Doing Business with Government: Are Prospective Suppliers Entitled to Procedural Due Process?

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DOING BUSINESS WITH GOVERNMENT: ARE PROSPECTIVE SUPPLIERS ENTITLED TO PROCEDURAL DUE PROCESS?

Polyvend, Inc. v. Puckorius
61 Ill. App. 3d 163, 377 N.E.2d 1160 (1978)

On June 7, 1978, the Appellate Court of Illinois for the First Dis- trict declared unconstitutional a recently enacted section of the Illinois Purchasing Act.\(^1\) The section of the Purchasing Act in question sought to prohibit state agencies from granting contracts to parties who have been convicted of the bribery or attempted bribery of state officials. In Polyvend, Inc. v. Puckorius,\(^2\) a case of first impression in Illinois, the court held that the new section violated the due process clause of the federal and state constitutions\(^3\) because it deprived a small group of bidders of the opportunity to do business with the State of Illinois "without some procedural safeguards."\(^4\)

In finding the section unconstitutional on procedural due process grounds, the Polyvend court held that bidders on government contracts have a protectable property interest in doing business with the state prior to the award of any contract rights.\(^5\) In effect, the court found

1. That section of the Illinois Purchasing Act provided:

   \[\text{[n]} \text{o person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer's or employee's official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record but has not been prosecuted for such conduct.}

   \text{For purposes of this Section, where an official, agent, or employee of a business entity committed the bribery or attempted bribery on behalf of such an entity and pursuant to the direction or authorization of a responsible official thereof, the business entity shall be chargeable with the conduct.}

   \text{Public Act 80-964, \$ 1, ILL. REV. STAT. ch. 127, \$ 132.10-1 (1977).}


3. U.S. CONST. amend. V provides in pertinent part:

   \[\text{[n]} \text{o person shall . . . be deprived of life, liberty or property without due process of law.}

   U.S. CONST. amend. XIV provides in pertinent part:

   \[\text{[n]} \text{o State shall deprive any person of life, liberty or property without due process of law.}

   Similar provisions are embodied in the Constitution of the State of Illinois. \text{See ILL. CONST. art. I, \$ 2 (1970).}

4. 61 Ill. App. 3d at 167, 377 N.E.2d at 1164.

5. The court stated:

   \[\text{[F]}\text{or the reasons stated we find that the plaintiff has a property interest which is protectable under the due process guaranties of the Federal and State constitutions. The statute, by not providing some procedural safeguards, is in contravention of those rights and is consequently unconstitutional. The order of the circuit court granting summary judgment to the plaintiff is reversed and remanded for proceedings not inconsistent with this opinion.}

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that the legislature lacks the power to establish the terms and conditions under which it will do business. In so finding, the court established a new standard for finding due process property interests and has raised anew previously settled issues in a manner likely to have great impact upon the future of procedural due process litigation in Illinois.

This comment will outline the constitutional rights of prospective government contractors\(^6\) and the development of the concept of "property" as it has evolved in procedural due process cases decided by the Supreme Court of the United States.\(^7\) It will then apply those concepts to the facts in the Polyvend case and will contrast the doctrines elaborated by the United States Supreme Court with the reasoning of the court in Polyvend.\(^8\) That comparison will lead to the conclusion that the Polyvend decision is not consistent with either the procedural due process opinions of the United States Supreme Court or with the decisions of the Supreme Court of Illinois.\(^9\) It will also be shown that the Polyvend opinion provides the basis for an expansion of due process challenges to presently valid legislative enactments.

**THE CONSTITUTIONAL RIGHTS OF BIDDERS**

The question of the rights of bidders under the federal constitution was apparently settled as early as 1940. In *Perkins v. Lukens Steel Co.*,\(^10\) the United States Supreme Court held that parties wishing to do business with the government have no standing to challenge either the government's purchasing decisions or its regulations because bidders do not have a constitutional right to do business with the government.\(^11\) In his opinion for the Court, Justice Black wrote that "[l]ike 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."\(^12\) Thus, Justice Black reasoned that the mere loss of potential income from the denial of participation in government contracts does not amount to the deprivation of a constitutionally protected right and that statutes requiring the public advertisement of bids were enacted for the benefit of the government and the people at

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\(^{10}\) *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

\(^{11}\) *Id.* at 127.

\(^{12}\) *Id.*
large—not for the benefit of private contractors.\textsuperscript{13}

In \textit{Perkins}, the Court specifically held that the legislature had the power to exclude from participation in government contracts \textit{any} contractor who failed to pay the minimum wage in the "locality" of the purchase.\textsuperscript{14} Furthermore, the Court found that the possibility that an administrator might make an erroneous decision in applying the statute was not a sufficient reason to invalidate the statute because the legislature had the power to delegate discretion in making such decisions.\textsuperscript{15}

The underlying rationale of the \textit{Perkins} opinion was that, \textit{prior} to the award of a government contract, bidders enjoy only those rights specifically granted by the legislature.\textsuperscript{16} Therefore, absent legislation to the contrary, constitutional protection could not be invoked by bidders because the legally protectable property interest necessary for the invocation of due process or other constitutional protection did not exist. However, the question of whether the \textit{Perkins} doctrine has retained its constitutional vitality in light of more recent developments in procedural due process litigation remains to be explored.

\textbf{EXPANDING THE SCOPE OF PROcedURAL DUE PROCESS}

Prior to 1970, the touchstone for finding property interests requiring the protection of procedural due process safeguards was found in the clear-cut distinction between constitutionally created \textit{rights} and \textit{privileges} granted by government largess.\textsuperscript{17} Under the then prevailing doctrine, virtually any government benefit that was not specifically awarded by the Constitution was held to be outside the ambit of due

\begin{quote}
\textsuperscript{13} Justice Black wrote:

\begin{quote}
[...] that Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.
\end{quote}
\end{quote}

\textit{Id.} at 116-17.

\textit{Id.} at 125.

\textsuperscript{14} The issue in \textit{Perkins} turned on whether the plaintiff had standing to challenge the purchasing procedures of the government. Therefore, the Court discussed the bidder's interest in terms of "litigable rights." Writing for the Court, Justice Black stated:

\begin{quote}
[We are of the opinion that \texttt{no legal rights} of respondents \texttt{were shown to have been invaded} or threatened in the complaint upon which the injunction of the Court of Appeals was based. 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.
\end{quote}

\textit{Id.} (emphasis added).

\textsuperscript{17} For a discussion of the right-privilege doctrine, see Van Alstyne, \textit{The Demise of the Right-Privilege Distinction in Constitutional Law}, 81 HiArV. L. Rev. 1439 (1968).
process protection. The *Perkins* decision was clearly consistent with an analysis based upon that immutable distinction between *rights* and *privileges*. The opportunity to do business with the government, after all, was not a right granted to all citizens by the Constitution.

"Entitlements" as Protectable Interests

In 1970, the United States Supreme Court greatly expanded the applicability of the procedural due process doctrine when it declared, in *Goldberg v. Kelly*, that the right-privilege distinction had outlived its usefulness in a changing society. The *Goldberg* case arose out of a challenge to the procedures used in the termination of payments under the Aid to Families and Dependent Children program. The Supreme Court declined to accept the argument that support payments were privileges which could be denied without prior notice and hearing. Support payments were held to be subject to procedural due process protection because such protection was appropriate not only for constitutionally created rights, but also for property interests created by an "entitlement" to government services. This novel concept would, in time, provide the basis for finding "entitlement" property interests in old age benefits, social security disability benefits, unemployment compensation, public education, and government employment.

The post-*Goldberg* "entitlement" cases had several factors in common. In each case, the plaintiffs had been excluded by an overreaching of administrative authority from governmental benefits in which they had been, or arguably should have been, enrolled. In addition, the plaintiffs were able to demonstrate a reasonable and substantial reliance upon the benefits which had been denied to them. Although *Goldberg* and its progeny established a new standard for finding prop-

18. The right-privilege distinction had been criticized as an overly restrictive limitation upon the power of the due process clause. The result of this analysis was that virtually all government benefits fell into the "discretionary" category and were, therefore, subject to arbitrary divestment. *Id*.

21. *Id*. at 263-64.
22. *Id*. at 261-62.
property interests, the rule remained that it was only after such an entitlement-created property interest was found that procedural due process considerations would arise.  

**The Source of Protected “Entitlements”**

Following the *Goldberg* opinion, the United States Supreme Court began to clarify the standards to be applied in determining the circumstances which gave rise to entitlements by defining the due process rights of public employees. In *Board of Regents v. Roth*, the Court held that an untenured instructor at a state university did not have an entitlement to continued employment because the instructor’s year to year contract with the state created no reasonable expectation of continued employment. Consequently, the Court found that procedural due process was not required prior to termination of his employment. The Court in *Roth* stated that “[t]he have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it.”

In a companion case, *Perry v. Sindermann*, the Court applied the same reasoning to find that a due process hearing would be appropriate, even for non-contractual employment, if the plaintiff-employee could show that his expectation of continued employment was reasonable in light of the terms of employment established by the state. The Court stated that “[a] person’s interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and

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28. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the plaintiff challenged the post-termination review procedure applied to Social Security disability payments. In deciding that the procedures were adequate, the Court addressed the threshold “entitlement” question and concluded that an examination of the procedures used was relevant only after finding “that the interest of an individual in continued receipt of these benefits [disability payments] is a statutorily created property interest.” *Id.* at 332 (emphasis added).
30. The *Roth* Court stated that:
   [the terms of the respondent’s appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern of being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.
31. *Id.* at 578.
32. *Id.* at 577.
33. 408 U.S. 593 (1972).
34. *Id.* at 602-03.
that he may invoke at a hearing.”

The source of non-contractual “mutually explicit understandings” upon which an employee may reasonably rely was referred to in the Roth opinion. In discussing the source of the interests protected by procedural due process, the Court stated that “[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Thus, the conclusion compelled by the Roth and Perry decisions is that the expectancy of receiving a benefit may ripen into an entitlement only if the state’s own acts, by statute, rule or contract, give credence to the plaintiff’s claim that he reasonably relied upon the expectancy.

The United States Supreme Court further clarified the source of entitlements in Arnett v. Kennedy. In the Arnett case, the Court held that a statute which provided exclusive conditions under which employment could be terminated did create the kind of reasonable expectancy that gave rise to an entitlement to the benefit. The statute in Arnett provided that the plaintiff, a non-probationary federal employee, could be fired “for such cause as will promote the efficiency of the service.” The Court concluded that “[t]he federal statute guaranteeing appellee continued employment absent ‘cause’ for discharge conferred on him a legitimate claim of entitlement which constituted a ‘property’ interest. . . .” Thus, the Arnett case stands for the proposition that statutory limitations of administrative discretion may become the source of protectable property interests because when the legislature imposes such limits upon administrators, a reasonable expectancy arises that the actions of administrators will be undertaken within the bounds of that discretion.

The Arnett analysis was further developed by the Supreme Court

34. Id. at 601 (emphasis added). The Perry Court remanded the case to allow the plaintiff to demonstrate that “mutually explicit understandings” were violated in his termination.
35. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
37. The plaintiff in Arnett alleged that the procedures employed in his termination violated his right to due process because they included no provision for a hearing. The administrator had complied with the procedures required by statute. The Court held that the termination procedures written into the statute were adequate to protect the property interest created therein. Id.
38. The employee in Arnett was discharged pursuant to the provisions of the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1976), which requires that prior to discharging a nonprobationary employee for cause, the employee must be given advance notice of the charges against him and a reasonable time to file a written answer.
39. 416 U.S. at 166.
in *Bishop v. Wood*. The plaintiff in *Bishop* was a municipal employee who had been discharged by the city manager pursuant to a city ordinance which had been interpreted to vest absolute discretion in the city manager to hire and fire city employees. In applying the *Arnett* rationale, the *Bishop* Court looked to the statutory power exercised by the city manager to determine whether the employee in *Bishop* had an entitlement to employment. The court concluded that the employee who held his position *at the sufferance* of the city necessarily had no entitlement to employment.

Thus, following *Arnett* and *Bishop*, the creation by the legislature of limitations on administrative discretion became a primary source of entitlement property interests. Conversely, in the absence of legislatively mandated limits on discretionary authority, only those benefits specifically granted by the Constitution may reasonably be relied upon. It is apparent that the existence of a “right” cannot depend upon the discretion of the party against whom that right is asserted. Thus, when the bestowal of government benefits is left to the discretionary power of administrators, those benefits do not constitute a protectable property interest.

The “Entitlements” of Bidders

The rights of employees to government employment are closely analogous to those of government contractors discussed in the *Perkins* opinion some thirty five years earlier. In other words, government employees, like bidders, have neither a legally protectable interest in government benefits nor a basis, therefore, for alleging a denial of procedural due process absent the creation of such rights by the government.

The conclusion that these same principles apply to government purchasing activities is buttressed by Justice Brennan’s opinion for the Court in *Goldberg v. Kelly*, in which he stated that “it is true, of course, that some governmental benefits may be administratively termi-
nated without affording the recipient a pre-termination evidentiary hearing."\(^{48}\) As an example of the kind of benefit which might be so denied, Justice Brennan cited \textit{Perkins v. Lukens Steel Co.} \(^{49}\) for the proposition that the state has absolute discretion in purchasing unless the legislature expressly limits that discretion.\(^ {50}\)

It is reasonable to conclude, therefore, that the expansion of the due process doctrine following the \textit{Goldberg} decision has not been extended into areas of legislatively granted discretion. Absent the imposition of statutory limitations upon administrative authority to hire or purchase, neither government employees nor government bidders have a property interest which can be invoked for due process purposes.\(^ {51}\)

**Polyvend Inc. v. Puckorius**

\textit{Factual Background of the Polyvend Opinion}

On October 1, 1977, the General Assembly of the State of Illinois enacted into law a new section of the Illinois Purchasing Act which provides:

[n]o person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer or employee’s official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record but has not been prosecuted for such conduct.

For purposes of this Section, where an official, agent or employee of a business entity committed the bribery or attempted bribery on behalf of such an entity and pursuant to the direction or authorization of a responsible official thereof, the business entity shall be chargeable with the conduct.\(^ {52}\)

Another section of the Illinois Purchasing Act requires that any contract entered into by state administrators which failed to comply with the new provisions would be void as a matter of law.\(^ {53}\) Therefore, once an administrator determined that a supplier was not in compliance with the statute, the administrator was obligated to reject the supplier’s bid.

On October 12, 1977, the Illinois Department of General Services

\(^{48}\) \textit{Id.} at 263 (footnote omitted).

\(^{49}\) 310 U.S. 113 (1940).

\(^{50}\) 397 U.S. at 263 n.10.

\(^{51}\) \textit{See} discussion in text accompanying notes 10-44 \textit{supra}.


\(^{53}\) \textit{Ill. Rev. Stat.} ch. 127, § 132.10 (1977) provides:

Any contract entered into or purchase or expenditure of funds by a State agency in violation of this Act or the rules and regulations adopted in pursuance of this Act is void and of no effect.
opened bids for the manufacture of the 1979 multi-year motor vehicle license plates. The only bid submitted was that of plaintiff, Polyvend, Inc. On November 18, 1977, the assigned state purchasing agent notified Polyvend, Inc. by letter that the license plate bid had been rejected pursuant to the state’s power to “reject any and all bids” and in conformity with the newly enacted statute.\(^5\) The reason for the rejection was that the plaintiff’s own bid and a Dun and Bradstreet report revealed that a Mr. Patrick Stoltz, the former president of an entity called Metal Stamping Corporation, was the president of Polyvend, Inc.\(^5\) The purchasing agent had determined that this was the same Patrick Stoltz who had pleaded guilty, on March 6, 1974, to bribing former Illinois Secretary of State, Paul Powell.\(^6\) During Mr. Powell’s tenure, and for some years thereafter, Metal Stamping Corporation had been the successful bidder on the annual license plate contract.\(^7\) Corporate documents submitted with the bid, or available as a matter of public record, showed that Polyvend, Inc., had been created some ninety days after the conviction of Mr. Stoltz by merging Metal Stamping Corporation into a former subsidiary, Polyvend, Inc.\(^8\) Apparently, the administrator determined that Mr. Stoltz and Polyvend, Inc. were precisely the sort of bidders which the legislature sought to exclude from participation in state contracts.\(^9\)

The trial court rejected the company’s plea for injunctive relief and the license plate contract was re-bid pursuant to the procedures of the Illinois Purchasing Act.\(^6\) Polyvend, Inc. did not bid on the second contract and the contract was let to another supplier.\(^6\) The plaintiff did not allege an abuse of administrative discretion in the finding that it was in violation of the statute and did not utilize the administrative appeal procedures which were available for challenging erroneous purchasing decisions.\(^6\)

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55. Id., 377 N.E.2d 1160.
56. Id.
58. 61 Ill. App. 3d at 164, 377 N.E.2d at 1161.
60. 61 App. 3d 163, 377 N.E.2d 1160.
61. Id.
62. Id. It should be noted that plaintiff’s failure to allege an error in the determination made by the administrator should have precluded consideration of the due process issues since there were no factual disputes to be raised at a subsequent hearing. See Codd v. Velger, 429 U.S. 624, 627 (1977).
The Reasoning of the Court

On appeal, Polyvend, Inc. chose to attack the statute itself rather than its application by the Illinois Department of General Services. The plaintiff did not introduce any evidence that the application of the statute was in error. Although several challenges to the statute were incorporated in the Polyvend appeal, the Appellate Court of Illinois for the First District decided the case solely on the issue of procedural due process. The court found that the plaintiff had a property right which was violated because the particular section of the Illinois Purchasing Act did not contain any notice or hearing provisions. The court concluded that the company's due process rights were violated because:

[t]he plaintiff did not simply lose a bid on a contract. The plaintiff has been forever barred from bidding on any contract based on a determination by an administrative agency without any procedural safeguards. The interest here is not merely a potential opportunity to perform a contract with the State of Illinois. Here the powers of government are directed toward an individual barring him from an opportunity to contract to supply goods and services to government. This is a significant aspect of commercial life and a State's determination to absolutely bar participation in it requires procedural safeguards.

In reaching the conclusion that a property right had been violated, the Polyvend court reviewed but did not analyze the contentions of the parties on the issue of procedural due process. Polyvend, Inc. contended that the statute finds an entity guilty of bribery by "legislative fiat" without notice, hearing or review. The defendant argued that due process safeguards would attach only if a property right was involved and that bidders do not have a right to perform government contracts.

The Polyvend court recognized that the Perkins opinion makes clear that no citizen has a right to do business with the state. However, the court cited an Illinois Supreme Court opinion, Bio-Medical v.

64. Petition for Leave to Appeal at 5.
65. On appeal, Polyvend, Inc. argued that the statute: (1) was retroactively applied; (2) is a Bill of Attainder; (3) is unconstitutionally vague; and (4) invalidly delegates legislative power to an administrator. Id. at 6-18.
66. 61 Ill. App. 3d at 164-65, 377 N.E. 2d at 1162.
67. Id. at 168, 377 N.E.2d at 1164.
68. Id. at 167, 377 N.E.2d at 1163.
69. Id. at 165-66, 377 N.E.2d at 1162-63.
70. Id. at 165, 377 N.E.2d at 1162.
71. Id.
72. Id. at 166, 377 N.E.2d at 1162.
Trainor,73 which “distinguished” Perkins.74 The plaintiff in Bio-Medical was a medical laboratory which received over ninety percent of its income from Medicaid payments. The laboratory had been continuously enrolled as a qualified Medicaid vendor for over seven years.75 The Bio-Medical court found that the plaintiff “possesses a legal interest which is threatened, that being the expectation of continuing to receive Medicaid payments on behalf of Medicaid recipients it services.”76 In referring to the Bio-Medical opinion, the Polyvend court asserted that “this expectation interest [receiving Medicaid payments] had been recognized as a protectable property interest.”77 However, the court did not explain why the expectation of receiving Medicaid payments was a protectable property interest nor did it explain how the property interest had arisen. Furthermore, the court did not discuss how Bio-Medical and Polyvend could be distinguished from Perkins. The Polyvend court simply stated that “here as in Bio-Medical Laboratories, Inc., the plaintiff's relationship must be analyzed and cannot be dismissed under the rubric of Perkins that the plaintiff has no right to perform government contracts.”78

After asserting that the Perkins rationale might not apply to the facts in Polyvend, the court relied on the rationale of Gonzalez v. Freeman,79 a federal district court case which dealt with the debarment of a government contractor. In Gonzalez, the plaintiffs Thomas P. Gonzalez, Carmen Gonzalez, Gonzalez Corp. and others were temporarily debarred from doing business with the Commodity Credit Corporation pending an investigation into the misuse of official commodity inspection certificates.80 Prior to the debarment, plaintiff Thomas P. Gonzalez had pleaded guilty to a misdemeanor arising from the misuse of such certificates. The Polyvend court noted that in Gonzalez the debarment was found to have been “imposed without observance of procedural safeguards and hence in excess of statutory jurisdiction and authority.”81 Although the Polyvend court recognized that Gonzalez was decided on federal statutory grounds, it applied the Gonzalez rationale to the constitutional issues in Polyvend. The court cited Gonzalez for the principle that:

73. 68 Ill.2d 540, 370 N.E.2d 223 (1977).
74. 61 Ill. App. 3d at 166, 377 N.E.2d at 1162.
75. 68 Ill.2d 540, 545, 370 N.E.2d 223, 227 (1977).
76. Id. at 544, 377 N.E.2d at 226.
77. 61 Ill. App. 3d at 166, 377 N.E.2d at 1163.
78. Id.
79. 334 F.2d 570 (D.C. Cir. 1964).
80. Id. at 572.
81. 61 Ill. App. 3d at 165, 377 N.E.2d at 1162.
[d]isqualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based on the record so made. 82

The Polyvend court concluded that Gonzalez could not be distinguished from Polyvend. 83 However, the court did not take cognizance of the statutory analysis upon which the entire Gonzalez opinion was premised. Nor did it note that Gonzalez was decided six years before the United States Supreme Court had begun to establish the method for finding entitlement property interests. 84

The court in Polyvend went on to state that due to a “determination of an administrative agency without any procedural safeguards,” the plaintiff was forever barred from bidding on state contracts. 85 However, the court did not discuss whether the administrative agency had been empowered by the legislature to make that determination or whether the legislature intended procedural safeguards to be applicable. The court simply borrowed language from Gonzalez to conclude that “[h]ere the powers of government are directed toward an individual barring him from the opportunity to contract to supply goods and services to the government. This is a significant aspect of commercial life and a state’s determination to absolutely bar participation in it requires procedural safeguards.” 86 The Polyvend court failed to note that the purchasing agent in Polyvend, unlike the Secretary of Agriculture in Gonzalez or the Director of Public Aid in Bio-Medical, was under a legislative mandate to act precisely as he did.

ANALYSIS OF THE POLYVEND OPINION

Apparently, the aspects of the company’s bid rejection which most troubled the Polyvend court were the potentially permanent nature of

82. Id. at 166, 377 N.E.2d at 1163 (citing Gonzalez v. Freeman, 334 F.2d at 578 (emphasis added)).
83. 61 Ill. App. 3d at 167, 377 N.E.2d at 1163.
85. 61 Ill. App. 3d at 167, 377 N.E.2d at 1162.
86. Id. (emphasis added).
the rejection and the alleged lack of prior notice and a hearing.\textsuperscript{87} Since it was not argued that the administrator in question abused his statutory authority, the issue on appeal should properly have been limited to whether the legislature's grant of authority to an administrator to make determinations which debar particular persons from participation in state contracts amounted to the denial of a property interest. It is only after finding such an interest that procedural due process analysis is relevant.\textsuperscript{88} In support of the analysis that a property interest arises when the legislature, through its administrators, declines to do business with a particular class of bidders, the court relied primarily on \textit{Bio-Medical v. Trainor}\textsuperscript{89} and \textit{Gonzalez v. Freeman}\textsuperscript{90} for the proposition that the \textit{Perkins} "governmental freedom to contract" rule does not apply to this case.\textsuperscript{91}

\textbf{Bio-Medical v. Trainor}

A review of the \textit{Bio-Medical} opinion, in light of the principles established by the United States Supreme Court for determining whether an "entitlement" property interest exists,\textsuperscript{92} does not lead to the conclusion reached by the \textit{Polyvend} court. In \textit{Bio-Medical}, the plaintiff was a corporation whose primary source of revenue was payments received under the federal Medicaid system.\textsuperscript{93} As the result of an audit which disclosed probable, but unproved, overpayments totaling more than $300,000.00, the Director of the Illinois Department of Public Aid threatened to suspend the plaintiff from the program.\textsuperscript{94} The court in \textit{Bio-Medical} applied a twofold analysis to determine whether the plain-

\textsuperscript{87} The court stated that "[t]he plaintiff did not simply lose a bid on a contract. The plaintiff has been forever barred from bidding on any contract based on a determination by an administrative agency without any procedural safeguards. . . . Debarring of a person from any opportunity to contract with the government is a protectable interest." \textit{Id.}


\textsuperscript{89} 68 Ill.2d 540, 370 N.E.2d 223 (1977).

\textsuperscript{90} 334 F.2d 570 (D.C. Cir. 1964).

\textsuperscript{91} The \textit{Polyvend} court stated that:

\textit{[t]he [Bio-Medical] court, in distinguishing Bio-Medical from Perkins, said that the plaintiff 'possesses a legal interest which is threatened, that being its expectation of continuing to receive Medicaid payments on behalf of Medicaid recipients it services.' Citing Hathaway [v. Mathews, 546 F.2d 227 (7th Cir. 1976)] and Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975), the Bio-Medical court stated that this expectation interest had been recognized as a protectable property interest. Here, as in Bio-Medical, the plaintiff's relationship with the government must be analyzed and cannot be dismissed under the rubric of Perkins that the plaintiff has no right to perform government contracts. Polyvend, Inc. v. Puckorus, 61 Ill. App. 3d 163, 166, 377 N.E.2d 1160, 1163 (1978), appeal docketed No. 51011 (Ill. Sup. Ct. Sept. 28, 1978).

\textsuperscript{89} See text accompanying notes 20-44 supra.

\textsuperscript{90} Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill.2d 540, 370 N.E.2d 223 (1977). The federal Medicaid system is administered in Illinois by the Illinois Department of Public Aid.

\textsuperscript{91} \textit{Id.}
tiff had a property interest requiring due process protection. First, it was determined that the agency’s threatened suspension of the plaintiff amounted to an interruption of an ongoing relationship upon which the plaintiff relied for over ninety percent of its income. Second, that reliance was found to be reasonable because “[n]one of these provisions [of the applicable statute] permit or suggest that the Director of Public Aid has the authority to permanently suspend or terminate a vendor who, pursuant to the Director’s findings, has committed an abuse of the program.”

Thus, the entitlement in Bio-Medical did not arise merely because an “expectation interest has been recognized as a protectable legal interest” or because such expectation was a “significant aspect of commercial life” as suggested by the court in Polyvend. Rather, the entitlement arose because the expectation was based upon the mutually explicit understanding that the Director of Public Aid was without statutory power to foreclose previously qualified Medicaid vendors from participation in the program. Therefore, Bio-Medical does not stand for the proposition that any expectation interest may become an entitlement property interest if it is “significant.” Rather, like the entitlement cases decided by the United States Supreme Court, the Bio-Medical court determined that the legislature’s limitation of administrative discretion in debarring participants created the interest to be protected.

The Bio-Medical opinion is consistent with the analysis employed by the United States Supreme Court in the employment cases because it recognized that the Perkins doctrine, although viable, does not protect administrative actions which exceed the statutory powers of the administrator in question. The Polyvend court incorrectly concluded

95. Id. at 553, 370 N.E.2d at 229.
96. 61 Ill. App. 3d at 166-67, 377 N.E.2d at 1163.
97. See text accompanying note 95 supra.
99. The court found that:
[...]pursuant to the expressed provisions of the Code, any Medicaid vendor who is properly licensed . . . and who complies with the Director’s rules and regulations relating to record keeping, disclosure, dispensation of services, or rules concerning the quality and quantity of medical assistance for which payment may be authorized, is entitled to receive payment for services provided to Medicaid recipients.
100. See Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). See also the discussion of the employment cases in the text accompanying notes 29-44 supra.
that *Bio-Medical* stands for the proposition that the *legislature* may not define the authority of administrators to carry out purchasing or other governmental functions.102

The continued viability of the *Perkins* doctrine in Illinois has been recognized by federal courts in cases which have interpreted Illinois law.103 Furthermore, the Appellate Court of Illinois for the Fourth District had previously recognized, in *Alfred Engineering v. Fair Employment Practices Commission*,104 that the *Perkins* rule is viable in Illinois. In rejecting a challenge to the Illinois Fair Employment Act which prohibits the granting of state contracts to parties who have committed discriminatory employment practices, the *Alfred Engineering* court stated that “[i]t is clear . . . that the rationale of *Perkins v. Lukens Steel Co.* . . . insofar as it relates to governmental freedom to contract is applicable in Illinois.”105 The court went on to observe that “[i]n *Bradley v. Case*, . . . our Supreme Court quoted with approval language to the effect that a contractor is not allowed to do public work in any mode he may choose to adopt without regard to the wishes of the state.”106 This line of reasoning is grounded in the same analysis applied by the United States Supreme Court in *Perkins*107 and *Goldberg*.108 The government enjoys the power to contract under any terms it finds necessary or beneficial. This conclusion remains unchanged by the *Bio-Medical* opinion.109

**Gonzalez v. Freeman**

The second major case relied on by the *Polyvend* court was *Gonza-

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102. The *Bio-Medical* court found that the legislature had made provisions for the Illinois Attorney General to investigate alleged cases of fraud and to prosecute these cases if necessary. The court held that “the total absence of standards, criteria or procedures for terminating or suspending vendors, coupled with the express delegation of enforcement responsibilities, is persuasive evidence that the legislature did not intend to confer on the defendant the authority now claimed.” *Id.* at 553-54, 370 N.E.2d at 229. Furthermore, the cases cited in *Bio-Medical* for support of the proposition that a property interest existed in that case involved the abuse of legislatively granted discretion or abuse of constitutional powers by the executive branch of government. *See e.g., City of Chicago v. F.E.P.C.,* 65 Ill.2d 108, 357 N.E.2d 1154 (1976); *Buezzell v. Walker,* 59 Ill.2d 146, 319 N.E.2d 502 (1974).


105. *Id.* at 601, 312 N.E.2d at 67.

106. *Id.*

107. *See the discussion of Perkins in the text accompanying notes 10-16 supra.*

108. *See the discussion of Goldberg in the text accompanying notes 20-22 supra.*

109. It should be noted that the *Bio-Medical* court's discussion of *Perkins* was limited to the issue of standing. *Bio-Medical* properly held that *Perkins* could not be invoked to prevent the plaintiff from litigating the issue of whether the Director of Public Aid had the statutory authority to carry out a debarment. The issue of whether there was an abuse of statutory authority is not addressed in *Perkins.*
The Gonzalez opinion was cited by the court in Polyvend because it, too, dealt with the issue of the debarment of participants in a government program. The plaintiff corporation in Gonzalez was prohibited from participation in Commodity Credit Corporation contracts because its president pleaded guilty to a misdemeanor for the misuse of official inspection certificates. The court in Gonzalez, however, found that "Congress has not made explicit provision for barring contractors doing business with Commodity Credit." Therefore, the Polyvend court was correct in pointing out that "Gonzalez was decided on federal statutory grounds and not on the basis of the Constitution." The court, however, was incorrect in concluding that the rationale of the Gonzalez opinion was equally applicable to the facts in Polyvend. The court in Polyvend also erred in failing to differentiate the source of administrative authority to debar contractors from the source of the legislature's power to require such debarment. Whereas, the legislature's power to deny participation in government benefits flows directly from its constitutionally derived power, the power of administrators, as in the Gonzalez case, is determined entirely by the statute which defines the functions and powers of the particular administrative agency. Therefore, the rationale of Gonzalez is not applicable to Polyvend. In Polyvend the administrator carried out the dictates of the legislature but in Gonzalez the administrator exceeded his statutory authority.

The Gonzalez opinion pointed out that it was Congress' failure to specifically grant the power to debar bidders which gave rise to the need for procedural protections. The rationale of Gonzalez was that

110. 334 F.2d 570 (D.C. Cir. 1964).
111. The court found that under § 10(a,b) of the Administrative Procedure Act, 5 U.S.C. § 1009(a,b) (1958) and of § 203(h) of the Agricultural Marketing Act of 1946, as amended 7 U.S.C. § 1622(h) (1958), the Secretary of Agriculture's discretion was impliedly limited by the legislature.
334 F.2d at 575.
112. 334 F.2d at 576.
113. 61 Ill. App. 3d at 166, 377 N.E.2d at 1163.
114. See 61 Ill. App. 3d at 166, 377 N.E.2d at 1163.
116. See Bio-Medical v. Trainor, 68 Ill.2d 540, 370 N.E.2d 223 (1977). The Bio-Medical court stated that "[t]his court has consistently held that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." Id. at 551, 370 N.E.2d at 228.
117. Gonzalez v. Freeman, 334 F.2d 570, 575 (D.C. Cir. 1964). District Judge Burger, now Chief Justice Burger, made clear that the reason for the court's opinion was that "[i]nforming the statute confers unreviewable finality on determinations of the Secretary as to questions of the scope of his congressional authority or the requisite procedural safeguards." Id.
since Congress had not clearly indicated that the plaintiff should be debarred for the acts admitted or that the administrator had the power to foreclose the plaintiff's participation, the plaintiff was entitled to procedural due process. Absent a clear expression of legislative intent to require debarment as a penalty, a reasonable expectation of continued participation in government contracts might well arise. However, even the Gonzalez opinion held that a protected interest would not have arisen had Congress vested authority in the administrator to debar parties in plaintiff's circumstances.

The "Entitlements" of Polyvend

The Illinois Purchasing Act and the Purchasing Rules give no indication that the legislature intended to give up its power to define and delegate its purchasing authority as it sees fit. Section 4 of the Illinois Purchasing Act specifically reserves complete discretion in purchasing decisions to the agencies charged with the responsibility of carrying out the dictates of the legislature. Prior to the Polyvend opinion a similar legislative enactment was interpreted by the United States Supreme Court to strip potential contractors of the standing needed to challenge purchasing decisions. Furthermore, the plaintiff's own bid expressly recognized that the state reserved the right to accept or reject any or all bids submitted. In addition, the Purchasing Rules provide that "[i]f it appears in the best interest of the State of Illinois, all bids may be rejected, and invitations to bid containing the same or rewritten terms and specifications may be reissued."

A review of the applicable sections of the Illinois Purchasing Act and the Purchasing Rules makes it difficult to determine the source of the property interest which the court found to arise from Polyvend.

Gonzalez court roughly parallels the reasoning of later Supreme Court decisions. See text accompanying notes 16-44 supra.

118. The Gonzalez opinion recognized that "[i]t is . . . correct . . . to say that no citizen has a 'right,' in the sense of a legal right, to do business with the government." 334 F.2d at 574.

The court went on to find that "[o]n an allegation of facts which reveals an absence of legal authority or basic unfairness presents a justiciable controversy [because the] [i]nterruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts." Id. at 574-75 (emphasis added).

119. Id. at 575.

120. ILL. REV. STAT. ch. 127, § 132.4 (1977) states in pertinent part:

[a]ny and all bids may be rejected, and when all bids are rejected, a readvertisement for bids therefor shall be published in the same manner as the original advertisement.

The Illinois legislature also has granted authority to the Department of General Services to screen potential bidders. See ILL. REV. STAT. ch. 127, § 132.6 (1977).


Inc.’s debarment. In addition to bribers, the Act and the Rules require that other types of bidders must be excluded from state contracts. For example, state officials\textsuperscript{124} and discriminatory employers\textsuperscript{125} cannot be awarded certain state contracts. Administrators have discretionary authority to determine which bidders fit the classifications\textsuperscript{126} and must decline the bid of any bidder who falls into the group.\textsuperscript{127} These administrative findings, like the administrative findings in Polyvend, are subject to administrative appeal.\textsuperscript{128}

The standards set forth in the procedural due process cases of the United States Supreme Court make it clear that the legislature has the power to procure needed services according to its own terms.\textsuperscript{129} The terms established by statute in Illinois at the time of the Polyvend decision vested that power in the purchasing agencies.\textsuperscript{130} Under such circumstances, it is difficult to conceive that any expectancy could arise, much less the kind of reasonable expectancy “supported by rule or statute” which might give rise to an entitlement.\textsuperscript{131}

In \textit{Bishop v. Wood},\textsuperscript{132} the United States Supreme Court found that the statute in question did not give rise to a property interest because it vested \textit{discretionary authority} in the city manager to hire and fire as he saw fit. Similarly, the statutes and rules which govern government purchasing in Illinois clearly vest the discretionary power to reject any and all bids in administrative agencies. By repeatedly serving notice that administrators may reject any bid without procedural safeguards, the Illinois General Assembly has made clear that no bidder has a protected property interest in having its bid accepted or considered for any state contract. Any bidder, not only those which have admitted bribery, may find that its bid has been rejected because of a “determination by an administrative agency without any procedural safeguards.”\textsuperscript{133} Purchasing agents, for example, may determine that a bidder lacks the expertise to perform a contract; that contract specifications are improperly drawn or are not met by a bidder; that the price is too high; or that granting any contract at all would simply not be in the best interests of the state. Any of these determinations may be made on any bid with-

\textsuperscript{127} See note 53 supra.
\textsuperscript{129} See text accompanying notes 10-44 supra.
\textsuperscript{130} See text accompanying notes 120-23 supra.
\textsuperscript{131} See Board of Regents v. Roth, 408 U.S. 564, 602 (1972).
\textsuperscript{132} 426 U.S. 341 (1976).
\textsuperscript{133} Polyvend, Inc. v. Puckorius, 61 Ill. App. 3d at 167, 377 N.E.2d at 1163.
out notice and hearing. Such a reservation of discretionary authority to carry out the legislature’s purchasing functions can hardly be said to create the kind of “mutually explicit understandings” that might give rise to a legitimate claim of entitlement to any state contract. And, without an entitlement or other property interest to be protected, no bidder has a basis for challenging bid rejections on procedural due process grounds. Thus, to hold as does the court in Polyvend, that a bidder which has been excluded from state contracts by statute possesses protectable property interests not shared by bidders in general, is neither logically consistent nor legally sound.

The Perkins “governmental freedom to contract” rule clearly establishes that the government has the absolute right to determine the terms and conditions according to which it will do business. Thus, the Illinois General Assembly’s pronouncement in the Purchasing Act that state purchasing agents must refrain from granting contracts to those who have illegally interfered with purchasing decisions is a legitimate exercise of that right. In holding that the legislature cannot establish its own method for determining which bidders qualify for state contracts, the Polyvend court improperly substituted its own opinion as to which procedures will best protect the state’s interests for the opinion of the legislature. In sum, the Polyvend court ignored the continuing validity of Perkins and thus its opinion casts doubt upon the future ability of the Illinois legislature to determine the terms and conditions according to which it will carry on business with the private sector.

Due to its misunderstanding of the Bio-Medical and Gonzalez opinions, the Polyvend court did not correctly apply Perkins. Specifically, the Polyvend court failed to note that both Bio-Medical and Gonzalez found due process violations because the respective debarments were not authorized by the legislature. Indeed, the court never considered whether the legislature has the right to authorize a debarment pursuant to its right to do business on its own terms.

This error was compounded by the court’s apparent misapprehension of the source of property interests described by the United States Supreme Court in the post-Goldberg entitlement cases. The essence of these cases is that before due process safeguards apply an expecta-

134. See text accompanying notes 10-16 supra.
136. See text accompanying notes 10-16 supra.
138. See text accompanying notes 73-84 supra.
139. See the discussion of the entitlement cases in the text accompanying notes 20-44 supra.
tion must be supported by statutes or rules which indicate that the plaintiff is "entitled" to the government benefit. If there are statutes or rules in Illinois which support Polyvend, Inc.'s expectation of receiving state contracts, they are not embodied in the Purchasing Act and were not disclosed in the Polyvend opinion. The result of the court's careless analysis is that it is not clear how the court found that a property interest arose in Polyvend or how such interests will be found to arise in the future.

The failure of the Polyvend court to clearly identify the source of the plaintiff's property right is likely to encourage a variety of interpretations as to how property rights arise and thus foster extensive due process litigation. In addition, the Polyvend opinion has the deleterious effect of blurring both the previously settled rights of bidders and the extent of the legislature's power to do business on its own terms. If the Polyvend decision is upheld by the Supreme Court of Illinois on the same grounds as those relied upon by the Polyvend court, the case might well be subject to at least four interpretations.

One interpretation is that the legislature no longer has the right or power to statutorily bar particular types of persons from participating in government benefits. Under this analysis, it would be possible to argue that presently valid statutes which specifically prohibit state officials from participating in state contracts might also be constitutionally infirm. In addition, statutes which condition participation in state contracts upon non-discriminatory employment practices, like the statute in the Alfred Engineering decision, might also come under attack.

A second interpretation of the Polyvend holding is that even if the legislature has the power to exclude certain parties from governmental benefits, it may not delegate that power to administrative discretion. This raises the possibility that the legislature could not grant authority to state administrators to determine the suitability of state job applicants for employment without due process review. In sum, the most damaging aspect of this interpretation would be the possibility of calling into question the authority of any administrator to operate within the bounds of his statutory responsibility.

Another potentially onerous interpretation is that Polyvend establishes the principle that an "expectation" interest amounts to a protectable property interest even without the "mutually explicit understandings" required by the procedural due process cases of the

United States Supreme Court.\textsuperscript{141} Conceivably, bidders and other parties may now demand due process protection for rights not granted by statutes, rules or the Constitution. If bidders who have notice that "any and all bids may be rejected"\textsuperscript{142} possess an entitlement property interest in government contracts, it would seem that any party who desires a government benefit would have a legitimate claim of entitlement to the benefit under this interpretation; even parties whose income tax return clearly revealed their ineligibility for income assistance payments as defined by statute could legitimately demand notice and a hearing before they could be denied such benefits.

Finally, the effect of \textit{Polyvend} on state purchasing activities will be direct and potentially far reaching. If the power of the legislature to set the terms and conditions under which it will do business may be challenged without the consent of the legislature, the entire procurement process is theoretically open to attack. After \textit{Polyvend}, the legislature's power to require financial responsibility of its suppliers is less clear. The power of administrators to require certain products and to reject others is also open to question. Even the power of the legislature and the state's administrators to reject irresponsible bidders is in doubt. The answer to these problems is, of course, a recognition that state purchasing must be undertaken at the discretion of the legislature. If there are to be restrictions upon that discretion, it is for the legislature itself to make that determination. The alternative raises the spectre of a state government grinding to a halt for want of a delivery of paper, or other such supplies, while a disgruntled contractor litigates his entitlement to property rights which the legislature never intended to create.

\section*{Conclusion}

In \textit{Polyvend}, the Appellate Court of Illinois for the First District found that bidders have a pre-contract property interest in doing business with the state which requires due process protection. The opinion ignores the reasoning used to find property interests in earlier United States Supreme Court decisions. Because \textit{Polyvend} does not clearly identify the source of the bidder's alleged property interest, the opinion is subject to a wide range of interpretations which are likely to confuse

\textsuperscript{141} See text accompanying notes 35-44 \textit{supra} for a discussion of "mutually explicit understandings."

\textsuperscript{142} ILL. REV. STAT. ch. 127, § 132.4 (1977).
and foster procedural due process litigation in Illinois. The *Polyvend* case was improperly decided and should be overturned.

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