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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.

Proposed Rule

1. Proposed Nondisplacement Rule (July 15, 2022)

The Biden Administration just issued a proposal to reinstitute the nondisplacement rule, which provides that contractors and subcontractors performing on covered Federal service contracts must in good faith offer to rehire employees supporting the predecessor contract.

- Under the proposed rule, at least 10 business days before contract expiration, departing contractors must provide the incoming contractor a list of all service employees working on the contract during the last month of performance. The incoming contractor must then give incumbent employees express bona fide offers for employment in positions for which they are qualified. Employees must be given at least 10 business days to accept the offer.

- There are key differences between the proposed rule and the version of the rule that existed under the Obama Administration, including that the new rule applies to contractors performing work at a different location than the predecessor contractor.

Comments on this proposed rulemaking are due August 15, 2022.

Claims Cases

1. *Zafer Construction Co. v. United States*, Fed. Cir. No. 21-1547 (July 18, 2022)

- In a highly anticipated decision, the Federal Circuit discussed the distinctions between claims and Requests for Equitable Adjustment (REA) in Contract Disputes Act (CDA) litigation.

- The unanimous opinion (authored by Judge Hughes and joined by Judges Newman and Reyna) confirms that a contractor submission qualifies as a claim under the CDA—even when styled as an REA—if it satisfies the definition of "claim", is properly certified, and sufficiently requests a contracting officer's decision.

- The opinion acknowledges that this flexible standard may result in some confusion as to when exactly a claim has been submitted, and "might create room for gamesmanship," but concludes that "the Government has tools to address this challenge."

Contractors attempting to submit REAs should pay careful attention to this decision to understand whether their submission may be deemed a formal claim.

Protest Cases

1. *ZeroAvia, Inc. v. United States*, Fed. Cl. No. 21-1991 (July 11, 2022)

- Court of Federal Claims (COFC) Judge Dietz dismissed a bid protest complaint for lack of standing based on an apparent failure to plead sufficiently detailed allegations of procurement error and prejudice.

- While it is common for the COFC to dismiss bid protests based on procedural issues (e.g., timeliness and standing) *after the case is fully briefed*, it is relatively rare for the court to dismiss a bid protest complaint for lack of sufficiently detailed allegations.

- The opinion explains that rather than reaching the merits, the COFC found that the plaintiff "has not provided sufficient factual support for its alleged procurement errors to establish that it has standing to bring its protest," noting that the plaintiff "bears the burden to establish that it has standing as part of its complaint."

This case is a reminder that threshold pleading standards do apply to bid protest complaints filed at the COFC, and failure to provide sufficiently detailed allegations in a complaint may in some cases warrant dismissal.

2. *Quality Technology, Inc.*, B-420576.3 (June 30, 2022)

- The agency initially selected QuTech for award, resulting in a GAO protest from disappointed offerors, including Sparksoft. The agency took corrective action and then selected Sparksoft for award.

- QuTech protested the award to Sparksoft, raising a novel argument that "the agency's consideration of the arguments presented in Sparksoft's protest challenging the initial award to QuTech constitute discussions, which the agency conducted unequally with only Sparksoft."

- GAO dismissed this novel argument as legally insufficient, emphasizing that there was no evidence "that the agency communicated with Sparksoft about the firm's proposal—or that the agency permitted Sparksoft to modify its proposal," and GAO was not aware of any legal authority to support "the contention that the submission of a protest amounts to discussions with the agency."

The arguments presented in this protest reflect the frustration that follows when a company receives a contract award, only to have the agency take corrective action in response to a protest and change its award decision in favor of the protester. GAO decisions typically treat two award decisions as standing alone and do not second guess the agency's decision to take corrective action or to select a new awardee. The protester here raised a novel discussions argument in attempt to turn the tables once more, but GAO would not take the bait.

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