The United States Court of Federal Claims presents:

ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

November 9, 2023

THE SHIFTING BURDEN OF PREJUDICE IN BID PROTESTS

Moderator: Hon. Matthew Solomson

Panelists:

Corinne Niosi, Assistant Director, Commercial Litigation Branch, DOJ

Anuj Vohra, Partner, Crowell & Moring LLP

Craig Holman, Partner, Arnold & Porter

WHAT IS STANDING?

According to SCOTUS:

> [T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)

> To satisfy the " 'irreducible constitutional minimum' " of Article III standing, a plaintiff must not only establish (1) an injury in fact (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016). . . .

Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797, 209 L. Ed. 2d 94 (2021)

STANDING

Must be alleged with facts and then proven on the merits.

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . .

Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136–37, 119 L. Ed. 2d 351 (1992) (distinguishing between "the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage)").

ARTICLE III REQUIREMENTS IN THE COURT OF FEDERAL CLAIMS?

> Although well established in the case law, it might seem odd, at first blush, that a constitutional doctrine ingrained in Article III of the Constitution would be applied to an Article I court. Several reasons, however, militate in favor of such an application. First, the Supreme Court has indicated that Article I courts, like their Article III counterparts, exercise the judicial power of the United States. See, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 889, 111 S. Ct. 2631, 115 L.Ed.2d 764 (1991). Second, the statute empowering this court to enter final judgments specifically refers to "case or controversy," 28 U.S.C. § 2519, thereby appearing to invoke the Article III requirements. *See CW Government Travel*, 46 Fed. Cl. at 557–58. Finally, Congress has specified that judgments of this court are reviewable by the Court of Appeals for the Federal Circuit and, ultimately, the Supreme Court, both Article III tribunals that would be unable to perform such review absent a justiciable case or controversy. *See American Maritime Transport*, 18 Cl. Ct. at 291; *Welsh v. United States*, 2 Cl. Ct. 417, 420–21 (1983).

Emerald Int'l Corp. v. United States, 54 Fed. Cl. 674, 677 (2002).

STANDING IN COFC BID PROTESTS

Who has standing to bring an action pursuant to 28 U.S.C. § 1491(b)?

INTERESTED PARTY

28 U.S.C. § 1491(b)(1) provides for ". . . an action by an **interested party** . . . ."

Who is an "interested party"?

> We therefore construe the term "interested party" in § 1491(b)(1) in accordance with the CICA, and hold that standing under § 1491(b)(1) is limited to **actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract**.

Am. Fed'n of Gov't Emps., AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)

WHAT TYPE OF INJURY IS COGNIZABLE?

- The definition of “interested party” encompasses a prejudice concept.
- Prejudice is where an offeror’s “direct economic interest would be [negatively] affected by the award of the contract or by failure to award the contract.”

THE RELATIONSHIP BETWEEN STANDING AND PREJUDICE

- "[T]he question of prejudice goes directly to the question of standing[.]" *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003).
- This would seem to be nothing more than an application of the Supreme Court's decisions in *Lujan* and other standing decisions.
  - "The first question [for standing] is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S. Ct. 827, 829, 25 L. Ed. 2d 184 (1970) (finding injury in fact where petitioners "allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners").
- "[T]o prevail in a bid protest, the protester must show not only a significant error the procurement process, but also that the error prejudiced it." *Data General Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996).

THE VARIOUS PREJUDICE TESTS (PRE-AWARD, POST-AWARD)

- Some Pre-Award Protests
  - A protester must allege "*non-trivial competitive injury* which can be addressed by judicial relief" to establish standing. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1362 (Fed. Cir. 2009).
- Post-Award Protests and Certain Pre-Award Protests
  - A protester must establish a "*substantial chance* of securing the award" to establish standing. *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369-70 (Fed. Cir. 2002) (*abrogated on other grounds by CACI, Inc.-Fed. v. United States*, 67 F.4th 1145 (Fed. Cir. 2023)).[1]
  - The Federal Circuit has found it appropriate to apply the substantial chance test in pre-award protests where an adequate factual predicate exists. *Oracle America, Inc. v. United States*, 975 F.3d 1279 (Fed. Cir. 2020); *Aero Spray, Inc. v. United States*, 156 Fed. Cl. 548, 564 (Fed. Cir. 2021) (rejecting application of the non-trivial competitive injury test outside of the limited circumstances identified by the Circuit).

[1] In *CACI*, the Federal Circuit explained that *Myers* erred in "treating the interested party issue as a jurisdictional issue." 67 F.4th at 1151.

THE FEDERAL CIRCUIT HAS ALWAYS CONSIDERED ARTICLE III STANDING CONCEPTS

> Article III considerations require a party such as Weeks to make a showing of *some* prejudice. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) ("First, the plaintiff must have suffered an 'injury in fact'....").
>
> …
>
> Upon consideration of the matter, we conclude that the standard applied by the Court of Federal Claims in this case strikes ***the appropriate balance between the language of § 1491(b)(1)***, which contemplates "an action by an interested party objecting to a solicitation for bids or proposals ... or any alleged violation of statute or regulation in connection with ... a proposed procurement***," and Article III standing requirements***. We therefore consider whether Weeks has demonstrated a "non-trivial competitive injury which can be addressed by judicial relief."

Weeks Marine, 575 F.3d at 1361-62 (emphasis added).

THE FEDERAL CIRCUIT WEIGHS IN ON STANDING AND PREJUDICE

CACI, Inc.-Fed. v. United States, 67 F.4th 1145, 1153–54 (Fed. Cir. 2023):

- "The issue of prejudice is related to the issue of statutory standing. *See Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996) (describing various formulations of prejudice)."
- "[A]s with statutory standing under *Lexmark*, the issue of prejudice is no longer jurisdictional unless it implicates Article III considerations, and our cases to the contrary are no longer good law. The issue of prejudice can properly be resolved by the Claims Court initially only if under *Chenery* the issue need not be remanded to the agency, for example, if the issue is a purely legal question. . . ."
- "Typically, however, if the issue has not been addressed in the first instance by the contracting officer, a remand is necessary for the contracting officer to address the issue of prejudice."

THE COURT'S ROLE IN ASSESSING PREJUDICE PER *CACI*

- "The issue of prejudice can properly be resolved by the Claims Court initially only if under *Chenery* the issue need not be remanded to the agency, for example, if the issue is a purely legal question. . . . Typically, however, if the issue has not been addressed in the first instance by the contracting officer, a remand is necessary for the contracting officer to address the issue of prejudice." *CACI, Inc.-Federal v. United States*, 67 F.4th 1145, 1153-54 (2023).
  - Limited to OCI?
  - Where else might this apply?

SUMMARY: PREJUDICE IS THE SAME AS ASKING "HOW WAS PLAINTIFF INJURED BY A GOVERNMENT DECISION?"

- If no injury, there's nothing to redress, and therefore no standing.
- Again, facts must be alleged that, if proven, demonstrate a redressable injury.
- But, as with any material facts, prejudice ultimately must be proven (and not simply alleged).

REMAINING QUESTIONS

- Was *CACI* correctly decided?
- What are *CACI*'s implications with regard to how Article III standing works at the Court of Federal Claims?
- Decision on the merits vs. jurisdiction – does it matter? What are the implications for so called "non-interested" parties under the APA?
- What about Federal Circuit law on challenging jurisdictional facts? What's the difference between challenging interested party status and challenging that a plaintiff is in privity of contract with the government under 28 U.S.C. § 1491(a)?

WHAT THE COURT IS SEEING IN PARTIES' BRIEFING

- Failure to allege facts demonstrating prejudice.
- Stacking (often redundant) claims that individually do not show prejudice and collectively might, but often not clear in which combination.
- Sometimes prejudice is obvious from the record; often it is not.