

Got Prejudice? Establishing Prejudice in Bid Protests When No Offerors Are Eligible for Award

BY C. BRADFORD JORGENSEN, THOMAS E. DALEY, AND DAVID R. LACKER



C. Bradford Jorgensen



Thomas E. Daley



David R. Lacker

Background Prejudice in Bid Protests, Generally

At the COFC, prejudice is required to establish standing, as well as for success on the merits.¹ For purposes of standing, the COFC “presume[s] the party bringing a bid protest will succeed on the merits of its claim and ask[s] whether it has alleged an injury (or

prejudice) caused by the procuring agency’s actions.”² On the merits, the COFC determines whether the protestor “can prove it was prejudiced based on the record evidence,”³ meaning that the protestor must “show that there was a substantial chance that it would have won the contract award but for the procurement errors of the agency.”⁴ The COFC has explained that it “assumes the facts alleged in a plaintiff’s complaint are true for the purposes of evaluating standing but not for the purpose of resolving whether a plaintiff has demonstrated prejudice on the merits.”⁵

GAO’s bid protest regulations require that “a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract.”⁶ In the post-award context, GAO has explained that it has “generally found that a protester is an interested party to challenge an agency’s evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained.”⁷ To demonstrate prejudice on the merits, GAO requires that an offeror demonstrate that, “but for the agency’s actions, it would have a substantial chance of receiving an award.”⁸ GAO “will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions.”⁹

G4S Secure Integration (2022)

In *G4S Secure Integration LLC v. United States*,¹⁰ the US Department of State (DOS) was procuring security services for the US embassy in Angola on a lowest-price, technically acceptable (LPTA) basis.¹¹ Although DOS received multiple proposals, it found that only the protestor, G4S, and the awardee, CGS-ORSA, submitted technically acceptable proposals.¹² DOS awarded the contract to CGS-ORSA based on CGS-ORSA proposing a lower price than G4S.¹³

A number of bid protest decisions have been issued in recent years by the US Court of Federal Claims (COFC) and the US Government Accountability Office (GAO) in which the protestor, the awardee, and all other offerors were deemed ineligible for award. In this scenario, the COFC and GAO are tasked with deciding whether to sustain the protest and require the agency to resolicit the procurement or uphold the agency’s award decision to an ineligible offeror. The issue typically arises in the context of evaluating prejudice on the merits and, at least at the COFC, resolution of the issue would appear to turn on whether the protestor committed the same error as the awardee.

This article begins by discussing how the COFC and GAO have resolved the issue of prejudice on the merits when, as a result of a successful bid protest, there are no offerors eligible for award. The article continues by addressing the standard for prejudice at the COFC and GAO, as well as four recent protests in which the issue of prejudice was considered when there were no offerors eligible for award. The article then provides an overview of the takeaways that can be gleaned from these cases, including that at least two COFC judges would not find that a protestor has been prejudiced if the protestor benefited from an agency error in the same manner as the awardee. However, as also discussed below, both the COFC and GAO have found that a protestor that is ineligible for award can nonetheless establish prejudice by demonstrating that (1) the awardee is ineligible for a different reason than the protestor and (2) there are no other eligible offerors remaining in the procurement.

C. Bradford Jorgensen, Thomas E. Daley, and David R. Lacker are members of DLA Piper’s Government Contracts practice, where they assist companies with a range of government contract matters, including bid protests before the US Government Accountability Office and the US Court of Federal Claims.

G4S filed a protest with the COFC, asserting that CGS-ORSA was ineligible for award because CGS-ORSA did not have an active profile in the System for Award Management (SAM) at the time of proposal submission, as required under Federal Acquisition Regulation (FAR) 52.204-7.¹⁴ The COFC agreed with G4S's argument, finding that CGS-ORSA's registration was "in progress" at the time of proposal submission and, therefore, did not meet the requirements of FAR 52.204-7.¹⁵

But the COFC determined that G4S failed to demonstrate that DOS's error of awarding the contract to an ineligible offeror was prejudicial because G4S also did not have an active SAM registration at the time of proposal submission.¹⁶ The court stated:

There has been no prejudice when a bid protestor benefited from the same potentially unlawful discretion from which the awardee benefited. . . . The plaintiffs here committed at least one of the errors they allege was committed by the defendant-intervenor, and therefore the plaintiffs benefited from the same exercise of discretion by State as the awardee. In such a situation, the plaintiffs are not able to demonstrate prejudice.¹⁷

Thus, the COFC concluded that G4S "failed to prove that they were prejudiced" by DOS's error and entered judgment in favor of the government and CGS-ORSA because G4S "benefited from the agency's error in the same way that the defendant-intervenor did."¹⁸

G4S subsequently appealed the COFC's judgment and moved for an injunction pending appeal, arguing that the COFC erred in upholding an award to an ineligible offeror.¹⁹ G4S explained that, during its evaluation, DOS had found that G4S and CGS-ORSA were the only offerors eligible for award in the procurement.²⁰ Further, G4S argued that, as a result of the COFC's decision finding that CGS-ORSA and G4S were both ineligible for award, there were no offerors eligible for award.²¹ G4S asserted that, rather than upholding the award to an ineligible offeror (i.e., CGS-ORSA), the COFC should have remanded the procurement to DOS, which would have reopened the procurement because none of the offerors in the procurement were eligible for award.²²

The COFC again rejected G4S's arguments, stating that there was "no connection" between the agency's failure to properly apply FAR 52.204-7 and the ultimate award decision.²³ The COFC asserted that neither CGS-ORSA nor G4S "gained a competitive advantage in the procurement" from DOS's error.²⁴ The COFC also noted that CGS-ORSA and G4S had a "full and equal opportunity to compete for the contract" and that the agency selected CGS-ORSA as the awardee based on its lower price.²⁵ The COFC, therefore, concluded that any error committed by the agency was a harmless error and that G4S had not established prejudice.²⁶ G4S subsequently voluntarily dismissed its appeal of the COFC's judgment.²⁷

Elevated Technologies (2022)

The procurement at issue in *Elevated Technologies, Inc. v. United States*²⁸ was for elevator maintenance and repair services at a medical center operated by the US Department of Veterans Affairs (VA).²⁹ The VA received six quotations, five of which the VA deemed technically unacceptable, including the quote submitted by the protestor, Elevated Technologies, Inc.

Elevated Technologies filed a bid protest with the COFC alleging that the VA erred by selecting GreenEfficient, Inc., as the awardee.³⁰ The COFC agreed, finding that GreenEfficient acted contrary to the terms of the solicitation by submitting multiple quotations to the VA.³¹ The COFC stated that the solicitation "contained an express provision mandating that the VA disqualify contractors who submitted multiple offers" and that the VA was required to disqualify GreenEfficient.³² Accordingly, with GreenEfficient disqualified, there would have been no offerors eligible to receive award.³³

Regarding prejudice, the COFC stated:

The VA's error in awarding GreenEfficient the contract despite it submitting multiple quotes was prejudicial to Elevated. Had the VA disqualified GreenEfficient, there would have been no technically acceptable quote in response to the RFQ. The VA would then have had to reconduct the procurement, thereby giving Elevated another opportunity to submit a quote. See *VAS Realty, LLC v. United States*, 26 F.4th 945, 950 (Fed. Cir. 2022). Accordingly, Elevated has satisfied the prejudice requirement. See *id.*; see also *Straughan Evtl., Inc. v. United States*, 135 Fed. Cl. 360, 374 (2017).³⁴

Thus, although Elevated Technologies also was ineligible for award, the COFC found that it had been prejudiced by the VA's award of a contract to another ineligible offeror.³⁵

RELX (2023)

In *RELX, Inc.*,³⁶ the US Department of the Air Force (Air Force) issued a solicitation for a software license that would enable its employees to access law enforcement, legal, and legislative content.³⁷ Award was to be made on an LPTA basis.³⁸ The Air Force received two quotations, one from RELX, Inc., d/b/a LexisNexis (RELX), and one from West Publishing Company (West).³⁹

The Air Force selected West as the LPTA awardee, and RELX filed a protest with GAO, arguing that (1) West did not offer a single platform, as required by the solicitation, and (2) West's quotation improperly included open market items.⁴⁰ GAO agreed with both arguments and sustained RELX's protest.⁴¹

When addressing the proper remedy, GAO noted that it would typically "recommend that the agency terminate the task order issued to West and issue the task order to RELX," but that, in the subject procurement, RELX also

was ineligible for award.⁴² Although not addressed in the Air Force’s evaluation, GAO found that, similar to West, RELX improperly included open market items in its quotation.⁴³ GAO stated that, because neither company was eligible for award and there were no other eligible offerors in the procurement, the Air Force should solicit and evaluate revised proposals.⁴⁴ In sustaining the protest, GAO appears to have found that, notwithstanding that RELX was ineligible for award based on the inclusion of

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open market items in its proposal, RELX nevertheless was prejudiced by the Air Force’s error of awarding the contract to an offeror (i.e., West) that did not meet the single platform requirement.⁴⁵

Harley Marine Services (2019)

In *Harley Marine Servs., Inc.—Costs*,⁴⁶ the US Defense Logistics Agency (DLA) issued a solicitation for barge services relating to bulk jet, marine diesel, and commercial fuel on an LPTA basis.⁴⁷ The protestor, Harley Marine Services, Inc. (Harley), and the awardee, Vane Line Bunkering, Inc. (Vane), were the only two offerors, and DLA selected Vane as the awardee based on Vane proposing a lower price than Harley.⁴⁸

Harley filed a bid protest with the GAO, asserting that Vane’s barges did not meet the technical requirements set forth in the solicitation,⁴⁹ and DLA ultimately took corrective action in response to that protest ground.⁵⁰ In responding to Harley’s request for reimbursement of protest costs, DLA argued that Harley’s protest ground was not clearly meritorious because Harley could not demonstrate prejudice, as “Harley’s barges similarly do not strictly comply with the aforementioned size restrictions.”⁵¹ GAO rejected DLA’s argument, stating: “[I]f Harley’s protest were sustained, Vane . . . would also be ineligible for award, and the agency would be faced with resoliciting the requirement. Under such circumstances, we find that Harley demonstrated competitive prejudice.”⁵²

Takeaways From These Recent Cases

As reflected in the above discussion, the COFC and GAO have reached different conclusions with respect to whether a protestor has been prejudiced by the award of a contract to an ineligible offeror when there are no other offerors eligible for award, including the protestor. Although an argument could be made that there is inconsistency in the decisions, there are at least three takeaways that can be identified from the current case law.

First, at least two COFC judges have been reluctant to find that a protestor has been prejudiced when the “protestor benefited from the same potentially unlawful discretion from which the awardee benefited,” even if there are no other offerors eligible for award, as Judge Hertling stated in *G4S Secure Integration LLC*.⁵³ Indeed, in *Elevated Technologies*, Judge Davis acknowledged that Judge Hertling had made “a correct statement of the law” in *G4S Secure Integration LLC* with respect to there being no prejudice when a protestor benefits from the same error as the awardee.⁵⁴ That said, in *Harley Marine Services*, the GAO reached a different result, finding that a protestor established prejudice even though the protestor allegedly committed the same error as the awardee because both the protestor and the awardee would have been “ineligible for award, and the agency would be faced with resoliciting the requirement.”⁵⁵ The *Harley Marine Services* decision may represent a split between the COFC and GAO on this point; however, it should be noted that the *Harley Marine Services* decision addressed the point in a footnote in a costs decision, so it is possible that GAO could reach a different conclusion when addressing the issue more directly in a merits-based decision.

Second, both the COFC and GAO have found that an ineligible protestor can establish prejudice on the merits by demonstrating that (1) there are no other eligible offerors remaining in the procurement and (2) the awardee is ineligible for a different reason than the protestor. In other words, unlike the situation in *G4S Secure Integration LLC* where the protestor benefitted from the same error as the awardee, a protestor would seem to be able to establish prejudice at both the COFC and GAO when the awardee benefitted from some other error that the protestor did not.

For instance, in *Elevated Technologies*, the agency found that the proposal submitted by the protestor (i.e., Elevated Technologies) was unacceptable because it did not meet a licensing requirement.⁵⁶ Although Elevated Technologies was ineligible for award, COFC found that it had been prejudiced by the VA’s error in awarding the contract to an offeror that violated a prohibition in the solicitation against submitting multiple proposals.⁵⁷ COFC reasoned that Elevated Technologies had demonstrated prejudice on the merits because, but for the agency’s error, “there would have been no technically acceptable” offeror and the agency “would then have had to reconduct the procurement, thereby giving Elevated another opportunity to submit a quote.”⁵⁸

Similarly, in *RELX, Inc.*, there were no offerors eligible for award, as the protestor was ineligible based on its inclusion of open market items in its proposal, while the awardee was ineligible for award because its proposal included open market items *and* did not offer a single platform, as required by the solicitation.⁵⁹ Although the protestor was ineligible, GAO nevertheless concluded that the agency's decision to award the contract to an ineligible offeror was prejudicial, apparently because the awardee, in addition to offering open market items, had committed an *additional* error that the protestor had not made.⁶⁰ GAO, therefore, recommended that the agency solicit and evaluate revised proposals, rather than upholding an award to an ineligible offeror.⁶¹


Third, the issue of whether and how a protestor can establish prejudice when the protestor, awardee, and all other offerors are ineligible for award is an unsettled area of bid protest law that is subject to change. The US Court of Appeals for the Federal Circuit has not squarely addressed the issue, and the decision of a COFC judge is not binding on other judges.⁶² Additionally, GAO has only issued a few decisions that address prejudice when the protestor, awardee, and all other offerors are ineligible for award, and the GAO has not articulated a clear standard for demonstrating prejudice in such a situation.

Moreover, there is Federal Circuit case law regarding prejudice for purposes of standing when all offerors, including the protestor, are ineligible for award, but the Federal Circuit has not yet indicated the role of that case law in establishing prejudice on the merits when all offerors are ineligible for award. Specifically, the Federal Circuit has held that, for purposes of standing, a protestor may establish prejudice by demonstrating that, "if, as a result of a successful bid protest, the government would be obligated to rebid the contract and the protestor could compete for the contract during the reopened bid."⁶³ Such a showing is sufficient to demonstrate prejudice even if the protestor is ineligible for award. For example, in *Tinton Falls Lodging Realty, LLC v. United States*, a protestor demonstrated prejudice for purposes of standing even though it was ineligible for award because, assuming the awardee was ineligible for award as the protestor alleged, there was "at least a realistic possibility" that the protestor could compete in a resolicitation.⁶⁴ Similarly, in *VAS Realty, LLC v. United States*, a protestor demonstrated prejudice for purposes of standing because, assuming the protestor succeeded on the merits of its protest, it "would remain the sole bidder for [the] lease," and, "to the extent [the protestor's] proposal is not technically acceptable, the government would then have to rebid the lease and thus afford [the protestor] another opportunity to bid."⁶⁵

Although the above-cited Federal Circuit decisions address prejudice in the context of standing, the language used in those cases is broad, and the COFC has previously relied on Federal Circuit decisions involving standing when resolving matters relating to prejudice on

the merits in a bid protest.⁶⁶ Moreover, the Federal Circuit's standing decisions do *not* include a requirement that, in order to establish prejudice, a protestor cannot have committed the same error as the awardee, as stated in the *G4S Secure Integration* decision. Rather, the decisions indicate that a protestor can establish prejudice by demonstrating that, as a result of the agency's error, the agency would be obligated to resolicit the contract and the protestor could compete in the resolicitation.⁶⁷ Thus, those Federal Circuit decisions may provide a basis for finding that a protestor, even if ineligible for award, has established prejudice on the merits merely by showing that the awardee and all other offerors were ineligible for award and reflect that the case law in this area of bid protest law remains unsettled.

Conclusion

Although not a common fact pattern in bid protests, the cases discussed in this article provide a pathway for a protestor that is ineligible for award to nonetheless demonstrate that it has been prejudiced by the award of a contract to a competitor that also should have been found ineligible for award. That said, the issue of whether a protestor can establish prejudice on the merits when the protestor, awardee, and all other offerors are ineligible is a highly fact-dependent inquiry that, at least at the COFC, may turn on whether the protestor made the same error as the awardee. 

Endnotes

1. See *Am. Relocation Connections, L.L.C. v. United States*, 789 F. App'x 221, 226–27 (Fed. Cir. 2019).
2. *Id.* at 226.
3. *Id.*
4. *Centerra Grp., LLC v. United States*, 138 Fed. Cl. 407, 413 (2018).
5. *Vanquish Worldwide, LLC v. United States*, 163 Fed. Cl. 57, 69 (2022).
6. See, e.g., *BOF GA Lenox Park, LLC*, B-421522, 2023 WL 4312837, at *3 (Comp. Gen. June 20, 2023) (citing 4 C.F.R. § 21.0(a)(1)).
7. *Id.*
8. *RTD Middleburg Heights, LLC*, B-421477 et al., 2023 WL 4504998, at *5 (Comp. Gen. May 31, 2023).
9. *Id.*
10. No. 21-1817C, 2022 WL 211023 (Fed. Cl. Jan. 24, 2022), *appeal dismissed*, No. 2022-1513, 2023 WL 316142 (Fed. Cir. Jan. 19, 2023).
11. *Id.* at *1.
12. *G4S Secure Integration LLC v. United States*, 159 Fed. Cl. 249, 254 (2022).
13. *Id.*
14. *G4S Secure Integration LLC*, 2022 WL 211023, at *6.
15. *Id.* at *6–7.
16. See *id.* at *8–9.
17. *Id.* at *8.
18. *Id.* at *9.
19. See generally *G4S Secure Integration LLC v. United States*, 159 Fed. Cl. 249 (2022).
20. *Id.* at 255.
21. *Id.*
22. *Id.* at 255–56.

23. *Id.* at 256.
24. *Id.*
25. *Id.* at 257.
26. *See id.*
27. *G4S Secure Integration LLC v. United States*, No. 2022-1513, 2023 WL 316142 (Fed. Cir. Jan. 19, 2023).
28. 160 Fed. Cl. 257 (2022).
29. *Id.* at 263.
30. *Id.* at 265.
31. *Id.* at 271.
32. *Id.*
33. *See id.*
34. *Id.* at 273.
35. *See id.* Elevated Technologies challenged the VA's finding that its proposal was technically unacceptable, but the COFC declined to address that protest ground, stating that Elevated Technologies' "protest can be sustained on the basis that GreenEfficient's quote should have been disqualified." *Id.* at 273 n.7.
36. B-421597.2 et al., 2023 WL 8120120 (Comp. Gen. Nov. 17, 2023).
37. *Id.* at *1.
38. *Id.*
39. *Id.*
40. *Id.* at *1–2.
41. *Id.* at *2–4.
42. *Id.* at *4.
43. *Id.*
44. *See id.*
45. *See id.* at *2–4.
46. B-416033.4, 2019 WL 1594776 (Comp. Gen. Mar. 15, 2019).
47. *Id.* at *1.
48. *See id.* at *2.
49. *Id.*
50. *Id.* at *3.
51. *Id.* at *4 n.2.
52. *Id.*
53. *See G4S Secure Integration LLC v. United States*, 2022 WL 211023, at *8 (Fed. Cl. Jan. 24, 2022); *cf. VS2, LLC v. United States*, 155 Fed. Cl. 738, 768 (2021) ("The simple fact is that VS2 cannot now complain about Vectrus's and the government's interpretation of the Solicitation when VS2 relied upon the very same interpretation when preparing its proposal.").
54. *See Elevated Techs., Inc. v. United States*, 160 Fed. Cl. 257, 274 (2022).
55. *Harley Marine Servs., Inc.—Costs*, 2019 WL 1594776, at *4 n.2.
56. *Elevated Techs., Inc.*, 160 Fed. Cl. at 265.
57. *See id.* at 271.
58. *Id.* at 273.
59. *RELX, Inc.*, B-421597.2 et al., 2023 WL 8120120, at *2–4 (Comp. Gen. Nov. 17, 2023).
60. *See id.* at *3 n.2.
61. *Id.* at *4.
62. *Sotera Def. Sols., Inc. v. United States*, 118 Fed. Cl. 237, 258 (2014) ("[D]ecisions of this court are not binding precedent for judges of this court.").
63. *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1359 (Fed. Cir. 2015) (citing *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001)).
64. *Id.* at 1359–60.
65. 26 F.4th 945, 950 (Fed. Cir. 2022); *see also Impresa Costruzioni Geom. Domenico Garufi*, 238 F.3d at 1334 (concluding that a protestor that had submitted a technically unacceptable proposal had standing because, if its protest was successful, "the government would be obligated to rebid the contract, and [the protestor] could compete for the contract once again").
66. *See, e.g., CW Gov't Travel, Inc. v. United States*, 154 Fed. Cl. 721, 747 (2021).
67. *See, e.g., Tinton Falls Lodging Realty, LLC*, 800 F.3d at 1359.