IN BID PROTEST, FEDERAL CIRCUIT HOLDS THERE IS NO PRESUMPTION OF PREJUDICE WHEN AGENCY MAKES IRRATIONAL AWARD

Recently, the Federal Circuit clearly stated that there is no presumption of prejudice whenever the Court of Federal Claims determines that the agency acted irrationally in making an award decision. *Systems Studies & Simulation, Inc. et al. v. United States, CAE USA, Inc.,* No. 2021-1469 (Fed. Cir. Dec. 30, 2021). Rather, the court reiterated that the approach in a bid protest must follow the Administrative Procedure Act, 5 U.S.C. Sec. 706, and 28 U.S.C. Sec 1491(b)(4). Specifically, when a court reviews agency action for being "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," "due account shall be taken of the rule of prejudicial error." 5 U.S.C. Sec 706. The challenger of agency action generally bears the burden of showing that the error was harmful (prejudicial).

In reviewing bid protests, the Court requires that the Claims Court do a 2 step analysis, and determine:

1) Whether the agency's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
2) Whether the error was prejudicial (i.e., was there a "substantial chance" that the protester would have received the contract but for the error in step 1)

The second step is always required before setting aside a contract award, regardless of whether an error was identified in the first step.

The Army awarded a helicopter flight training contract to L3 Doss Aviation, but this was followed by a bid protest by Systems Studies, which was sustained by the Court of Federal Claims. After re-evaluation, the Army awarded the contract to CAE USA. System Studies protested again at the Court of Federal Claims. Systems Studies protest was rejected, except for an argument that the Army would not obtain a "significant cost savings benefit to the agency" as concluded by the Army. The Court of Federal Claims agreed that it was irrational for the Army to categorize this aspect of CAE's proposal as a strength, but nevertheless denied System's Studies protest because there was no prejudice to the protester from this error, because the Army had made no adjustment to CAE's price based on a cost savings from the strength.

On appeal, Systems Studies asserted when whenever the Court of Federal Claims determines in a bid protest that an agency's decision was arbitrary and capricious, the defect in the agency decision must be *presumed* to be prejudicial. The Federal Circuit rejected that approach, and instead explained the two-step procedure outlined above. The Federal Circuit concluded that there is no presumption of prejudice when a protester demonstrated irrationality in an agency decision—the protester must show prejudice. If the protester cannot show it had a "substantial chance" of receiving the award, the protest cannot be sustained.

Takeaway. At the Court of Federal Claims (and on appeal to the Federal Circuit), a protester can never assume that agency error automatically entitles it to have its protest sustained. Not only must agency irrationality/error be shown, but actual prejudice must be fully explained.

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