

Halter Marine, Inc. v. U.S.

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OPINION

HORN, Judge.

The plaintiff, Halter Marine, Inc. (Halter) filed a post-award bid protest complaint seeking to set aside the award of a contract by the United States Coast Guard (Coast Guard) to the defendant-intervenor, Marinette Marine Corporation (Marinette), for a multi-mission Great Lakes Ice Breaker (GLIB).

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Standard of Review

The plaintiff has filed a protest requesting the court to issue a permanent injunction directing the Coast Guard to re-evaluate the proposals of Halter and Marinette to permit correction of the alleged errors committed by the agency in the original evaluation process. The plaintiff seeks a new award based upon such re-evaluation to the plaintiff. The Administrative Dispute Resolution Act of 1996, Pub.L. No. 104-320, §§ 12(a), 12(b), 110 Stat. 3870, 3874 (1996), amended the Tucker Act and also provided the United States Court of Federal Claims with post-award bid protest jurisdiction for actions filed on or after December 31, 1996. See 28 U.S.C. § 1491(b)(1)-(4) (2000). The statute provides that post-award protests of agency procurement decisions are to be reviewed under the Administrative Procedure Act (APA) standards, making the standards outlined in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir.1970) and the line of cases following that decision applicable. See Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (2003); Impresa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed.Cir.2001).

Agency procurement actions, therefore, should be set aside when they are determined to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "(D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (2000); Impresa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332; RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1290 (Fed.Cir.1999). In Impresa Costruzioni Geom. Domenico Garufi v. United States, the court wrote:

Under the APA standards that are applied in the Scanwell line of cases, a bid award may be set aside if either: (1)[T]he procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.... When a challenge is brought on the first ground, the courts have recognized that contracting officers are "entitled to exercise discretion upon a broad range of issues confronting them" in the procurement process. Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir.1994). Accordingly, the test for reviewing courts is to determine whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," *id.*, and the "disappointed bidder bears a 'heavy burden' of showing that the award decision 'had no rational basis.'" Saratoga Dev. Corp. v. United States, 21 F.3d 445, 456 (D.C.Cir.1994). When a challenge is brought on the second ground, the disappointed bidder must show "a clear and prejudicial violation of applicable statutes or regulations." Kentron [Hawaii, Ltd. v. Warner,] 480 F.2d [1166,] 1169 [(D.C.Cir.1973)]; Latecoere, 19 F.3d at 1356.

Impresa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332-33 (certain citations omitted); see also OMV Med., Inc. v. United States, 219 F.3d 1337, 1343 (Fed.Cir.2000).

A disappointed bidder has the burden of demonstrating the arbitrary and capricious nature of the agency decision by a preponderance of the evidence. See Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995-96 (Fed.Cir.1996); Wilner v. United States, 24 F.3d 1397, 1413 (Fed.Cir.1994) (dissenting on other grounds); Labat-Anderson Inc. v.

United States, 50 Fed.Cl. 99, 106 (2001), *aff'd* 264 F.3d 1071 (Fed.Cir.); Emery Worldwide Airlines, Inc. v. United States, 49 Fed.Cl. 211, 222 (2001); Dynacs Eng'g Co. v. United States, 48 Fed.Cl. 614, 619 (2001); Ellsworth Assocs., Inc. v. United States, 45 Fed.Cl. 388, 392 (1999). The United States Supreme Court has identified sample grounds which can constitute arbitrary or capricious agency action:

[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). "The agency must present a full and reasoned explanation of its decision The reviewing court is thus enabled to perform a meaningful review" In re Sang-Su Lee, 277 F.3d 1338, 1342 (Fed.Cir.2002).

Under an arbitrary or capricious standard, the reviewing court should not substitute its judgment for that of the agency, but should review the basis for the agency decision to determine if it was legally permissible, reasonable, and supported by the facts. Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43, 103 S.Ct. 2856. "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed.Cir.1989) (quoting M. Steintal & Co. v. Seamans, 455 F.2d 1289, 1301 (D.C.Cir.1971)); *see also* Cybertech Group, Inc. v. United States, 48 Fed.Cl. 638, 646 (2001). As stated by the United States Supreme Court:

Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (citations omitted); *see also* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), *reh'g denied*, 420 U.S. 956, 95 S.Ct. 1340, 43 L.Ed.2d 433 (1975); In re Sang-Su Lee, 277 F.3d at 1342; Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed.Cir.2000) ("The arbitrary and capricious standard applicable here is highly deferential. This standard requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.") (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. at 285, 95 S.Ct. 438); Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955, 959 (Fed.Cir.1993); ManTech Telecomms. and Info. Sys. Corp. v. United States, 49 Fed.Cl. at 63; Ellsworth Assocs., Inc. v. United States, 45 Fed.Cl. at 392 ("Courts must give great deference to agency procurement decisions and will not lightly overturn them.") (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)); Redland Genstar, Inc. v. United States, 39 Fed.Cl. 220, 231 (1997); Mike Hooks, Inc. v. United States, 39 Fed.Cl. 147, 154 (1997); Cincom Sys., Inc. v. United States, 37 Fed.Cl. 663, 672 (1997); Commercial Energies, Inc. v. United States, 20 Cl.Ct. 140, 145 (1990) ("In simple terms, courts should not substitute their judgments for pre-award procurement decisions unless the agency clearly acted irrationally or unreasonably.") (citations omitted).

Similarly, in E.W. Bliss Co. v. United States, the United States Court of Appeals for the Federal Circuit offered guidance on the applicable standard of review:

Procurement officials have substantial discretion to determine which proposal represents the best value for the government. *See* Lockheed Missiles & Space Co., Inc. v. Bentsen, 4 F.3d 955, 958 (Fed.Cir.1993); *cf.* Widnall v. B3H, 75 F.3d 1577 (Fed.Cir.1996) (holding that Board of Contract Appeals should defer to agency's best value decision as long as it

is "grounded in reason ... even if the Board itself might have chosen a different bidder"); In re General Offshore Corp., B-251969.5, B-251969.6, 94-1 Comptroller Gen.'s Procurement Decisions (Federal Publications Inc.) ¶ 248, at 3 [1994 WL 129008] (Apr. 8, 1994) ("In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Where an evaluation is challenged, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion.") (citations omitted). Bliss has not shown that the Mint abused its discretion in awarding the contract to Pressmasters.

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Bliss' [other challenges to the procurement] deal with the minutiae of the procurement process in such matters as technical ratings ... which involve discretionary determinations of procurement officials that a court will not second guess. See Lockheed Missiles & Space Co., 4 F.3d at 958; Grumman Data Systems Corp. v. Widnall, 15 F.3d 1044, 1048 (Fed.Cir.1994) ("[S]mall errors made by the procuring agency are not sufficient grounds for rejecting an entire procurement."); ... E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed.Cir.1996); see also JWK Int'l Corp. v. United States, 49 Fed.Cl. 371, 388 (2001), *aff'd* 279 F.3d 985 (Fed.Cir.2002). In a negotiated procurement, in which contracting officers are generally afforded even greater decision making discretion, in comparison to their role in sealed bid procurements. "It is well-established that contracting officials are accorded broad discretion in conducting a negotiated procurement" Hayes Int'l Corp. v. United States, 7 Cl.Ct. 681, 686 (1985) (citing Sperry Flight Sys. v. United States, 212 Ct.Cl. 329, 339-340, 548 F.2d 915 (1977)); see also Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d at 958; Cybertech Group, Inc. v. United States, 48 Fed.Cl. at 646 ("The court recognizes that the agency possesses wide discretion in the application of procurement regulations."); CACI Field Servs., Inc. v. United States, 13 Cl.Ct. 718, 726 (1987), *aff'd*, 854 F.2d 464 (Fed.Cir.1988). In Burroughs Corp. v. United States, the court described the broad discretion afforded a contracting officer in a negotiated procurement as follows: Remarking on the contracting officer's discretion in negotiation the court in Sperry Flight Systems Division v. United States, 212 Ct.Cl. 329, 339, 548 F.2d 915, 921 (1977) noted that "... the decision to contract--a responsibility that rests with the contracting officer alone--is inherently a judgmental process which cannot accommodate itself to absolutes, at least not without severely impairing the quality of the judgment called for ..." and that, "effective contracting demands broad discretion." Because of the breadth of discretion given to the contracting officer in negotiated procurement, the burden of showing this discretion was abused, and that the action was "arbitrary and capricious" is certainly much heavier than it would be in a case of formal advertising. Burroughs Corp. v. United States, 223 Ct.Cl. 53, 65, 617 F.2d 590, 598 (1980) (citation omitted; omissions in original); see also LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1555 (Fed.Cir.1995); JWK Int'l Corp. v. United States, 49 Fed.Cl. at 388; ManTech Telecomms. and Info. Sys. Corp. v. United States, 49 Fed.Cl. at 64. The United States Court of Appeals for the Federal Circuit has stated that: Effective contracting demands broad discretion. Burroughs Corp. v. United States, 223 Ct.Cl. 53, 617 F.2d 590, 598 (1980); Sperry Flight Sys. Div. v. United States, 548 F.2d 915, 921, 212 Ct.Cl. 329 (1977); see NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377

(Fed.Cir.1986); Tidewater Management Servs., Inc. v. United States, 573 F.2d 65, 73, 216 Ct.Cl. 69 (1978); RADVA Corp. v. United States, 17 Cl.Ct. 812, 819 (1989), *aff'd*, 914 F.2d 271[, 1990 WL 122139] (Fed.Cir.1990). Accordingly, agencies "are entrusted with a good deal of discretion in determining which bid is the most advantageous to the Government." Tidewater Management Servs., 573 F.2d at 73, 216 Ct.Cl. 69....

Lockheed Missiles & Space Co., Inc. v. Bentsen, 4 F.3d at 958-59; Grumman Data Sys. Corp. v. Dalton, 88 F.3d at 995; *see also* Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1046 (Fed.Cir.1994).

The wide discretion afforded contracting officers extends to a broad range of procurement functions, including the determination of what constitutes an advantage over other proposals. As stated by the United States Supreme Court:

Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on "engineering and scientific" considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.

Fed. Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463, 92 S.Ct. 637, 30 L.Ed.2d 600, *reh'g denied*, 405 U.S. 948, 92 S.Ct. 929, 30 L.Ed.2d 819 (1972); *see also* Compubahn v. United States, 33 Fed.Cl. 677, 682-83 (1995) ("[T]his court is in no position to challenge the technical merit of any comments made on the evaluation sheets or decisions made during the several stages of evaluation.") (footnote omitted); Electro-Methods, Inc. v. United States, 7 Cl.Ct. 755, 762 (1985) (Especially "where an agency's decisions are highly technical in nature ... judicial restraint is appropriate and proper.") (citations omitted). *But cf.* Cybertech Group, Inc. v. United States, 48 Fed.Cl. at 646 (Although acknowledging that the agency's decision is entitled to a presumption of regularity, stating "[t]he court must, however, perform a thorough review of even technical decisions in order to meaningfully exercise its jurisdiction.") (citing Prineville Sawmill Co. v. United States, 859 F.2d 905, 910-11 (Fed.Cir.1988)). As noted above, the question is not whether the court would reach the same conclusions as the agency regarding the comparison of proposals, but rather, whether the conclusions reached by the agency lacked a reasonable basis, and, thus, were arbitrary and capricious.

To prevail in a bid protest case, the protester also must demonstrate prejudice. 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). Expanding on the prejudice requirement, the United States Court of Appeals for the Federal Circuit has held that:

To prevail in a bid protest, a protester must show a significant, prejudicial error in the procurement process. *See* Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed.Cir.1996); Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed.Cir.1996). "To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract." Data General, 78 F.3d at 1562 (citation omitted). Rather, the protester must show "that there was a substantial chance it would have received the contract award but for that error." Statistica, 102 F.3d at 1582; *see* CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed.Cir.1983) (to establish competitive prejudice, protester must demonstrate that but for the alleged error, " 'there was a substantial chance that [it] would receive an award--that it was within the zone of active consideration.' ") (citation omitted).

Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed.Cir.), *reh'g denied* (1999) (citation omitted in original); *see also Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed.Cir.2002); OMV Med., Inc. v. United States, 219 F.3d at 1342; Advanced Data Concepts, Inc. v. United States, 216 F.3d at 1057; Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1380 (Fed.Cir.2000). In Data General Corporation v. Johnson, the Circuit Court wrote:
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.... The standard reflects a reasonable balance between the importance of (1) averting unwarranted interruptions of and interferences with the procurement process and (2) ensuring that protesters who have been adversely affected by allegedly significant error in the procurement process have a forum available to vent their grievances.
Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed.Cir.1996).

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