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Welcome to Jenner & Block's Government Contracts Legal Round-Up, a biweekly update on important government contracts developments. This update offers brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

Claims/Appeals

1. *Zafer Constr. Co. v. United States*, Fed. Cir. No. 21-1547 (Argued April 2022)

- The Federal Circuit is poised to issue a significant decision distinguishing between claims and requests for equitable adjustment (REAs) for purpose of establishing jurisdiction under the Contract Disputes Act (CDA).
- The Court of Federal Claims (COFC) dismissed the claim for lack of jurisdiction after finding that the contractor's submission, styled as an REA, did not qualify as a claim under the CDA.
- On appeal, the contractor argues that its submission satisfies all of the requirements for a valid, certified claim, and that the COFC decision must be reversed for the same reasons that the Federal Circuit recently reversed the ASBCA in a similar case, *Hejran Hejrat Co. Ltd. v. US Army Corps of Engineers*, 930 F.3d 1354 (Fed. Cir. 2019).
- During oral argument, Federal Circuit judges Newman, Reyna, and Hughes appeared skeptical of the government's position and the COFC's holding. The argument revealed some uncertainty, however, as to how to distinguish claims from REAs based on existing Federal Circuit precedent.

While it is important that proper claims are not rejected for lack of jurisdiction based on procedural formalities, it is also important that contractors are able to submit REAs that do not constitute claims triggering the CDA dispute process. Contractors and their counsel should keep an eye on this appeal to understand how (if at all) the Federal Circuit draws the line between claims and REAs.

COFC Protest Decisions

1. *Connected Global Solutions, LLC v. United States*, COFC No. 22-292C (June 21, 2022)

- This is the latest decision in a long-running, high-profile protest that has already generated significant litigation before GAO and COFC.
- In a rare procedural ruling, the court previously granted limited discovery from the awardee relating to an alleged proposal misrepresentation.
- In this decision, the court considers whether to supplement the administrative record with various documents relevant to the alleged proposal misrepresentation, including the discovery responses.
- The opinion provides a helpful explanation of the interplay between record supplementation, judicial notice, and the Federal Rules of Evidence.

Contractors and protest counsel should watch this litigation carefully to understand the court's evolving approach to alleged proposal misrepresentations, discovery in bid protests, and record supplementation.

GAO Protest Decisions

1. *Insight Technology Solutions, Inc.*, B-410534 (May 27, 2022)

- The protester challenged a solicitation requirement that offerors demonstrate capability maturity model integration (CMMI) level 3 certification at the time of proposal submission.
- GAO rejected the protester's challenge to the agency requirement for CMMI level 3 certification, deferring to the agency's determination of its own requirements.
- GAO sustained the protest, however, finding that the agency could not support the requirement for CMMI level 3 certification *at the time of proposal submission*.

Solicitations typically impose compliance obligations and certification requirements. GAO will generally defer to an agency's assessment of its requirements in this respect. GAO will, however, scrutinize the timing of those requirements, particularly where an agency demands that offerors demonstrate a certain certification or capability before performance begins. This line of precedent will be increasingly important as agencies seek to incorporate evolving cyber and information security qualifications into the procurement process.

2. *Sabre Systems, Inc.*, B-420090.3, (June 1, 2022) (Published June 14, 2022)

- GAO sustained a protest because the contracting agency failed to evaluate the awardee's total compensation plan in accordance with FAR 52.222-46 (Evaluation of Compensation for Professional Employees).

- FAR 52.222-46 contemplates evaluation of an offeror’s compensation for “professional employees, as defined in 29 CFR 541.” In this procurement, the agency determined that only a small subset of four labor categories should be considered “professional employees” as defined in 29 C.F.R. part 541. The agency reasoned that part 541 included various categories of employees, and so the agency excluded from its professional compensation analysis those employees whose duties more closely matched other categories of employees defined in part 541.
- GAO rejected this interpretation, holding instead that the plain language of FAR 52.222-46 unambiguously requires the agency to evaluate the compensation of a proposed employee that meets the definition of “professional employees” regardless of whether that employee also meets another part 541 labor category definition. GAO found that a portion of the employees the agency excluded from its analysis of professional compensation qualified as professional employees, and GAO sustained the protest on this basis.

The purpose of evaluating proposed compensation for professional employees is to assess each offeror’s ability to provide uninterrupted, high-quality work, considering the realism of the proposed professional compensation and its impact upon recruiting and retention. GAO will sustain a protest where an agency fails to reasonably evaluate offerors’ proposed total compensation plans in accordance with FAR provision 52.222-46, for example by unreasonably excluding from the agency’s analysis certain proposed employees who meet the definition of a professional employee as defined in subpart D of part 541.

3. *The Ulysses Group, LLC*, B-420566 (June 7, 2022) (Published June 8, 2022)

- GAO denied the protest challenging the Air Force’s decision to reject a late-submitted proposal where the offeror made multiple unsuccessful efforts to submit its proposal prior to the announced deadline.
- The solicitation required offerors to submit proposal volumes through a designated online DoD portal by the stated deadline, cautioning offerors not to wait until the last minute and that no exceptions would be made to the submission deadline.
- Beginning two days prior to the deadline for proposal submission, the company could not successfully upload its proposal to the portal. The company repeatedly sought the assistance of the portal help desk, to no avail. Prior to the deadline, the company submitted a copy of its technical volume to the help desk and discussed these issues with the contracting officer.
- The Air Force rejected the proposal because it was not submitted in accordance with the solicitation’s requirements. GAO denied the protest, upholding the Air Force’s decision.

Offerors are well advised to submit proposals early and leave time for unexpected technical hiccups. Otherwise, and at least at GAO, hardline principles relating to the time and manner of

proposal submission may prevent a contractor from obtaining relief, even if the technical issue is seemingly caused by failures in the very government system required under the solicitation.

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Government Contractor Litigation and Compliance

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