



Last week, in a decision that will increase the burden of proof for contractors in bid protests, the U.S. Court of Appeals for the Federal Circuit clarified that prejudice, a critical part of any protest action, is not to be presumed from arbitrary and capricious government procurement actions.

In a bid protest, the court must assess whether a procuring agency acted contrary to law or without a rational basis. If the court determines that the government acted irrationally or violated a statute or regulation, the court must then determine whether the agency's conduct prejudiced the protestor. Without prejudice, the protest should be denied, regardless of whether the government committed an error. A line of cases from the U.S. Court of Federal Claims, however, has interpreted Federal Circuit precedent as requiring the court to *presume* prejudice from an irrational or arbitrary and capricious agency action. *See, e.g., Caddell Construction Co. v. United States*, 125 Fed. Cl. 30, 50 (2016); *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 329 (2006). According to these cases, a separate showing of prejudice is required only if the government's error involved a violation of statute or

regulation—otherwise prejudice is presumed. Not all Court of Federal Claims' decisions follow this standard, with many still requiring the protestor to demonstrate prejudice in every instance.

Now, the Federal Circuit has firmly settled the disagreement. In *Sys. Stud. & Simulation, Inc. v. United States*, No. 2021-1469 (Fed. Cir. Dec. 30, 2021), System Studies & Simulation, Inc. (S3), an unsuccessful bidder, protested the award of a U.S. Army contract for helicopter flight training services. The Court of Federal Claims agreed with S3 that the agency had acted arbitrarily and capriciously in an aspect of its award decision, but nonetheless, it denied S3's protest on the ground that S3 was not prejudiced by the error.

S3 argued on appeal that there is a presumption of prejudice whenever the Court of Federal Claims determines that an agency acted irrationally in making an award decision. The Federal Circuit rejected that argument, relying on the Administrative Procedure Act (APA), which governs judicial review of agency actions in bid protests, and the court's own precedent. After summarizing the APA's mandate that a court give due account to the rule of prejudicial error, the court reiterated the two-step process it has consistently prescribed: (1) asking whether the agency's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and, if so, (2) asking whether the error was prejudicial. After clearly articulating that the second step is "always required before setting aside a bid award, regardless of whether the error identified at the first step was arbitrary and capricious action or, instead, a violation of law," the Federal Circuit expressly held that there is no presumption of prejudice when a protestor demonstrates irrational agency action.

Having rejected the presumption S3 urged it to adopt, the Federal Circuit explained that to demonstrate prejudice, S3 needed to show, in its post-award protest, that there was a substantial chance it would have received the award but for the agency's error. The Federal Circuit reviewed for clear error the lower court's factual findings underlying the Court of Federal Claims' determination that S3 failed to demonstrate prejudice. Finding no departure from the correct legal standard, it affirmed the lower court's decision.

The S3 decision will have important implications going forward. Previously, the law at the Court of Federal Claims was unsettled, with some judges granting protests based on any arbitrary and capricious agency action, regardless of whether the error had any real impact on the outcome of the procurement. As such, a protestor could throw the kitchen sink at a procurement and ultimately prevail if it managed to uncover an immaterial agency error. Now, protestors will always need to prove not only that the agency committed an error, but also that the error prejudiced the protestor. The Federal Circuit's confirmation that courts should not presume prejudice will increase protestors' burden, but should reduce the number of awards overturned for inconsequential errors. As such, potential protestors should carefully consider prejudice when deciding whether to file a protest at the Court of Federal Claims.

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