COMPETITIVE PREJUDICE

In order to win a bid protest, it isn't enough for a protester to show that an agency has made an error (violation of law, regulation or procedure), no matter how egregious, in conducting a procurement. At both the Government Accountability Office and the Court of Federal Claims ("COFC"), the protester must show "competitive prejudice" in order to have its protest sustained and win. Competitive prejudice is necessary to show that a protester is an "interested party," and even where the protest is made to the contracting agency, the protester must establish that it is an "interested party" and show "competitive prejudice." FAR 33.103(d)(1)(vii). This blog discusses competitive prejudice, and explains a recent COFC case, *Precision Asset Management Corp.,* No. 15-1495C (Fed. Cl. Feb. 26, 2016), where the court found for good reason that there was no competitive prejudice, and dismissed the case.

The COFC Formulation of Competitive Prejudice: The Court says this:

> To prevail in a bid protest, a protester must show a significant, prejudicial error in the procurement process. To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract. Rather, the protester must show "that there was a substantial chance it would have received the contract award but for that error."

Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999). (internal citations omitted).

A further example shows the court philosophy here:

> To establish prejudice, a protester is not required to show that but for the alleged error [in the procurement process], the protester would have been awarded the contract. []. Such a rule would make it virtually impossible for a protester ever to prevail, no matter how egregious the error in the procurement process. On the other hand, a showing of a mere possibility that the protester would have received the contract but for the error is inadequate to show prejudice. If that were sufficient, the requirement of prejudice would be virtually eliminated. The proper standard lies between these polarities.[]We think that the appropriate standard is that, to establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract.

Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996)

> **Example of Prejudice shown at the court:**
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> Here [protester] argues that the award [] should be set aside on a variety of grounds. If [protester] were successful, the award would be set aside, and [protester] might secure it. [Protester] also argues that the Air Force improperly failed to conduct "discussions" [with it] and that, if it had, [Protester] would have been able to cure deficiencies in its bid.

> There is no question here that [Protester] was a qualified bidder and that its proposal would have been improved and its chances of securing the contract increased if the problem with its cost estimate had been cured. The Air Force's decision letter stated that "[a]ll offerors provided proposals which met minimum contract requirements" and "all proposals were fundamentally sound." (Source Selection Decision Document at 1.) Under these circumstances, [Protester] has established prejudice (and therefore standing), because it had greater than an insubstantial chance of securing the contract if successful on the merits of the bid protest.

Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003).

Example of Prejudice *not shown* at the court:

> The trial court did not clearly err in finding that Bannum was not significantly prejudiced by the BOP's violations. To establish prejudice Bannum was required to show that there was a "substantial chance" it would have received the contract award but for the BOP's errors in the bid process. This test is more lenient than showing actual causation, that is, showing that but for the errors Bannum would have won the contract. Bannum necessarily relies on the difference between the 104 points the BOP docked it based on the CEFs, and the 74.5 points by which Alston Wilkes won the bid. Had the BOP deducted fewer than 29.5 points for past performance, Bannum would have prevailed. But neither Bannum nor the record explains why Bannum had a substantial chance of scoring at least 74.5 points higher on past performance had the BOP reviewed the CEFs in accordance with the FAR. [] There is nothing besides Bannum's conjecture to support the contention that another review, comporting with the FAR, would provide it a substantial chance of prevailing in the bid. Bannum's argument rests on mere numerical possibility, not evidence.

Bannum, Inc. v. U.S., 404 F.3d 1346, (Fed Cir. 2005) (internal citations omitted).

The GAO Formulation of Competitive Prejudice: The GAO says this:

> GAO will not sustain a protest absent a showing of competitive prejudice, *i.e.,* where the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award.

Dell Servs. Fed. Gov't, Inc., B-412340, Jan. 20, 2016, 2016 CPD ¶ 43, n3.

So at both the GAO and the COFC, the protester must show that but for the agency's improper actions, it would have a "substantial chance of receiving award. The test is essentially the same in both forums.

Examples of Prejudice shown at the GAO

> Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial

> chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. [] Here the protest was sustained because prejudice was present. The agency improperly awarded the contract on the basis of a proposal that materially failed to comply with RFP and protester was misled during discussions and would have otherwise proposed a different and lower-cost solution.

Intelsat Gen. Corp., B-412097, Dec. 23, 2015, 2016 CPD ¶ 30.

> [GAO] found prejudice and sustained the protest because each of these discriminators cited by the contracting officer was the result of an unreasonable evaluation or unequal treatment. Thus, if proposals had been properly evaluated, GAO could not say what ratings would have been assigned to the proposals, or whether protester's proposal would have been considered to be among the most highly rated proposals. GAO resolves any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest.

Arctic Slope Mission Servs., LLC, B-410992.5, Jan. 8, 2016, 2016 CPD ¶ 39

> **Example of Prejudice *not shown* at the GAO**
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> Moreover, even where an agency arguably may have relaxed a material solicitation requirement, the protester must still show that it was prejudiced by the agency's actions. Competitive prejudice is an essential element of a viable protest and there is no basis for finding prejudice and sustaining a protest where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award. In order to demonstrate unfair competitive prejudice from a waiver or relaxation of the terms and conditions of an RFP, a protester must show that it would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. (Protest denied because no basis to conclude that protester was prejudiced by awardee's failure to state, verbatim, a certification set forth in the RFP. Protester would not have changed its proposal to its competitive advantage had it known that the agency would have accepted a differently worded certification.)

Penn Parking, Inc., B-412280.2, Feb. 17, 2016, 2016 CPD ¶ 60 (internal citations omitted)

Precision Asset Management Corp., No. 15-1495C (Fed. Cl. Feb. 26, 2016). This was a recent court case involving a contract for property management on behalf of the Federal Housing Authority (FHA). Proposal evaluation was done in two steps: (1) evaluation for technical acceptability and (2) evaluation of only those proposals that were technically acceptable to determine which was best value. Adjectival ratings were determined for the two evaluation factors, past performance and price.

Minemier & Associates was chosen by FHA as a compromise between price and confidence rating. Its price was $33.1 million and it offered "Good/Significant" confidence. The protester (Precision Asset Management) asserted that FHA didn't properly consider its references and gave it a lower rating. It also challenged the rating given to Minemier. The government moved

to dismiss because the protester had failed to show competitive prejudice and lacked standing to bring the bid protest.

The court held that Precision Asset had failed to present any evidence that its chances of winning the contract would have increased, even if the evaluation errors it alleged had been cured. Even if Precision got the highest confidence rating (Excellent/High Confidence), and even assuming that Minemier's confidence rating was downgraded, there would still be one offer with the highest confidence rating (Excellent/High Confidence) *at a lower price than Precision's.* And, Precision Asset showed no evidence in the record that it offered some experience or service that might have caused FHA to value its proposal above that other offeror, despite the higher price.

Therefore, the Court granted the motion to dismiss because Precision lacked a substantial chance of winning the award.