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NEWSLETTER

Lack of Prejudice Will Sink Even a 'Meritorious' Protest

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As experienced protest counsel, we know (i) that you can pick lint off of any procurement; and (ii) because of that fact, a protester alleging error in the procurement process needs to show that the error was "prejudicial." This is true at the U.S. Government Accountability Office (GAO), the U.S. Court of Federal Claims (COFC), and even in an agency-level protest: Competitive prejudice is an essential element of any successful protest. The U.S. Court of Appeals for the Federal Circuit's decision in *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996), expressed this standard test for competitive prejudice: Not only must the protester establish a significant error in the procurement, it must show that "but for" that significant error, the protester had a substantial chance of receiving the award.

On September 2, 2020, in *Oracle America, Inc. v. United States*, Case No. 19-2326, the Federal Circuit put the competitive prejudice standard to the test in the long-running protest saga for the U.S. Department of Defense (DOD) Joint Enterprise Defense Infrastructure (JEDI) procurement, where Oracle protested the solicitation, and separate protests proceeded on the ultimate award decision. Oracle primarily contested two aspects of the JEDI solicitation. First, Oracle challenged DOD's decision to solicit for a single-award indefinite delivery/indefinite quantity (IDIQ) contract instead of a multiple award contract, as Oracle alleged to be required under 10 U.S.C. § 2304a. Second, Oracle challenged the solicitation's "Gate Criteria," specifically that a contractor had to have at least three commercial cloud data centers within the United States, each separated by 150 miles and each with a Federal Risk and Authorization Management Program (FedRAMP) "Moderate" authorization at the time of proposal submission. Oracle did not have the FedRAMP "Moderate"

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authorization at the time it submitted its proposal.

On the first argument, both the COFC and the Federal Circuit panel agreed with Oracle that DOD had not met the requirements of 10 U.S.C. § 2304a(d)(3) to justify a single-award IDIQ contract. DOD had argued that a single award contract was permissible under Section 2304a(d)(3)(A)(ii) because the solicitation provided exclusively for firm, fixed price task orders, or delivery orders for services for which prices were established in the contract for the specific tasks to be performed. The COFC and Federal Circuit agreed with Oracle that DOD could not rely on this provision to justify soliciting a single award IDIQ contract because the JEDI contract specifically contemplated adding new, not-yet-defined, services to the contract which were not already priced in the contract (nor could they be, given the lack of definition in the solicitation).

But establishing this legal error was insufficient for the COFC to issue a judgment in Oracle's favor because Oracle did not prevail on its second argument regarding the Gate criteria. The court upheld this aspect of the solicitation, holding that the record was clear that FedRAMP Moderate authorization was a necessary, minimum requirement for the JEDI contract. Because Oracle did not have the necessary FedRAMP authorization at the time of proposal submission (although it obtained it during the course of its protest), the court held that Oracle could not establish competitive prejudice with respect to its first, successful protest issue. That is, even if DOD committed legal error in procuring a single award IDIQ contract, Oracle was not prejudiced because even if the contract had been multiple award, Oracle was not a qualified bidder.

On appeal, Oracle raised these same two arguments (among others), and the Federal Circuit panel affirmed the COFC decision on both. Relying on *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), which held that courts should only uphold agency action on the grounds asserted by the agency, Oracle nonetheless argued that the COFC erred in its prejudice decision by declining to remand the decision to the agency and, instead, determining that the agency would have used the Gate criteria even in a multiple-award setting.

Oracle also urged the panel to adopt a standard of "non-trivial competitive injury" that had been applied in other pre-award bid protest cases. Again, the Federal Circuit sided with the COFC. The panel stated that the "non-trivial competitive injury" standard applied when there was not a sufficient factual foundation for applying the "substantial chance of award" standard. Here, there was a factual record that allowed the court to apply that "substantial chance of award" standard. The Federal Circuit further noted that its review on appeal of a finding of prejudice or no prejudice is based on the "clearly erroneous" standard. Applying that higher standard of review, the Federal Circuit agreed with the COFC that the *Chenery* doctrine does not apply where it is clear that the agency would have reached the same decision, even if it had committed error. "In light of the [COFC's] careful consideration of the record evidence" that DOD would have reached the same decision on the Gate criteria even if the procurement was conducted as multiple award, the Federal Circuit held that the COFC decision that Oracle would not have had a substantial chance of award, and thus had not established prejudice, was not clearly erroneous.

The moral of the story is whether a contractor is dissatisfied with the terms of a solicitation or the results of a competition, even a plain error is irrelevant if the contractor cannot establish prejudice.