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NEWSLETTER

Federal Circuit Clarifies Relationship Between Standing and Prejudice

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In *American Relocation Connections, LLC v. United States*, No. 1:18-cv-00963 (Oct. 11, 2019), the U.S. Court of Appeals for the Federal Circuit clarified the relationship between the dual requirements that a protester demonstrate both standing and prejudice in order to pursue a protest. The decision provides a valuable lesson on why contractors must be careful not to assume they have prejudice simply because they demonstrate standing, and must allege facts that satisfy all of the jurisdictional predicates for bringing a protest.

American Relocation Connections involved a pre-award bid protest challenging a request for quotations (RFQ) issued by U.S. Customs and Border Protection (CBP) for employee relocation services. American Relocation Connections, LLC (ARC) argued that CBP violated Small Business Administration (SBA) regulations by failing to consult the SBA during its market research under 13 C.F.R. § 125.2(c)(2) in determining whether to set the competition aside for small businesses.

ARC had performed the employee relocation services contract under a small-business set-aside since 2014. In August 2017, the CBP chose to re-compete its employee relocation services contract and issued an RFQ under the Federal Supply Schedule. The 2017 RFQ stated that the procurement would be set aside for small businesses; however, due to an outdated version of the Statement of Work within the RFQ, CBP cancelled the 2017 RFQ. CBP then conducted new market research and concluded that there was only one certified small business available to compete, which would not satisfy the requirements for a small business set-aside procurement. CBP did not confer with the SBA when conducting its market research. As a result

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of its market research, CBP issued a new RFQ in 2018 on an unrestricted basis.

Upon learning that the re-competition of its incumbent contract would not be set aside for small businesses, ARC contacted CBP to learn the agency's rationale. CBP then issued RFQ Amendment 1, clarifying that the 2018 RFQ was being issued under North American Industry Classification System (NAICS) Code 531210 and CBP did not expect that there would be sufficient small businesses under that code who could compete for the work as a set-aside.

Following this exchange, ARC pursued a protest at the Government Accountability Office (GAO), which was dismissed. ARC then filed a pre-award protest at the U.S. Court of Federal Claims (COFC). At COFC, ARC argued that CBP erroneously failed to set aside the RFQ for small businesses and failed to consult the SBA during its market research that showed only one firm capable of competing. The failure to consult with SBA, ARC alleged, was a prejudicial error. COFC denied the protest, noting that CBP conducted acquisition planning and market research prior to issuing an unrestricted solicitation; that CBP was not required to consult with the SBA under section 125.2(c)(2); and that ARC was not prejudiced by CBP's failure to consult.

ARC appealed to the Federal Circuit, which noted that the principal dispute on the merits was whether the requirements of section 125(c)(2) apply when a federal agency issues an order against a multiple award contract (here, the Federal Supply Schedule). However, the Court never reached the merits of that issue because it held that while ARC had standing to bring the protest, ARC could not show it was prejudiced by CBP's actions.

The Federal Circuit determined that ARC had fully addressed whether it had standing to bring the claim but had not fully alleged facts to show it also had been prejudiced by the agency's failure to consult with SBA. ARC argued that it needed only prove it had standing to proceed, and that any prejudice was assumed to flow from the existence of standing, which may involve an element of prejudice. The Court disagreed, stating that the existence of standing, alone, does not establish prejudicial error and that a protester must allege sufficient facts to establish both standing and competitive prejudice.

Under 28 U.S.C. § 1491(b)(1), a protester must both have standing and show prejudice in order to bring a bid protest. The standing inquiry is a jurisdictional one; if the contractor does not have standing, the protest cannot proceed. To have standing, a contractor must be an "interested party"—*i.e.* an actual or prospective bidder—and it must possess a direct economic interest in the challenged procurement. The protester satisfies the direct economic interest requirement differently depending on whether it is a post- or pre-award protest. In the pre-award setting that ARC faced, a protester must demonstrate a non-trivial competitive injury which can be addressed by judicial relief. (In a post-award protest, a prospective bidder must demonstrate that it had a substantial chance of receiving the award but for the agency's error.)

Prejudice, on the other hand, requires an evaluation of whether a protester can establish that, based on the record evidence, the agency committed an error that affected the substantial rights of the contractor. To do so,

the Court applies a "harmless-error" test: the correction of the error must yield a different result in order for the error to be harmful and be prejudicial to the party.

As the Federal Circuit stressed throughout its analysis, the assessment of any prejudice should not be viewed as the same standard as the jurisdictional requirement for a protester to demonstrate standing by "a non-trivial competitive injury." While prejudice can be and often is a factor in determining whether there has been a competitive injury, a protester should never assume that the inverse is also true—that where there is standing there must necessarily also be prejudice.

ARC, CBP, and the Federal Circuit agreed that as the incumbent and a prospective bidder, ARC had standing to bring the protest and challenge CBP's market research. Ultimately, however, the Federal Circuit determined that the prejudice analysis rested heavily upon CBP's decision to issue the 2018 RFQ under NAICS code 531210. Under 13 C.F.R. § 121.1103(b)(1), ARC was required to appeal a contracting officer's NAICS code within 10 calendar days after the RFQ's issuance. Because ARC did not appeal the NAICS code, it had waived its right to challenge the chosen code. Thus, even if CBA had consulted the SBA, the record indicated it still would have issued an unrestricted procurement due to a lack of qualified contractors under the selected NAICS code. Therefore, ARC failed to prove that CBP's failure to consult the SBA would affect CBP's ultimate decision to issue the 2018 RFQ on an unrestricted basis.

Although *American Relocation Connections* is nonprecedential, the decision underscores three important considerations for federal contractors. ***First***, a protester should not assume that having standing to pursue a protest eliminates the additional need to ultimately demonstrate prejudice, such that the outcome of the protest could lead to a different result for the protester. Although it is not always clear and the relationship may be muddled, protesters need to show both standing and prejudice. As the Court made clear, standing does not necessarily establish prejudice even though prejudice may sometimes be part of establishing standing. Contractors should be careful to address both in any protest and never assume that one will automatically lead to the other. ***Second***, the case highlights the importance of diligently and timely pursuing all possible arguments, even if an argument does not appear from the outset to be a material one. Here, the protester did not timely challenge the NAICS code that CBP had selected for its market research, which was ultimately fatal to its protest because the record demonstrated that there were not sufficient small businesses under that NAICS code to warrant a set-aside. ***Finally***, because the Federal Circuit did not reach the underlying merits, it remains an open question whether an agency must consult SBA under 13 C.F.R. § 125.2(c)(2) for an order under a multiple award contract, such as the GSA FSS.