Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

So You Want To Supplement The Record At Claims Court

Sandeep N. Nandivada

Law360, New York (February 9, 2017, 1:07 PM EST) -- Defining the administrative record is a key aspect of litigating bid protests before the U.S. Court of Federal Claims. From the time a protest is filed, the parties must carefully navigate which evidence may be considered by the court in deciding the protest and which must be excluded. In many instances, the parties' understanding of what evidence should be before the court evolves throughout the proceedings. Parties thus frequently find themselves needing to introduce additional extrinsic evidence to support their allegations.

The court's supplementation case law provides a rough framework for the type of extrinsic evidence that may properly be admitted to the administrative record, but there still is uncertainty as to whether extrinsic evidence regarding competitive prejudice should be admitted to the administrative record or only to the court's record. The answer to this question has the potential to affect the outcome of a bid protest, as the court is permitted to decide the merits of bid protest based solely on the evidence in the administrative record.

This article examines the contours of the court's supplementation case law and identifies best practices for parties seeking to introduce extrinsic evidence to support their case.

Supplementation Standard

The U.S. Court of Federal Claims reviews bid protests under the Administrative Procedure Act's standard of review (5 U.S.C. § 706(2)(A)). 28 U.S.C. § 1491(b)(4). Under that standard, the court will set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Savantage Financial Services Inc. v. United States, 595 F.3d 1282, 1285 (Fed. Cir. 2010). That determination must be "based on the record the agency presents to the reviewing court" to ensure that the court does not use other evidence to "convert the 'arbitrary and capricious' standard into effective de novo review." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Murakami v. United States, 46 Fed. Cl. 731, 735 (2005), aff'd, 398 F.3d 1342 (Fed. Cir. 2005); McConnell Jones Lanier & Murphy LLP v. United States, 128 Fed. Cl. 218, 237 (2016) ("As a general rule, in determining whether an agency's actions are arbitrary or irrational, the 'focal point for judicial review [of the agency's decision] should be the administrative record already in existence, not some new record made initially in the reviewing court.'")

Based on these foundational principles, the U.S. Court of Appeals for the Federal Circuit has held that "supplementation of the record should be limited to cases in which the omission of extra-record

evidence precludes effective judicial review." Axiom Resource Management Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (holding supplementation is permissible only when "necessary in order not 'to frustrate effective judicial review'"); Per Aarsleff A/S v. United States, 829 F.3d 1303, 1311 n.3 (Fed. Cir. 2016) (same). What "precludes effective judicial review," however, continues to be a topic of great interest before the Court as parties test the boundaries of the administrative record to advance their case.

Supplementation to Address What the Agency Considered or Should Have Considered

The Court of Federal Claims has recognized that supplementation of the administrative record is necessary for effective judicial review where the additional evidence to be added "was or should have been considered by the agency." East West Inc. v. United States, 100 Fed. Cl. 53, 57 (2011). In practice, this has resulted in the court granting motions to supplement the administrative record in four general categories.

First, the court has held that the administrative record may properly be supplemented with evaluation worksheets, findings and reports, and communications among evaluators. See e.g., Tauri Group LLC v. United States, 99 Fed. Cl. 475, 481-82 (2011). In Tauri, the court explained that the court's review was required to be based "on the full administrative record" that was before the agency when the relevant decision was made. Tauri, 99 Fed. Cl. at 480 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)). Although this did not mean that the administrative record had to include every document related to the procurement in question, it did mean that the agency was required to disclose "materials relevant to the specific decisions being challenged." Id. at 481. In other words, "information relied upon but omitted from the paper record" should be included in the administrative record. Id.

Accordingly, the court recognized that individual evaluator worksheets should be part of the administrative record because such documents took the views of individual evaluators "from the realm of deliberation or 'rough drafts' and place[d] them in the category of information considered or relied upon in the decision making process." Id. Similarly, the court held that analyses or opinions of officials outside a particular evaluation team, but which inform the decision-making of the evaluation team, should be included in the administrative record. Id. Thus, in Tauri, the court ruled that the administrative record should be supplemented with individual technical evaluation worksheets; excel worksheets referenced in an agency affidavit reflecting the underlying determinations communicated by the technical evaluation team to the cost team; and email communications identified in an agency affidavit containing information considered by the cost evaluation team, or that placed such information in context. Id. at 481-82.

Second, the court has admitted affidavits or expert testimony to address the "tacit knowledge" of an offeror or agency personnel, which is of a highly technical and complex nature.[1] See e.g., Palantir USG Inc. v. United States, 129 Fed. Cl. 218, 242 (2016); Hunt Building Co. Ltd. v. United States, 61 Fed. Cl. 243, 272 (2004); Gentex Corp. v. United States, 58 Fed. Cl. 634, 649 (2003). In Palantir, the court supplemented the administrative record with expert reports because, "given the highly technical nature of the Army's requirements and Palantir's capabilities," such reports were "necessary for the court to effectively review aspects of the challenged agency procurement action." Palantir, 129 Fed. Cl. at 242. Similarly, in Gentex, the court admitted an affidavit to the administrative record because it addressed the protester's understanding of the solicitation requirements, which "illuminate[d] complex issues and assist[ed] the Court in understanding the parties' positions." Gentex, 58 Fed. Cl. at 649; see also Hunt, 61 Fed. Cl. at 272 (admitting affidavits that assisted court in understanding protest complexities).[2]

Importantly, the court has held that technical and complex matters include matters related to an agency's cost evaluation. See FirstLine Transp. Sec., Inc. v. United States, 116 Fed. Cl. 324, 328 (2014) (supplementing administrative record with expert affidavit regarding cost and price analysis); PlanetSpace Inc. v. United States, 90 Fed.Cl. 1, 9 (2009) (supplementing administrative record with affidavit regarding price difference between plaintiff's and awardee's proposals because "there is enough technical detail involved in the calculation of the price difference for this section to be useful").

Third, the court has allowed supplementation of the administrative record to add evidence of bias or bad faith. See e.g., Beta Analytics International Inc. v. United States, 61 Fed. Cl. 223, 226 (2004); Palantir, 129 Fed. Cl. at 238. In Beta Analytics, the court explained that because it would be rare for evidence of bad faith to be placed in the administrative record by an agency itself, a party may rely on extra-record evidence to support its claim that discovery regarding bad faith conduct is necessary. Beta Analytics, 61 Fed. Cl. at 226. Although the court ultimately did not allow supplementation in Beta Analytics, it did in Palantir, where the court granted in part the plaintiff's motion to supplement the administrative record and allowed for limited discovery to address the plaintiff's bad faith allegations. Palantir, 129 Fed. Cl. at 238.

Fourth, the court has admitted additional evidence contained in agency procurement files or generally known in an industry or discipline, but that was inappropriately ignored by the agency. See e.g., Mori Associations Inc. v. United States, 98 Fed. Cl. 572, 575 (2011). In Mori, the court allowed supplementation of the administrative record where the agency's cancellation of a procurement was based in part on cost savings, but the agency failed to consider the protester's proposed pricing, which was in the agency's procurement file before it canceled the procurement. Mori, 98 Fed. Cl. at 574-75. In granting the motion to supplement the administrative record, the court noted that "relevant evidence that was ignored may normally be a prime example of 'relevant information that by its very nature would not be found in an agency record.'" Id. at 575 (citing Orion International Technologies v. United States, 60 Fed. Cl. 338, 343 (2004).

Supplementation to Address Prejudice

Although the court has provided helpful guidance regarding supplementation in the above contexts, there is considerable uncertainty regarding the ability to supplement the record to demonstrate competitive prejudice. The court generally has allowed parties to introduce evidence demonstrating competitive prejudice, but it has varied with respect to the manner in which such evidence may be considered. Recent decisions reflect a split within the court, with some judges allowing supplementation of the administrative record to address competitive prejudice, while others permit such evidence to be added only to the court's record.

In some cases, including one from 2016, the court has allowed parties to supplement the administrative record with evidence showing prejudice. See McConnell Jones Lanier & Murphy LLP v. United States, 128 Fed. Cl. 218, 237 (2016) (allowing supplementation "to give the Court the benefit of [the cost expert's] quantitative analysis of the impact of the errors the agency allegedly committed); Hunt, 61 Fed. Cl. at 272 (allowing supplementation to allow protester to explain impact of agency's evaluation errors); Gentex, 58 Fed. Cl. at 649 (allowing supplementation to allow protester to explain how it "would have changed its proposal were it not for the Air Force's illegal actions").

The more prevalent trend in the case law, however, is for the court to allow parties to introduce evidence of prejudice only to the court's record. In East West Inc. v. United States, 100 Fed. Cl. 53, 55 (2011), the plaintiff attempted to supplement the administrative record with an affidavit addressing

competitive prejudice, arguing that "effective judicial review is precluded unless the affidavit is added to the record because prejudice is from the plaintiff's perspective and evidence of this perspective will necessarily be absent from the administrative record." As an alternative, the plaintiff requested that the court admit the affidavit to the Court's record for the purpose of establishing prejudice. Id.

Applying Axiom, the court found that supplementation of the administrative record would not be appropriate because the information did not reflect "what was or should have been considered by the agency," and therefore was not necessary for effective judicial review. Id. at 57. However, although the court declined to supplement the administrative record with the affidavit, it found that the affidavit should be admitted to the court's record because "a bid protester's entitlement to relief may often turn on considerations of injury that spring from the challenged actions, and to that extent could not be reflected in the agency record underlying those actions." Id. In this regard, the holding in East West Inc. is consistent with the majority of the court's precedent. See CSC Gov't Sols. LLC v. United States, No. 16-1000C, 2016 WL 7031012, at *10 n.9 (Fed. Cl. Dec. 2, 2016) (admitting affidavit of cost expert regarding prejudice to the Court's record, but not as a supplement to the administrative record); PlanetSpace, 90 Fed. Cl. at 7 (adding portions of affidavit to court's record that address why grant of injunctive relief would be in the public interest); AshBritt Inc. v. United States, 87 Fed.Cl. 344, 366–67 (2009) (admitting portions of affidavit addressing prejudice to Court's record because "[e]vidence directed at prejudice and remedy necessarily would not be before an agency decisionmaker effecting a procurement decision such as a source selection award"); Holloway & Co. PLLC v. United States, 87 Fed. Cl. 381, 391 n.12 (2009) ("It is the responsibility of this Court, not the administrative agency conducting the procurement, to provide for factual proceedings directed toward, and to find facts relevant to, irreparability of harms or prejudice to any party or to the public interest through grant or denial of injunctive or declaratory relief."

The question as to whether extrinsic evidence related to prejudice should be admitted to the administrative record or only to the court's record is an important one. Because the court reviews bid protests under the arbitrary and capricious standard of review, the court may decide the merits of a protest based only the administrative record that was before the agency when it made the challenged decision. 28 U.S.C. § 1491(b)(4); Fla. Power & Light, 470 U.S. at 743-44; Murakami, 46 Fed. Cl. at 735; McConnell, 128 Fed. Cl. at 237. As a practical matter, this means that when the court admits an affidavit pertaining to prejudice only to the court's record, it cannot rely on that affidavit when deciding the case on the merits — even though such affidavits typically comment on the rationality of the agency's conduct in addition to quantifying the impact of the agency's alleged errors. Instead, the Court may rely on the affidavit only to determine the appropriate relief, if any, under the circumstances — an inquiry that is independent of the protest's merits and which typically depends on evidence that necessarily would not be present in the administrative record. See East West, 100 Fed. Cl. at 55. Whether a party is permitted to introduce evidence of prejudice to the administrative record often determines whether that party prevails in the protest.

Best Practices

Recent court decisions offer insight into how parties should craft their motions to supplement the administrative record to maximize the likelihood that the court will admit and consider the extrinsic evidence. In particular, parties should keep three key points in mind:

1. Focus on what the agency should have considered as part of its evaluation. The case law is clear that the court's review is to be based on the "full administrative record." Tauri, 99 Fed. Cl. at 480. Thus, parties have a right to supplement the administrative record with evidence that the agency possessed

when it made the challenged procurement decision and which is reasonably related to the matters before the court. This is true regardless of whether the agency actually relied on that evidence.

2. Stress the complexity of the issues before the court and think broadly. The court has recognized that there is a clear benefit to allowing parties to introduce extrinsic evidence to explain highly technical or complex matters before the court. Hunt Bldg., 61 Fed. Cl. at 272. Parties should stress the complexity of the issues about which they seek to introduce extrinsic evidence and emphasize how the evidence will simplify matters for the Court. Parties also should be mindful that technical and complex matters include matters related to an agency's cost evaluation. FirstLine, 116 Fed. Cl. at 328 (2014); PlanetSpace, 90 Fed.Cl. at 9.

3. Give the court options. Given the split at the court, motions to supplement the administrative record with evidence of prejudice should include an alternative request that the extrinsic evidence be admitted to the court's record. Although the court may not rely on information that is only in the court's record but not in the administrative record when deciding the merits of a protest, it may at least consider such information to address whether a protester is entitled to relief.

—By Sandeep N. Nandivada, Morrison & Foerster LLP

Sandeep Nandivada is an associate in the Northern Virginia office of Morrison & Foerster.

[1] As discussed below, in certain circumstances, the court has admitted such affidavits only to the court's record, as opposed to the administrative record.

[2] As noted below, the court in Gentex and Hunt also admitted affidavits into the administrative record because they demonstrated the competitive prejudice suffered by the protester. Hunt, 61 Fed. Cl. at 272; Gentex, 58 Fed. Cl. at 649.
