PLEASE CHECK YOUR CRYSTAL BALL AT THE COURTROOM DOOR—A CALL FOR THE JUDICIARY IN BID PROTEST ACTIONS TO LET AGENCIES DO THEIR JOB

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I. INTRODUCTION

Neither trial nor appellate courts are well equipped to speculate. Indeed, they often remind litigants of their limitations in that regard. For example, they refuse to award lost profits damages when it is "speculative" that any would have been earned but for the breach.[1]

It is ironic, then, that when making prejudice determinations in several recent bid protest cases, both the Federal Circuit and the Court of Federal Claims have resorted to speculation as to how a procuring agency would have acted, basing their speculation on a hypothetical record that the courts posit likely would have been made at the agency level. Both the Federal Circuit's

1. *See, e.g.*, Cal. Fed. Bank v. United States, 245 F.3d 1342, 1351–52 (Fed. Cir. 2001); San Carlos Irrigation & Drainage Dist. v. United States, 111 F.3d 1557, 1563 (Fed. Cir. 1997).

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most recent elaboration of the standard under which it will review prejudice determinations in bid protest cases, and the burden both the appellate and trial courts have put on successful protestors, deserve more careful analysis than those matters have sometimes received.

Prior to 2004 the Federal Circuit analyzed three cases regarding whether a violation of procurement law was prejudicial, and the court prejudged what an agency would have concluded if the matter had been remanded to the agency for proceedings in conformity with law.[2] Particularly overreaching in its attempts at clairvoyance was the majority opinion in *H.G. Properties A, L.P. v. United States*,[3] in which the court held that, even assuming the protestor had appropriately complained that the agency had made multiple, material deviations to the requirements immediately after the award such that the revised requirements should have been published to all of the potential offerors and new offers solicited and evaluated, the protestor lacked standing because it did not have a substantial chance for an award in any resolicitation.[4]

To reach this conclusion, the majority—despite the appearance that it could not have had any idea of what the details would have been of revised proposals if the matter had been resolicited—went through a series of hypothetical speculations about what the revised requirements might have been, how the protestor might have responded to them, and how the agency might have scored revised offers.[5]

This type of crystal-ball work by a court is not only difficult, it is unnecessary and ill-advised. The review standard of the Administrative Procedure Act (APA)[6] is incorporated by reference into the bid protest review standard for the Court of Federal Claims.[7] Under the APA standard, a reviewing court may not supply a reasoned decision for the agency when the agency has not done so itself and must remand to the agency if it finds error, allowing the agency to perform its appointed duties in an appropriate manner.[8] A reviewing court is not allowed to substitute its own views and thereby second-guess the agency.[9] Neither may a court properly preempt an agency by speculating in the first instance how an agency, if confronted with different facts on

2. *See* Frederick W. Claybrook Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 33 Pub. Cont. L.J. 535, 556–64 (2004) (discussing those cases).

3. 68 F. App'x 192, 193 (Fed. Cir. 2003).

4. *Id.* at 194–95.

5. *Id.* at 195. Judge Schall did not participate in this speculative exercise. *Id.* at 195–97 (Schall, J., dissenting). The other two Federal Circuit decisions were *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000), and *JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002). *See* Claybrook, *supra* note 2, at 558–61.

6. 5 U.S.C. § 706 (2006).

7. 28 U.S.C. § 1491(b)(4) (2000).

8. The Supreme Court first articulated this rule in *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 195–200 (1947), and *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 95 (1943).

9. *See* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332–33 (Fed. Cir. 2001); E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

remand, might perform its discretionary functions under different and unknown circumstances.[10] Procurement decisions, like other agency decisions, often entail complicated factors and complex trade-offs.[11] When a court hypothesizes about what the agency might do on remand, it usurps the agency's prerogatives and exceeds its own proper sphere.[12]

This is not to say, of course, that a reviewing court, once it finds error in a procurement process, has completed its task. In the Tucker Act[13] as revised by the Administrative Dispute Resolution Act of 1996 (ADRA),[14] Congress provided that the Court of Federal Claims "shall review the agency's decision pursuant to the standards set forth in section 706 of title 5,"[15] the APA's judicial review provision. Section 706 provides that, when courts are reviewing agency action, "due account shall be taken of the rule of prejudicial error."[16]

However, that analysis, when performed properly, necessitates neither omniscience nor divination. Instead, it requires a review of the existing administrative record and a finding of "no prejudice" only when, *from the record already made by the agency* and supplemented as appropriate, it is obvious that the error, if it had not occurred, would have made no difference in the agency's ultimate decision as initially reasoned. For instance, in a low-cost-wins procurement in which the protestor lost by $1,000 and it proves an agency error that overstated its price, but only by $100, the protestor would not be able to show prejudice. The more sophisticated and complicated the agency's evaluation analysis, however, the more difficult it becomes for the court to make a "no prejudice" finding without stepping into the shoes of the agency itself and practicing clairvoyance.[17]

10. *See Overton Park*, 401 U.S. at 416; *Chenery II*, 332 U.S. at 200; *Chenery I*, 318 U.S. at 94–95.

11. *See* Multimax, Inc. v. FAA, 231 F.3d 882, 886–87 (D.C. Cir. 2000); *E.W. Bliss Co.*, 77 F.3d at 448–49.

12. "It is not for us to determine independently" the appropriate agency action. *Chenery I*, 318 U.S. at 94–95. "The cause should therefore be remanded…to the [agency] for such further proceedings…as may be appropriate." *Id.* "After a remand was made,…the [agency] was bound to deal with the problem afresh, performing the function delegated to it by Congress.… Only in that way could the legislative policies embodied in the Act be effectuated." *Chenery II*, 332 U.S. at 201; *see also* Camp v. Pitts, 411 U.S. 138, 143 (1973) ("The validity of the [agency's] action must, therefore, stand or fall on the propriety of that finding.… If that finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency] for further consideration."). The Federal Circuit recently applied the *Chenery* principles in a veteran's case in *Mayfield v. Nicholson*, 444 F.3d 1328, 1334 (Fed. Cir. 2006). *See also* Bivings v. United States Dep't of Agric., 225 F.3d 1331, 1335 (Fed. Cir. 2000); Hensley v. West, 212 F.3d 1255, 1264, 1265 (Fed. Cir. 2000).

13. 28 U.S.C. §§ 1491–1509 (2000).

14. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870.

15. 28 U.S.C. § 1491(b)(4).

16. 5 U.S.C. § 706.

17. *See* Fort Carson Support Servs. v. United States, 71 Fed. Cl. 571, 593 (2006). The Federal Circuit recognizes this truism in the "best value" award situation by observing that the more technical a determination becomes, the more discretion the court affords the agency's determination and the greater its need to guard against second-guessing the agency. *See, e.g.*, Galen Med.

This Article will first discuss *Bannum, Inc. v. United States* (*Bannum I*).[18] In that decision, the Federal Circuit began a helpful analysis of the appropriate review standard for prejudice determinations of the trial court, but stopped short of recognizing the different procedural postures of such trial court decisions and the need for varying standards depending on the type of evidence relied upon by the Court of Federal Claims in making prejudice determinations.[19]

Unfortunately, in *Bannum I* the Federal Circuit also sent an improper signal that crystal-ball prejudice determinations not only would be tolerated, but also would be given minimalist appellate review.[20] Since that decision, in at least six cases the Court of Federal Claims has fallen victim to the misconception that it should prognosticate what an agency likely would do on remand after it corrected error in its initial procurement action. Each of those cases is discussed below, and provides further illustrations as to why the courts should not usurp an agency's duties when making a prejudice determination after finding procurement error. Finally, this Article will outline the appropriate standard for prejudice determinations under the APA in bid protest cases.

II. *BANNUM I*: ONE STEP FORWARD, TWO STEPS BACK

In *Bannum, Inc. v. United States* (*Bannum I*), the Federal Circuit addressed the proper appellate scope of review for prejudice findings by the trial court in bid protest actions.[21] While the court properly recognized that a one-size-fits-all, *de novo* solution was inappropriate, it improperly swung to the other extreme in articulating a one-size-fits-all, "clear error" appellate standard.[22] Instead, the Federal Circuit should recognize that the appellate review standard varies depending on whether or not the administrative record has been supplemented by contested evidence. Moreover, in *Bannum I*, the court improperly applied the prejudice standard to the facts before it, implying that the trial court must prejudge what the agency might do on remand, instead of finding prejudice whenever there is any reasonable possibility that a different result might eventuate upon remand to the agency.

A. *The Review Standard Two-Step*

In *Bannum I*, Judge Gajarsa for a unanimous panel carefully considered the appropriate appellate review standard for the different aspects of a bid

Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004); E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996); LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1555 (Fed. Cir. 1995); Burroughs Corp. v. United States, 617 F.2d 590, 597–98 (Ct. Cl. 1980); *see also* Multimax, Inc. v. FAA, 231 F.3d 882, 886–87 (D.C. Cir. 2000); J.A. Jones Mgmt. Servs. v. FAA, 225 F.3d 761, 765 (D.C. Cir. 2000); Omega World Travel, Inc. v. United States, 54 Fed. Cl. 570, 578 (2002).

18. 404 F.3d 1346 (Fed. Cir. 2005).
19. *Id*. at 1351.
20. *See id*. at 1351–52.
21. *Id*. at 1351, 1353–54.
22. *Id*. at 1354.

protest.[23] The trial court had applied the APA's "arbitrary and capricious" and "not in accordance with law" standards in finding error in the procurement action, and the appellate panel reviewed these merits findings under the same APA review standards and without deference, *i.e.*, *de novo*.[24] This ruling was appropriate considering the circumstances of the case, in which the trial court did not make any independent record supplementing the administrative record.[25] In such a situation, the appellate judges are practically in the identical situation as the trial judge in determining the legality of the agency's actions because that question is determined solely on a paper record. Thus, when reviewing only the administrative record, the Federal Circuit reviews "without deference,"[26] which is the functional equivalent of a *de novo* review of a summary judgment on uncontested facts.[27] The *Bannum I* court did not discuss the various situations in which the administrative record is supplemented in a bid protest action and whether a different level of appellate review is required in some or all of such situations.[28]

The trial court in *Bannum I* had found that an agency official of the appropriate level had not reviewed the protestor's past performance information, as required by the Federal Acquisition Regulation.[29] Affirming this merits ruling

23. *Id*. at 1351, 1353–57. Chief Judge Michel and Judge Newman were the other two judges on the panel. *Id*. at 1349.

24. *Id*. at 1351.

25. *Id*. at 1350.

26. *Id*. at 1351; *see also* Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1318–19 (Fed. Cir. 2003); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1330 (Fed. Cir. 2001); Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057 (Fed. Cir. 2000).

27. *See*, *e.g.*, R&W Flammann GmbH v. United States, 339 F.3d 1320, 1322 (Fed. Cir. 2003); *Info. Tech.*, 316 F.3d at 1318; *Advanced Data Concepts*, 216 F.3d at 1057; Stratos Mobile Network USA, LLC v. United States, 213 F.3d 1375, 1379 (Fed. Cir. 2000).

28. *See Bannum I*, 404 F.3d 1346, 1351 (Fed. Cir. 2005). The Court of Federal Claims judges generally follow the rules for supplementation of an administrative record set out by the District of Columbia Circuit in *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). *See*, *e.g.*, Savantage Fin. Servs., Inc. v. United States, 81 Fed. Cl. 300, 309–11 (2008); Marine Hydraulics Int'l, Inc. v. United States, 43 Fed. Cl. 664, 670 (1999); United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 319 (1998); CRC Marine Servs., Inc. v. United States, 41 Fed. Cl. 66, 84 (1998). The Federal Circuit has recognized that supplementation of an informal administrative record in bid protest cases is appropriate in certain circumstances. *See*, *e.g.*, *Info. Tech.*, 316 F.3d at 1324 n.2; *Impresa*, 238 F.3d at 1338–39; *see also* Cubic Applications, Inc. v. United States, 37 Fed. Cl. 345, 350 (1997) (observing that the administrative record in a procurement context is "something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review"). Courts following the *Esch* rules have allowed supplementation of the record by documents, affidavits, depositions, and oral testimony. *See*, *e.g.*, R&D Dynamics Corp. v. United States, 80 Fed. Cl. 715, 723–24 (2007) (documents); Geo-Seis Helicopters, Inc. v. United States, 77 Fed. Cl. 633, 648–49 (2007) (declaration and testimony); Galen Med. Assocs., Inc. v. United States, 56 Fed. Cl. 104, 109 (2003) (deposition), *aff'd*, 369 F.3d 1324 (Fed. Cir. 2004); Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211, 219 (deposition), *aff'd*, 264 F.3d 1071 (Fed. Cir. 2001); Dubinsky v. United States, 43 Fed. Cl. 243, 245 n.4, 252 (1999) (oral testimony). *But see* Serco Inc. v. United States, 81 Fed. Cl. 463, 480 n.22 (2008) (criticizing *Esch* as "heavily in tension" with Supreme Court precedents on supplementation of the administrative record).

29. *Bannum I*, 404 F.3d at 1351–53.

based on its *de novo* review,[30] the Federal Circuit next addressed the appropriate appellate review standard for prejudice findings. It held that, in making a prejudice analysis, the Court of Federal Claims must "make factual findings from the record evidence as if it were conducting a trial on the record. In such circumstances this court reviews such findings for clear error, consistent with [Rule 52 of the Rules of the Court of Federal Claims (RCFC)] and appellate review of factual determinations underpinning a discretionary ruling on preliminary injunction."[31] This basic assumption of the appellate court that the Court of Federal Claims makes findings "as if it were conducting a trial" when determining prejudice is not accurate in all situations.[32] As a result, the analysis set out in *Bannum I* needs further refinement.[33]

The prejudice cases generally involve three separate types of evidence relied upon to make the required prejudice showing.[34] Starting with the simplest first, some prejudice findings are based strictly on the documentary administrative record provided by the agency. For instance, in *Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt*,[35] the court found that the low bidder in a low-price-wins evaluation had improperly been disqualified. No supplementation of the record was necessary to show that the protestor had been prejudiced by the legal error.

In a second situation, the record provided by the agency is supplemented, but only with written materials. These materials can be (a) additional, contemporaneous documents that should have been provided as part of the original agency record;[36] (b) written statements by agency officials explaining the agency action;[37] or (c) sworn statements from the protestor itself.[38] Such statements by the protestor might explain, for instance, that the protestor could have submitted an offer but for the overly restrictive requirement that it is

30. *Id*.
31. *Id*. at 1353–54.
32. *See id*.
33. *See generally* 12 James William Moore et al., Moore's Federal Practice § 61.02[2] (Matthew Bender 3d ed. 2008) ("Clearly, review for harmless error is fact-specific and must, therefore, proceed on a case-by-case basis."); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2883, at 448–49 (2d ed. 1995).
34. This same analysis applies to merits decisions. For instance, when a trial court takes testimony to supplement the record to review a claim of bias, its fact findings in that regard are entitled to "clear error" appellate review, even though *de novo* review is appropriate if only a paper administrative record is involved. *See, e.g.*, Latecoere Int'l, Inc. v. United States Dep't of the Navy, 19 F.3d 1342, 1356–57, 1364–65 (11th Cir. 1994).
35. 506 F. Supp. 1059 (D.R.I. 1980).
36. *See, e.g.*, R&D Dynamics Corp. v. United States, 80 Fed. Cl. 715, 723–24 (2007).
37. *See* Camp v. Pitts, 411 U.S. 138, 142–43 (1973); *see, e.g.*, CHE Consulting, Inc. v. United States, 78 Fed. Cl. 380, 388–89 (2007). In *Camp*, the Supreme Court stated that necessary supplementation to an agency record could be "either through affidavits or testimony." *Camp*, 411 U.S. at 142–43; *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (suggesting supplementation by affidavit).
38. *See, e.g.*, Knowledge Connections, Inc. v. United States, 79 Fed. Cl. 750, 762–63 (2007). Such statements are often notarized affidavits, but can also be declarations sworn under penalty of perjury. *See* 28 U.S.C. § 1746 (2000).

challenging or that it could have offered a different technical approach than it did if it had known the actual evaluation scheme, or that it could have lowered its price but for the alleged error.[39]

The third type of situation in which the trial court makes prejudice findings involves relevant testimony that is contested and presented subject to cross-examination.[40] In such situations, the trial court does not make fact findings that are based solely upon an uncontested documentary record.[41] Instead, the court must assess the credibility of the witnesses and make appropriate determinations of fact.[42]

The *Bannum I* court apparently had only this third situation in mind when it stated that it would review a prejudice determination of the trial court for "clear error," as it stated that the trial court would have "to make factual findings from the record evidence as if it were conducting a trial on the record."[43] For such situations, factual findings involving credibility determinations should, indeed, be given "clear error" review, not *de novo* review. However, when the legal conclusion of whether an error is prejudicial is based solely on a documentary record of uncontested facts, it is the functional equivalent of a motion for summary judgment, and *de novo* review should be appropriate.

The Federal Circuit in *Bannum I*, when articulating a "clearly erroneous" standard for prejudice rulings, noted in support that the Court of Federal Claims "was the first tribunal to assess prejudice."[44] That will invariably be

39. *See, e.g.*, Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1563 (Fed. Cir. 1996) (finding no prejudice in part because the protestor did not provide affidavit support as to how it would have altered its bid but for the error concerning which it complained); Candle Corp. v. United States, 40 Fed. Cl. 658, 666 (1998) ("[P]laintiff has not presented any viable evidence upon which to conclude that it was prejudiced as a result of these violations.").

40. *See* Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999).

41. *See id.*

42. In *Alfa Laval*, the Federal Circuit, while appropriately reversing the trial court's "no prejudice" finding that was a usurpation of the agency's duty to reevaluate, also reviewed the trial court's finding that had the evaluators analyzed the protester's proposal properly, they would have found the proposal compliant. *Id.* at 1368. The court found "no error in that finding." *Id.* This suggests that the appellate court applied a "clear error" standard for the finding of the court below, which was based only in part on the administrative record.

The manner in which the Federal Circuit reviews the balancing of the equities for injunctions in bid protest cases also serves as a helpful analogy. In *PGBA, LLC v. United States*, 389 F.3d 1219 (Fed. Cir. 2004), the appellate court had before it a decision of the Court of Federal Claims in which the trial court had found prejudicial error but had declined to provide injunctive relief because of various equities that were established through affidavit and oral testimony. *Id.* at 1223. The appellate court applied an "abuse of discretion" standard to review a propriety of the Court of Federal Claims' decision not to grant the injunctive relief, noting that an abuse of discretion occurs when "the court made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact finding." *Id.* (quoting Int'l Rectifier Corp. v. Samsung Elecs. Co., 361 F.3d 1355, 1359 (Fed. Cir. 2004)). In *PGBA*, the court affirmed because it did not find a "clear error of judgment" in the trial court's weighing of the relevant factors and evidence. *Id.* at 1228–32.

43. *Bannum I*, 404 F.3d 1346, 1354, 1357 (Fed. Cir. 2005).

44. *Id.* at 1354 ("In this case the trial court was the first tribunal to assess prejudice to Bannum.").

true because there will never be a contemporaneous agency prejudice determination to review, as the agency when making a procurement decision does not simultaneously make prejudice findings on the assumption that it has committed legal error. But that fact does not distinguish a bid protest prejudice determination based on a documentary record from typical summary judgment proceedings. Those proceedings are based on a documentary record and uncontested facts made entirely in the trial court, but the trial court's decision still receives *de novo* appellate review.[45] A bid protest prejudice finding based solely on a paper record should similarly receive *de novo* appellate review.

Appellate review principles regarding contract interpretation issues reinforce this conclusion. If an interpretation issue is to be determined solely on the face of the contract, *i.e.*, without resort to extrinsic, testimonial evidence, then review on appeal is *de novo*, as the appellate judges have no credibility determinations to make and are in the same position as the trial court when only reviewing documents.[46] If the contract is ambiguous and testimony about trade practice, negotiations, or predispute interpretations is considered, or other extrinsic testimony concerning fraud or duress is considered, then findings of the trial court based on such evidence receive deference and "clear error" review.[47] The same principles should apply in bid protest cases.

B. *The Application Missteps*

The *Bannum I* court's analysis and resulting application were also deficient in two other significant respects. First, the court dealt with dicta in *JWK International Corp v. United States* (*JWK II*)[48] in a way that could mislead.[49]

45. *See, e.g.*, Carborundum Co. v. Molten Metal Equip. Innovations, Inc., 72 F.3d 872, 877–78 (Fed. Cir. 1995) (remarking that when "the only issue is one of law to be applied to an undisputed set of facts, we have plenary review of the court's decision").

46. NVT Techs., Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004); Galen Med. Assocs. Inc. v. United States, 369 F.3d 1324, 1329 (Fed. Cir. 2004); Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1318 (Fed. Cir. 2003); Boston Five Cents Sav. Bank, 768 F.2d 5, 8 (1st Cir. 1985); P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916–17 (Fed. Cir. 1984); Foster Constr. C.A. v. United States, 435 F.2d 873, 881 (Ct. Cl. 1970); Maxwell Dynamometer Co. v. United States, 386 F.2d 855, 867 (Ct. Cl. 1967).

47. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 731–32 n.4 (1988) (citing "standard contract law" for the proposition that "the existence and scope of a particular [specialized trade] usage is usually a question of fact"); Blue Cross & Blue Shield United v. United States, 117 F. App'x 89 (Fed. Cir. 2004) (finding an income tax settlement agreement ambiguous such "that the matter must be remanded for consideration of the extrinsic evidence by the trier of fact"); 3 Arthur Linton Corbin, Corbin on Contracts § 554, at 219 (1960) ("The question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law."); 4 Samuel Williston, A Treatise on the Law of Contracts § 616, at 649, 652 (Walter H.E. Jaeger ed., 3d ed. 1961) ("The general rule is that interpretation of a writing is for the court.… Where, however, the meaning of a writing is uncertain or ambiguous, and parol evidence is introduced in aid of its interpretation, the question of its meaning should be left to the jury."). *See generally* Frederick W. Claybrook Jr., *It's Patent That "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What* Phillips *Portends for Contract Interpretation*, 16 Fed. Cir. B.J. 91, 114–32 (2006).

48. 279 F.3d 985 (Fed. Cir. 2002).

49. *See Bannum I*, 404 F.3d 1346, 1356–57 (Fed. Cir. 2005).

The panel in *JWK II* had found no violation of law, but then had proceeded to determine that, even if there was a violation, it would not have been prejudicial.[50] The *Bannum I* court quoted from *JWK II* and supplied the following commentary to rebut a statement in that decision that the court was applying summary judgment-type review:

> [A]lthough the *JWK II* opinion recites a summary judgment-type review of the facts, *JWK II*, 279 F.3d at 987, when considering prejudice, this court did *not* draw all reasonable inferences in favor of the non-moving party. To the contrary, the court reviewed the evidence of prejudice on the merits:
>
> > In the absence of an alleged error, there must be a "substantial chance" that JWK would have received the award. *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996). *JWK argues that if the contracting officer had entered into cost discussions and it had been given the opportunity to offer cost caps on its proposed labor rate escalation, then it could have bid a lower cost and been awarded the contract.* But cost was the least important criterion, and even with the cost realism adjustment, JWK's bid was still lower than LTM's. It was more important that JWK received lower ratings in the technical and management areas than LTM, because the contracting officer decided that LTM's superiority in those areas outweigh the marginal cost difference between the two. *That was a permissible judgment* under the source selection regulation, FAR § 15.308, 48 C.F.R. § 15.308 (2001).
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> *JWK II*, 279 F.3d at 988–89 (emphases added). If the court were applying a summary judgment review and determining whether a genuine issue of dispute of fact existed, then on the facts set forth in the quoted language it would have had to infer prejudice, hold the protestor survived a summary judgment, vacate the trial court judgment and remand for trial on the merits. In short, this court's review of the factual record for prejudice in *JWK II* was unnecessary to its result, and in any event applied a different standard that did not draw inferences in favor of the non-moving party.[51]

The *Bannum I* court was correct to note that the *JWK II* court did not give the protestor any benefit of the doubt.[52] However, this only dramatizes that the *JWK II* court, under the guise of making a prejudice determination, improperly prejudged what the result would have been if the parties had been able to submit offers and have them considered by the agency in accordance with law. Unless there was a finding by the trial court that JWK would not have altered its offer if proper discussions had been held during the procurement process—which there was not—then prejudice (assuming error) had been shown on the record. Also, the circuit court's findings that JWK would not have won even if it had been given the opportunity to alter its proposal after discussions is the type of divination that courts should eschew. In such a situation, like in a summary judgment proceeding,[53] a reviewing court should draw all reasonable inferences in the movant's favor. In a summary judgment setting, that means the trial court *itself* will hear the case; in a bid protest,

50. *JWK II*, 279 F.3d at 988.
51. *Bannum I*, 404 F.3d at 1357.
52. *See id.*
53. *See* Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

that means that the court returns it to the *agency* to rehear the case consistent with law.

This leads to the second application deficiency of the *Bannum I* decision. When the panel applied its clear error analysis, it noted that the protestor needed to have scored a certain number of additional points on past performance to have received the award.[54] It was mathematically possible for the protestor to have done so if its past performance materials had been reviewed by the appropriate official.[55] That was not sufficient for the circuit court, however. It elucidated as follows: "There is nothing besides Bannum's conjecture to support the contention that another review, comporting with the FAR, would provide it a substantial chance of prevailing in the bid. Bannum's argument rests on mere numerical possibility, not evidence."[56]

This raises the bar too high. In the same sense that a reviewing court should not hypothesize about what an agency might determine if it acts in accordance with law on remand, it is not the protestor's burden to "prove" the relative probabilities of such hypothetical actions. The *Bannum I* decision infers that the protestor should have called the agency evaluators to testify about what they might have done if they had not acted irrationally or violated procedures. But trial courts, in conducting a prejudice analysis, should not be forced into a situation of taking testimony from the agency decision makers as to what the agency's likely response would have been if it had pursued a procurement correctly. Not only would such testimony likely trespass onto the forbidden ground of *post hoc* rationalizations,[57] and not only could their conjectures not be effectively tested or cross-examined, but such testimony also would run counter to the admonitions of the Supreme Court that the mental decision-making processes of agency officials are not typically to be discovered.[58] A bid protestor is only required to show that an agency *could* have reasonably awarded the contract to the protestor, not that the agency likely *would* have done so.[59] Once the protestor has shown that it would have *possibly* received an award, it has carried its burden and the reviewing court must remand to

54. *Id*.
55. *Id*.
56. *Bannum I*, 404 F.3d 1346, 1358 (Fed. Cir. 2005).
57. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962); Co-Steel Raritan, Inc. v. Int'l Trade Comm'n, 357 F.3d 1294, 1316 (Fed. Cir. 2004); Asia Pac. Airlines v. United States, 68 Fed. Cl. 8, 19 (2005); Arch Chems., Inc. v. United States, 64 Fed. Cl. 380, 386 (2005). The Government Accountability Office (GAO) also views *post hoc* rationalizations in bid protest actions with substantial skepticism. *See*, *e.g.*, Boeing Sikorsky Aircraft Support, Comp. Gen. B-277263, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, at 5; Bosco Contracting, Inc., Comp. Gen. B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140, at 3–4.
58. *See Overton Park*, 401 U.S. at 420.
59. "To establish a prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract." Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (quoting Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996)).

the agency for actions consistent with law. It is the agency that is authorized to make the actual judgment call.

III. DIVINATIONS OF THE COURT OF FEDERAL CLAIMS: SIX SAMPLE SPECULATIONS

A review of the bid protest decisions of the Court of Federal Claims since *Bannum I* shows that the court has, on occasion, converted a prejudice analysis into a prejudgment of what the agency might do on remand instead of focusing on what effect, if any, the error had on the determination already made by the agency. The problem predictably showed up in a companion case to *Bannum I*, but the crystal ball, rather than the existing record, has been consulted in other decisions as well.

A. *Divination No. 1:* Bannum II

Bannum II[60] was a companion case to *Bannum I*. It presented exactly the same issue on the merits and a similar prejudice issue: whether a protestor would have achieved a winning score if the proper agency official had reviewed its past performance information.[61] On remand to reconsider *Bannum II* in light of the circuit court decision in *Bannum I*,[62] the central issue was defined as the determination of whether the protestor could show "prejudice by evidencing a substantial chance that, absent the error, it would have been awarded the contract."[63] Not surprisingly, the trial court found that the protestor's prejudice arguments had largely been foreclosed by the Federal Circuit's erroneous reasoning in *Bannum I*.[64] The trial court repeated that Bannum's prejudice argument demonstrated a numerical possibility, but that such a determination was "not evidence."[65] And so, the trial court held, the protestor's prejudice showing failed.[66]

60. Bannum, Inc. v. United States (*Bannum II*), 69 Fed. Cl. 311 (2006) (C. Miller, J.), *on remand from* Bannum, Inc. v. United States, 126 F. App'x 958 (Fed. Cir. 2005), *rev'g and remanding* Bannum, Inc. v. United States, 60 Fed. Cl. 718 (2004), *aff'd*, 214 F. App'x 989 (Fed. Cir. 2007).

61. *Id*. at 316–17. The *Bannum II* court used different roman numeral designators than are used in this article, referring to the circuit court opinion designated in this article as "*Bannum I*" as "*Bannum IV*."

62. *Bannum*, 126 F. App'x 958 (Fed. Cir. 2005).

63. *Bannum II*, 69 Fed. Cl. at 317 (citing *Bannum I*, 404 F.3d 1346, 1353 (Fed. Cir. 2005)); Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004); *Alfa Laval*, 175 F.3d at 1367.

64. *Bannum II*, 69 Fed. Cl. at 317.

65. *Id*. (quoting *Bannum I*, 404 F.3d at 1358).

66. *Id*. at 317–18 (citing *Bannum I*, 404 F.3d at 1358). It is conceivable that this issue was correctly decided on the alternative ground that the procurement evaluators could not properly correct the past performance errors and that, as a matter of law, the rescoring of the past performance materials could not be done by the evaluators and the protestor was saddled with its failure to complain about its past performance scores in the appropriate forum. *See Bannum I*, 404 F.3d at 1353; *Bannum II*, 69 Fed. Cl. 311, 318 (2006). However, that was not the articulated rationale for the "no prejudice" finding in either decision.

For the reasons stated above, the *Bannum II* court, like the *Bannum I* court, under the guise of a prejudice analysis should not have placed the burden on the protestor to prove the hypothetical of what would probably occur if the matter were remanded to the agency for proceedings in conformity with law. Instead, the prejudice analysis should have only focused on addressing the evaluation that the agency actually performed and whether, if the error had not been committed, the award decision may have been different.

Ironically, the trial court in *Bannum II* made exactly this point, although in a slightly different context.[67] By the time of the remand in *Bannum II*, work on the challenged contracts had already taken place for over two years.[68] To overcome the problem of reconvening the evaluators and adding even more delay into the equation, the agency and the intervenor-awardee suggested that, instead of remanding to the agency, the court itself perform a rescoring exercise to determine if there were prejudice.[69] The court properly rejected the suggestion in the following words: "The difficulty is that the court cannot sit as a super '[Supervisory Contracting Officer].' Either the administrative record displays a disparity in scoring that plaintiff could not overcome on remand, or it does not, which would require an evaluation of the quality of the proposals."[70] In the same way that a trial court cannot sit as a super "Supervisory Contracting Officer," it cannot sit as a "Super Evaluator" or "Super Source Selection Authority" and come up with its own scoring of proposals and its own award decision.[71] It can appropriately review the administrative record to see if a protestor could have potentially gained the award if the evaluators had done their job properly, but it is not within the province of reviewing courts to perform "an evaluation of the quality of the proposals."[72]

Bannum II was also appealed. The substance of the appellate resolution was as short as it was foreordained:

> On remand, the Court of Federal Claims ruled that the [agency's] failure to comply with FAR § 42.1503(b) had not prejudiced Bannum because Bannum had not shown that if the authorized officials had reviewed its submissions, the result actually or probably would have been the award of the contracts to Bannum. As in the prior case, Bannum's challenge to the procurement "rests on a mere numerical possibility, not evidence." The Court of Federal Claims did not err in ruling that Bannum failed to establish it was prejudiced.[73]

67. *See Bannum II*, 69 Fed. Cl. at 317.
68. *Id*. at 318.
69. *Id*.
70. *Id*.
71. *See* Camp v. Pitts, 411 U.S. 138, 143 (1973); *Chenery II*, 332 U.S. 194, 195–200 (1947).
72. *Bannum II*, 69 Fed. Cl. 311, 318 (2006). In this Article, the situation discussed is typically whether a protestor could gain an award itself, which assumes that the agency decision being reviewed is an award decision. A similar analysis obtains if the challenged agency action is an allegedly unlawful solicitation provision prior to award or a disqualification of the offeror from the competitive range or in connection with the award decision.
73. Bannum, Inc. v. United States, 214 F. App'x 989, 990 (2007) (citing *Bannum II*, 69 Fed. Cl. at 317–18, and quoting *Bannum I*, 404 F.3d 1346, 1358 (Fed. Cir. 2005)).

Once again, the Federal Circuit articulates a faulty standard. A protestor, after showing that an agency has committed legal error, does not have to prove that it "actually or probably" would have won the award.[74] The protestor only has to prove that there was a reasonable possibility that it might have won. Commonly, that showing will be made based on a "mere numerical possibility," which, contrary to the repeated intimations of the Federal Circuit, should be a proper and relevant showing based on the evidence of the existing administrative record. Except in those rare instances in which it would be an abuse of discretion *not* to award the contract to the protestor with the error corrected,[75] the protestor will never be able to prove with certainty whether it will obtain the award upon a proper exercise of agency discretion. To have a protestor try to prove a hypothetical of what probably would have happened if the agency had done the evaluation properly and for the trial court to make fact findings in that regard puts the trial court in the oracular business that the Supreme Court has repeatedly said it must avoid.[76] Giving due regard to the rule of prejudicial error, as required by the APA review standard,[77] does not call for a trial court to become a "Super Evaluator."[78]

B. *Divination No. 2:* RISC Management

The Court of Federal Claims, in *RISC Management Joint Venture v. United States*,[79] performed a "stealth" prejudice analysis in which the court avoided asking the appropriate questions to determine whether there had been prejudice and whether the matter should be remanded to the agency evaluators. In *RISC Management*, the court faulted the best-value determination because the Contracting Officer who made the trade-off failed to appreciate important differences between two prior solid waste management contracts that were consolidated by the solicitation under which the award was being challenged and because these misunderstandings "ripened into an overemphasis on environmental functions relative to the overall work to be performed."[80] Despite

74. *See id*. (citing *Bannum II*, 69 Fed. Cl. at 317–18).

75. *See* Choctaw Mfg. Co. v. United States, 761 F.2d 609, 617 n.14, 618–21 (11th Cir. 1985); Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 204–06 (D.C. Cir. 1984); *see also* LeBoeuf, Lamb, Greene & MacRae LLP v. Abraham, 347 F.3d 315, 320 (D.C. Cir. 2003); Cal. Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281, 294–95, 296 n.26 (1998).

76. *See, e.g.*, *Camp*, 411 U.S. at 143; *Chenery II*, 332 U.S. at 196, 200; *Chenery I*, 318 U.S. 80, 94–95 (1943); *see also* Mayfield v. Nicholson, 444 F.3d 1328, 1335 (Fed. Cir. 2006).

77. *See* 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4).

78. The results of a reevaluation on remand are often also affected by differing personnel being involved for the agency. It is not infrequent that, due to the length of time taken to resolve the case, the same evaluation personnel are unavailable, in whole or in part, when the matter is remanded for reconsideration. *Cf*. Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007) (finding it presumptively prejudicial when the criminal defendant had to use a preemptory juror strike when the trial court had erred in denying a motion to strike for cause because it altered the composition of the venire).

79. 69 Fed. Cl. 624 (2006).

80. *Id*. at 637.

the court's acknowledgment of these "flaws" in the Contracting Officer's analysis, it looked to other parts of the evaluation, including the awardee's higher past performance scores, and found that those scores did support the ultimate decision.[81] The court then concluded as follows:

> In the present case, although the court would have undertaken a different analytical approach had it been in the shoes of the Contracting Officer, it cannot conclude that the Contracting Officer made an unsupported best-value determination or that her decision to award the contract to HSS was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A).[82]

In performing a review under section 706, it is not the purpose of the court to determine whether there is *any* conceivable way that the decision could be rationally upheld, despite error in the rationale stated by the decision maker. To the contrary, once error has been found, as it was by the Court of Federal Claims in the best-value analysis of the *RISC Management* case, the question becomes whether the agency decision maker might have reached a different conclusion if she had not inserted the "flaws" into the analysis that she did.[83] Unless it is clear that the flaws did not affect the ultimate outcome—which is especially difficult to determine in a best-value trade-off when there are no specified objective standards to assess—then prejudice is shown and the evaluation must be returned to the agency's decision maker to perform the analysis without the flaws.[84]

C. *Divination No. 3:* Systems Plus

The Court of Federal Claims turned the proper prejudice analysis in a best-value procurement upside down in *Systems Plus, Inc. v. United States*.[85] The court found that, in conducting the price evaluation of a basic ordering agreement solicitation under which task orders would later be issued, the Contracting Officer arbitrarily analyzed the hourly rates and, thus, came up with a wrong analysis of the likely cost to the Government:

> [T]he Contracting Officer calculated a simple, non-weighted arithmetic mean of all hourly labor rates to derive an average hourly rate for each bidder. The Contracting Officer provides no explanation of why this methodology provided a reasonable measure for comparing the bidders' pricing. This methodology allowed no consideration for the fact that different labor categories would likely be used at different levels for different projects. For example, if a vendor was [sic] to supply DOL with maintenance and support services for its desktop personal computers, it is logical to assume that technicians would work significantly more hours than

81. *Id.* at 638.
82. *Id.*
83. *See id.* at 637–38.
84. *See* Camp v. Pitts, 411 U.S. 138 (1973); *Chenery II*, 332 U.S. 194, 207–09 (1947).
85. 69 Fed. Cl. 757 (2006) (Lettow, J.). After the case began, the Contracting Officer "disqualified" the protestor due to the alleged appearance of an impropriety related to disclosure of some cost rates of the awardee. The court found that disqualification to be arbitrary and capricious, *id.* at 764–69, but that portion of the case has no bearing on the topics discussed in this Article.

> supervisory or management personnel. The Contracting Officer's analysis completely ignored these basic realities. The court finds that the Contracting Officer's use of this methodology to the exclusion of other pricing considerations was not rational and therefore finds that the Contracting Officer's price evaluation was arbitrary within the meaning of 5 U.S.C. § 706(2)(A).[86]

This arithmetic leveling mistake obviously had more than trivial relevance in the case due to the facts that (a) the protestor trailed only the awardee in the technical aspect of the evaluation and (b) the protestor ranked first and the awardee third when pricing on a sample task order used for evaluation purposes was calculated, but (c) the protestor was third and the awardee first when the hourly rates were improperly averaged on a nonweighted basis by the Contracting Officer.[87] This swapping of price positions indicates that the protestor's supervisory personnel had higher average rates than the awardee's, but lower average rates in those job categories likely to be used for more hours on the task orders to be issued under the procurement.

The trial court, having found error in the evaluation, properly turned next to the issue of whether the protestor had shown "that the error prejudiced it."[88] But it immediately took a detour by remarking that, in a best-value procurement, "a disappointed bidder has a relatively heavy burden to show that its position in the procurement was prejudiced."[89] It based its conclusion on the proposition that, *when attempting to demonstrate error* in a best-value procurement, a protestor's burden is relatively heavy because "the contracting officer ha[s] even greater discretion than if the contract were to have been awarded on the basis of cost alone."[90] In actuality, because a best-value evaluation is highly discretionary, the protestor's burden to prove prejudice in a best-value case once error has been found should in general be *easier*, not harder, as there is less certainty as to how the agency would have conducted its evaluation if the error had not been committed and as to whether it would have changed the result.[91]

86. *Id*. at 774 (citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

87. *Id*. at 761–62.

88. *Id*. at 774 (quoting Galen Med. Assocs. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004)).

89. *Id*.

90. *Id*. (quoting *Galen Med. Assocs.*, 369 F.3d at 1330); *see also* Banknote Corp. of Am., Inc. v. United States, 56 Fed. Cl. 377, 380 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004).

91. Judge Wolski recognized this ineluctable conclusion in *Fort Carson Support Services v. United States*, 71 Fed. Cl. 571 (2006), which involved a best-value evaluation using verbal, rather that numerical, descriptors:

> Under a method that relies on numerical scores, the prejudice determination is as simple as comparing the points affected by an arbitrary decision to the spread between the protester and winning bidder. *See, e.g.*, *Beta Analytics Int'l, Inc. v. United States*, 67 Fed. Cl. 384, 407–08 (2005). The narrative approach followed here, however, makes the government vulnerable to a finding of prejudice whenever a decision that appeared to have influenced the ultimate decision of best value is found arbitrary—that is, is found to rely on false statements, is contradicted by the evidence, violates procurement rules, *etc*.

Starting with upside-down logic, it is not surprising that the *Systems Plus* court reached the wrong conclusion with respect to prejudice, finding none by means of the following analysis:

> The solicitation did not, and was not required to, rate the relative importance of the different evaluation criteria. Accordingly, the Contracting Officer had broad discretion to determine how important each of the criteria would be in the evaluation. In his best-value determination, the Contracting Officer indicated that there was no particular "weight" assigned to the evaluation factors: "As . . . competing offeror proposals in the Technical areas become more equal in rating, the more important Price will become." . . . The Contracting Officer stated that "[f]rom a business point of view, the value of [awardee's] quote response (non-cost factors) *supercedes* [sic] *any variances for interpreting the ranking of offerors for price*." . . . It thus appears that the Contracting Officer determined that [awardee's] proposal was sufficiently superior to other offerors' proposals that [awardee] should be selected regardless of which measure of price was evaluated. The Contracting Officer was not required to choose the lowest-price proposal, and therefore his decision that [awardee] offered the best value regardless of the manner in which price was measured will not be deemed arbitrary, capricious, or otherwise not in accordance with law pursuant to 5 U.S.C. § 706(2)(A).[92]

This analysis is systemically faulty. If the Contracting Officer, as reported in this case, does not need to apply any particular weight to any of the factors and has free-floating discretion as to what weight to give them,[93] then it becomes impossible to predict how the error identified by the court might have played into the analysis or how it would do so upon a remand to the agency once the error was corrected.[94] The pricing error was obviously material because the protestor had the lowest price in the one evaluation situation, *i.e.*, sample task order pricing, in which the error did not infect the analysis, moving the protestor from third to first in the price evaluation.[95]

The one sentence from the best-value determination of the Contracting Officer on which the trial court based its no-prejudice conclusion is much

Fort Carson, 71 Fed. Cl. at 593. Even this overstates the degree of precision possible when numerical best-value evaluation schemes are used, as numbers are only guides for a source selection official. *See* FAR 15.308; *see also* 210 Earll, L.L.C. v. United States, 77 Fed. Cl. 710, 722 (2006) (Baskir, J.) (remanding to agency because court could not prejudge what the result would be in a best-value reevaluation by the agency).

92. Systems Plus, Inc. v. United States, 69 Fed. Cl. 757, 774 (2006) (citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001)) (record citations omitted).

93. It is the unusual procurement in which the evaluation criteria and their weights do not need to be published and adhered to during the evaluation. *See* FAR 13.106-2(a)(2), 15.305(a); *see also* Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1047 (Fed. Cir. 1994); OTI Am., Inc. v. United States, 68 Fed. Cl. 646, 655–56 (2005); Transatl. Lines LLC v. United States, 68 Fed. Cl. 48, 51–52 (2005); Naplesyacht.com v. United States, 60 Fed. Cl. 459, 468–69 (2004). This type of evaluation scheme was apparently not challenged by the protestor in *Systems Plus*. *See* Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (holding that allegations of solicitation illegalities must be raised prior to award or are waived in a subsequent bid protest action).

94. *See Fort Carson*, 71 Fed. Cl. at 593.

95. *Systems Plus*, 69 Fed. Cl. at 762.

too ambiguous to provide a "pass" to the agency no matter what the materiality of the error.[96] Indeed, the portion of the Contracting Officer's statement italicized by the court in the quotation above dealt only with ranking order, which itself cannot provide a rational basis for evaluation because an offer ranked first may have a price advantage of either $1.00 or $1,000,000.00.[97] The actual evaluated price differences based upon a proper weighting were left undone by the evaluators and, thus, were unknown to the Contracting Officer at the time he made his best-value determination.[98] Thus, the court could not properly draw any definite conclusion as to the weight the source selection official would have given to accurate figures and whether it would have changed the outcome.[99]

That the trial court misapplied the function of the prejudice determination is dramatized by the fact that, at the end of its analysis, the court did not recite the rule of harmless error, but instead made a determination that there was not error in the source selection.[100] However, the court had already determined on the merits that there was error in the price evaluation.[101] The trial court should not have then lapsed into an assessment of what would have happened if the error had not occurred when the administrative record was effectively silent on the matter.[102] While the trial court ultimately recited that the protestor "would not have been awarded the [basic purchasing agreement] even if the Contracting Officer had used the pricing analysis advocated by the plaintiff,"[103] the trial court improperly took it upon its own shoulders to make that determination when it was not clear from the administrative record that the error was harmless. Because the protestor was "within the zone of active consideration,"[104] it had met its burden to show prejudice, and the trial court should have returned the matter to the agency for reconsideration not infected by error.

D. *Divination No. 4:* Rig Masters

The Court of Federal Claims also dabbled in divination in its alternative holding in *Rig Masters, Inc. v. United States*.[105] This was a best-value procurement, and the evaluation factors were technical, past performance, and cost, weighted in that order.[106] Of the three qualified offerors, the protestor had

96. *Id*. at 774.
97. *See id*. A source selection official must consider price, and the relative price difference, in any evaluation. *See* 10 U.S.C. § 2305(a)(3)(A)(ii) (2006); 41 U.S.C. § 253a(c)(1)(B) (2000); FAR 15.304(c)(1).
98. *See* Systems Plus, Inc. v. United States, 69 Fed. Cl. 757, 762, 774 (2006).
99. *See id*.
100. *Id*. at 774.
101. *See id*.
102. *See id*.
103. *Id*. at 774–75.
104. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (quoting CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1574–75 (Fed. Cir. 1983)).
105. 70 Fed. Cl. 413 (2006) (Hodges, J.).
106. *Id*. at 416.

the lowest cost, but the agency noted two technical deficiencies and three additional weaknesses in the protestor's technical proposal that gave it a greater risk rating than that of the awardee.[107] The protestor complained that the agency had abused its discretion by not conducting discussions.[108] It noted that, if it had been informed of its evaluated deficiencies, weaknesses, and risks, it could have explained them or revised its proposal to eliminate them, allowing it to move into first place overall.[109] The trial court disagreed that it was entitled to that opportunity, noting that the solicitation had advised that the award could be made without discussions and that the agency had received three acceptable proposals from which to choose.[110]

The trial court then proceeded to hold that, in the alternative, the protestor had not met its burden to show prejudice if the failure to hold discussions had been arbitrary, capricious, or contrary to law.[111] In explaining its rationale, the court by its language repeatedly betrays that it was simply guessing about what the probable outcome would have been if it had seen fit to remand to the agency for a reevaluation after discussions and another round of proposals:

> The record does not *suggest* that the [agency] would have awarded the contract to [the protestor] if the agency had conducted discussions. Several aspects of the record *appear to indicate* to the contrary in fact.... [There follows a discussion of the relative importance of the evaluation factors.]
>
> ....
>
> ...Assuming [the protestor] was included in such a tradeoff, its...performance risk would have *somewhat or even fully* have [sic] negated its equally rated technical proposal. The contracting officer found it reasonable, in light of the technical differences between [the awardee] and [the third offeror], to pay less money for a proposal of lesser technical merit given the additional performance risk associated with [the third offeror]. It is *likely* then, that the contracting officer would have chosen [awardee] over [protestor], even after discussions. [Protestor] had the same "additional performance risk" that [the third offeror] had, but without the higher technical rating. Because cost was the least important of the three factors, and [the monetary] savings to the [agency] *likely* would have been considered negligible. Paying...more to [the awardee] would have been worth the performance risk involved with contracting with [the protestor]. Other problems with [protestor] *may have been* fatal to its being selected, notwithstanding its benefit in terms of price.[112]

Although the amount of redacted text in the published version of the opinion makes it difficult to get a hard fix on the materiality of the various evaluation factors, what can be known with certainty is that the court could have had no real information about (a) how persuasive the protestor could have been in negotiations in addressing the perceived deficiencies and weaknesses in its proposal, (b) how the offerors would have altered their proposals in another round of proposals after discussions, or (c) which of the three offerors would

107. *Id.* at 421, 423.
108. *Id.* at 422.
109. *Id.* at 420–22.
110. *Id.* at 421–22.
111. *Id.* at 422–23.
112. *Id.* (emphasis added).

have ended up on top after discussions and an evaluation of revised proposals.[113] The court's crystal-ball gazing is an exercise of futility that shortchanges both the competitors and the agency.

There is one practice pointer that can be gleaned from the decision in *Rig Masters*. The court also faulted the protestor for only making "bald assertions" that discussions could have significantly changed the outcome, finding such to be insufficient to demonstrate prejudice.[114] The court cautioned that "the protestor must identify specific facts intending to show" it might have been awarded the contract but for the alleged error.[115] To improve its chances of proving prejudice, a protestor should provide sworn statements or oral testimony as to how it would have addressed evaluation concerns, how it would have revised its proposal, and how that might have changed the award decision.[116] Of course, even such precautions will not be adequate if the trial court imposes a standard of verifiable clairvoyance on the protestor, as the court did in the next example noted below.

E. *Divination No. 5:* Ironclad/EEI

The protestor in *Ironclad/EEI v. United States*[117] had been eliminated from the competitive range by the agency when the agency issued an amendment to the solicitation. The protestor complained that if it had been issued the amendment, then it would have significantly lowered its price, and that because of its excellent ratings in other parts of the evaluation, it would have been in the zone of active consideration for award.[118] While disagreeing with the contention that the agency had been required to send the amendment to the protester after it had been eliminated from the competition,[119] the court focused its main attention on whether the protestor had adequately proven prejudice assuming it should have been provided the amendment.[120] In this instance, one of the protestor's principals provided an affidavit supporting the contention that the protestor's price would have been measurably lower if it had received the amendment and had been permitted to revise its offer.[121] The court was unimpressed:

113. *See id*. at 415, 417–18, 424.
114. *Id*. at 422.
115. *Id*. (citing Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996)).
116. *See* MVM, Inc. v. United States, 46 Fed. Cl. 137, 140–41 (2000) (considering expert witness reports about how a change to the solicitation requirements would have affected pricing); Candle Corp. v. United States, 40 Fed. Cl. 658, 665 (1998) (finding protestor's claim of prejudice unpersuasive because it was not supported by affidavit or other evidence). *But see* Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1368 (Fed. Cir. 1999) (rejecting the contention that the protestor-incumbent had to put on evidence demonstrating that the reasons for the price differences in the initial proposals of the awardee and the protestor tied directly to the error proven).
117. 78 Fed. Cl. 351 (2007) (Bush, J.).
118. *Id*. at 360.
119. *Id*. at 361–62.
120. *Id*. at 362.
121. *Id*. at 360, 362.

> [T]he affidavit from [the protestor's principal], which is at the heart of [the protestor's] claim of prejudice, is conclusory and unpersuasive. With regard to price changes, [the affiant] avers only that the [protestor] would have lowered its prices and that "[t]his resultant price decrease would be approximately 13.77% for installation of government furnished [materials], and approximately 6.88% lower for furnishing and installing structural panels, joists and rafters." Notably, the affidavit does not explain the manner in which these percentage decreases were calculated. [The protestor] likewise has not presented additional evidence to support the allegations contained in that affidavit. In the court's view, plaintiff relies on no more than a post-hoc assertion of what it "might have done" regarding pricing, had the circumstances been different. Similar arguments presented in this court have had little success.... [T]he court finds that the affidavit, which includes only conclusory and self-serving allegations, does little to satisfy [protestor's] burden of proof.
>
> The court must also agree with the United States that, were it to engage in speculation regarding the manner in which [protestor] might have amended its offer in response to [the solicitation amendment], it would also have to assume that other offerors would have changed their proposals as well. Plaintiff offers no substantive response to the government's argument that, had that happened, [the protestor] still would not have presented a price proposal attractive enough to qualify for the competitive range. Moreover, it would be impossible for the court to divine the success or failure of an amended proposal from [the protestor], given that "a second [best and final offer] may reasonably be rated higher *or lower* than an offeror's initial proposal or its prior [best and final offer]."[122]

Impossible for the court to divine, indeed. And also impossible for the protestor to divine. That does not mean that a protestor fails to carry its burden to prove prejudice, however. A protestor cannot be criticized for submitting a "post-hoc assertion" and for submitting "self-serving allegations" when it also is given the burden to assert what it would have done if it had been given an opportunity that it was denied by the agency.[123]

Adding insult to injury, the trial court suggests that what other offerors might do on remand also works to the protestor's disadvantage.[124] A protestor cannot reasonably be asked to provide "hard evidence" as to how other offerors might have changed their offers in the same circumstances. Even if every offeror made sworn assertions in that regard and backed it up with "evidence" sufficiently certain for the trial court, the offerors would not be bound by such assertions in a resolicitation and could submit very different revised proposals when the procurement continued. This all demonstrates why, once a protestor has shown—based on the administrative record and with or without further affidavit or oral testimonial assertions of what it would or could have done if the agency had acted in conformity with law—that there is any reason-

122. *Id.* at 362–63 (quoting Labat Anderson, Inc. v. United States, 42 Fed. Cl. 806, 848 (1999)) (citations omitted).

123. A similar improper burden is indicated in dicta in *Park Tower Management, Ltd. v. United States*, 67 Fed. Cl. 548 (2005) (Braden, J). In that case, after finding no violation, the court went on to advise that it "was important for [the protestor] to understand" that there was "no evidence" that the ultimate result would have changed assuming the evaluation had been done differently. *Id.* at 564. That is hardly surprising, as the agency did not perform the different (proper) evaluation.

124. *See* Ironclad/EEI v. United States, 78 Fed. Cl. 351, 363 (2007).

able possibility that a different result could have occurred, the protestor has met its burden to show prejudice. This will invariably be the case when remand requires the competition to be reopened and new proposals received, as the procurement is then a "new ball game" and any offeror in the competition has a reasonable chance of success because they are within the competitive range determined by the agency. Neither the court nor the protestor is called upon to prognosticate with likelihood the eventual outcome. The duty of the court is to return the matter to the agency so it can perform its evaluation in a lawful manner.

F. *Divination No. 6:* Knowledge Connections

Knowledge Connections, Inc. v. United States[125] demonstrates both appropriate and inappropriate determinations by the reviewing court. The court freely acknowledged its responsibility not to substitute its judgment for that of the agency in decisions committed to the agency.[126] Admirably, in prior proceedings the court had dutifully followed this mandate by remanding to the General Services Administration (GSA) to clarify its rationale for not including the protestor in a GSA schedule award.[127] When reviewing the agency's expanded rationale after remand, the court noted the delicate and difficult balancing of competing interests in which GSA had engaged and upheld the expanded rationale as rational.[128]

But there was an additional problem. GSA had been required to consult with, and consider the views of, several other agencies in structuring the schedule offering from which the challenged procurement decisions had flowed.[129] GSA admitted that it had not done so, and the court ruled that "GSA erred in failing to consult with other affected agencies to gather their views . . . ."[130] Despite what the court had described as a delicate balancing of the interests involved,[131] the court continued, in relevant part, as follows:

> In context, that failing, however, was not "significant error" on GSA's part, that by itself would render GSA's actions in the VETS GWAC arbitrary or capricious. Ultimately, the court can not conclude that GSA's errors were sufficiently material to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because it structured the CPP2 criteria rationally based upon its prior experience.[132]

125. 79 Fed. Cl. 750 (2007) (Lettow, J.).

126. *Id*. at 761, 764 (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Vt. Yankee Nuclear Power Corp. v Nat'l Res. Def. Council, Inc., 435 U.S. 519, 558 (1978); *Chenery I*, 318 U.S. 80, 88, 94 (1943); OTI Am., Inc. v. United States, 68 Fed. Cl. 646, 657 (2005); Keeton Corrections, Inc. v. United States, 59 Fed. Cl. 753, 755 (2004)).

127. Knowledge Connections, Inc. v. United States, 76 Fed. Cl. 6, 22 (2007).

128. *Knowledge Connections*, 79 Fed. Cl. at 762–63.

129. *Id*. at 763–64.

130. *Id*. at 764.

131. *Id*. at 762–63, 764.

132. *Id*. at 764 (citing 5 U.S.C. § 706(2)(A); RISC Mgmt. Joint Venture v. United States, 69 Fed. Cl. 624, 638 (2006); J.C.N. Constr. Co. v. United States, 60 Fed. Cl. 400, 412 (2004), *aff'd*, 122 F. App'x 514 (Fed. Cir. 2005)).

This conclusory analysis is wanting in two respects. First, a court cannot avoid a prejudice analysis simply by labeling an error as insignificant,[133] like the trial court did here, or as "harmless," "minor," "small," "immaterial," or "*de minimis*," as other courts have done.[134] Such conclusions can only be reached after engaging in a proper prejudice analysis. The applicable standard of review, "section 706 of title 5,"[135] does not distinguish between gradations of error except in calling for application "of the rule of prejudicial error."[136] If there *is* prejudice, the error is neither harmless nor immaterial. If there is *not* prejudice, the error is *de minimis* and minor. Saying that only "substantial" or "significant" errors are remediable is tantamount to saying that errors must be prejudicial.[137] If more is intended by a court when it uses such terminology, then it injects a new type of "harmful error" into the prejudice analysis.[138] It short-circuits the required analysis for a reviewing court to say, as it did in *Knowledge Connections*, that based on what the agency did consider, its determination was "rationally based,"[139] when it is reversible error for an agency not to consider all relevant factors,[140] like the views of other agencies that were required by law to be considered but were ignored by the agency in that case.[141]

Second, the *Knowledge Connections* court's simple declaration of no prejudice is unconvincing. How could the court possibly know what views would have been expressed by the other agencies with which GSA should have consulted? How could the court know if and how those views would have affected GSA's own conclusions and structuring of the procurement? Such counterfactuals are imponderables, but they cannot properly be brushed aside. Lacking omniscience, a reviewing court should remand to allow the agency to perform its required duties.[142]

133. *Id. at* 764 (citing *J.C.N. Constr. Co.*, 60 Fed. Cl. at 412).

134. *See*, *e.g.*, Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1048 (Fed. Cir. 1994) (citing Andersen Consulting v. United States, 959 F.2d 929, 933 (Fed. Cir. 1992)); Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955, 960 (Fed. Cir. 1993); Precision Images, LLC v. United States, 79 Fed. Cl. 598, 616 (2007); Metcalf Constr. Co. v. United States, 53 Fed. Cl. 617, 622 (2002).

135. 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4).

136. 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4).

137. *See*, *e.g.*, 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4). *But see*, *e.g.*, *Precision Images*, 79 Fed. Cl. at 616–17 (improperly separating analysis of the significance of the error from the prejudice analysis).

138. *See*, *e.g.*, Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d 1016, 1021–22 (3d Cir. 1982).

139. Knowledge Connections, Inc. v. United States, 79 Fed. Cl. 750, 764 (2007).

140. *See* Motor Vehicle Mfg'rs Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Keeton Corrections, Inc. v. United States, 59 Fed. Cl. 753, 755 (2004).

141. *Knowledge Connections*, 79 Fed. Cl. at 764.

142. The prejudice analysis in *Precision Images*, although presenting a closer case, can also be questioned. In a procurement that rated past performance as superior to cost, the low-cost offeror was erroneously rated "Little Confidence" for past performance when it should have been rated "Unknown Confidence." 79 Fed. Cl. at 623–24. Even though "Unknown Confidence" was a superior past performance score than "Little Confidence," it was still below the rating of the higher-priced offeror, "Satisfactory Confidence," the next higher rating. *Id.* at 623–25. The court ruled that the protestor had "presented no evidence" that it might have received the award with an "Unknown Confidence" rating. *Id.* at 627. That is normally a determination that

IV. THE APPROPRIATE PREJUDICE STANDARD: AVOIDING CRYSTAL-BALL JURISPRUDENCE

While the various prejudice formulations of the Federal Circuit for bid protest cases are subject to criticism,[143] the major part of the solution for avoiding an improper lapse into speculation as to what an agency would do on remand is for the courts to analogize an agency to a jury and the prejudice determination to a motion for a directed verdict. A plaintiff in a civil jury trial has the initial burden to put on a *prima facie* case; if he does not, the court may and should enter a directed verdict against him.[144] However, a directed verdict usurps the role of the jury if there is any reasonable basis upon which a jury could find for the plaintiff on the record presented, viewing the evidence in the plaintiff's favor.[145]

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can only be made by the agency. However, in that case, the protestor had not even argued the proposition. *Id*. at 623–27; *see also* Westech Int'l, Inc. v. United States, 79 Fed. Cl. 272, 300 (2007) (Sweeney, J.) (engaging in similar hypothetical reevaluation in finding no prejudice).

Similarly, the court's prejudice analysis in *HWA, Inc. v. United States*, 78 Fed. Cl. 685 (2007) (G. Miller, J.), is subject to criticism. The court found several errors in a past-performance evaluation of a best-value procurement, but no prejudice. *Id*. at 702–03. To arrive at its prejudice finding, the court gave the protestor improperly denied credit and then made several assumptions about verbal descriptors such as "Excellent," "Very Good," and "Satisfactory" and how they would average out in a hypothetical reevaluation. *Id*. at 689 n.4. While none of the court's averaging exercise was illogical on its face, the court ignored that (a) sometimes, for instance, an agency may rationally decide that a strong "Excellent" combined with two strong "Very Good" ratings reflects an overall "Excellent" (like an A+ and two B+ grades can give a student an overall A); and (b) such descriptors are only guides to the ultimate decision maker, who does not have to follow them if his own evaluation rationally differs. *See* FAR 15.308; *see also* Grumman Data Sys. Corp. v. Dalton, 15 F.3d 1044, 1048 (Fed. Cir. 1994) (upholding source selection official's rejection of evaluators' recommendations); L-3 Commc'ns Integrated Sys. v. United States, 79 Fed. Cl. 453, 462 (2007); Fort Carson Support Servs. v. United States, 71 Fed. Cl. 571, 588–90 (2006).

143. The Federal Circuit and the Court of Federal Claims uncritically adopted the Brooks Act prejudice standard for prior General Services Administration Board of Contract Appeals protests when that standard is at variance with the APA's harmless error standard. *See* Claybrook, *supra* note 2, at 556–57. *See generally* Frederick W. Claybrook Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Cases—Learning Lessons All Over Again*, 29 Pub. Cont. L.J. 1, 40–45 (1999) [hereinafter Claybrook, *Learning Lessons*]. The APA prejudice standard is met simply by a possibility that the agency would have acted differently but for the error, *see id*. at 41, but the Brooks Act standard adopted for protest cases under the APA has been held to require something more in terms of a "reasonable likelihood" or "substantial chance" or a "not . . . insubstantial" chance of winning the award, although the standard is less than "more likely than not." *See* Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003); Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1086 (Fed. Cir. 2001); Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999); 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); Asia Pac. Airlines v. United States, 68 Fed. Cl. 8, 18 (2005). It is far from clear where a trial court is meant to draw this variously described line, which does not have any established judicial provenance.

144. *See* Fed R. Civ. P. 50(a); 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2524 (3d ed. 2008).

145. *See* Fed R. Civ. P. 50(a); 9B Wright & Miller, *supra* note 144, § 2524; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–52 (1985) (applying same standard in summary judgment proceedings); Day & Zimmerman Servs. v. United States, 38 Fed. Cl. 591, 609 (1997) (holding that doubts about prejudice should be resolved in the protester's favor, citing GAO precedent to the same effect).

Similarly, a protestor once showing error must also put forward a *prima facie* case of prejudice to prevail;[146] if it does not, or if the Government puts forward superior evidence that shows on the record already made below or as appropriately supplemented that the error was harmless or cured, then the court should enter a judgment against the protestor despite the procurement error.[147] However, a judgment against the protestor on the basis of lack of prejudice usurps the role of the agency if there is a reasonable basis upon which to conclude that the agency could find in the protestor's favor upon remand. The court must make this determination on the basis of the initial record made by the agency.[148] It is not called upon to hypothesize about how competitors will revise proposals on remand or how the agency is likely to evaluate or rescore those hypothetical proposals.[149] Moreover, the greater the latitude on remand for offerors to revise their proposals and the greater the discretion of the agency in making its award determination, the easier it is for the protestor to meet his burden to prove prejudice.[150]

V. CONCLUSION

The Federal Circuit and the Court of Federal Claims should reexamine their handling of prejudice in bid protest cases. The Court of Federal Claims, once it finds error on the merits, should only require a showing that there is a possibility of a different outcome in the evaluation if the error were corrected and if the agency conducted the evaluation in accordance with law. It is decidedly not the duty of the trial court to hypothesize what the agency might do on remand—indeed, it is the trial court's duty *not* to do so. Nor is it the burden of a protestor successful on the merits to "prove" what "likely" would occur on remand to the agency. A court, when making the prejudice determination, should analogize to motions for directed verdict and only fail to remand to the agency if there is no reasonable basis to find for the protestor. In making that

146. *See Bannum I*, 404 F.3d 1346, 1358 (Fed. Cir. 2005); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 321–28 (1986) (discussing plaintiff's opening burden in summary judgment proceedings).

147. *See* PGBA, LLC v. United States, 389 F.3d 1219, 1228–32 (Fed. Cir. 2004) (affirming trial court's weighing of the prejudice and other equities after a taking testimony).

148. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973).

149. This prejudice standard in veteran's appeal cases is the same as under the APA, requiring that a reviewing court "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b) (2000). The Court of Appeals for Veterans Claims has appropriately explained that a veteran does not bear the burden of persuasion, but only a burden to make a *prima facie* showing that the error affected his substantive rights. Mayfield v. Nicholson, 19 Vet. App. 103, 119–20 (2005), *rev'd on other grounds*, 444 F.3d 1428 (Fed. Cir. 2006). If the veteran makes a *prima facie* showing, the burden shifts to the agency to demonstrate that the error was either harmless or cured. *Id.*; *see also* Lindsay v. United States, 295 F.3d 1252, 1261 (Fed. Cir. 2002) ("[A] claimant need not provide definite proof of prejudicial error…but only enough of a factual predicate to direct further inquiry into the nexus between the error or injustice and its adverse consequences."). *See generally* C. Robert Luthman, Conway v. Principi, Mayfield v. Nicholson, *and (Re?)Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 Fed. Cir. B.J. 509 (2007).

150. *See* Fort Carson Support Servs. v. United States, 71 Fed. Cl. 571, 593 (2006).

determination, if it is not apparent from the agency record already made in support of the initial procurement decision (plus any appropriate supporting evidence submitted to make the prejudice showing) that the error would have had no effect on the outcome, then it is the duty of the reviewing court under section 706 to set aside the agency action and return the matter to the agency for further action in conformity with law.[151]

The Federal Circuit should refine its review standard of prejudice findings made by the Court of Federal Claims. If the finding of prejudice rests solely on a written record, as it often will because the administrative record itself will often be sufficient to demonstrate prejudice or not and affidavit testimony may well be unrebutted,[152] then the record on appeal is strictly documentary and the appropriate standard of review is *de novo*.[153] However, to the extent the trial court makes contested findings of fact based on oral testimony, then those facts should be given clear error review. When exercising its appellate functions, the Federal Circuit has no more cause or authority to resort to its crystal ball than does the Court of Federal Claims. If the result might be different on remand, a reviewing court must allow the procuring agency entrusted to make the evaluation to do its job.

151. 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4) (2000); *see Chenery I*, 318 U.S. 80, 94–95 (1943); *Chenery II*, 332 U.S. 194, 201 (1947).

152. While the merits determination is now typically addressed under new Court of Federal Claims Rule 52.1, "Administrative Records," an agency does not make a prejudice determination on the existing administrative record. Thus, the summary judgment practices found at RCFC 56 may well be appropriate for the prejudice portion of a bid protest. If a protestor supplies affidavit testimony to demonstrate prejudice, *e.g.*, to demonstrate that it would have lowered its price if proper discussions had been held with it by the agency, that testimony must be accepted unless it is countered by other competent evidence in the record or its credibility is undermined by cross-examination of the affiant. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Moore U.S.A., Inc. v. Standard Register Co., 229 F.3d 1092, 1112 (Fed. Cir. 2000) (a "party may not overcome a grant of summary judgment by merely offering conclusory statements") (citing Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984)). Protestors would be wise to expressly move for summary judgment under RCFC 56 with respect to the prejudice portion of their cases. This is reflected in the Rules Committee Note provided upon adoption of Rule 52.1 in 2006:

> Cases filed in this court frequently turn only in part on action taken by an administrative agency. In such cases, the administrative record may provide a factual and procedural predicate for a portion of the court's decision, while other elements might be derived from a trial, an evidentiary hearing, or summary judgment or other judicial proceedings. This rule applies whether the court's decision is derived in whole or in part from the agency action reflected in the administrative record.

Fed. Cl. R. 52.1 (committee note). Presumably, Rule 52.1 applies only to that part of the court's proceedings that deals with an administrative record. *See* Allied Materials & Equip. Co. v. United States, 81 Fed. Cl. 448, 461 (2008) (refusing to consider affidavit as supplementation of the administrative record because it was not presented by motion in conformity with Rule 52.1); PGBA, LLC v. United States, 60 Fed. Cl. 196, 204 n.11, *aff'd*, 389 F.3d 1219 (Fed. Cir. 2004) (recognizing that some matters in a bid protest, such as prejudice and remedial issues, may present "genuine disputes of material fact the resolution of which must occur by way of a trial or evidentiary hearing").

153. See discussion *supra* notes 34–37 and accompanying text.