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¶ 6 *Office Design* At The Protest Fora: Window Dressing Or New Rule?

A special column by Noah B. Bleicher, Nathaniel E. Castellano and Aime J. Joo, colleagues in the government contracts practice at Jenner & Block LLP. Relevant here, Noah previously served as a bid protest hearing officer at the Government Accountability Office, and Nathan clerked for The Honorable Jimmie V. Reyna at the U.S. Court of Appeals for the Federal Circuit. The ideas presented here, particularly those that may prove to be in error, are the authors' own and should not be attributed to any other.

In *Office Design Group v. U.S.*, 951 F.3d 1366 (Fed. Cir. 2020), 62 GC ¶ 82, the U.S. Court of Appeals for the Federal Circuit announced a precedential standard to use when reviewing unequal treatment allegations in a bid protest. Now that the Government Accountability Office and the U.S. Court of Federal Claims have had some time with *Office Design*, we surveyed relevant bid protests to gauge the decision's impact. As is often the case these days, the answer depends on the protest forum.

Protesting Unequal Treatment

Allegations of unequal treatment are a mainstay of postaward bid protest practice. When a disappointed offeror challenges an agency's evaluation of proposals and award decision, the protest will almost always include an allegation that the contracting agency disparately evaluated proposals. There are several practical reasons for this.

First, particularly at the GAO where record production is limited to the scope of the protester's challenges, it is important for protest counsel to try to include cognizable allegations directed at the agency's evaluation of the awardee to obtain broad record materials (and therefore more opportunity for viable supplemental protest grounds). Second, a compelling claim of unequal treatment often sets the stage for a compelling case of competitive prejudice (although that outcome is by no means guaranteed). And third, compared to directly challenging increasingly complex technical evaluation findings, lawyers are often more comfortable with the analogical exercise of claiming that two proposal features are essentially the same and therefore should have received the same assessment.

Prevalence notwithstanding, it was not until 2020 that the Federal Circuit had an opportunity to clearly address the legal basis and standard for unequal treatment allegations.

The *Office Design* Decision

Judge Reyna authored *Office Design*, joined by Judges Lourie and Hughes. The decision helpfully begins by stating the legal basis for unequal treatment allegations. Quoting Federal Acquisition Regulation 1.602-2(b), Judge Reyna explained (at 1372) that the FAR "requires an agency to treat offerors fairly and impartially," and that this "obligation necessarily encompasses an agency's obligation to fairly and impartially evaluate all proposals."

That a precedential Federal Circuit decision invokes FAR 1.602-2(b) as a substantive source of contractor rights is a major development on its own. The Department of Justice has long resisted any argument that FAR 1.602-2(b) provides a substantive right. Professor Nash surveyed these cases nearly a decade ago in *Fair Treatment of Contractors: Do FAR Provisions Confer Rights?*, 20 N&CR ¶ 35. Surprisingly, in at least one case after *Office Design*, the DOJ continued to dispute that FAR 1.602-2(b) is a substantive source of rights; Judge Solomson squarely rejected that DOJ position as foreclosed by *Office Design* in *Tolliver Group, Inc. v. U.S.*, 151 Fed. Cl. 70 (2020).

Having recognized the legal basis for unequal treatment allegations, *Office Design* confirmed that "[e]qual evaluation of proposals, however, does not translate into identical evaluations," and cited FAR 1.102-2(c)(3) to confirm that an "agency is under no obligation to assign dissimilar proposals the same evaluation rating."

Recognizing that the Federal Circuit had not yet provided a binding precedent for review of unequal treatment allegations, Judge Reyna synthesized the rules previously applied by the various COFC judges:

> To prevail at the Claims Court, a protestor must show that the agency unreasonably downgraded its proposal for deficiencies that were "substantively indistinguishable" or nearly identical from those contained in other proposals. A protestor may also prevail by showing that the agency inconsistently applied objective solicitation requirements between it and other offerors, such as proposal page limits, formatting requirements, or submission deadlines.
>
> We see no reason to depart from the Claims Court's "substantively indistinguishable" standard. If a protestor meets this threshold, a reviewing court can then comparatively and appropriately analyze the agency's treatment of proposals without interfering with the agency's broad discretion in these matters. If a protestor does not, then the court should dismiss the claim. To allow otherwise would give a court free reign to second-guess the agency's discretionary determinations underlying its technical ratings. This is not the court's role. [Citations omitted.]

By stating the standard as requiring either (1) "substantively indistinguishable" or "nearly identical" proposals, or (2) inconsistent application of "objective solicitation requirements" (akin to page limits and submission deadlines), the Federal Circuit arguably set tough standards for unequal treatment claims. And, to be sure, most allegations of unequal treatment after *Office Design* have been denied, and the few sustain decisions provide guidance for practitioners as they continue to pursue these types of allegations.

Office Design At The GAO

Office Design was quickly featured in GAO decisions. Even under that standard, the GAO has still sustained several allegations of unequal treatment. The GAO has also sustained allegations of unequal treatment based on standards other than those articulated in *Office Design*.

The most prominent decision to date appears to be *Battelle Memorial Institute*, Comp. Gen. Dec. B-418047.3, 2020 CPD ¶ 176, 62 GC ¶ 187, 2020 WL 2836276. In that case, the Centers for Disease Control and Prevention assessed a weakness to Battelle's proposal because it "did not specifically describe the technical approach to investigating the role of CD8 T-cells in influenza infection," but the agency did not assess a weakness to the awardee's proposal, which apparently lacked the same information. Applying the "substantively indistinguishable" standard, the GAO still found disparate treatment, stating that the "proposals were substantively indistinguishable in this regard," as "[n]either addressed investigating the role of CD8+ T-cells in influenza infection, but only Battelle's proposal received a weakness for this failure." The published decision redacts the primary proposal content, leaving readers limited ability to independently assess just how similar the proposals were.

Following *Battelle*, other GAO decisions have sustained protests on disparate treatment grounds in a similar manner, sticking close to the "substantively indistinguishable" standard. For example, in *DigiFlight, Inc*., Comp. Gen. Dec. B-419590, 2021 CPD ¶ 206, 2021 WL 2184132, 63 GC ¶ 193, the GAO sustained the protest because the contracting agency unequally assigned a strength to the awardee's proposal based on an impressive retention rate and corresponding proposed benefits, but the agency was unable to articulate how the protester's proposal was "substantively different" despite not being credited with a strength. Likewise, in *Mayvin, Inc.*, Comp. Gen. Dec. B-419301.6, 2021 CPD ¶ 249, 2021 WL 3268364, the GAO sustained the protest because the agency assigned a strength for the awardee's goal of retaining 100% of qualified incumbent employees, but it did not similarly credit the protester's proposal for the same feature. These cases show that protesters have still had success at the GAO making disparate treatment arguments under the "substantively indistinguishable" standard.

Notably, whereas *Battelle* found unequal treatment when the awardee's proposal was *missing* the same content that the evaluators found lacking from the Battelle proposal, *DigiFlight* and *Mayvin* found unequal treatment from the other direction: the protesters' proposals were found to have *included* the same content that the evaluators found beneficial in the awardees' proposals. Taken together, these cases confirm that unequal treatment can occur in both instances: based on comparison of the information that is affirmatively included in two proposals, or comparison of the information that is not included in either proposal.

Some GAO decisions issued after *Office Design*, however, have found disparate treatment based on different articulations of the standard. In other words, the GAO did not respond to *Office Design* by discarding its prior decisions on unequal treatment—nor has it meaningfully dissected the distinctions between the standard espoused by the Federal Circuit and GAO's prior handling of unequal treatment allegations.

In *Insight Technical Solutions, Inc.*, Comp. Gen. Dec. B-420133.2, 2022 CPD ¶ 13, 2021 WL 6619306, a protest decided almost two years after *Office Design*, the GAO reverted to its well-worn pabulum that "where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offerors' proposals." Without citing *Office Design*, the GAO concluded the proposals in that procurement had "nearly identical language" surrounding cross-training staff and ways of backfilling vacancies; given the redactions, it is unclear how similar the approaches actually were. By describing the proposals as having "nearly identical language," the decision arguably mirrors the "nearly identical" language

from *Office Design*, but the intent is neither obvious nor explained. Perhaps proposals with "nearly identical language" are necessarily "substantively indistinguishable," and therefore any difference in ratings could "not stem from differences between the offerors' proposals." Then again, the words are different, so it is hard to be sure whether the uniquely phrased standards are actually the same.

In another protest decided after *Office Design*, *HomeSafe Alliance, LLC*, Comp. Gen. Dec. B-418266.5, 2020 CPD ¶ 350, 2020 WL 6504948, the GAO found unequal treatment where "[t]he technical capability proposals offered essentially the same benefit." Again, the redactions prevent a complete analysis, but concluding that two proposals offer essentially the same benefit seems to be a different analysis than concluding that proposals are substantively indistinguishable. Indeed, substantively *distinguishable proposals* conceivably could offer *indistinguishable benefits*. Are competing offerors' different means to the same end sufficient factual predicate for the GAO to sustain a disparate treatment protest ground?

Creating even more daylight from *Office Design*, the GAO has on occasion reviewed unequal treatment allegations through a broader lens. In these decisions, the GAO applies a holistic test that considers whether an agency is more exacting in its evaluation of one proposal compared to another:

> [W]here an agency treats offerors unequally by, for example, reading some proposals in an expansive manner and resolving doubt in favor of the offeror, while reading other proposals narrowly and applying a more exacting standard that requires affirmative representations within the four corners of the proposal, we have found such evaluations to involve disparate treatment.

Weston-ER Federal Services, LLC, Comp. Gen. Dec. B-418509, 2020 CPD ¶ 311, 2020 WL 6273445 (citing *Arctic Slope Mission Services*, LLC, Comp. Gen. Dec. B-410992.5, 2016 CPD ¶ 39, 2016 WL 757563).

In *Western-ER*, decided a few months after *Office Design*, the protester was assigned a weakness because "it was not clear whether work in response to Hurricanes Irma and Maria met the [Request for Proposal's] definition of project." The agency had found that the work did not meet the solicitation's definition of "project" because it was performed on different islands. However, the agency did not assign a similar weakness to the awardee's proposal for work that also did not meet the definition of "project." Without mentioning the *Office Design* standard, the GAO still concluded that "the agency evaluated APTIM's proposal in a more expansive manner, while applying a more exacting standard to Weston-ER's proposal."

That GAO sustain decision—which follows at least 10 other sustains since 2003 considering whether a contracting agency deployed different levels of scrutiny to proposals—seems to support that the GAO has multiple standards in its toolbox when assessing allegations of unequal treatment. And relevant here, the GAO has yet to analyze how this seemingly encompassing standard squares with the more narrow *Office Design* standard. Until the GAO does so, protest practitioners have a broad body of precedential GAO decisions to cite as support for disparate treatment charges, depending on the nature of the claim.

Office Design At The COFC

To the extent the GAO continues to apply some disparate treatment standards that it developed before *Office Design*, one explanation for that may simply be that GAO decisions are not subject to direct appeal to the Federal Circuit. The COFC however, is subject to direct Federal Circuit appeal.

Indeed, even where a protester did not cite the "binding standard in any of its briefs," Judge Solomson concluded that the "Court is bound by the *Office Design Group* standard and applies it here." *ENGlobal Government Services, Inc. v. U.S.*, 159 Fed. Cl. 744 (2022).

And, unsurprisingly, the judges have consistently invoked *Office Design* as the dispositive standard and have consistently held that allegations of unequal treatment fail against that standard. *E.g.*, *LB&B Associates, Inc. v. U.S.*, 160 Fed. Cl. 710 (2022) (Holte); *Leeward Construction, Inc. v. U.S.*, 160 Fed. Cl. 446 (2022) (Davis); *Acesfed, LLC v. U.S.*, 158 Fed. Cl. 529 (2022) (Campbell-Smith); *Alpine Cos., Inc. v. U.S.*, 156 Fed. Cl. 681 (Fed. Cl. 2021) (Bruggink); *Blue Origin Federation, LLC v. U.S.*, 157 Fed. Cl. 74 (2021) (Hertling); *PAE Aviation & Technical Services, LLC v. U.S.*, 156 Fed. Cl. 454 (2021) (Smith); *Agile-Bot II, LLC v. U.S.*, 156 Fed. Cl. 180 (2021) (Horn); *People, Technology & Processes, LLC v. U.S.*, 151 Fed. Cl. 713 (2020) (Tapp); *Wisconsin Physicians Service Insurance Corp. v. U.S.*, 151 Fed. Cl. 22 (2020) (Sweeney); *Glocoms, Inc. v. U.S.*, 150 Fed. Cl. 258 (2020) (Lettow); *Technology Innovation Alliance LLC v. U.S.*, 149 Fed. Cl. 105 (2020) (Kaplan).

In *Ascendant Services, LLC v. U.S.*, 160 Fed. Cl. 275 (2022), Judge Somers rejected an argument that the *Office Design* standard was limited to unequal treatment in assigned "deficiencies," as opposed to other ratings, and described the nature of the court's inquiry:

> [T]he inquiry on a disparate evaluation claim is the same whether the disparate evaluation involves a strength, weakness, or deficiency: the Court is examining whether there is something in the protestor's proposal that is different from one or more other proposals that is rated higher. And the analysis of whether something is actually different between proposals, examines whether the proposals do, in fact, have real differences (such that the agency's evaluation was rational) or whether the proposals are "substantively indistinguishable" (such that the agency's disparate evaluation was irrational). In other words, it makes no difference in this type of analysis whether the Court is looking at strengths, weaknesses, deficiencies, or something else entirely. This is perhaps why, as Defendant-Intervenor correctly points out, multiple judges on this Court have applied the substantively indistinguishable standard to a variety of disparate evaluation claims rather than exclusively applying the standard to challenges of deficiencies alone….

Consistent with this approach, Judge Roumel applied the *Office Design* standard to review alleged unequal treatment in past performance evaluations in *Frawner Corp. v. U.S.*, 161 Fed. Cl. 420 (2022). In other words, the COFC judges have hewn closely to the *Office Design* standard as applied to technical deficiencies and have also applied the rule to other disparate treatment claims.

We are aware of only one published COFC decision finding unequal treatment under the *Office Design* standard, issued by Judge Dietz in *Thalle Construction Co. v. U.S.*, 159 Fed. Cl. 698 (2022). Judge Dietz found the agency unequally evaluated Thalle and the awardee when assessing two significant weaknesses against Thalle's proposal. While most of the details are redacted, the decision concludes that:

> [T]he Corps treated Thalle's proposal unequally when it assessed a significant weakness against Thalle's proposal and did not assess the same weakness to P&J's proposal. If the Corps determined that [REDACTED] was unwarranted for this project, resulted in unnecessary schedule risk, and thus warranted assessment of a significant weakness, the Corps should have applied this determination equally to both Thalle's and P&J's respective proposals.

Similarly, for the second weakness, the decision finds that the "Corps unequally treated Thalle's proposal when it assessed a significant weakness to Thalle's proposal because its 'schedule does not consider the [REDACTED] [Quality Control] and [Quality Assurance] laboratory' " where "neither

Thalle's, nor P&J's, construction schedules list [REDACTED] laboratory, so both technical approaches contain inconsistencies with the respective construction schedules."

The heavy redactions prevent a robust analysis of the court's disparate treatment findings. Nevertheless, *Thalle* confirms that the COFC judges will genuinely engage with disparate treatment allegations and, at least in some cases, it is possible to satisfy the *Office Design* standard.

Concluding Thoughts

We see at least three takeaways from the post-*Office Design* decisions. *First*, *Office Design* seems to have made some impact at both the GAO and COFC, but as of now the impact at the COFC appears more significant. At the GAO, the *Office Design* "substantively indistinguishable" standard often features as window dressing to the analysis. The GAO appears willing to consider disparate treatment theories other than the relatively narrow categories of claims sanctioned in *Office Design*. Most significantly, the GAO seems willing to find unequal treatment based under the holistic "more exacting standard" of proposal review, which does not turn on a finding of substantively indistinguishable proposals. The GAO may also find unequal treatment by looking for different ratings assigned to proposal features that offer nearly identical benefits (or perhaps nearly identical drawbacks), without necessarily requiring that the underlying proposal content be substantively identical. The COFC, by contrast, is likely to confine its analysis to the *Office Design* standard. That makes sense, because any appeal from the COFC will trigger direct review by the Federal Circuit, grading the COFC decision against *Office Design's* binding precedent. As might be expected, most unequal treatment allegations have failed under *Office Design*, but *Thalle* confirms that this can still be a viable basis for protest at the COFC.

Second, this seems to be one of the few areas where the COFC is more uniform in its approach than the GAO. Usually, the GAO is the more consistent of the two fora, given that its decisions are deemed decisions of the Office rather than decisions of the particular hearing officer; whereas the COFC judges are not bound by their colleagues' decisions. Here, by contrast, the Federal Circuit's precedential opinion binds all the COFC judges alike, requiring consistency. To the extent certain GAO decisions may stray from *Office Design* and apply other standards in the GAO's toolbox, this may be because the parties to the protest are driving the argument in that direction, and the GAO hearing officer assigned to the protest declines to veer the protest onto the *Office Design* path.

Third, the *Office Design* standard seems to be yet another emerging area of divergence in protest practice at the GAO and the COFC. There have always been meaningful differences between the two fora, e.g., timeliness, record production, remedy, standard of review, and appeal. But over the past several years the list of differences seems to be rapidly growing, including with respect to key personnel, corrective action, presumption of prejudice, discretion to conduct discussions, and discretion to cancel solicitations. Add disparate treatment to the list. One might even say the fora have a substantively *distinguishable* approach to disparate treatment claims. *Noah B. Bleicher, Nathaniel E. Castellano, and Aime J. Joo*