the specifications desired. This means that the bidder must promise to deliver items

of contracts in a few leading suppliers; (d) preservation of essential skilled labor forces; (e) utilization of existing open industrial capacity; (f) preservation of essential management organization and know-how; and (g) a maximum degree of subcontracting. N.Y. TIMES, Dec. 9, 1954, p. 1:7. See 31 Comp. Gen. 279 (1952).

⁴⁴ See J. P. Miller, "Military Procurement Policies: World War II and Today," 42 AM. ECON. REV., PAPERS AND PROCEEDINGS No. 2, p. 453 at 457-458 (May 1952), for a statement of the five major objectives of the military procurement program. Briefly, they are fulfillment of requirements, efficient production, budgetary economy, economic stabilization, and socio-political objectives.

which are not materially at variance with the technical attributes of the required product. In a case, for instance, where the government wanted steel to conform to specification no. 352a and the bidder specified use of steel per specification no. 352, the Comptroller General ruled that award could not be made to the low bidder.⁴⁵

The cases where the bidder fails to conform to the required delivery date furnish a second example of an unresponsive bid. This applies only in procurements where time is of the essence. In those cases and where the invitation so specifies, a bid will not be considered unless delivery of the items is promised within the required time.⁴⁶

A third category is made up of cases where the bid does not conform to essential provisions of the invitation for bids. An example of this came in 1944 when, in reply to an invitation to bid on laundry services, the only bidder deleted the required Eight-Hour Law provision on the mistaken assumption that it had been suspended by the war emergency; the bid was accepted because it was the only bid and the services were urgently required. Nevertheless, the Comptroller General declared the contract to be invalid.⁴⁷

Still another situation authorizing rejection of the low bid as unresponsive arises when improper restrictions or conditions are inserted in the bid of the company. (This situation clearly illustrates the non-consensual nature of significant parts of government contracts: no deviation is allowed from the invitation to contract. A firm does business on the government's terms or it does not get the award.) Such a restriction must, however, be of more than a minor nature; it must be of sufficient substance that "further orderly procedure is uncertain or impossible."⁴⁸ An attempt by a firm to protect itself against such future changes in conditions as increased costs, or an attempt to limit its liability, or an attempt to shift the burden of risk to the government will all allow the contracting officer to reject low bids. The rationale is that to allow the imposition of such conditions would make the government's obligation uncertain or indefinite and would be unfair to other bidders in that a contract accepting such conditions would not be the proposal offered to the other bidders.

⁴⁵ 9 Comp. Gen. 24 (1929). See also 17 Comp. Gen. 554 (1938); 19 Comp. Gen. 662 (1940); 30 Comp. Gen. 179 (1950).

⁴⁶ See *Sequoia Mills v. United States*, 60 Ct. Cl. 985 (1925); 20 Comp. Gen. 4 (1940); 34 Comp. Gen. 24 (1954); 20 Op. Atty. Gen. 496 (1892).

⁴⁷ 24 Comp. Gen. 376 (1944).

⁴⁸ E.g., 20 Comp. Gen. 216 (1940); 20 Comp. Gen. 4 (1940); 17 Comp. Gen. 864 (1938); 15 Comp. Gen. 553 (1935).

IV. INELIGIBLE FIRMS

Discussed above have been the situations which constitute the bulk of cases whereby firms seeking government contracts may be eliminated from competition. Another category exists, however, which involves relatively few would-be contractors but which has features raising some troublesome questions in administrative procedure. The following question indicates the nature of this category: to what extent may a buying agency "blacklist" a business concern? That is to say, may a company be refused a contract for ethical reasons or because its integrity is considered to be substandard? If so, what are the limitations on this power of disqualification?

To begin with, it should be stated that federal buying agencies do exercise power to establish and maintain lists of firms to whom awards will not be made—in other words, to blacklist. In what manner and under what criteria may such blacklisting be exercised?

The term itself is a catch-all colloquialism not particularly descriptive of what in fact takes place when certain firms are disqualified from receiving a federal contract. In practice, the word is not used. Rather, the technical terms of "ineligibility," "debarment," and "suspension," all of which have more precise referents, are in common use. Although no definition of the latter words is to be found in statute or regulation, they refer to different activities under the procedure of disqualification of bidders. Distinctions between them may, on analysis, be more apparent than real; nevertheless, they are used. An example appears in the Armed Services Procurement Regulation, one part of which "prescribes policies and procedures relating to the debarment of bidders . . . , ineligibility of bidders . . . , and the suspension of bidders. . . ."⁴⁹

Firms "ineligible" to receive contracts include those found to have violated the Walsh-Healey Public Contracts Act,⁵⁰ the Davis-Bacon Act,⁵¹ or the Buy American Act,⁵² and those who do not qualify as "manufacturers" or "regular dealers" under the Walsh-Healey Act. Those "debarred" are firms convicted of fraud or other criminal offense in connection with a contract or convicted of a violation of the anti-trust laws. Those "suspended" are those who are suspected of having committed fraud or other criminal offense in connection with a contract.

⁴⁹ ASPR 1-600, reported at 1A CCH GOVT. CONTRACTS REP. ¶29,049A (1955).

⁵⁰ 49 Stat. L. 2038 (1936), 41 U.S.C. (1952) §35.

⁵¹ 46 Stat. L. 1494 (1931), 40 U.S.C. (1952) §276a-2(a).

⁵² 47 Stat. L. 1520 (1933), 41 U.S.C. (1952) §10b(b).

In short, business firms blacklisted fall into one of two general categories: those who have been convicted of violation or of a failure to observe some federal statute and those who are merely suspected of having committed such a violation or failure. Accordingly, a fifth statement may be made: *certain firms may be barred from obtaining—or, perhaps more importantly, from even being considered for—a federal contract where those firms have been convicted of a statutory violation or are suspected of having committed such a violation.*⁵³

"The penalty of blacklisting is so severe that its imposition may destroy a going business."⁵⁴ That being so, the procedure of *how* this action is taken and the question of whether the administrative procedure should be changed seems to be worthy of comment in some detail.

V. DEBARMENT AND INELIGIBILITY

One of the sanctions imposed by Congress in order to insure adherence to the Walsh-Healey, Davis-Bacon and Buy American Acts is the provision made in those statutes for disqualification of violators for a period of three years. One part of the Walsh-Healey Act directs the Comptroller General to distribute a list to all agencies containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by that act.⁵⁵ That statute, in addition, imposes the requirement of being a manufacturer or regular dealer on those firms desiring to contract with the federal government. Under the Davis-Bacon Act, violators are also listed by the Comptroller General after a similar determination by the Secretary of Labor. Buy American Act violators are similarly treated.

In addition to the above-mentioned statutes, federal contractors may run afoul of another group of prohibitions imposed by the Secretary of Labor by regulation. Acting under authority delegated by Congress in

⁵³ Or are, for those contracts within the purview of the Walsh-Healey Act, determined by the Secretary of Labor to be neither a manufacturer nor a regular dealer.

⁵⁴ *ATTY. GEN. COMM. ON AD. PROC., DIVISION OF PUBLIC CONTRACTS 4 (1939)* (mimeographed monograph). As of November 15, 1954, 20 business enterprises and 27 individuals were barred under the Walsh-Healey Act, and 15 firms and 16 individuals under the Davis-Bacon Act. Pursuant to the Secretary of Labor's regulations, noted in note 56 *infra*, as of November 15, 1954, five firms and one individual were on the ineligible list for violations of the Housing Act of 1949, and five firms and six individuals for violations of the Eight-Hour Law. Communication from the Assistant General Counsel, General Accounting Office, to the present writer, dated December 10, 1954.

⁵⁵ See Ball, "Blacklisting Federal Contractors," 28 *WASH. UNIV. L.Q.* 147 (1943), for a discussion of the early practice under the Walsh-Healey Act. See 3 *CCH, LAB. LAW SERV.* ¶26,108 (1953) for reports of decisions by the Labor Department.

Reorganization Plan No. 14 of 1950, the Secretary of Labor has promulgated a set of standards, regulations, and procedures with respect to administration and enforcement by federal agencies of labor standards provisions applicable to contracts covering federally financed and assisted construction.⁵⁶ Under these regulations, which have the same effect as a statute, firms found in willful or aggravated violation of any of eight federal statutes are treated in a fashion similar to those found to have violated the Walsh-Healey or Davis-Bacon Acts.

No other express congressionally-approved provision exists for disqualifying firms from getting federal contracts. However, administrative regulations provide for disqualification in other instances. The key regulation here is that issued by the General Services Administration, entitled "Debarment of Bidders," which provides the basis for further disqualification action by both civilian and military agencies. The regulation notes the aforementioned statutory disqualification, including those imposed by the Secretary of Labor, and then provides as follows (§207.03):

"... Entry shall be made on the debarment and ineligible lists of firms or individuals on the following bases:

"d. Those the executive agency determines to debar administratively for any of the causes and under all of the appropriate conditions listed in subsection 207.05."⁵⁷

Section 5 of the regulation authorizes debarment "in the public interest" for conviction of a criminal offense in obtaining or performing a government contract, conviction of violation of the antitrust laws arising out of submission of bids or proposals, a serious and willful failure to deliver on a previous contract or a history of unsatisfactory performance on previous contracts or violation of the contractual cove-

⁵⁶ Published in the *Federal Register* at 16 FED. REG. 4430 (1951), 16 FED. REG. 11592 (1951), and 17 FED. REG. 11593 (1952); codified at 29A C.F.R. (Supp. 1954) §5. For Reorganization Plan No. 14 of 1950, see 15 FED. REG. 3176 (1950); 63 Stat. L. 207 (1949), 5 U.S.C. (1952) §133Z-15.

The statutes concerned are (1) the Anti-Kickback Act; (2) the Eight-Hour Law; (3) the National Housing Act; (4) the Hospital Survey and Construction Act; (5) the Federal Airport Act; (6) the Housing Act of 1949; (7) the School Survey and Construction Act of 1950; (8) the Defense Housing and Community Facilities and Services Act of 1951. These statutes are cited in 29A C.F.R. (Supp. 1954) §5.

⁵⁷ GSA Reg. 1-II-207.00, issued Jan. 5, 1953, and amended by GSA General Regulation No. 15, dated June 17, 1954. The text references are made to the regulation as amended. According to the letter (No. 1-11, Jan. 5, 1953) transmitting the regulation to the heads of federal agencies, approval was given to its promulgation by the Comptroller General of the United States.

nant against contingent fees, and debarment by some other federal agency. The military departments have followed the provisions of this regulation and provide for debarment in essentially the same terms as those listed.

Restrictions applicable against contractors debarred by the military departments include those of not awarding contracts to or soliciting proposals from those firms, possible termination of existing contracts, and possible withholding of funds due under existing contracts. In addition, in those contracts where the government has reserved the right to approve subcontracts, the award of a subcontract to a debarred firm will be disapproved; in certain cases, this may include "second-tier" subcontracts, that is, sub-subcontracts.

But both the General Services Administration's regulation and the Armed Services Procurement Regulation provide certain administrative safeguards which go far to prevent arbitrary or ill-considered action on the part of procurement officials. Provision is made in the regulations for notification to the affected firm of the action taken and an opportunity afforded to contest the determination administratively. An additional safeguard exists in the opportunity to ask the Comptroller General to intervene should the bid of a debarred contractor be rejected by a contracting officer.

In cases, then, of both ineligibility and debarment, the procurement agencies have built-in administrative machinery which will prevent taking action in secret and which will give the affected concern a chance to know what it is faced with and to contest whatever charges there may be. The final category of blacklisted firms is, however, one where these procedural safeguards do not exist.

VI. SUSPENSION OF CONTRACTORS

The General Services Administration's regulation permits agencies to add additional names to the disqualified list:

"Nothing in this section shall prevent any agency from supplementing the consolidated list with names of firms or individuals administratively determined to be included, in accordance with procedures established by such agency, for causes other than those specifically set forth herein, or from establishing such other lists as any agency, in its discretion, may elect to use."⁵⁸

⁵⁸ GSA Reg. 1-II-207.08 (Jan. 5, 1953).

It is upon this subsection that the military departments apparently rely for authority for the procedure of "suspending" firms suspected of having some species of fraud or other criminal act in connection with obtaining, attempting to obtain, or in the performance of a contract. According to the Armed Services Procurement Regulation, suspension is to be for "a temporary period pending the completion of investigation and such legal proceedings as may ensue." Restrictions to be placed upon the contractor during suspension include nonsolicitation of bids and proposals and possible termination of existing contracts, withholding of funds due on existing contracts, and the disapproval of subcontract awards to such firms. All of this is to be done without notifying the firm.

By summary administrative action, then, which is taken without notice or hearing or opportunity either to know or to contest whatever evidence may motivate the action, a company is abruptly deprived of opportunities to bid, to be paid, or even to know what the trouble is. "A suspended Contractor will not be informed of the prohibitions effected against him," states the military regulation.

But some recognition is given of the far-reaching effect of such action and procurement officials are admonished that suspension is "a drastic action which must be based upon adequate evidence rather than mere accusation" and that the placing of the name of a firm on the suspended list will be for "the purpose of protecting the interest of the Government and not for punishment." Some modification of the prescriptions of the suspension policy are possible when it is determined that a modification would be to the government's interest.⁵⁹

That procedure raises several problems: (a) the source of the authority and the legal basis of suspension action; (b) relief, if any, available to a firm against whom suspension action has been taken; (c) whether the procedure as now in operation meets minimum standards of procedural due process; and (d) whether other procedures could be created to insure that the interests of the government are fully protected on the one hand and that full protection is accorded the individual business enterprise on the other.

⁵⁹ ASPR 1-600 through 1-609 contains not only the regulations for debarment but also for suspension. The quoted matter in the text is taken from these paragraphs. See 1A CCH, GOVT. CONTRACTS REP. ¶¶29,049A to 29,049I (1954).

A. *Authority for Suspension*

No express statutory authority exists for suspension action by the military procurement authorities. At no place in the Armed Services Procurement Act is there even recognition by Congress that summary action of that type may be taken. The legislative history is silent, although the Senate Report does contain language stating that a bidder's reputation may be evaluated in determining responsibility of bidders.⁶⁰ No judicial decision directly on point has been found. However, the Comptroller General, ever-watchful guardian of the tax dollar, has stated that "as a general rule there is no authority for the debarment of bidders and all bids should be received and given consideration on an equal basis."⁶¹ Since suspension action is taken on the basis of *unproved* facts—on a suspicion, not a certainty, of irregularity—it would seem to be an a fortiori case that the Comptroller General would, in a proper case, likewise disapprove of suspension. (Not, be it noted, because of any desire to insure procedural due process, but to save Uncle Sam some money; apparently, it is dollars, not attempts to attain justice, which motivates that office.)

The absence of either statutory or judicial authority for the power to suspend is not, of course, determinative of the question. It would take no farfetched reasoning to establish such a power on rather well-founded grounds. In one sense the question is answered by a dictum in *Perkins v. Lukens Steel Company*,⁶² the case upholding the constitutionality of the Walsh-Healey Act. There the Supreme Court made this oft-quoted statement: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." The Court then held that a contractor had no "standing" to contest an administrative action by the Secretary of Labor. But suspension was not before

⁶⁰ "The question whether a particular bidder is a 'responsible bidder' requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors. The service concerned with the procurement of goods of the type dealt in by the bidder is naturally best qualified to make this evaluation, and broad discretion is accordingly reserved to the service in this respect." S. Rep. 571, 80th Cong., 2d sess., July 16, 1947, published in 2 U.S. Code Cong. Serv. 1048 at 1064 (1948).

⁶¹ 7 Comp. Gen. 547 (1928).

⁶² 310 U.S. 113 at 127, 60 S.Ct. 869 (1940).

the Court in that case, and its present validity has possibly been watered down by subsequent congressional action (see below).

The *Lukens Steel* decision aside, a compelling case may be made for the proposition that suspension power is a necessary derivative from the power granted in the Armed Services Procurement Act to determine responsibility of bidders. In addition to the aforementioned Senate Report's reference to reputation in determining a bidder's responsibility, some recent fairly analogous case material is available. During World War II it was the practice of some of the emergency agencies, notably the Office of Price Administration (OPA) and the War Production Board (WPB), to issue suspension orders for violations of war-time rationing and material-allocation regulations. Such an order resulted in making rationed articles unavailable to the violator, thus creating a most serious situation of depriving the violator of his means of livelihood. Many cases arose as a result of bitter controversy over the procedure, to be decided definitively in 1943 by the Supreme Court in *L. P. Stewart & Bro., Inc. v. Bowles*.⁶³ The action was one to enjoin enforcement of a suspension order by the OPA; the Court limited its decision to the narrow question of whether the statutory power to allocate materials included the power to issue suspension orders and to withhold rationed materials from established violators of ration regulations. After noting that the administrative finding of repeated violations was not challenged, the Court concluded that suspension orders could be issued, even though no statutory authority expressly gave that power.

In like fashion, the congressional mandate to award contracts to "that responsible bidder whose bid is most advantageous to the government, price and other factors considered," of course carries with it the power to determine lack of responsibility. A suspension directive against a firm is, in essence, such a determination. But it has ramifications beyond that type of determination and is far more serious than the normal determination of lack of responsibility.

One considerably older Supreme Court case buttresses the view that a power to suspend exists: in *United States v. Adams*⁶⁴ the Court held that the Secretary of War was legally correct in suspending payment on an existing contract until all of the facts were available to the paying officers and could be evaluated to ascertain the propriety of cer-

⁶³ 322 U.S. 398, 64 S.Ct. 1097 (1944).

⁶⁴ 74 U.S. 463 (1868).

tain payments. Payment on the contract had been held up pending investigation of allegations of fraud committed by Army procurement officers and Adams.

Before, however, power to suspend contractors suspected of fraud may be accorded a legal basis another hurdle must be overcome: whether suspension is "punitive" or "remedial" in nature. Although this is essentially a sterile inquiry, productive more of logic-chopping than meaningful insight into administrative practice, it is a question courts try to answer. The Armed Services Procurement Regulation is careful to point out that suspension "will be for the purposes of protecting the interest of the government and not for punishment," indicating, perhaps, the concern of the drafters of that regulation for that legal hurdle. The doctrine involved has been stated in this fashion: "Administrative imposition of criminal penalties is . . . generally forbidden. But administrative imposition of civil or remedial penalties is commonplace. . . ." ⁶⁵ Here, again, the *Steuart* case provides some authoritative statements. There the Court rejected the firm's arguments that "suspension orders are penalties to which persons will not be subjected unless the statute plainly imposes them" and denied that an order of suspension was a "means of punishment of an offender." Rather, the suspension order was designed "to protect the distribution system and the interests of conservation." In like fashion, present-day suspension of would-be contractors could be viewed not as punishment, but as a system designed to insure that the military procurement dollar is spent properly.

But the *Steuart* case is not on all-fours with the suspension procedures of the military departments. Perhaps more of a "right" is involved in being able to buy and sell commodities in the market than in selling to the government. In that case the administrative finding of repeated violations of the regulations was not challenged on judicial review. Undoubtedly this factor played a large part in the Court's decision.

Enough has been said, perhaps, to indicate that the power of suspension could be held to be within the power of the procurement officials. Whether that power is properly wielded is another question.

B. *Administrative Safeguards*

Assuming, then, that a suspension power exists, is it being conducted with due regard to safeguards against arbitrary or mistaken

⁶⁵ DAVIS, ADMINISTRATIVE LAW 66 (1951).

administrative action? Is there any requirement for procedural due process standards to be adhered to in the determination of a suspension order?

In the absence of congressional action, any due process requirements will, if they are erected at all, have to come from judicial action. Here at the very outset a formidable obstacle is met in the decision in the *Lukens Steel* case to the effect that those who would contract with the government lack "standing" to contest administrative action.⁶⁶ By way of dictum, the Court said that the government "enjoys the unrestricted power . . . to determine those with whom it will deal," and concluded that a firm claiming to be aggrieved by administrative action could not contest the action of the government in its proprietary capacity. If the doctrine of that case is adhered to, then the result would be: summary administrative action, taken *in camera* without notice or opportunity to be heard, is beyond judicial relief. That would be true even though, as the Attorney General's Committee on Administrative Procedure stated, "the penalty of blacklisting is so severe that its imposition may destroy a going business." A strange doctrine, that, in a government supposedly of laws, not of men.

The rationale of the *Lukens Steel* case is based on a privilege-right dichotomy. Contracting with the government was held to fall within the general class of interests called privileges, short of being a "legal right" for the protection of which judicial review is available. Having a privilege only, the contractor has no standing to sue since no legally protected interest is at stake. "Due process," it has been observed, "does not prevent the government from denying bounties or privileges without a hearing. Just as one must have a sufficient 'interest' or must be in the technical sense 'aggrieved' or 'adversely affected' in order to obtain judicial review of administrative action, so one must have a legally recognized interest or right in order to be entitled to participate in an administrative proceeding."⁶⁷

The privilege-right antinomy and the basing of judicial relief on the pigeon-hole containing rights is scarcely a realistic approach to a complex problem of administration. As has been stated by a leading contemporary commentator, an "applicant for . . . a government contract,

⁶⁶ Cf. *Walter P. Villere Co. v. Blinn*, (5th Cir. 1946) 156 F. (2d) 914.

⁶⁷ DAVIS, *ADMINISTRATIVE LAW* 246-247 (1951). Cf. "Despite the unanimity and clarity of the *Lukens Steel* decision, one may still wonder whether a supplier of goods to the Government may never have standing to challenge such an administrative regulation." *Id.* at 682.

whose financial well-being may be wholly dependent on the government grant, [should not be treated any differently than] one declared to be injured in his personal or property 'rights.'"⁶⁸ The dominating influence of government purchases upon the American economy generally and upon individual business enterprises specifically makes the *Lukens Steel* doctrine unreal today. Power of life or death over a firm is within the hands of unrestrained administrative officials; that power, when used, involves more than the deprivation of a grant, benefit, or privilege in the traditional sense.⁶⁹ The "standing" doctrine, if it precludes effective redress for parties the object of suspension action, involves an economic favor of great importance in present-day America. "When the Government's purchases are so great that they dominate the entire economy, the implications of the *Perkins* decision with respect to unreviewable administrative power can hardly be overstated."⁷⁰ The point is not whether the government has or does not have the power to deny award of contracts or whether the award of a contract is or is not a privilege. Rather, it is whether such privileges should be denied to individual business firms without the latter being afforded an opportunity to obtain a judicial decision on the legality or the propriety of such denials. "Absolute discretion," Justice Douglas once remarked, "like corruption, marks the beginning of the end of liberty."⁷¹

At this juncture, it may be well to refer to recent legislation which at least limits, if not overturns, the *Lukens Steel* decision. In 1952 Congress amended the Defense Production Act to provide in part for judicial review of certain determinations under the Walsh-Healey Act:

"Notwithstanding the inclusion of any stipulations required by any provision of this Act in any contract subject to this Act, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market.'"⁷²

⁶⁸ SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 159 (1954).

⁶⁹ This was recognized by the Secretary of Labor early in the history of the administration of the Walsh-Healey Act. That official reportedly was reluctant to invoke the blacklist provisions of the act since blacklisting might destroy a going business and thus defeat one of the purposes of the act by eliminating employment opportunities. Cf. CHAMBERLAIN, DOWLING AND HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 107-109 (1942).

⁷⁰ Nathanson, "Central Issues of American Administrative Law," 45 AM. POL. SCI. REV. 348 at 373 (1951).

⁷¹ In *New York v. United States*, 342 U.S. 882 at 884, 72 S.Ct. 152 (1951).

⁷² 66 Stat. L. 308 (1952), 41 U.S.C. (1952) §43a(c).

Just what effect this legislation will have is not clear. Some indication, however, of the intent of Congress may be derived from the following statement by Senator Fulbright: "It is our purpose, by this amendment, to overturn that [*Perkins v. Lukens Steel Co.*] decision."⁷³ Does it give "standing" to contestants of administrative action on contracts? Within the field of the contracts covered by the Walsh-Healey Act, it seems clear that it does. It has been so held: in *Covington Mills v. Durkin*, a case where a restraining order of a minimum wage determination was sought, the federal district court said that, despite the *Lukens Steel* case, the complainants "have a standing to sue for the simple reason that . . . the Fulbright Amendment [provides for] . . . the very kind of review they are seeking here."⁷⁴

If that is true, then how much validity does the *Lukens Steel* case have today? Apparently little so far as its precise holding is concerned, for Congress has overruled the Supreme Court. A great deal, perhaps, on the broader question of lack of standing and the consequent freedom of the government to deny contracts. An example here is *Atlantic Freight Lines, Inc. v. Summerfield* where a motor carrier sought to enjoin issuance of a postage stamp commemorating the Baltimore and Ohio Railroad's 125th anniversary. In a per curiam opinion, the court, affirming and quoting the district court, said: "It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such,"⁷⁵ citing the *Lukens Steel* case. Although an argument could be made that Congress in the Fulbright Amendment indicated a preference against the latter case, it is probably safe to assume that the amendment will have but a limited application and will probably be confined entirely to Walsh-Healey determinations. Courts will probably continue to hew to the line of no standing, and will not create new concepts of judicial controversies in the public contract field.

But in any event, adherence to a sterile privilege-right division is not helpful. Conceptualistic thinking seldom is helpful to understanding, however convenient it may be. The test should not be what the

⁷³ 98 CONG. REC. 6531 (1952).

⁷⁴ 3 PIKE & FISCHER, ADMIN. LAW (2d ser.) 221 (D.C. D.C. 1953). This case has now been decided on the merits with the determination of the Secretary of Labor under the Walsh-Healey Act overturned by the federal district court. *Covington Mills v. Mitchell*, 23 U.S. Law Week 2510 (April 12, 1955).

⁷⁵ (D.C. Cir. 1953) 204 F. (2d) 64.

Court in the *Lukens Steel* case leads one to believe: whether a contractor or bidder on government contracts has a legal right or merely a privilege. Such an approach really assumes the answer in its mere statement of the problem. Rather, the issue is whether, in choosing those with whom it will do business, the government will be required to pay attention to those fundamental standards of fair play usually subsumed under the rubric of procedural due process. Roscoe Pound has said:

"In administrative adjudication there is an obstinate tendency to decide without a hearing, or without hearing one of the parties, or after conference with one of the parties in the absence of the other, whose interests are adversely affected, or to treat the statutory requirement of a hearing as a mere formality and act upon preformed opinions as to the order to be made. Another closely related tendency is to make determinations on the basis of reports not divulged, giving the party affected no opportunity to refute or explain. Another is to make determinations seriously affecting individual rights without a basis in evidence of rational probative force. Another no less widespread but not easy to reach under the statutes and procedure of today is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency."⁷⁶

This generalized indictment by Pound may or may not have general application or may or may not be generally true. Quite possibly it is too severe.⁷⁷ But does it not have application to the specific case of suspensions of suspected contractors as carried out today? Much of what he says is true of the suspension procedure: there is no hearing; reports of investigation are not divulged; no explicit statutory authority exists for the procedure. More than that, the party affected is not even informed of the suspension until he finds a bid rejected or payments withheld, and even at that time he is not told of the nature of the charges against him, what he is believed to have done, or how long the suspension will last. A clearer case of administrative absolutism would be hard to imagine. As Bentham has remarked, "where there is no publicity, there is no justice."

⁷⁶ Pound, "The Challenge of the Administrative Process," 30 A.B.A.J. 121 at 123 (1944).

⁷⁷ Certainly it was too severe for the specific matter Pound was discussing: OPA suspension orders. Apparently he was writing under a mistaken view of the facts. See Field, "Rationing Suspension Orders: A Reply to Dean Pound," 30 A.B.A.J. 385 (1944). But see Smith, "Comment on Mr. Field's Reply for the OPA," 30 A.B.A.J. 390 (1944).

C. *Suspension in World War II*

A comparison with the procedures set up during World War II controlling the issuance of suspension orders by the OPA and WPB indicates the scope of unchecked power presently resting in procurement officers. In both of those wartime agencies scrupulous regard was paid to procedural safeguards so that the parties affected had every opportunity of notice, hearing, judicial review and the other due process requirements. "In the use of the suspension power great care [was] taken by OPA to safeguard the individual from any injustice. . . ."⁷⁸ Some difference of opinion may have existed at that time on the validity of that statement. But for present purposes it can be said that the OPA procedure seems a very model of fairness when compared to contractor-suspension techniques which are based upon mere suspicion of irregularity.

Similarly, the WPB took care to erect and maintain safeguards for individuals affected by suspension orders. Although there may not have been strict legal necessity for such action, the WPB, after issuing its first suspension order in 1941, took care to formalize and improve its technique so that the end of providing safeguards for the persons believed to be violating the priority regulations was furthered.⁷⁹ The procedure included notice to the alleged violator, a hearing conducted by a compliance commissioner, the power to compel attendance of witnesses for both parties, written and oral arguments, and judicial review of any suspension order.⁸⁰

D. *Countervailing Considerations*

So much, then, for the case for a new procedure within the buying agency itself, one which would give the business enterprises affected an opportunity to be treated openly. Are there compelling arguments on the other side in support of the present method of operation? What can be said in favor of it?

The arguments are two-fold: (a) those based on the technical legal argument that a contractor, present or would-be, has no standing to contest such action; the view is that the action of the government is proprietary in nature and subject to no inhibitions other than those self-imposed by statute or internal administrative directive; and (b)

⁷⁸ Field, "Rationing Suspension Orders: A Reply to Dean Pound," 30 A.B.A.J. 385 at 386 (1944).

⁷⁹ See O'Brien and Fleischmann, "The War Production Board Administrative Policies and Procedures," 13 GEO. WASH. L. REV. 1 (1944), for an account of the WPB procedure.

⁸⁰ Id. at 50-54.

those based on the view that divulging the charges to the firm affected will in some manner operate both to prejudice or compromise whatever subsequent case the Department of Justice may have against the party and to place an undue burden on the procurement process.

The technical legal argument will stand or fall on the present validity of the broad *Lukens Steel* doctrine. In addition to the Fulbright Amendment of 1952, some question may be raised as to whether the Administrative Procedure Act (APA) has changed the situation. Definitive answer to this question appears to be shrouded in doubt. Two problems are implicit in the question: are the military departments subject to the APA, and does section 10 of the APA change prior doctrine on judicial review?

On the first problem, the short answer is that the APA does apply to the military establishment, except as noted in the APA itself, for the reason that the APA is designed to apply to agencies in a functional manner. Specific agencies, as such, are not exempted; the act "was intended to apply to the entire executive branch of the Federal Government."⁸¹ Exceptions to its coverage have been drawn functionally, not with the idea of placing entire agencies beyond its reach. "The Act is comprehensive in scope and in terms applies to the executive and all administrative agencies, but exceptions are provided for as to certain types of functions. Thus, for example, while there is no exemption under the Act for the War and Navy Departments as such, Section 2(a) exempts courts-martial, military commissions, and military or naval authority exercised in the field in time of war or in occupied territory."⁸² The legislative history and recent judicial decisions back up this conclusion. "[I]t has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions."⁸³ In *Lassiter v. Guy F. Atkinson Co.*, the Court of Appeals for the Ninth Circuit said in the course of holding that the War Department was a federal agency, "The authority to act with the sanction of government behind it determines whether or not a governmental agency exists. The form the agency takes, or the function it performs are not determinative of the question of whether it is an agency. . . ."⁸⁴

⁸¹ Schwartz, "The Administrative Procedure Act in Operation," 29 N.Y. UNIV. L. REV. 1173 at 1175 (1954).

⁸² VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 87 (1953).

⁸³ ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. 248, 79th Cong., 2d sess., p. 191 (1946).

⁸⁴ (9th Cir. 1949) 176 F. (2d) 984 at 991.

So much, then, for the applicability of the Administrative Procedure Act: it would appear that at least the "housekeeping" functions of the military departments are within its purview. Does the act change the no-standing doctrine?

Section 10(a) of the Administrative Procedure Act gives standing to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute. . . ."⁸⁵ One view of the meaning of this provision is that it "undoubtedly adds nothing to the law."⁸⁶ A recent case buttresses this view: in *Clement Martin, Inc. v. Dick Corp.*,⁸⁷ the plaintiff was the low bidder on a contract to construct a hospital but the award went to the next highest bidder. The district court dismissed the action while asserting that even though plaintiff might have suffered grievous harm, the Administrative Procedure Act did not create rights but merely conferred jurisdiction to review discretionary acts of agencies which affect existing statutory rights. If, then, section 10(a) of the Administrative Procedure Act merely restates prior law, it would appear to be clear that suspension would not be susceptible to judicial review.

The other reason for not disclosing the situation to the party affected—possible prejudice to a later legal action by the Department of Justice—does not hold water. In the first place, it is hardly a sound argument to say that fair play may be dispensed with in order to build up a possible criminal or civil action. The very genius of the American legal system is against such procedure. Perhaps an even more compelling argument may be made by comparing again the OPA and WPB wartime procedure. In both of those agencies, criminal sanctions were applicable to violations of the statutes; but this was not deemed of sufficient importance to prohibit holding hearings. In WPB suspension hearings, the hearing officer had the following alternatives open to him: he could close the case, recommend submission to the Department of Justice for criminal or civil action or recommend issuance of a suspension order. As of October 1, 1944, some 1500 compliance hearings had been held, with 430 cases referred to the Department of Justice for action.⁸⁸ It would seem to be clear

⁸⁵ 60 Stat. L. 243 (1946), 5 U.S.C. (1952) §1009(a).

⁸⁶ Comment, 56 YALE L.J. 670 at 690 (1947).

⁸⁷ (D.C. Pa. 1951) 97 F. Supp. 961. But cf. *American President Lines v. FMB*, (D.C. D.C. 1953) 112 F. Supp. 346.

⁸⁸ O'Brien and Fleischmann, "The War Production Board Administrative Policies and Procedures," 13 GEO. WASH. L. REV. 1 at 51 (1944).

that administrative secrecy is not a necessary prerequisite to successful prosecution.

At best, then, the argument in favor of secrecy and lack of hearing rests on technical legal grounds. No compelling policy argument is in favor of it, other than possible delay in the procurement process with attendant confusion and harm to the national defense effort. That type of argument swayed the Court in the *Lukens Steel* case: "Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional government practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is . . . essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered."⁸⁹ But does not such a view make too much of expediency and efficiency? Equally, it would be more efficient for many governmental activities now subject to court review to be unhampered by judicial scrutiny, but that is scarcely an argument for doing away with the machinery of judicial review or the underlying purposes of the Administrative Procedure Act. The self-limitation may indicate too great a deference to the procurement expert.⁹⁰ Furthermore, it is doubtful that an undue delay would eventuate should suspension procedures be changed.

E. *A Fair Procedure*

In any event, alleged delay is more of an argument against judicial intervention than it is against an administrative hearing of the nature provided for by the APA. If true in purchasing, why would not the same argument prevail in priority and materials allocations during time of war? Apparently no adverse effect was noted by either the OPA or WPB of a type which would make unsuitable an administrative hearing and judicial review. A delay argument may be an example of what

⁸⁹ *Perkins v. Lukens Steel Co.*, 310 U.S. 113 at 130, 60 S.Ct. 869 (1940).

⁹⁰ For a discussion of modern judicial deference to the executive branch in the fields of public employment, treatment of aliens and the postal service, see McCloskey, "The McCarran Act and the Doctrine of Arbitrary Power" in *PUBLIC POLICY: A YEARBOOK OF THE GRADUATE SCHOOL OF PUBLIC ADMINISTRATION, HARVARD UNIVERSITY* 228 (1953). And for a trenchant criticism of the doctrine of the *Lukens Steel* case, see Davis, "Unreviewable Administrative Action," 15 F.R.D. 411 at 421 et seq. (1954).

Justice Frankfurter noted in another case, that of "conjuring up horrible possibilities that never happen in the real world. . . ."⁹¹

A fair-play requirement would be one calling not so much for judicial review as for procedural safeguards within the agency itself. Probably the ordinary channels of judicial review of administrative action, i.e., consideration of the validity of the action in an enforcement proceeding or in a suit brought by a party to enjoin enforcement, would not be satisfactory. *That* could delay procurement; certain it is that obtaining military requirements should not be held up, if held up in fact they would be, pending the outcome of the usually slow-moving judicial process.

Necessary instead is some sort of administrative procedure which would allow firms in question to have notice of the charges, to appear and to present evidence, to question witnesses, and to enjoy other procedural safeguards. No delay would necessarily accompany such a system. Such a procedural requirement could be set up with the recognition that denials of the contracting privilege is really a penalty in fact, and a most drastic one, when financial life is at stake, and, as presently carried out, is punishment before conviction. Even the WPB suspension orders were recognized to have a punitive aspect: "there is unquestionably an incidental punitive element in the proposed [suspension] action. . . ."⁹² This is particularly true when suspension runs on for months, even years; the longer it remains in force the more drastic the impact upon the firm itself.⁹³ The impact is both financial in losing out on government business and in the firm's reputation: the knowledge that a company is "in bad" with the government becomes known and has a deleterious effect on the firm's reputation, good will and credit standing.

⁹¹ *New York v. United States*, 326 U.S. 572 at 583, 66 S.Ct. 310 (1946).

⁹² O'Brian and Fleischmann, "The War Production Board Administrative Policies and Procedures," 13 *Geo. Wash. L. Rev.* 1 at 49 (1944). See also *ATTY. GEN. COMM. ON AD. PROC., DIVISION OF PUBLIC CONTRACTS* 4 (1939): "The withholding of government business may be an exceedingly drastic, if not altogether ruinous penalty."

⁹³ For an account of the handling of one suspended firm by the Department of the Army, see Senate Hearings before a Subcommittee of the Select Committee on Small Business, 83d Cong., 1st sess. (1953), entitled: "Participation of Small Business in Military Procurement." At pages 1 through 91 of that document, and particularly at pages 73-77, is testimony from Army officials about a firm first suspended on November 1, 1951; while the suspension was modified later, apparently the firm was still suspended on November 20, 1952, when the Department of Justice notified the Army that the case was being closed without action in the Criminal Division. It should be noted that testimony such as this is very rare. Normally, information about suspended contractors is classified and closely guarded. See *ASPR* 1-601.3, 1A CCH, *GOVT. CONTRACTS REP.* ¶29,049B (1954). For a subsequent development of this suspension action, see 34 *Comp. Gen.* 180 (1954).

Or the procedural requirement could be established with the recognition that a firm has a legal right at least to be *considered* for government contract awards and to be treated fairly, even if there is no legal right to obtain a contract. No one would seriously argue that a legal right to receive contracts exists or should exist. But it can be argued in persuasive terms that a firm should not be deprived of the opportunity to be considered for contract-award without elementary due process requirements being followed.

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered."⁹⁴ Here, then, is an opportunity for law to experience one of those moments.

VII. CONCLUSION

An examination has been made in general terms of occasions when federal procurement officials may refuse to do business with would-be contractors. Special emphasis has been placed upon the procedure of suspending firms suspected of irregular dealings, since that procedure raises some important questions in administrative law.

In 1940 the Supreme Court stated clearly that the federal government enjoys an unrestricted power to set the terms and conditions upon which it will do business and to choose those with whom it would contract. But even if that statement is presently valid, it still does not give the individual procurement officer unfettered freedom of choice of contractor. Congress, the President, the courts and the Comptroller General have all imposed inhibitions upon that freedom. In addition, the procurement officer's agency regulations both refine the externally-

⁹⁴ Justice Douglas in *United States v. Wunderlich*, 342 U.S. 98 at 101, 72 S.Ct. 154 (1951). It appears to be meet to quote additional language from Justice Douglas' dissenting opinion:

"... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

"The instant case reveals only a minor facet of the agelong struggle. The result reached by the Court can be rationalized or made plausible by casting it in terms of contract law: the parties need not have made this contract; those who contract with the Government must turn square corners; the parties will be left where their engagement brought them. And it may be that in this case the equities are with the Government, not with the contractor. But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected."

imposed proscriptions and add new limitations on his freedom and the exercise of his authority.

Blacklists developed under statutory warrant have administrative safeguards designed to prevent arbitrary action. But nonstatutory blacklisting—suspension—is conducted in secret, in the absence of any such safeguards. A strong and perhaps compelling argument can be made for a change in suspension procedures leading toward the prevention of possible arbitrary action.