

Lining Up to Protest

Bid protest dismissed as company fails to allege it was “next in line” for award

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The United States Court of Federal Claims, in a decision issued February 10, 2015, dismissed the bid protest complaint filed in Universal Marine Company, K.S.C. v. United States, No. 14-1115C because the protester was not “next in line” for award and, therefore, lacked standing to protest. As described below, this decision ultimately was an easy one for the Court. The case, however, serves as a critical reminder for potential protesters of the necessity of demonstrating, through a carefully crafted complaint, that they were “prejudiced” by the agency’s actions.

Background

Universal Marine involved a solicitation issued by the U.S. Army to operate a facility in Kuwait that repairs and refurbishes commercial shipping containers. The procurement was conducted under a lowest price, technically acceptable (LPTA) evaluation scheme, wherein the Army would make award to the offeror that submitted the lowest-priced proposal also deemed technically acceptable. Four firms, including Universal Marine, submitted proposals in response to the solicitation, and the Army deemed all of the proposals technically acceptable. The Army then proceeded to make award to the lowest-priced offeror per the terms of the solicitation. Universal Marine, which submitted the *highest* proposed price of the four offerors, was not selected for award.

Universal Marine then filed a bid protest with the Government Accountability Office (GAO) in which it challenged the awardee’s technical and price evaluations. GAO dismissed this protest, finding that Universal Marine was “not an interested party.” The company then filed the instant protest with the Court, raising the same allegations. The government immediately moved to dismiss, arguing that Universal Marine lacked standing because it was not “next in line” for award.

Lack of Standing

Granting the government's motion, the Court explained that, under its bid protest jurisprudence, a contractor must establish that it is an "interested party" to have standing to pursue a protest. The Court explained further that the standing inquiry is essentially a three-part test. First, the protester "must show that: (1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement. ... A third test has added that a protestor must show the alleged errors in the procurement were prejudicial." Moreover, a protester demonstrates prejudice when "it can show that but for the error, it would have had a substantial chance of securing the contract."

Although Universal Marine was an actual offeror, it could not demonstrate that it was prejudiced by the errors it described because it was the highest-priced of the four offerors—or fourth in line for award under the solicitation's LPTA evaluation scheme. In order to have standing, the Court stated, Universal Marine "would have to challenge the bona fides of each of the other three offerors' eligibility or the solicitation as a whole ... even if the court were to set aside the award to [the awardee], the award would go to the second-place offeror. ... Without any challenge to the intervening offerors, Universal Marine cannot prevail."

Thus, Universal Marine failed even to *allege* that it should have been "next in line" for award—because it failed to raise allegations directed at the second- and third-priced offerors. As such, Universal Marine failed to meet the standard for what the Court termed "allegational prejudice," which made the case easy for the Court to dismiss for lack of standing.

The case should serve as a warning to all potential protesters to take great care in crafting their pleadings. Because of the solicitation's LPTA evaluation scheme, it was incumbent on Universal Marine to raise allegations regarding all of the higher-ranked offerors. The company evidently failed to realize the necessity of such allegations and thereby lost its opportunity to protest (not to mention the contract itself).

A Distinction with a Difference: The Two Types of Prejudice

It is important to note that the "allegational prejudice" relevant in *Universal Marine* is distinct from, but often confused with, a second variety of prejudice necessary for a protester ultimately to prevail on the merits of its protest. This second variety of prejudice—often referred to as "APA [Administrative Procedure Act] prejudice"—requires a protester to demonstrate that, but for any errors it identifies during the protest, it had a "substantial chance" of receiving the award. See *Linc Govt. Servs., LLC v. United States*, 96 Fed. Cl. 672, 695-96 (2010). ("In order to prevail in a bid protest, however, a plaintiff must satisfy a second type of prejudice requirement, one that has caused a good deal of confusion because it is often mistaken for its standing doctrinal fraternal twin. ... The need for this second showing of prejudice is captured in section 10(e) of the Administrative Procedure Act. ... In particular, the APA instructs that 'due account shall be taken of the rule of prejudicial error' when determining whether to set aside any unlawful agency decision.") Thus, the first variety of prejudice—that discussed in *Universal Marine*—relates to the protest as *alleged*, while the second variety of prejudice examines the effect of errors actually demonstrated on the merits. See *USfalcon, Inc. v. United States*, 92 Fed Cl. 436, 450 (2010). ("Since the prejudice determination for purposes of standing necessarily occurs before the merits of a protest are reached, the Court must accept the well-pled allegations of agency error to be true. ... Normally, if the protester's case rests on just one allegedly irrational action, or just one purported violation of a law or regulation, the finding of prejudice in the standing context will be replicated on the merits, once the asserted error is confirmed.

But a different outcome is possible if more than one ground is raised, as multiple errors might cumulatively establish prejudice, but not a smaller combination of them.”)

Thus, a protester ultimately must show both types of prejudice for its protest to succeed. The Court, however, will never reach consideration of “APA prejudice” if the protester fails to allege—as Universal Marine failed to allege—that it is an interested party.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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