

STANDING, PREJUDICE, AND PREJUDGING IN BID  
PROTEST CASES

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I. INTRODUCTION

Congress amended the Tucker Act<sup>1</sup> by the Administrative Dispute Resolution Act of 1996 (ADRA)<sup>2</sup> to provide that the Court of Federal Claims (COFC) would determine the merits of bid protest cases under the standard set out for judicial review in the Administrative Procedure Act (APA).<sup>3</sup> The Federal Circuit has recently taken opportunities to discuss, under the revised act, both the appropriate measure for standing and the proper rule for consideration of prejudice in bid protest cases. Breaking with prior precedent *sub silentio*, the Federal Circuit has begun to chart a wayward course in both these areas.

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1. 28 U.S.C. §§ 1491–1509 (2000).

2. Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104–320, 110 Stat. 3870.

3. 28 U.S.C. § 1491(b)(4) (2000) (citing Administrative Procedure Act (APA) § 10(e), 5 U.S.C. § 706).

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This Article analyzes the Federal Circuit's case law concerning standing and prejudice under the bid protest provisions of section 1491(b). It will, first, review the Federal Circuit's adoption of the definition of "interested party" as given in the Competition in Contracting Act (CICA),<sup>4</sup> the appropriateness of that determination, and some of the interpretation issues that the CICA definition poses. Second, this Article will examine the Federal Circuit's merger of the injury-in-fact prong of the standing test with the necessary showing of prejudice on the merits and sound a warning concerning this merger. Third, when applying the prejudice standard on the merits, in several recent cases the Federal Circuit has shown an unfortunate tendency to prejudge how the agency would act if the agency reviewed the matter on remand. In so doing, the Federal Circuit has overstepped its authority and violated well-established principles under the APA.

## II. ADOPTION OF CICA'S "INTERESTED PARTY" DEFINITION

Congress specified in the ADRA that both federal district courts and the COFC would have jurisdiction in bid protests by "an interested party."<sup>5</sup> Left unaddressed explicitly in the text of the statute and in its legislative history was the question of whether Congress intended "interested party" to take on the same meaning as it had defined in the CICA for General Accounting Office (GAO) bid protests<sup>6</sup> or to be synonymous with the less restrictive standing rules for "adversely affected or aggrieved" parties as set out in the APA<sup>7</sup> and as elaborated by multiple Supreme Court and other opinions.<sup>8</sup> While divining congressional intent is often fraught with perils, the Federal Circuit, when resolving this issue in favor of the CICA definition, in all likelihood made the wrong choice. Even the CICA definition leaves ambiguities to be resolved and has engendered splits of interpretation and application between the GAO and the courts.

### A. *The Federal Circuit's AFGC Decision*

Resolving a split among the COFC judges as to whether the CICA or APA standing rules applied,<sup>9</sup> the Federal Circuit in *American Federation of Govern-*

4. Act of July 18, 1984, Pub. L. No. 98-369, div. B, tit. VII, subtit. D, § 2741(a), 98 Stat. 1199 (codified at 31 U.S.C. § 3551(2) (2000)).

5. Pub. L. No. 104-320, § 12(a), 110 Stat. 3874 (codified at 28 U.S.C. § 1491(b)(1) (2000)).

6. See 31 U.S.C. § 3551(2) (2000).

7. 5 U.S.C. § 702 (2000).

8. The leading decision in the Supreme Court's modern interpretation of standing challenging agency action is *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). For a general discussion of standing under the APA, see III RICHARD J. PIERCE JR., *ADMINISTRATIVE LAW TREATISE* 1107-225 (4th ed. 2002); 6 JACOB A. STEIN ET AL., *ADMINISTRATIVE LAW* § 50.01 (2003).

9. Compare *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90, 101-02 (2000) (adopting APA standard); *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 605, 612-13 (2000) (*Myers I*) (same), *aff'd on other grounds*, 275 F.3d 1366 (Fed. Cir. 2002) (*Myers*); *Winstar Communications, Inc. v. United States*, 41 Fed. Cl. 748, 756 (1998) (same); *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 789-90 (1997) (same); *Am. Fed'n of Gov't Employees v. United States*, 46 Fed. Cl. 586, 591-95 (2000) (*AFGE I*) (same), *aff'd on other grounds*, 258 F.3d 1294 (Fed. Cir.

*ment Employees v. United States (AFGE)*<sup>10</sup> sided with the minority position at the COFC and ruled that Congress had intended to adopt the CICA definition of “interested party” when it enacted new section 1491(b)(1) in the ADRA. In *AFGE*, a union of federal employees and two of its members challenged the propriety of a “contracting out” decision by the agency that converted responsibility for the work in question from federal employees to a private contractor. Obviously, the federal employees, who would lose their jobs because of the contracting-out decision, were directly and substantially “interested” in any normal sense of the term (although the COFC determined that they were not within the zone of interest of the statutes under which they challenged the decision and denied standing on that ground<sup>11</sup>). However, it was equally clear that the union and its employees would not qualify as an “interested party” under the CICA definition because they were neither actual nor prospective offerors. The CICA defines an “interested party” as follows:

The term “interested party,” with respect to a contract or a solicitation or other request for offers . . . means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.<sup>12</sup>

The Federal Circuit in *AFGE* conceded that the plain language of new section 1491(b)(1) did not resolve the issue as to whether the CICA definition or the more liberal APA standing rules should apply and so it examined the legislative history of the ADRA.<sup>13</sup> The Federal Circuit noted that the legislative history indicated that a congressional sponsor of the provision expected that, under its terms, “[e]ach court system [the district courts and the COFC] would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system.” The court also acknowledged that the district courts had consistently applied the APA standards in bid protest cases, so that, if the CICA definition were adopted, bid protest jurisdiction<sup>14</sup> would not be preserved, but curtailed.<sup>15</sup>

2001) (*AFGE*); *Delbert Wheeler Constr., Inc. v. United States*, 39 Fed. Cl. 239, 245 & n.11 (1997), *aff’d*, 155 F.3d 566 (Fed. Cir. 1998) (same); *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 494 (1997) (same); *with Ryan Co. v. United States*, 43 Fed. Cl. 646, 657 n.17 (1999) (adopting CICA standard) *and Cincom Sys., Inc. v. United States*, 37 Fed. Cl. 663, 669–70 (1997) (same).

10. 258 F.3d 1294 (Fed. Cir. 2001).

11. *AFGE I*, 46 Fed. Cl. at 597–600, *aff’d on other grounds*, 258 F.3d 1294 (Fed. Cir. 2001); *see also Am. Fed’n of Gov’t Employees v. Clinton*, 180 F.3d 727 (6th Cir. 1999); *Am. Fed’n of Gov’t Employees v. Cohen*, 171 F.3d 460 (7th Cir. 1999); *Nat’l Fed’n of Fed. Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989); *Am. Fed’n of Gov’t Employees v. Dunn*, 561 F.2d 1310 (9th Cir. 1977).

12. 31 U.S.C. § 3551(2) (2000).

13. 258 F.3d at 1299–301.

14. Standing is jurisdictional and a court has no jurisdiction to consider the merits of the case unless the plaintiff has standing. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998); *Myers*, 275 F.3d at 1369. “Courts are divided on the question of whether a party must satisfy the Article III requirements for standing in order to intervene in a review proceeding initiated by another party.” *PIERCE, supra* note 8, at 1112; *see Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999) (collecting cases).

15. *AFGE*, 258 F.3d at 1300–01 (quoting 142 Cong. Rec. S11,849 (daily ed. Sept. 30, 1996) (statement of Sen. Levin)).

One would have thought that this analysis would have been sufficient to settle the question. Adding weight to the obvious conclusion that the COFC would have to acquire the broader APA jurisdiction of the district courts in order to have the “full range of bid protest cases previously subject to review in either system”<sup>16</sup> is the complete absence of any language in the legislative history indicating that Congress intended the COFC to have jurisdiction coterminous with that of the GAO, rather than the district courts.<sup>17</sup> However, the Federal Circuit attempted to undercut this legislative history, first, by pointing out that the “vast majority” of cases brought in the district courts “were brought by disappointed bidders.”<sup>18</sup> While at the same time admitting that not *all* were, the panel distilled from this a possibility that “Congress *may* have intended the court to exercise jurisdiction over disputes brought by disappointed bidders only,”<sup>19</sup> finding textual support in a remark of a sponsor that *Scanwell*<sup>20</sup> permitted “a contractor to challenge a Federal contract award.”<sup>21</sup> This solitary reference in the ADRA legislative history is a weak reed when compared to the broad principle enunciated by that same sponsor of the legislation—that the COFC would be afforded the entire jurisdiction previously exercised by the district courts. The sponsor’s shorthand description of *Scanwell* cases is readily harmonized with the broader goal he stated by reading his description of *Scanwell* cases as simply that, a shorthand phrase not intended to be all-inclusive. The controlling interpretational principle is that legislative intent “must be construed in the light of the intended purpose.”<sup>22</sup> That purpose here was to preserve, not constrict, jurisdiction previously exercised in *Scanwell* cases in accordance with APA standing principles.

Second, the Federal Circuit was “guided by the principle that waivers of sovereign immunity . . . are to be construed narrowly.”<sup>23</sup> Ignored by the court was the fact that, by defining jurisdiction under new section 1491(b)(1) to alter district court jurisdiction from APA standing to the more restrictive CICA standing, it was, *a fortiori*, ruling that Congress had intended to divest

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16. *Id.* at 1300.

17. It was on this particular legislative history that the trial court had principally relied in finding that Congress intended APA standing rules to apply. *Am. Fed’n of Gov’t Employees v. United States*, 46 Fed. Cl. 586, 593–95 (2000) (*AFGE I*).

18. *Am. Fed’n of Gov’t Employees v. United States*, 258 F.3d 1294, 1301 (Fed. Cir. 2001) (*AFGE*).

19. *Id.* (emphasis added).

20. Bid protest actions in the courts are often referred to as *Scanwell* cases after the lead decision finding standing by a disappointed bidder under the APA to challenge a procurement decision. *See Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

21. *AFGE*, 258 F.3d at 1301–02 (quoting 142 CONG. REC. S11,848 (daily ed. Sept. 30, 1996) (statement of Sen. Cohen)) (emphasis added by court).

22. 2A NORMAN J. SINGER, SUTHERLAND STAT. CONSTR. § 45.05, at 31 (5th ed. 1992); *see also* *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (applying same principle when interpreting contracts); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978) (same).

23. *AFGE*, 258 F.3d at 1301 (citing *McMahon v. United States*, 342 U.S. 25, 27 (1951) (“[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign.”)).

previously exercised jurisdiction from district courts, which had concurrent jurisdiction with the COFC under the ADRA until that concurrent jurisdiction sunset on January 1, 2001.<sup>24</sup> The court in *AFGE*, therefore, neglected to apply a countervailing, but equally applicable, statutory interpretation principle. Once jurisdiction has been conferred by Congress on federal courts, there is a longstanding presumption *against* construing statutes to divest that jurisdiction. As the Supreme Court has recently reiterated, such “[r]epeals by implication are not favored. . . .”<sup>25</sup> The Federal Circuit did not consider, or even reference, this precedent.<sup>26</sup>

Third, the Federal Circuit in *AFGE* put some weight on the fact that Congress—in contradistinction to where it had expressly called out the APA standard of review in subsection 4 of new section 1491(b)<sup>27</sup>—did not cite in subsection (1) of new section 1491(b) the APA standing provision or use the “adversely affected or aggrieved” language of the APA,<sup>28</sup> but instead only used the term “interested party.”<sup>29</sup> From this, the court inferred that Congress did not intend the APA standard to apply. However, the opposite inference is just as readily drawn. Congress showed that it knew how to cite another statute when it so intended, and it did call out the APA in new section 1491(b) but did not call out the CICA. The fact that Congress could just as easily have referred to the CICA in subsection 1491(b)(1) as it later did to the APA in subsection 1491(b)(4), if it had so intended, indicates that it did *not* intend the CICA to apply.<sup>30</sup> It should logically be assumed that Congress understood that, by calling out the APA in one part of the new section, it implied the APA would apply in all relevant respects (as the majority of COFC judges

24. ADRA § 12(d), 110 Stat. 3875; see 28 U.S.C. § 1491(b)(1) (2000) (“both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction. . . .”).

25. *Felker v. Turpin*, 518 U.S. 651, 660 (1996); accord *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868); *Calcano-Martinez v. INS*, 232 F.3d 328, 338 (2d Cir. 2000), *aff’d*, 533 U.S. 348 (2001).

26. Nor did the *AFGE* court consider or reference the Supreme Court’s admonition that there is a presumption in favor of reviewability for challenging agency action under the APA. See *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–11 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967); see generally *PIERCE*, *supra* note 8, at 1258–302. While not tracking directly on the standing question presented by new section 1491(b), this presumption does so at least inferentially. Congress called out the APA as the standard of review for procurement actions, 28 U.S.C. § 1491(b)(4) (2000), and the presumption of reviewability suggests that Congress would not have intended to constrict those who could challenge the action more restrictively than the APA itself would, especially when sometimes the most logical litigants to challenge the agency action, like the federal employees who lost their jobs due to the challenged procurement action in *AFGE*, are disqualified under the more restrictive CICA standard.

27. See 28 U.S.C. § 1491(b)(4) (2000) (“In any action under this subsection, the courts shall review the agency’s decision pursuant to the standards set forth in section 706 of title 5.”).

28. See 5 U.S.C. § 702 (2000).

29. *Am. Fed’n of Gov’t Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (*AFGE*). The APA provides relief to a “person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action.” 5 U.S.C. § 702 (2000).

30. See generally *SINGER*, *supra* note 22, § 47.23, at 216–27 (“expressio unius est exclusio alterius”).

addressing the topic understood).<sup>31</sup> From that, it follows that Congress would have expressly negated the inference that the APA standing standards were to apply if it had not intended them to apply.

Fourth, and cutting against this, as the Federal Circuit noted, is the fact that Congress used the exact term in subsection 1491(b)(1) that it used in the CICA, “interested party,” rather than the APA’s terminology of an “aggrieved” or “adversely affected” party.<sup>32</sup> But “interested party” is not so peculiar a term that it must be afforded the CICA statutory definition or none at all. It can be comfortably construed as synonymous with the APA’s “adversely affected or aggrieved” definition<sup>33</sup> and, in fact, the Supreme Court in construing the APA’s standing standard has frequently referred to adversely affected parties as having an “interest” in the agency action they challenged.<sup>34</sup> After all, part of the APA test as articulated by the Supreme Court is that the litigant be within the “zone of interests” protected by the law under which the action is brought,<sup>35</sup> and the courts have repeatedly held that disappointed bidders are within the zone of interests of the procurement laws and regulations.<sup>36</sup>

After its analysis, the Federal Circuit in *AFGE* announced its bottom line: Despite the fact that the CICA bid protest provisions only apply to GAO disputes,<sup>37</sup> Congress’s use of “interested party” in new section 1491(b) “suggests that Congress intended the standing requirements that applied to protests brought under the CICA to apply to actions brought under § 1491(b)(1).”<sup>38</sup> This reading of Congress’s intent is, at best, questionable, as it was reached by ignoring fundamental interpretational principles. Congress had explicitly expressed a desire that the COFC obtain the complete jurisdiction of the district courts. The Federal Circuit’s resolution did not satisfy that overarching purpose, but instead imposed on the COFC a more restrictive jurisdiction based on a statute dealing with the GAO bid protest function.

#### B. Interpretation Issues Under the CICA Definition

The CICA definition of an “interested party” is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the

31. See *supra* note 9.

32. *AFGE*, 258 F.3d at 1302 (citing 31 U.S.C. § 3551(2) and 5 U.S.C. § 702 (2000)).

33. See 5 U.S.C. § 702 (2000).

34. See, e.g., Fed. Election Comm’n v. Akins, 524 U.S. 11, 19–20 (1998); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882–83 (1990); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688–89 (1973); Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972); Barlow v. Collins, 397 U.S. 159, 164–65 (1970); Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153–54 (1970).

35. *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153; accord *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394–97 (1987); *Barlow*, 397 U.S. at 164.

36. See, e.g., *Merriam v. Kunzig*, 476 F.2d 1233, 1242–43 (3d Cir. 1973); *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 861–73 (D.C. Cir. 1970); *Int’l Ass’n of Firefighters v. U.S. Dep’t of Navy*, 536 F. Supp. 1254, 1263 (D. R.I. 1982); *CHE Consulting, Inc. v. United States*, 47 Fed. Cl. 331, 339–40 (2000); *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 790 (1997).

37. See 31 U.S.C. §§ 3551–56 (2000).

38. *Am. Fed’n of Gov’t Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (*AFGE*).

award of the contract or by failure to award the contract.”<sup>39</sup> This definition itself is not without ambiguity. Two principal issues concern the elasticity of the term “prospective bidder or offeror” and the way to give the term “direct economic interest” its intended meaning, especially as it relates to subcontractors.

### 1. Standing of Prospective Bidders or Offerors

A “prospective” bidder or offeror granted standing under the CICA is, by definition, one that has not submitted a bid or offer on the challenged procurement. Starting with the Ninth Circuit in *Waste Management of North America, Inc. v. Weinberger*,<sup>40</sup> the courts have applied a cribbed interpretation of this term to deny standing to prospective bidders or offerors.

In *Waste Management*, the Ninth Circuit (most likely incorrectly) applied the “interested party” definition of the CICA<sup>41</sup> to find that the contractor lacked standing as a “prospective bidder” on a waste collection procurement for a military base. The contractor had not submitted a bid for the procurement, but it protested on the grounds that it was the only contractor permitted to collect waste in the relevant geographic area. The entire analysis of the Ninth Circuit was as follows: “Here, once the bid proposal period ended, Waste Management could not qualify as a ‘prospective’ bidder; it must have filed a bid protest or become an ‘actual’ bidder by submitting a bid.”<sup>42</sup> Thus, under this reading, to be a “prospective” bidder, a contractor must announce its desire to participate in the procurement by filing a protest during the proposal period.

The *Waste Management* holding has not been applied under either the CICA or APA standing definitions in challenges to sole-source procurements<sup>43</sup> or in other situations in which contractors are precluded from bidding

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39. 31 U.S.C. § 3551(2) (2000).

40. 862 F.2d 1393 (9th Cir. 1988).

41. *Id.* at 1396–98. *Waste Management* is *sui generis* among reported decisions, and almost certainly incorrect, in finding jurisdiction for the bid protest action at the district court under a provision of the CICA, 31 U.S.C. § 3556 (Supp. III 1985). *Id.* at 1397. The CICA does not now provide and has never provided jurisdiction in bid protest cases to the district courts, although it recognized that district courts had such jurisdiction. *Id.* Instead, district court jurisdiction in bid protest cases was based on federal question jurisdiction, 28 U.S.C. § 1331 (1994), and, after passage of ADRA in 1996, on the Tucker Act, as amended, 28 U.S.C. § 1491(b)(1) (Supp. II 1996). It was apparently because of its improper invocation of the CICA for its jurisdiction that the Ninth Circuit then looked to the CICA’s “interested party” definition for standing, rather than applying the APA standards.

42. *Waste Management*, 862 F.2d at 1398.

43. *E.g.*, *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001) (standing assumed); *Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 728–29 (8th Cir. 1997); *T&S Prods., Inc. v. USPS*, 68 F.3d 510, 513–14 (D.C. Cir. 1995); *Varicon Int’l v. OPM*, 934 F. Supp. 440 (D.D.C. 1996); *Info. Res. Inc. v. United States*, 676 F. Supp. 293, 297 (D.D.C. 1987); *Aero Corp. v. Dep’t of Navy*, 540 F. Supp. 180, 201–03 (D.D.C. 1982); *Cubic Def. Sys., Inc. v. United States*, 45 Fed. Cl. 239, 246–48 (1999); *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 494–97 (1997).

at all.<sup>44</sup> However, the Federal Circuit adopted the reasoning of *Waste Management* to deny standing to a potential prime contractor that had filed neither a bid nor a protest in *MCI Telecommunications Corp. v. United States*,<sup>45</sup> in which the court construed a practically identical “interested party” definition under the now-repealed Brooks Act.<sup>46</sup> The court in *MCI* held that, under a plain reading, “prospective” means that the contractor must be “expecting to submit an offer prior to the closing date of the solicitation” and thus “the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends. . . .”<sup>47</sup> This rationale was recently applied by the COFC in *McRae Industries, Inc. v. United States*<sup>48</sup> under section 1491(b)(1) as revised by ADRA.

This restrictive definition of “prospective bidder or offeror” imposed by the courts in *Waste Management* and *MCI* is not as “plain” as they state. In fact, it is the courts that are reading words into the text that do not appear there. The plainest reading of the distinction between an “actual” and a “prospective” bidder is that the “prospective” bidder *could have* submitted a bid, but did not, i.e., the contractor was a “potential” bidder (not an “actual” one). This distinction does not put controlling weight on the timing of the end of the proposal period, which is not mentioned in the definition, and it makes more sense because a prospective bidder’s opportunity to participate in a procurement is not extinguished automatically if it did not submit a bid during the initial solicitation period. If the protest itself, if successful, would reopen the solicitation for those same goods or services being solicited, then the opportunity (the “prospect”) of bidding would not be extinguished for the protester.

*MCI* itself provides a good illustration. In *MCI*, the protester alleged that the agency had waived material, mandatory requirements of the solicitation in making the contract award and that, if the solicitation were to be revised with the relaxed requirements, it might offer as a prime contractor and so was a “prospective bidder” in the event of a resolicitation.<sup>49</sup> Because *MCI*’s protest challenges, if meritorious, would have required a resolicitation and because *MCI* was clearly qualified to bid on any such resolicitation as a prime con-

44. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210–12 (1995); *N.E. Fla. Chap. of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663–69 (1993); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 706 (9th Cir. 1997); *Dynalantic Corp. v. Dep’t of Def.*, 115 F.3d 1012, 1015–18 (D.C. Cir. 1997); *Rapides Reg’l Med. Ctr. v. Dep’t of Veterans’ Affairs*, 974 F.2d 565 (5th Cir. 1992); *United States v. Compusearch Software Sys.*, 936 F.2d 564, 566 (Fed. Cir. 1991) (finding Brooks Act standing when protester precluded from bidding on an allegedly erroneous contract modification); *ATA*, 38 Fed. Cl. at 496–97 (contractor challenging bidder qualification requirements). In *MCI Telecommunications Corp.*, 90–2 CPD ¶ 280, 70 Comp. Gen. 20 (1990), the GAO distinguished the Federal Circuit’s *MCI* decision factually when *MCI* challenged a modification to the same contract involved in the Federal Circuit case as outside the scope of the contract and requiring a separate procurement. *MCI*, 70 Comp. Gen. at 22–23.

45. 878 F.2d 362 (Fed. Cir. 1989).

46. 40 U.S.C. § 759(f)(9)(B) (1994) (repealed).

47. *MCI*, 878 F.2d at 365.

48. 53 Fed. Cl. 177 (2002).

49. *MCI*, 878 F.2d at 364.



tractor, it should have been considered as a “prospective offeror” and an interested party under the CICA definition.

Similarly, in the recent COFC case of *McCrae Industries*, the protester alleged that, if it had known that the agency was going to waive mandatory evaluation tests for those who did submit offers, it would have bid on the procurement initially and would do so in a resolicitation with a suitably revised, relaxed specification. Following the rationale of *MCI*, the COFC found that the protester lacked standing under the CICA’s “interested party” definition “because McCrae decided not to submit a bid for this contract or protest the RFP requirements prior to the close of bidding. . . .”<sup>50</sup> The Catch-22 of this situation is obvious, in that McCrae only learned that the supposedly mandatory evaluation tests were not performed *after* the award to its competitor had been announced. There is no reason, either in the text of the CICA, logic, or public policy to find that a prospective bidder like McCrae should not have standing. McCrae had a vital interest, was misled by improper agency action, and might have submitted the offer most beneficial to the Government if it had been allowed to bid on the actual requirements.<sup>51</sup>

Notably, the GAO has rejected the *MCI* approach and has adopted the appropriate reading of “interested party” under the CICA. For instance, in the same *McCrae Industries* case, which was first protested before the Comptroller General, the GAO had found the protester to have interested party status under the CICA as a “prospective bidder or offeror” under the following reasoning:

Inasmuch as the appropriate relief, if our Office were to sustain the protest, would be for the protester and other offerors to be given an opportunity to compete based on a revised RFP, we consider the protester to have a sufficiently direct economic interest in the outcome to be deemed an interested party.<sup>52</sup>

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50. *McCrae Indus.*, 53 Fed. Cl. at 180.

51. It would be a different matter, of course, if the protest allegations by a nonbidder would not lead to a reopening of the solicitation and another round of offers. For example, if a nonbidder alleged that Bidder A, the awardee, was not eligible under the solicitation requirements, but disqualification of Bidder A would only mean that the award would have been made to Bidder B, then there would be no legitimate prospect that the nonbidder protester would ever become a bidder and the nonbidder would not be an interested party. See, e.g., *United States v. IBM Corp.*, 892 F.2d 1006, 1010–12 (Fed. Cir. 1989). In *Waste Management*, the protester alleged that all of the bidders were not qualified due to lack of an appropriate permit; therefore, it would be the only legitimate bidder in a resolicitation. *Waste Mgmt. of N. Am., Inc. v. Weinberger*, 862 F.2d 1393, 1395 (9th Cir. 1988).

52. *McCrae Indus., Inc.*, Comp. Gen. B-287609.2, July 20, 2001, 2001 CPD ¶ 127, at 3; *accord* *Navajo Nation Oil & Gas Co.*, Comp. Gen. B-261329, Sept. 14, 1995, 95–2 CPD ¶ 133, at 3 n.2; *Courtney Contracting Corp.*, Comp. Gen. B-242945, June 24, 1991, 91–1 CPD ¶ 593. The COFC criticized the approach of the GAO in finding standing under the reasoning quoted above as “circular” and also because standing must be resolved before the merits are argued. It is the court that misses the point, not the GAO. The allegations and expected relief of a prospective bidder are directly relevant to the question of standing. Moreover, as will be explained in more detail *infra* at Part III.B, while the merits should not be decided in a standing examination, well-pled allegations should be accepted as true provisionally, *i.e.*, as having “merit” for standing purposes. This does not involve circular reasoning, as long as the merits are not actually adjudicated before standing is determined.

The GAO approach is, indeed, the appropriate one. If a successful protest would allow the contractor to participate as a bidder or offeror—whether or not the protester did so in the first round—the protester qualifies as a “pro-pective bidder or offeror” under the CICA’s “interested party” definition.

For these reasons, the decision in *MCI* should be restricted to the Brooks Act, rather than extended to the CICA definition of “interested party.” This can be done, in part, on the basis of the one textual distinction between the Brooks Act and CICA language defining “interested party.” Under the Brooks Act, the “interested party” definition was “with respect to a contract *or proposed contract*.”<sup>53</sup> Under the CICA, the “interested party” definition is “with respect to a contract *or a solicitation or other request for offers* described in paragraph (1).”<sup>54</sup> Paragraph (1) of the section defines “protest” to be an objection to, *inter alia*, a “solicitation . . . for offers for a contract for the procurement of property or services.”<sup>55</sup> The reference in the CICA to a “solicitation . . . for the procurement of property or services” can reasonably be interpreted to include the *entire* procurement process until a proper award is made for those same goods and services, i.e., to include any reopening of the procurement due to an illegality in the initial solicitation exercise. This “solicitation . . . for the procurement of property or services” language,<sup>56</sup> absent from the Brooks Act, could serve to cabin the *MCI* rationale.

*MCI* also could be limited to its facts, which involved the protester deciding in the initial solicitation to compete as a subcontractor to another offeror, rather than as a prime contractor itself.<sup>57</sup> Although this is admittedly not a differentiation of much substance, it would distinguish cases such as *McRae*. Subcontractors are often potential prime contractors and, if the solicitation terms were revised, might deem it in their best interests to compete as a prime contractor on the revised solicitation, either because of the solicitation revisions or due to market or other circumstances that might have changed from the time of the initial bid. The rationale of *MCI*, if it is not overruled or found inapplicable under the CICA definition, should be limited however possible.

## 2. Subcontractors as Interested Parties

Both the courts and the GAO have consistently ruled that a subcontractor is not an interested party, even under the APA standing rules.<sup>58</sup> Typically, they have based this conclusion on their reading that a subcontractor is itself nei-

53. 40 U.S.C. § 759(f)(9)(b) (1994) (repealed) (emphasis added).

54. 31 U.S.C. § 3551(2) (2000) (emphasis added).

55. *Id.* § 3551(1).

56. *Id.*

57. *MCI Telecomm. Corp. v. United States*, 878 F.2d 362, 363 (Fed. Cir. 1989).

58. *See, e.g., Contractors Eng'rs Int'l, Inc. v. United States Dep't of Veterans' Affairs*, 947 F.2d 1298, 1300–02 (5th Cir. 1991); *Info. Sys. & Networks Corp. v. United States Dep't of Health and Human Servs.*, 970 F. Supp. 1, 7–9 (D.D.C. 1997); *Amdahl Corp. v. Baldrige*, 617 F. Supp. 501, 504–08 (D.D.C. 1985); *Optimum Sys.*, 54 Comp. Gen. 767 (1975); *see also Phoenix Eng'g, Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1524–26 (6th Cir. 1992).

ther an “actual” nor a “prospective” bidder.<sup>59</sup> It is hardly obvious, however, that a subcontractor to an actual bidder is not also itself a “potential” bidder.<sup>60</sup> And, as discussed above,<sup>61</sup> if a subcontractor can legitimately allege that he would propose as a prime contractor on a corrected solicitation, he should be found to qualify as a prospective bidder under the CICA definition of “interested party.”

It seems likely that subcontractors that have served or will serve only as subcontractors in a procurement also are appropriately disqualified as not having a “direct economic interest,” as required by the CICA definition.<sup>62</sup> By use of the term “economic interest,” Congress apparently intended to eliminate the noneconomic injuries that can support standing, both constitutionally and under the APA, such as alleged injuries to “aesthetic, conservational, and recreational” values.<sup>63</sup> Thus, the CICA definition of “interested party” eliminates a protest by an individual based on his or her concern that his or her environment would be adversely affected by a particular procurement action. If the requirement were only for an “economic interest,” however, it would not eliminate any subcontractors, as they would have an economic interest in the award of the contract to the prime contractor with whom they were teamed on the bid. But Congress added the additional requirement of a “direct” economic interest, and that does seem to eliminate second-tier economic injuries such as those suffered by subcontractors in an improper procurement decision.

Under the APA, standing has not been limited to *direct* economic injuries. For example, in *Tozzi v. U.S. Department of Health and Human Services*,<sup>64</sup> a manufacturer of PVC medical products that release dioxin when incinerated challenged HHS when it upgraded dioxin to a “known” human carcinogen. The company alleged that this upgrade would have the effect of decreasing the sales of its PVC medical products and, thus, would hurt its profits. The D.C. Circuit rejected the Government’s claim that the manufacturer lacked standing because the alleged economic damage was indirect. Pointing out that the injury only had to be “fairly traceable” to the challenged agency action,<sup>65</sup> the court explained as follows:

[W]e have never applied a “tort” standard of causation to the question of traceability. Where, as here, the alleged injury flows not directly from the challenged

59. *E.g.*, *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 494 (1997).

60. Indeed, the district court precedent finding lack of subcontractor standing could be criticized for relying on GAO precedent, which applied the CICA, rather than the APA. *See, e.g.*, *Contractors Eng’rs Int’l*, 947 F.2d at 1300–01 (relying on GAO precedent), and *Amdabl*, 617 F. Supp. 501 (relying in turn on GAO precedent).

61. *See supra* Part II.A.

62. 31 U.S.C. § 3551(2) (2000) (emphasis added).

63. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *see, e.g.*, *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882–83 (1990) (upholding environmental interest for standing); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 238 n.4 (1986) (same); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72–78 (1978) (same).

64. 271 F.3d 301 (D.C. Cir. 2001).

65. *Id.* at 308 (citing *Lujan*, 504 U.S. at 590).

agency action, but rather from independent actions of third parties, we have required only a showing that “the agency action is at least a substantial factor motivating the third parties’ actions.” For example, we have allowed plaintiffs claiming that regulatory changes have caused “competitive injury,” defined only as “exposure to competition,” to sue the regulating agencies, even though the harm resulted most directly from independent purchasing decisions of third parties.<sup>66</sup>

The better reading, then, is that Congress, in requiring in the CICA that an interested party have *direct* economic injury, rejected the “fairly traceable” rule applied in APA cases that allows indirect economic injuries to establish standing. To show standing in a bid protest, the protester must show a “first-tier” injury as a prime contractor having lost the award. A subcontractor qua subcontractor can allege only second-tier damage, as its alleged injury relies on receipt of a further contract from the prime contractor to obtain its profits. Thus, it has only *indirect* economic injury due to an illegal procurement.<sup>67</sup> Of course, if the subcontractor can legitimately allege that it would compete as a prime contractor in the solicitation if it were conformed to legal requirements, then it should have standing as a “prospective bidder or offeror” under the next round of the solicitation, as, in that situation, it would suffer direct economic injury as a prime contractor.

### III. THE MUDDLING MERGER OF THE STANDING AND PREJUDICE TESTS

The Federal Circuit in recent decisions has merged the constitutional standing requirement for injury-in-fact<sup>68</sup> with the requirement that a protester be able to demonstrate that a violation of law is prejudicial to obtain relief on

66. *Id.* at 308–09 (quoting *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) and citing *Bristol-Meyers-Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996)); *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986)).

67. For example, in *N. Carolina Div. of Servs. for the Blind v. United States*, 53 Fed. Cl. 147 (2002), *aff'd*, 60 Fed. Appx. 826 (Fed. Cir. 2003), the state licensing agency under the Randolph-Sheppard Act, 20 U.S.C. §§ 107–107(f) (2000), filed a bid protest action as the bidder designated by the statute, together with an individual blind plaintiff who would have performed some of the services as a subcontractor to the state agency. *Id.* at 150–57. While the court found that the individual plaintiff lacked standing because he was not an actual or prospective offeror, it also could have denied standing because he was not receiving a “direct” economic benefit, but only an indirect one through the state agency. *Id.* at 162. In the situation in which the state agency is not really a contractor and stands in the shoes of those it represents, it could be argued that a blind operator is the real party in interest and thus qualifies as an “actual or prospective bidder or offeror.”

68. The injury-in-fact component of the standing test is based on the Case or Controversy Clause of the Constitution and, thus, is a nonwaivable jurisdictional requirement. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 150. Many scholars have questioned the propriety of this constitutional interpretation. *E.g.*, Richard J. Pierce Jr., *Is Standing Law or Politics?* 77 N.C. L. REV. 1741 (1999); Cass R. Sunstein, *What's Standing After Lujan: Of Citizens Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). But “[d]espite its dubious pedigree, the injury-in-fact test seems to have become so deeply imbedded in the Court’s jurisprudence that the Court is likely to retain some version of the test.” PIERCE, *supra* note 8, at 1113.

the merits. This muddling of the two standards is doctrinally imprecise and substantively confusing. Its ill effects have already started to surface in the COFC.

#### A. *Genesis of the Merger*

The Federal Circuit's melding of the injury-in-fact portion of the standing test with the requirement to show prejudice on the merits was initially seen in *Impresa Construzioni Geom. Domenico Garufi v. United States*.<sup>69</sup> In *Impresa*, the Federal Circuit applied the CICA standing standards.<sup>70</sup> After first distinguishing cases in which the protester had no economic interest in the outcome because, if the protest were successful, the award would go to another party, the court appropriately found standing in the situation at hand because the protester would have a fresh opportunity to compete were it successful:

In this case, . . . if appellant's bid protest were allowed because of an arbitrary and capricious responsibility determination by the contracting officer, the government would be obligated to rebid the contract, and appellant could compete for the contract once again.<sup>71</sup>

So far, so good. In a rebid situation, where all offerors are free to alter their bids as they so desire, all competitors are back to square one with a direct economic interest, and so standing is established.

However, the Federal Circuit continued in *Impresa* with the following words:

Under these circumstances, the appellant has a "substantial chance" of receiving the award and an economic interest and has standing to challenge the award. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999).<sup>72</sup>

Here is the first wrong turn. *Alfa Laval* was not a standing case. Rather, Alfa Laval had protested a procurement in which a minimum mandatory requirement of the RFP had been waived for its competitor. The COFC validated Alfa Laval's complaint, but found that the contractor could not establish *prejudice* because its conforming bid was significantly higher priced than its competitor's.<sup>73</sup> The *standing* of Alfa Laval, the incumbent and a bidder in the procurement, was never at issue. The sole issue on appeal was whether Alfa Laval had "demonstrated a significant, prejudicial error in the procurement

69. 238 F.3d 1324 (Fed. Cir. 2001).

70. *Id.* at 1334. The court in *Impresa* reserved the issue of whether the CICA standard or the APA standing requirements should be applied, an issue it soon thereafter resolved in favor of the CICA standard in *AFGE*. *Id.* See *supra* Part II.A for a discussion of the ruling in *AFGE*. Of course, the constitutional threshold of injury-in-fact is satisfied by the CICA's "interested party" definition, which requires a "direct economic interest" to be held by the protester. 31 U.S.C. § 3551(2) (2000); see *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); see generally *PIERCE*, *supra* note 8, at 1121–25.

71. *Impresa*, 238 F.3d at 1334.

72. *Id.*

73. *Alfa Laval Separation, Inc. v. United States*, 40 Fed. Cl. 215, 235 (1998) (*Alfa Laval I*), *rev'd*, 175 F.3d 1365 (Fed. Cir. 1999) (*Alfa Laval*) (discussing standard of review on the merits, but not standing).

process.”<sup>74</sup> To answer this question, the Federal Circuit applied (whether correctly or not will be discussed in greater detail below<sup>75</sup>) the standard it had set out earlier in Brooks Act protest cases:

To prevail in a bid protest, a protester must show a significant, prejudicial error in the procurement process. See *Statistica v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996). “To establish prejudice, a protester is not required to show that[,] but for the alleged error, the protester would have been awarded the contract.” *Data General*, 78 F.3d at 1562 (citation omitted). Rather the protester must show “that there was a substantial chance it would have received the contract award but for that error.” *Statistica*, 102 F.3d at 1582. . . .<sup>76</sup>

The court in *Alfa Laval* reiterated by concluding, “[a] protester demonstrates *prejudice* by showing that there was a substantial chance it would have received the contract award if the government had not violated the law.”<sup>77</sup> By citing and quoting in *Impresa* from a case dealing solely with prejudice in order to establish a standing standard, the Federal Circuit took its first step in melding the two inquiries.<sup>78</sup>

The Federal Circuit took the next step of the merger process in *Myers Investigative and Securities Services, Inc. v. United States*.<sup>79</sup> Myers contested two sole-source awards to competitors, and the Federal Circuit ruled on whether it had standing to do so. While some of the court’s language, and its ultimate result, are unobjectionable, the court also explicitly cemented the improper merger of the standing and prejudice standards foreshadowed in *Impresa*.

The Federal Circuit in *Myers* began its substantive analysis with the following words:

To some extent, the Court of Federal Claims appears to have treated the question of whether Myers was prejudiced by the GSA as different from the question of whether Myers has standing. In fact, prejudice (or injury) is a necessary element of standing.

In *Impresa*, *Alfa Laval*, and *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996), we held that a potential bidder must establish that it had a substantial chance of securing the award in order to establish standing.<sup>80</sup>

74. *Alfa Laval*, 175 F.3d at 1366.

75. See *infra* Part IV.A.

76. *Alfa Laval*, 175 F.3d at 1367 (also citing *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1574–75 (Fed. Cir. 1983); to establish competitive prejudice, protester must demonstrate that, but for the alleged error, there was a substantial chance that it would receive an award—“that it was within the zone of active consideration”).

77. *Id.* at 1368 (quoting *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).

78. While the Federal Circuit has not cited other circuits in support of its own views, it is not the First Circuit Court of Appeals to have improperly melded the standing and prejudice tests. In *Look v. United States*, 113 F.3d 1129, 1131–32 (9th Cir. 1997), the Ninth Circuit followed the lead of the D.C. Circuit in *Energy Transp. Group v. Maritime Admin.*, 956 F.2d 1206, 1211 (D.C. Cir. 1992), in improperly equating the “substantial chance” prejudice standard with the injury-in-fact standing requirement. In neither *Look* nor *Energy Transportation*, however, did the court expressly state that the injury-in-fact standing test and the prejudice merits requirement were one and the same.

79. 275 F.3d 1366 (Fed. Cir. 2002).

80. *Id.* at 1369–70.

While *Impresa* did involve a standing issue, *Alfa Laval* and *Statistica* did not. They were both cases considering whether the contractor (which had standing) had shown sufficient *prejudice* to be provided relief on the merits. While it is true that it is necessary for a litigant to allege injury to itself to demonstrate standing, it does not follow that the injury-in-fact analysis for standing is identical to the determination of whether prejudicial error has been shown on the merits. Indeed, the two are separate questions that traditionally have been—and should continue to be—treated separately.

The Federal Circuit in *Myers* then continued in its melding exercise by citing yet another prejudice case:

Myers urges, however, that the substantial chance requirement should not be applied in sole[-]source procurements. Precisely this contention was considered and rejected in our recent decision in *Emery Worldwide Airline, Inc. v. United States*, 264 F.3d 1071, 1086 (Fed. Cir. 2001).<sup>81</sup>

The court considered nothing of the kind in *Emery*. Emery challenged a sole-source award by the U.S. Postal Service for which Emery was an incumbent provider and concededly qualified to perform the work awarded on a sole-source basis. There was no question that Emery had standing to protest the award, and, in fact, the issue was never even raised or discussed in either the COFC or Federal Circuit opinions.<sup>82</sup> What *was* discussed in both decisions was whether Emery had been *prejudiced* by the violation of law found by the COFC.<sup>83</sup> In *Emery*, the Federal Circuit simply applied the “substantial chance” *prejudice* standard to the sole-source situation to determine whether relief would be afforded in light of a regulatory violation by the agency.<sup>84</sup>

Finally, the Federal Circuit in *Myers* stated the unobjectionable core of the *Impresa* rule for standing:

In *Impresa* we considered the standard to be applied where the plaintiff claims that the government was obligated to rebid the contract (as contrasted with a situation in which the plaintiff claims that it should have received the award in the original bid process). 238 F.3d at 1334. To have standing, the plaintiff need only establish that it “could compete for the contract” if the bid process were made competitive. *Id.*<sup>85</sup>

For standing purposes, it should only be necessary for the protester to make the necessary allegations (subject, of course, to Rule 11 certifications<sup>86</sup>), but

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81. *Id.* at 1370.

82. See *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001) (*Emery*), *aff'g* 49 Fed. Cl. 211 (2001) (*Emery I*).

83. *Emery I*, 49 Fed. Cl. at 229–30; *Emery*, 264 F.3d at 1086.

84. *Id.*

85. *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (*Myers*).

86. Rule 11 of the COFC tracks Federal Rule of Civil Procedure 11 and provides that a signature on the pleadings is a certification that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support. . . .” RULES OF THE U.S. COURT OF FED. CLAIMS 11(b)(3).

Myers made no assertions that it would have been a responsible contractor for the procurements it challenged if they were rebid and, therefore, that it would have been a qualified competitor.<sup>87</sup> Thus, the Federal Circuit found that Myers lacked standing.<sup>88</sup>

The Federal Circuit reinforced its merger of the standing and prejudice requirements in *Information Technology & Applications Corp. v. United States*.<sup>89</sup> While properly finding that the protester had standing to challenge the award decision as an actual offeror,<sup>90</sup> the appellate court went out of its way to chide the COFC for treating prejudice as a legal requirement independent of standing:

The Court of Federal Claims did not decide the question of prejudice, because it determined that there was no error in the procurement process, stating that, “[i]f the court finds error, the court *then examines* whether the error was prejudicial to plaintiff.” 51 Fed. Cl. at 346 (emphasis added). This approach was erroneous. In fact, because the question of prejudice goes directly to the question of standing, the prejudice issue must be reached before addressing the merits. As we said in *Myers*, “prejudice (or injury) is a necessary element of standing.” 275 F.3d at 1370.

To establish prejudice, [the protester] must show that there was a “substantial chance” it would have received the contract award but for the alleged error in the procurement process. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (citation omitted).<sup>91</sup>

The COFC did not deserve the chiding. There was no serious question about the standing of the protester in *Information Technology*, and none was raised below.<sup>92</sup> Instead, the trial court was making the unremarkable—and previously unchallenged—statement that, in addition to “showing that the agency’s action was arbitrary or capricious or otherwise inconsistent with law, a plaintiff in a bid protest action must show that the action was prejudicial.”<sup>93</sup> For this proposition, the COFC cited the Federal Circuit’s own precedent in *Alfa Laval* and *Data General Corp. v. Johnson*,<sup>94</sup> and it could have multiplied

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87. Myers did allege that it would have bid in the event of a recompetition. 275 F.3d at 1370; see also *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 605, 612–13, 620 (2000) (*Myers I*). The trial court had found this sufficient for purposes of standing without addressing whether the protester also had alleged it would have been a qualified offeror on the recompetition it sought to obtain, *id.* at 612–13, addressing that issue, instead, in its consideration of prejudice. *Id.* at 620.

88. *Myers*, 275 F.3d at 1370–71. The Federal Circuit’s apparent imposition of a proof standard, rather than a pleadings standard, to the standing issue in *Myers* will be discussed *infra* at Part III.B.

89. 316 F.3d 1312 (Fed. Cir. 2003).

90. *Id.* at 1319.

91. *Id.*

92. See *Info. Tech. & Applications Corp. v. United States*, 51 Fed. Cl. 340 (2001) (*Info. Tech. I*), *aff’d*, 316 F.3d 1312 (Fed. Cir. 2003) (*Info. Tech.*).

93. *Info. Tech. I*, 51 Fed. Cl. at 346.

94. *Id.* (citing *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”)).



those citations tenfold.<sup>95</sup> For example, in the perhaps most commonly cited discussion of prejudice (albeit under the Brooks Act) in *Statistica, Inc. v. Christopher*, the Federal Circuit stated,

A protester must show not simply a significant error in the procurement process, but also that the error was prejudicial, if it is to prevail in a bid protest. To establish competitive prejudice, a protester must demonstrate that[,] but for the alleged error, there was a “substantial chance that [it] would receive an award—that it was within the zone of active consideration.”<sup>96</sup>

The GAO follows the same rule: “[O]ur Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions, that is, unless the protester demonstrates that, but for the agency’s actions[,] it would have had a substantial chance of receiving the award.”<sup>97</sup>

Even more significantly, the trial court in *Information Technology* had appropriately noted that the judicial review standard of the APA set out in section 706 of title 5 (the standard that Congress specified in the ADRA for bid protests<sup>98</sup>) expressly provides that prejudice be considered in conjunction with review on the merits:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency actions, findings and conclusions found to be
  - (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

95. *E.g.*, *JWK Int’l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002); *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1086, 1088 (Fed. Cir. 2001) (*Emery*); *OMV Med., Inc. v. United States*, 219 F.3d 1337, 1342 (Fed. Cir. 2000); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed. Cir. 2000); *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000); *DSE, Inc. v. United States*, 169 F.3d 21, 31 (D.C. Cir. 1999); *San Francisco v. United States*, 130 F.3d 873, 881 (9th Cir. 1997); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581–83 (Fed. Cir. 1996); *Cent. Ark. Maint., Inc. v. United States*, 68 F.3d 1338, 1342 (Fed. Cir. 1995); *Cleveland Telecomm. Corp. v. Goldin*, 43 F.3d 655, 659 (Fed. Cir. 1994); *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1048 (Fed. Cir. 1994); *Andersen Consulting v. United States*, 959 F.2d 929, 932, 935 (Fed. Cir. 1992); *Fed. Elec. Corp. v. Carlucci*, 866 F.2d 1530, 1532–33 (D.C. Cir. 1989); *CACI Field Servs. v. United States*, 854 F.2d 464, 466–67 (Fed. Cir. 1988); *Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1169, 1180–81 (D.C. Cir. 1973).

96. 102 F.3d at 1581 (citing *Data Gen. Corp.*, 78 F.3d at 1562, and quoting *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1574–75 (Fed. Cir. 1983) (quoting *Morgan Bus. Assocs., Inc. v. United States*, 223 Ct. Cl. 325, 619 F.2d 892, 896 (1980))).

97. *IGIT, Inc.*, Comp. Gen. B-275299.2, June 23, 1997, 97–2 CPD ¶ 7, at 8; *accord Sabreliner Corp.*, Comp. Gen. B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ 68, at 8; *McDonald-Bradley*, Comp. Gen. B-270125, Feb. 8, 1996, 96–1 CPD ¶ 54, at 3; *Square 537 Assocs., Ltd. P’ship*, Comp. Gen. B-249403.2, Apr. 21, 1994, 94–1 CPD ¶ 272, at 6; *Lithos Restoration Ltd.*, Comp. Gen. B-247003.2, Apr. 22, 1992, 92–1 CPD ¶ 379, at 5–6.

98. See 28 U.S.C. § 1491(b)(4) (2000).

- (B) contrary to constitutional right, power, privilege or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
- (D) without observance of procedures required by law. . . .

. . . .  
 In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, *and due account shall be taken of the rule of prejudicial error.*<sup>99</sup>

This APA requirement that prejudice be considered by a court when reviewing the merits of agency action and determining what relief should be granted in the event of a successful challenge is plainly distinct from the standing provisions of the APA, which are found in another section.<sup>100</sup> It is a distinction that has been observed repeatedly and consistently in the past, and it should continue to be observed.

#### B. *The Appropriate Distinction Between Prejudice on the Merits and the Injury-in-Fact Requirement for Standing*

The concepts of prejudice on the merits and injury-in-fact for standing purposes are related but distinct. The difference is more than semantic. It has a direct, practical effect on the level of proof required.

As is often stated, standing is a jurisdictional prerequisite and is to be determined *prior* to the testing of the case on the merits by discovery, trial, or summary judgment.<sup>101</sup> “Questions of standing focus not on the merits of the case but on whether parties have the right to seek judicial review.”<sup>102</sup>

It was not always so. Beginning in the 1930s and continuing through the 1960s, the Supreme Court advocated the “legal-right” or “legal-interest” test for standing, which required the petitioner to first establish that the challenged agency action violated a right specifically conferred in a statute to the petitioner.<sup>103</sup> The commentators barraged the legal-right test with criticism, most particularly in that it confused the merits inquiry with a threshold standing analysis, as summarized in a leading treatise:

Perhaps the most telling criticism was based on its confusion of the issue of access to the courts with the issue of whether a party should prevail on the merits of a dispute. Under the legal right test, a court was required to determine whether the petitioner’s claim had merit in order to decide whether the petitioner was entitled to have the merits of its case considered by the court. This circular reasoning process is unnecessary to the determination of the threshold question of access to judicial review, and it can force a court to determine the merits of a claim at such an early stage that the court does not focus enough attention on the merits. Thus,

99. APA § 10(e), 5 U.S.C. § 706 (2000) (emphasis added).

100. *See id.* § 702.

101. *E.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–04 (1998); *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (*Myers*) (“standing is a threshold jurisdictional issue”).

102. STEIN ET AL., *supra* note 8, at 50–3.

103. *See, e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Atlanta v. Ickes*, 308 U.S. 517 (1939); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118 (1939); *Spunt & Son, Inc. v. United States*, 281 U.S. 249 (1930); *see generally* PIERCE, *supra* note 8, at 1114–18.

considering the merits of a party's claim as part of the process of determining whether the party has standing to assert that claim invites poorly reasoned summary judicial disposition of the merits of the claim.<sup>104</sup>

Eventually, the Supreme Court came to agree with the criticism and, in its 1970 decision in *Association of Data Processing, Inc. v. Camp*, jettisoned the legal-right or legal-interest test for exactly that reason:

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is *arguably* within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.<sup>105</sup>

All that is required, then, to establish standing is that a party *argue* or *claim* that it will suffer substantial injury (again, subject to the good-faith-pleading requirements of Rule 11). The party, to be allowed in the courtroom door, does not have to prove the merits of his or her case and substantial prejudice. The Supreme Court repudiated that approach when it overturned the legal-right test for standing.

A recent application of this rule is seen in the First Circuit's decision in *Save Our Heritage, Inc. v. FAA*.<sup>106</sup> In that case, preservationist organizations and other parties claimed that an FAA authorization for additional airline traffic over a particular route would cause damage to historic and natural resources, a claim that the FAA had considered and rejected in the agency proceedings. On the merits, the First Circuit sustained the FAA's assessment that increases in flights would have a *de minimis* environmental effect.<sup>107</sup> However, the First Circuit rejected the FAA's challenge to the standing of the petitioners based on the agency's argument that it had found no significant environmental impact in the challenged proceedings:

At first blush, this appears to be a question of the merits rather than one of standing; the petitioner certainly *alleged* substantial effects and challenged both the FAA's contrary findings and the procedures used to reach them.

We need not rule out the possibility of cases where the claim of impact is so specious or patently implausible that a threshold standing objection might be appropriate. But beyond that, we think that the likelihood and extent of impact are properly addressed in connection with the merits and issues of harmless error. *A reasonable claim of minimal impact is enough for standing* even though it may not trigger agency obligations.<sup>108</sup>

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104. PIERCE, *supra* note 8, at 1116–17.

105. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added); *see also* *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

106. 269 F.3d 49 (1st Cir. 2001).

107. *Id.* at 59–63.

108. *Id.* at 56 (citations omitted) (emphasis added) (citing, *inter alia*, BREYER & STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1107 (2d ed. 1985); *Bell v. Hood*, 327 U.S. 678, 681–84 (1946)). The citation to *Bell v. Hood* is apt. In that case, the Court explained that jurisdictional challenges are to be decided on the pleadings, not after consideration of the merits:

For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a

All that is required to demonstrate standing is a legitimate *allegation* of injury.<sup>109</sup> A court would err if it went to the merits and ruled on the prejudice issue in order to resolve the issue of standing.<sup>110</sup> As a leading treatise summarizes, “Courts are required to make their standing determination on the basis of the pleadings, and, for this purpose, allegations of injury must be viewed in favor of the persons who seek standing. Yet, the burden to prove each element of standing remains on the plaintiff.”<sup>111</sup>

Predictably, exactly this error of reaching the merits to determine standing has begun to infect the workings of the COFC. In *North Carolina Division of Services for the Blind v. United States*,<sup>112</sup> the state agency that licenses the blind for operation of vending facilities on federal property pursuant to the Randolph-Sheppard Act<sup>113</sup> protested a contract award by the Army to a non-handicapped contractor for food and dining facility services at Fort Bragg.

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cause of action on which relief could be granted is a question of law and[,] just as issues of fact[,] it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations and the complaint did not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

*Bell*, 327 U.S. at 682. The Court then went on to say that there are exceptions for when the claim “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” *Id.* at 682–83. Even then, the Court noted that it had previously questioned the accuracy of calling such “frivolous” dismissals jurisdictional. *Id.* at 683.

109. This is not to suggest that standing issues are never suitable for adjudication on affidavit or under the summary judgment procedure of Rule 56. Compare *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (whether association had standing due to members adjudicated under Rule 56 on affidavits submitted by members), with *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (decided on Rule 12(b) motion to dismiss on the pleadings). A court may rely on affidavits filed or pursue the standing issue by other evidentiary means if there is reason to question the accuracy or completeness of pleadings. But pursuing some evidentiary materials for the issue of standing does not open up the entire merits of the case for decision in the guise of a standing analysis. Cf. *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (rejecting legal-rights standing analysis because it required analyses of the merits). In *Lujan*, for example, the Court considered affidavits going solely to the standing of individuals who challenged the agency action, not to the merits, and determined that those affidavits, taken at face value, left no question of fact that the litigants failed to allege facts sufficient to gain standing, and so granted summary judgment against them. 497 U.S. at 883–99.

110. As the First Circuit in *Save Our Heritage* suggests, there might be claims of impact that are specious or patently implausible or inadequate on their face. 269 F.3d at 56; see *Bell*, 327 U.S. at 682–83. In a bid protest context, for example, a competitor on a procurement might allege a violation of only one part of the evaluation that, if corrected and the protester got full credit for that area, would still not put it in the zone of consideration for an award. However, normally the preferable way to dispose of such a case, rather than dismissing for lack of standing, would be to grant summary judgment on the merits for the inability to demonstrate prejudice. See, e.g., *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1088 (Fed. Cir. 2001) (*Emery*); cf. *Lujan*, 497 U.S. at 883–99 (deciding standing issue on affidavits under Rule 56); *Bell*, 327 U.S. at 683 (suggesting dismissals due to frivolous allegations are more properly considered merits dismissals, rather than jurisdictional).

111. STEIN ET AL., *supra* note 8, at 50–24 thru 50–26 (footnotes and citations omitted).

112. 53 Fed. Cl. 147 (2002), *aff’d*, 60 Fed. Appx. 826 (Fed. Cir. 2003). Other decisions have continued to ignore this improper wording of the standing and prejudice tests. See, e.g., *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 16–20 (2003); *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 648 (2003).

113. 20 U.S.C. §§ 107–107f (2000).

The state agency alleged that the Army had improperly failed to apply to the procurement the preferences for the blind that the Randolph-Sheppard Act specifies and that, because of the Army's failure to do so, the state agency had not had enough time to prepare the proposal it did submit, which the Army had evaluated as outside the competitive range.<sup>114</sup> These allegations were sufficient to establish the standing of the state agency, which performs as the offeror under the Randolph-Sheppard Act. The Army moved to dismiss for lack of standing, however, based on the argument that the state agency could not demonstrate that it had a substantial chance of receiving the award. Applying the Federal Circuit's language in *Myers*, the trial court ruled that, to make the standing determination, it "must also determine whether prejudice or injury occurred since prejudice is an element of the standing requirement."<sup>115</sup> Based on this standard, the COFC did not find the well-pled allegations of the state agency persuasive for standing purposes and went on to examine at some length the merits of the case. Only after resolving the merits against the state agency did it conclude that the state agency had not shown "that it would have had a substantial chance of receiving the challenged award and that there was a significant prejudicial error," so that it lacked standing.<sup>116</sup>

The Federal Circuit should clarify the confusion that it has engendered. It should instruct, consistent with Supreme Court precedent, that, for standing purposes, the merits of whether or not an error is prejudicial need not be addressed, but only whether the protester, on the face of its pleadings, colorably alleges injury in fact. The Federal Circuit has perhaps not gone so far down the road to merging the two standards that it cannot right itself. For instance, it can rely on its language in *Information Technology*, which, in finding standing, relied only on what the protester "argue[d]"—in other words, the court properly relied only on the protester's allegations.<sup>117</sup> The Federal Circuit should reject the implication in *Myers* that, in order to demonstrate standing, the contractor is required to put on evidence that it was a qualified bidder.<sup>118</sup>

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114. *N.C. Div. of Servs. for the Blind*, 53 Fed. Cl. at 163.

115. *Id.* at 161 (citing *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (*Myers*)).

116. *Id.* at 163–68. That the court saw standing as a merits inquiry was also shown when the court faulted the state agency for not providing evidentiary support for its allegations and when it based its standing decision, in part, on affidavits supplementing the administrative record. *Id.* at 158–59.

117. *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (*Info. Tech.*) ("Here [the protester] *argues* that the award . . . should be set aside on a variety of grounds. . . . [The protester] also *argues* that the Air Force improperly failed to conduct 'discussions' with [it] and that, if it had, [the protester] would have been able to cure deficiencies in its bid.") (emphasis added).

118. *Myers*, 275 F.3d at 1370–71. The court determined that *Myers* had not "established" that it was qualified to compete for the contract because it had "made no effort to show it was responsible" and "presented no evidence that it was qualified." *Id.* at 1371. From this, the court concluded that "*Myers* has not shown that it was prejudiced." *Id.* If *Myers* had failed to *allege* that it was qualified, then dismissal for lack of standing was appropriate. If *Myers* had alleged that it was qualified but then failed to prove it, judgment on the merits should have been granted

IV. PREJUDGING AGENCY ACTION IN THE GUISE OF DETERMINING  
PREJUDICE

Despite the merger of the prejudice-on-the-merits analysis and the injury-in-fact standing requirement in certain recent Federal Circuit decisions, the Federal Circuit has also continued to apply the prejudice rule after finding on the merits that an agency erred. Unfortunately, in some instances the Federal Circuit has shown a propensity to prejudge the result of what a remand to the agency would have accomplished, rather than allowing the agency to perform that function. In doing so, the Federal Circuit has overstepped its bounds, in violation of well-settled Supreme Court precedent.

A. *The APA Governs the Prejudice Determination*

A foundational and obvious point—but one consistently ignored by the Federal Circuit—is that the prejudice standard is set by the APA, not by the CICA, the Brooks Act, or some other statute. In the Tucker Act as revised by the ADRA, the COFC “shall review the agency’s decision pursuant to the standards set forth in section 706 of title 5.”<sup>119</sup> Section 706 provides that, when exercising judicial review of agency action, “due account shall be taken of the rule of prejudicial error.”<sup>120</sup> In cases arising under revised section 1491(b), however, the Federal Circuit has consistently rearticulated the prejudice standard to be that enunciated in *Statistica* and other Brooks Act cases.<sup>121</sup> It has never explicitly recognized the prejudice standard called out by section 706 of the APA; nor has it ever analyzed *Scamwell* cases and other APA decisions that establish a test for prejudice under that section.

Under the *Statistica* line of cases, the protester must show a “substantial chance” that it would have received the contract absent the error of which it complains.<sup>122</sup> However, the APA itself in section 706 does not require proof of “substantial” prejudice, but only that the error was “prejudicial.”<sup>123</sup> In the leading bid protest prejudice case under the APA, *Kentron Hawaii, Ltd. v. Warner*,<sup>124</sup> the D.C. Circuit did not require a “substantial” likelihood of prejudice, but only a showing that the agency’s procurement error “affected” or was otherwise “causally related” to the procurement decision.<sup>125</sup> Courts ap-

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against Myers because it had failed to show that it was *prejudiced* (not because it lacked standing). In *Castle v. United States*, 301 F.3d 1328, 1337 (Fed. Cir. 2002), the Federal Circuit, in a non-bid protest case, helpfully cited *Myers* for the proposition that standing is a jurisdictional issue, from which it properly concluded that standing “may be decided without addressing the merits of a determination.”

119. 28 U.S.C. § 1491(b)(4) (2000).

120. 5 U.S.C. § 706 (2000).

121. See, e.g., *JWK Int’l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002); *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1086 (Fed. Cir. 2001) (*Emery*); *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (*Alfa Laval*).

122. *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996); see *Alfa Laval*, 175 F.3d at 1367.

123. 5 U.S.C. § 706 (2000).

124. 480 F.2d 1166 (D.C. Cir. 1973).

125. *Id.* at 1180–81.

plying the APA standard in nonprocurement situations have expressly rejected the “substantial possibility” of prejudice test, holding that it is stricter than the APA standard, which instead sets out a “mere possibility” test.<sup>126</sup> The *Kentron* formulation under section 706 of the APA of a “clear and prejudicial” violation has been widely adopted in the other circuits.<sup>127</sup> While the Federal Circuit in *Data General*, a Brooks Act case, postulated that, if the “mere possibility” standard were adopted, “the requirements of prejudice would be virtually eliminated,”<sup>128</sup> experience simply does not prove out that assertion. In *Kentron Hawaii* itself<sup>129</sup> and in many other APA cases applying the *Kentron Hawaii* standard, protesters have been found to have failed to have shown adequate prejudice to gain relief.<sup>130</sup> The Federal Circuit would do well, then, to consider whether the “substantial chance” prejudice standard it articulated under the Brooks Act is appropriate for bid protest cases that Congress has directed are now to be decided under the judicial review provisions of the APA.<sup>131</sup>

### B. *The Prohibition on Prejudging*

Whether or not the “substantial chance” standard is the appropriate prejudice standard under the APA, the Federal Circuit appropriately recognizes that, in the guise of judicial review, a court is not to second-guess the agency

126. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983); *Evans v. Perry*, 944 F. Supp. 25, 29 (D.D.C. 1996). This is not to say that courts in *Scanwell* actions under the APA have been pristine in taking note of this distinction, as a few courts, without principled analysis, have adopted the Federal Circuit’s “substantial chance” standard articulated under the Brooks Act. See, e.g., *Strategic Analysis, Inc. v. United States Dep’t of Navy*, 939 F. Supp. 18, 23 (D.D.C. 1996) (quoting *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996)); *Look v. United States*, 113 F.3d 1129, 1131 (9th Cir. 1997) (quoting *CACI, Inc. v. United States*, 719 F.2d 1567, 1574 (Fed. Cir. 1983)); *Energy Transp. Group v. Mar. Admin.*, 956 F.2d 1206, 1211 (D.C. Cir. 1992) (same).

127. See, e.g., *Smith & Wesson v. United States*, 782 F.2d 1074, 1078–79 (1st Cir. 1986); *Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 616 (11th Cir. 1985); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1270 (5th Cir. 1978); *Orbis & Assocs. v. Sec’y of Navy*, 863 F. Supp. 1186, 1189–90 (E.D. Cal. 1994); *Howard Cooper Corp. v. United States*, 763 F. Supp. 829, 834 (E.D. Va. 1991); *NOA Airscrew Howden, Inc. v. Dep’t of Army*, 622 F. Supp. 984, 988 (E.D. Mich. 1985); *James Luterbach Constr. Co. v. Adamkus*, 577 F. Supp. 869, 871 (E.D. Wis. 1984); *John W. Danforth Co. v. Veterans Admin.*, 461 F. Supp. 1062, 1070 (W.D.N.Y. 1978). The Federal Circuit itself has cited *Kentron Hawaii* since the APA has been applied to bid protests brought in the COFC. See *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332–33 (Fed. Cir. 2001).

128. *Data Gen. Corp.*, 78 F.3d at 1562.

129. 480 F.2d at 1181.

130. See, e.g., *Marwais Steel Co. v. Dep’t of the Air Force*, 871 F. Supp. 1448, 1454 (D.D.C. 1994); *Harvard Interiors Mfg. Co. v. United States*, 798 F. Supp. 565, 573–74 (E.D. Mo. 1992); *Single Screw Compressor, Inc. v. United States Dep’t of Navy*, 791 F. Supp. 7, 10–11 (D.D.C. 1992); *Tech. for Communications Int’l, Inc. v. Garrett*, 783 F. Supp. 1446, 1451 (D.D.C. 1992); *Saratoga Dev. Corp. v. United States*, 777 F. Supp. 29, 38–39 (D.D.C. 1991), *aff’d*, 21 F.3d 445 (D.C. Cir. 1994).

131. See Frederick W. Claybrook Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions—Learning Lessons All Over Again*, 29 PUB. CONT. L.J. 1, 40–45 (1999).

or to substitute its own views for those of the agency.<sup>132</sup> This rule has important corollaries, among them that the court must assess the agency action on the basis of the grounds articulated by the agency, not on post hoc rationales suggested by counsel.<sup>133</sup> Most critical for purposes of a prejudice showing, however, is the corollary rule, first established by the Supreme Court in its *Chenery* cases,<sup>134</sup> that the reviewing court may not supply a reasoned decision for the agency and must remand to the agency if it finds error, allowing the agency to perform its appointed duties in a lawful manner. The Supreme Court has repeatedly admonished that “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>135</sup> How much greater is the error when a court “first-guesses” an agency, i.e., when it speculates how an agency, if confronted with different facts, may perform its discretionary functions in the first instance. Such agency decisions, in the procurement realm as in others, often entail complicated factors and complex trade-offs. For a court to hypothesize what the agency will do on remand would be to usurp the agency’s prerogatives.<sup>136</sup>

### C. Violations of the Prohibition

In the guise of making a determination of whether the protester had shown that the error of which it complained was prejudicial, the Federal Circuit in several recent cases has shown a willingness to ignore the rule requiring remand to the agency when error is found and to hypothesize what it believes the agency likely would do if presented with a chance to correct its error. Such prejudging was first seen in *Advanced Data Concepts, Inc. v. United States*.<sup>137</sup>

*Advanced Data Concepts* involved a procurement in which the protester, ADC, alleged multiple evaluation errors. ADC’s bid was 26 percent below that of the awardee, but the agency had evaluated it 33 percent lower in the technical point scoring. The COFC found merit in several of ADC’s com-

132. See, e.g., *Impresa*, 238 F.3d at 1332–33; *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).

133. See *Motor Vehicle Mfg’rs Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623–24 (D.C. Cir. 1997); *Widnall v. B3H Corp.*, 75 F.3d 1577, 1580–82 (Fed. Cir. 1996); *Delta Data Sys. Corp. v. Webster*, 755 F.2d 938, 939 (D.C. Cir. 1985); *Cal. Marine Cleaning, Inc. v. United States*, 42 Fed. Cl. 281, 296 (1998).

134. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*).

135. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); accord *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–54 (1990); *Fla. Power & Light v. Lorion*, 470 U.S. 729, 743–44 (1985); *Citizens to Preserve Overton Park*, 401 U.S. at 420–21.

136. “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.

137. 216 F.3d 1054, 1055, 1058 (Fed. Cir. 2000).



plaints and calculated that, if reevaluated, ADC could have improved its technical score to be within 27 percent of the awardee's point score. Relying on the RFP's specification that technical factors were of "greater importance" than cost, the COFC found that ADC was not prejudiced by the evaluation errors.<sup>138</sup> On appeal, the question presented was whether the "no prejudice" finding was proper.

To begin its analysis, the Federal Circuit repeated the formula that, to prevail, the protester must show that the procurement "errors were prejudicial. In other words, ADC must show that, if [the agency] had made no errors, 'there was a reasonable likelihood that [it] . . . would have been awarded the contract.'" <sup>139</sup> The court also noted that "[p]rejudice is a question of fact" in a bid protest.<sup>140</sup> The Federal Circuit then went on an unnecessary excursion to outline the basic test for reviewing the merits in bid protest cases, discussing the arbitrary and capricious standard of judicial review under the APA.<sup>141</sup> This excursion soon caused confusion. When the court returned to the matter at hand, i.e., the question of whether the trial court's "no prejudice" finding was proper,<sup>142</sup> the sum and substance of its decision was as follows:

As the Court of Federal Claims properly noted, [the agency's] evaluations of the offers and the bid were reasonable and complied with the solicitation. Even adjusting the scores of ADC and [the awardee] to give ADC the benefit of every inference and potential factual dispute does not bring ADC's technical evaluation scores anywhere near the proximity to [the awardee's] that would be necessary to render the [agency] evaluation arbitrary and capricious. After all, the solicitation gave all bidders notice that DOE would give more weight to technical proposals than to cost proposals. Accordingly[,] the trial court correctly determined, under the applicable standard of review, that ADC suffered no prejudice from any [agency] evaluation errors.<sup>143</sup>

This ruling is confused and improper. The protester had already established that the agency had acted arbitrarily and capriciously in several respects in conducting the evaluation. The question for determination was whether those errors were prejudicial, which is *not* assessed on an "arbitrary and capricious" basis.<sup>144</sup> Whether a "mere possibility" or a "substantial chance" or a "reasonable likelihood" prejudice standard is applied, sufficient prejudice was shown by ADC to require the case to be remanded to the agency for a reevaluation, and a new award decision, without the taint of error. That new

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138. *Advanced Data Concepts, Inc. v. United States*, 43 Fed. Cl. 410, 422 (1999).

139. *Advanced Data Concepts*, 216 F.3d at 1057 (quoting *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996)).

140. *Id.*

141. *Id.* at 1057–58.

142. The court properly held that it owed no deference to the trial court's summary judgment disposition on this issue. *Id.* at 1057.

143. *Id.* at 1058.

144. See 5 U.S.C. § 706. The APA sets out the "arbitrary and capricious" test for finding error and then provides that the reviewing court is to take due account of "the rule of prejudicial error." By definition, the rule of prejudicial error never comes into play unless error is first found under the "arbitrary and capricious" or other applicable standards in section 706 for finding error.

award decision was not before the courts, and it was improper to speculate as to what the new decision would have been and how it would have been supported by the agency. It is simply not within a court's competence or authority to decide that a 26 percent lower price does not balance out a 27 percent lower technical score, even if technical considerations have greater importance than cost. Many a protestor has lost a challenge based on having better point scores than the awardee because "an agency may properly award to a lower rated, lower cost offeror, even if cost is the least important evaluation factor, if it reasonably determines that award to the higher cost offeror is not justified given the level of technical confidence available at the lower cost,"<sup>145</sup> and because, as a matter of law, point scores are not determinative, but only serve as guides to the source selection authority.<sup>146</sup> Thus, the issue of whether ADC would have won under a properly conducted evaluation was not a decision that could be determined with certainty by the court. Prejudice was established, and remand to the agency was required. Once a protestor succeeds on the merits, its right to a lawful exercise of discretion by the agency cannot be denied on the basis of a hypothetical, "what-the-agency-would-likely-do" evaluation by a court.

The Federal Circuit's decision in *JWK International Corp. v. United States*<sup>147</sup> is subject to the same criticism, although, in *JWK*, the no-prejudice ruling was only an alternative ground for denying the appeal. In that case, the protester challenged the adequacy of the Navy's discussions with it during the procurement process and alleged that, if discussions had been adequate, it could have significantly improved its proposal. The Navy evaluated JWK to have a lower cost, but awarded to another contractor due to its superior ratings on other factors.<sup>148</sup> Turning to its alternative ground of no prejudice, after reciting the "substantial chance" standard, the court reasoned as follows:

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

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145. *M-Cube Info. Sys., Inc., Comp. Gen. B-284445*, 2000 WL 656,188 (Apr. 19, 2000); *accord World Travel Serv. v. United States*, 49 Fed. Cl. 431, 441-42 (2001) (collecting cases); *ITT Fed. Servs. Corp. v. United States*, 45 Fed. Cl. 174, 193 (1999).

146. See FAR 15.101-1, 15.308; *TRW, Inc. v. Unisys Corp.*, 98 F.3d 1325, 1327-28 (Fed. Cir. 1996) (observing that the source selection authority in a best-value procurement is not bound by quantitative scoring but must make a qualitative trade-off to determine if the superior technical offer justifies the higher cost); *Marine Hydraulics Int'l, Inc. v. United States*, 43 Fed. Cl. 664, 675 (1999).

147. 279 F.3d 985 (Fed. Cir. 2002). The Federal Circuit's analysis in *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1088 (Fed. Cir. 2001), also is suspect. The trial court found a violation of preprocurement notification requirements of a planned sole-source award. The purpose of such requirement is not only to allow the agency to determine if other companies meet the stated requirements, but to allow other companies to convince the agency that it has overstated its requirements. Yet, the Federal Circuit found that Emery could not show prejudice for a violation of the notice requirements because it did not meet the stated requirements. *Id.* That assumes, however, that the requirements would have remained the same if proper preprocurement notification requirements had been followed.

148. *JWK*, 279 F.3d at 987-88.

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 [the awardee's]. It was more important that JWK received lower ratings in the technical and management areas than [the awardee], because the contracting officer decided that [the awardee's] superiority in those areas outweighed 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).<sup>149</sup>

It obviously would have been a permissible judgment if there were no error in the procurement. However, assuming that there were an error in the cost discussions and that JWK could have significantly improved its offer, there is no way that the court could know how the source selection authority would have exercised his judgment based on a revised set of facts presented to him, including a significantly lower cost by the protester. If the court had found error, it also should have found prejudice and remanded the case to the agency to conduct a lawful reevaluation, which would have entailed a further round of offers and a new agency determination based on a different record.<sup>150</sup>

This trend of prejudging what the agency would do on remand is also seen in a recent Federal Circuit decision not selected for publication in the Federal Reporter and so of no precedential value. In *H.G. Properties A, L.P. v. United States*,<sup>151</sup> the protester complained that a contract that had previously been awarded to a competitor had been materially modified shortly after award such that, under the CICA, a recompetition had been required. The COFC denied the protester relief and a divided panel affirmed on the basis that the

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149. *Id.* at 988–89.

150. The court's alternative no-prejudice ruling in *JWK* also runs counter to the rulings in *Impresa* and *Alfa Laval*, as further explained in *Myers*, that, in a situation in which there will be a rebidding opportunity, no further prejudice showing is required other than that the protester is a qualified offeror. See *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001); *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1368 (Fed. Cir. 1999) (*Alfa Laval*); *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (*Myers*).

An example of an appropriate prejudice analysis is found in the COFC decision in *United Payors & United Providers Health Servs., Inc. v. United States*, 55 Fed. Cl. 323 (2003). In that case, the court found that the agency had made unsupportable assumptions in its cost realism analysis. Moving to a discussion of whether these errors were prejudicial, the agency attempted to show that, even with them corrected, the protester would not have been awarded the contract. Rejecting the agency's claim, the court found that nothing in the administrative record provided the necessary guidance for calculating the cost impact and that the court would "not attempt to speculate" as to how costs would change based on proper assumptions. *Id.* at 331–32.

An example of an inappropriate prejudice analysis is found in the COFC decision in *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 605 (2000) (*Myers I*), *aff'd*, 275 F.3d 1366 (Fed. Cir. 2002). The trial court speculated that, in a rebid situation, "there is no way of determining whether [the agency] would have given [the protester] a passing or failing technical score" and "it is possible" the agency "could have found it incapable of performing the contracts." From this, the court determined that Myers had not proven "by clear and convincing evidence that it was prejudiced" by the agency's errors. *Id.* at 620. Assuming Myers had alleged or shown it was arguably qualified (which it had not), the trial court should have remanded to the agency to run a recompetition, not speculated on its possible outcome.

151. 68 Fed. Appx. 192 (Fed. Cir. 2003).

protester, HGP, had “failed to show it had a substantial chance of submitting a winning bid and therefore lacked standing. . . .”<sup>152</sup>

At issue in *H.G. Properties* was the award of a lease by the National Parks Service for a new museum center. HGP, the incumbent, was eliminated from the competitive range based on technical merit and informational deficiencies, despite having a significantly lower price than the awardee. However, two weeks after award, the agency terminated the contract for convenience. Faced with a breach of contract claim because of the termination, the agency and awardee settled their dispute by the awardee submitting a “revised proposal,” the agency paying for restart costs, and the parties executing a “revised version” of the contract. This revised lease significantly reduced the technical requirements for the facility, lessened the amount of space subject to lease (by over 20 percent), lengthened the lease term, extended the lease commencement date by a year, and provided for the agency to reimburse the lessor for real estate taxes, which it had not done under the original solicitation. HGP alleged that, with these modifications, it could have offered a much more competitive bid and would have been awarded the contract.<sup>153</sup>

Senior Judge Archer and Judge Rader in their majority opinion sidestepped whether these changes were within the scope of the original contract and, after reciting the instruction of *Myers* that prejudice is a necessary element of standing, moved on to determine whether HGP would have a substantial chance of winning a recompetition.<sup>154</sup> The majority then engaged in the following expanded—and extraordinary—discussion of why it (and, it postulated without support, the trial court as well) believed that HGP “did not show it had a substantial chance of submitting a winning contract bid on the modified requirements”:

HGP argues that[,] given an opportunity to compete on the “revised” contract specifications, its new proposal would include improved space layout and building design relating to protection of secure storage and work areas, as well as HVAC zoning. HGP also asserts its score would improve because the omitted swing space, redundant HVAC, freezer, building automation and blast resistant window requirements were areas in which HGP’s proposal received no points. HGP emphasizes its improved proposal would “reduce the difference in the technical scores among the ‘offerors,’ making its lower contract price a compelling price advantage over [the awardee].” However, these assertions are not sufficient to show that HGP would likely be awarded a contract under the revised requirements.

As a Best Value [*sic*] contract, technical factors for safeguarding the museum’s collection were paramount; price was less important. No record evidence shows HGP can better renovate its existing building now to meet several [solicitation] criteria than before [the awardee] was awarded its contract. Indeed, HGP lost 54 units on building layout, compared with [the awardee’s] loss of 15 units. The bulk of the omitted criteria cost HGP 28 units on its technical score. However, several basic

152. *Id.* at 193. As is apparent from this quotation, the Federal Circuit in *H.G. Properties* also followed the improper lead of those cases merging the prejudice and injury-in-fact standing requirements by equating the two.

153. *Id.* at 195 (majority op.), 196–97 (Schall, J., dissenting).

154. *Id.* at 194 (citing *Myers*, 275 F.3d at 1370).

items not affected by the revised lease cost HGP 75 units, while [the awardee] only lost 18 units in these same basic areas (including architectural finishing, floor coverings, lighting, door hardware, restrooms, sidewalk, neighborhood, chemically benign interior finishings, and fire resistant walls). HGP lost 40 units by ignoring the energy efficiency and zoning of HVAC criteria; [the awardee] only lost 10 units in these areas. To reconfigure its existing building housing [center], HGP would still lose points for collection of safety/security during construction. While HGP might improve its score in some areas, no evidence of improvement was evident in many basic areas. HGP simply has not shown it would likely be awarded the contract under the revised requirements. Consequently, HGP did not establish that it was an interested party and it does not have standing to bring this action.<sup>155</sup>

A more blatant attempt to step into the agency's shoes and conduct an evaluation process in the abstract (without revised proposals) and then to determine a "likely" outcome can hardly be imagined. This simply is not a reviewing court's job, whether it be the COFC or the Federal Circuit. Nor is this result mandated by Federal Circuit precedent. As Judge Schall pointed out in dissent, under *Impresa* and *Myers* (and *Alfa Laval*<sup>156</sup>), once a qualified protester has established that a full rebidding situation with revised offers is required due to the alleged errors, that protester has established prejudice.<sup>157</sup>

The courts have no authority, under the APA or otherwise,<sup>158</sup> to supplant the executive agency's duties to make contract award determinations in accordance with law.<sup>159</sup> Judge Schall correctly concluded in *H.G. Properties* that the protester "was not required to show that it had a 'substantial chance' of

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155. *Id.* at 195.

156. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1368 (Fed. Cir. 1999) (*Alfa Laval*).

157. *H.G. Properties A, L.P. v. United States*, 68 Fed. Appx. 192, 196 (Fed. Cir. 2003) (Schall, J., dissenting) (quoting *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (*Myers*) (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001))). Of course, as discussed *supra* at Part III, *Impresa* and *Myers* improperly applied the prejudice standard in a standing situation. As noted above, the court in *H.G. Properties*, relying on *Myers*, also misconstrued the prejudice analysis to be a standing issue.

158. Of course, an Article III court (such as the Federal Circuit) or Article I court (such as the COFC) usurping an executive agency's duties also raises constitutional separation-of-power concerns not explored in this Article.

159. The oft-cited rule that a court cannot make a contract award is another recognition and application of this rule. "It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties." *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970); *see also Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1153 (Fed. Cir. 1994); *Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 489 n.7 (10th Cir. 1987); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 204-06 (D.C. Cir. 1984); *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1575 (Fed. Cir. 1983) ("The flaw in the government's argument here is that it misconceives the nature of the injury that unsuccessful bidders seek to rectify in bid protest suits . . . The injury CACI here asserts is that the government's breach of this implied contract to deal fairly with all bidders denied CACI the opportunity to have its bid considered solely on its merits. An injunction barring the award would correct this alleged injury since it would require the government, if it wants to go ahead with the procurement, to repeat the bidding process under circumstances that would eliminate the alleged taint of the prior proceedings."); *Bannum, Inc. v. United States*, 56 Fed. Cl. 453, 459 (2003); *Mantech Telecomm. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 79 (2001); *CCL Serv. Corp. v. United States*, 43 Fed. Cl. 680, 688 (1999).

being awarded the lease. It was only required to show that the solicitation requirements had been modified to such an extent that competition for the lease was required and that it could have competed for the lease” under revised proposals.<sup>160</sup> Any other result runs roughshod over the well-established principles that courts must not make new records for the agency, must not substitute their speculative rationales for agency decision making, and must remand to the agency for a redetermination when the outcome on remand is uncertain.

#### V. CONCLUSION

Whether standing under section 1491(b) as enacted under the ADRA is appropriately analyzed under the APA or under the more restrictive provisions of the CICA definition of “interested party,” the Federal Circuit in several recent decisions has improperly merged the injury-in-fact requirement for standing and the need to show prejudice once a procurement error is demonstrated on the merits. While related, the concepts are distinct, and standing is determined by examining a protester’s well-pled allegations, without having to decide the merits.

Whether a protester has shown prejudice on the merits is to be determined under the APA standards called out in section 1491(b), not under CICA or other standards. In making those determinations, the courts need be wary of exceeding the scope of their judicial review authority by postulating whether the protester would be a “likely” awardee if there is a recompetition. While some recent Federal Circuit decisions have usurped the agency’s rightful authority in this respect, other decisions have appropriately indicated that, once a recompetition with revised offers is called for, any qualified offeror has a substantial chance of winning and has established the necessary prejudice to prevail. The courts must leave it to the agency upon remand to evaluate revised offers and to make a new award decision consistent with law.

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160. *H.G. Properties*, 68 Fed. Appx. at 197 (Schall, J., dissenting).