

Bid Protest Spotlight: Availability, Disparate Treatment, Codes

By **James Tucker and Markus Speidel** (April 3, 2020, 5:32 PM EDT)

Thus far the coronavirus outbreak has not resulted in dramatic changes to U.S. Government Accountability Office processes, as they have been almost completely electronic from the start. It is possible, though, that contractors may see more written debriefings, debriefings conducted by phone or delayed debriefings, all of which may have impacts on potential bid protests.

This month's spotlight examines three protest decisions addressing challenges to unavailability of key personnel, disparate evaluations, and NAICS code designations.

In NCI Information Systems Inc., the GAO found an awardee had no responsibility to inform the procuring agency of a key person's alleged unavailability during the pendency of corrective action where the awardee lacked actual knowledge of the alleged unavailability before the re-affirmation of its award.

In Office Design Group, the U.S. Court of Appeals for the Federal Circuit adopted an existing U.S. Court of Federal Claims standard for deciding disparate-treatment allegations.

In Paradigm Engineers & Constructors PLLC, the Court of Federal Claims established a "plausibly related" test in reviewing NAICS code designations.



James Tucker



Markus Speidel

NCI Information Systems

NCI Information Systems[1] involved the unavailability of key personnel — a protest ground that has become increasingly common — and what happens when a key person becomes unavailable during post-protest corrective action, but the offeror learns that fact only after the agency has reaffirmed its initial award.

Analysis

Among various other protest grounds, the protester alleged that one of the awardee's proposed key personnel became unavailable during voluntary corrective action taken in response to a prior protest. The protester argued that, under the GAO's precedents, the awardee should have notified the agency of the alleged unavailability.

Because the awardee did not do so, and because its key person allegedly was not available as of the agency's decision to reaffirm the original contract award, the protester argued the awardee was ineligible for award.

The protester's basis for alleging unavailability appears to have been an internet search that supposedly showed the key person changed jobs and moved to Arizona during the pendency of the prior protest.

The agency countered that reevaluation of key personnel was not within the scope of the corrective action and, in any event, the allegedly unavailable person had not given notice of unavailability.

As far as the agency and awardee were aware, the person (who was proposed as a contingent hire) remained available as proposed, in accordance with his signed commitment letter, which he had not revoked.

The GAO found it unnecessary to resolve whether the proposed key person was actually unavailable, as the awardee provided a declaration that it had no actual knowledge of unavailability and the proposed key person, who was another company's employee, had not rescinded his commitment letter.

The GAO found this lack of actual knowledge of unavailability was sufficient to deny the protest ground:

While an offeror generally is required to advise an agency where it knows that one or more key employees have become unavailable after the submission of proposals, there is no such obligation where the offeror does not have actual knowledge of the employee's unavailability.

Because it resolved the protest ground on actual knowledge, the GAO did not address a much more interesting question. The agency argued there is no legal basis for protesting the unavailability of key personnel in the context of corrective action that does not include reevaluating key personnel.

One also might question, regardless of the scope of corrective action, whether the GAO's rule for reporting key personnel unavailability that occurs before award even applies when the key personnel (allegedly) become unavailable only after the initial award decision, but prior to the conclusion of corrective action. The GAO left those questions for another day.

Takeaways

Long drawn-out procurements can present a number of challenges, including how to keep proposed key personnel available for an indefinite period of time. The time required for protests and potential corrective action to play out only exacerbates that difficulty.

If the COVID-19 pandemic ends up delaying procurements — which seems like a reasonable possibility — more of these issues may be seen.

As long as the GAO maintains its current requirement to self-report any discovered unavailability of key personnel — sometimes long after the proposal was submitted — offerors will remain in the difficult position of trying to remain reasonably assured of proposed candidates's continuing availability, while not unnecessarily gaining actual knowledge of a disqualifying problem that they would have to report.

Office Design Group

In Office Design Group,^[2] the Federal Circuit adopted the Court of Federal Claims' "substantially

indistinguishable” test in assessing a protester’s allegations of disparate treatment in the evaluation of proposals.

The protester alleged the U.S. Department of Veterans Affairs unfairly downgraded its proposal to supply health care furniture and related services, alleging that its proposal was sufficiently similar to the awardees’s proposals to merit the same ratings. Unfortunately for the protester, all three tribunals that heard the protest found the argument unconvincing.

The VA issued five nearly identical solicitations to supply goods and services across five geographic regions, intending to award four or five contracts per region. The protester submitted an offer for all five regions.

The VA found all of the protester’s proposals technically unacceptable. Under one of the solicitation’s evaluation subfactors, offerors had to answer 33 yes-or-no questions, which the agency would convert into points. A passing score for the subfactor was 40 points. The protester received 12 points.

After failing to convince the GAO or Court of Federal Claims that it was the victim of disparate treatment, the protester appealed to the Federal Circuit on the same grounds, alleging seven examples of disparate treatment.

Analysis

The protester had no better luck on appeal. The Federal Circuit observed that it had not previously articulated a standard for assessing disparate evaluation protest grounds.

The court noted that to prevail at the Claims Court, a protester must show the agency unreasonably downgraded the protester’s proposal for deficiencies which were substantially indistinguishable or nearly identical to those contained in proposals that were rated differently.

The Federal Circuit adopted the lower court’s precedents and held that, unless a protester makes such a showing, a reviewing court should dismiss the protest. Doing otherwise would give a court “free [rein] to second guess the agency’s discretionary determinations,” exceeding its mandate.

The court then identified four ways in which the protester’s proposal was substantially distinguishable from the winning proposals, including its failure to address hardware and software requirements, staff experience with applicable codes and standards, and whether its staff would use AutoCad or PDFs to produce the requisite drawings.

For these reasons, the court determined the protester could not prevail on the majority of its disparate treatment claims.

The Federal Circuit found the protester did succeed in establishing disparate treatment in two instances, entitling it to six additional points. However, the resulting additional six points were insufficient for the protester’s proposal to be found acceptable under the stated evaluation criteria.

The errors being de minimis, the court found the protester was unable to show prejudicial error from the two evaluation errors, and affirmed the lower court’s dismissal.

Takeaways

The Federal Circuit's adoption of the substantially indistinguishable or nearly identical standard now provides binding precedent for disparate treatment arguments brought to the Court of Federal Claims. The Federal Circuit's citation of five Claims Court cases invoking the same standard of review provides further guidance to would-be litigants in determining just what counts as substantially indistinguishable.[3]

Paradigm Engineers and Constructors

Paradigm Engineers and Constructors[4] involved an allegation that the VA assigned an incorrect North American Industry Classification System, or NAICS, code to small business set-aside procurement and that the U.S. Small Business Administration Office of Hearings and Appeals, or OHA, wrongly upheld the assignment of that code.

The VA sought to renovate a medical center building and issued a presolicitation notice for design services, setting the solicitation aside for service-disabled veteran-owned small businesses.

The statement of work called for renovation designs and the replacement of second-story windows and the heating, ventilation and air-conditioning, or HVAC, systems in the building. What was the proper NAICS code to characterize that work?

In the presolicitation notice, the contracting officer initially referenced NAICS codes for both engineering services and architectural services, despite a regulatory requirement to select a single code. The VA, realizing its error, issued the formal solicitation with the NAICS code engineering services only, and a corresponding size standard of \$16.5 million.

In response to the solicitation, the VA received five proposals, including that of the protester, Paradigm. After the receipt of proposals, the VA changed its mind again and amended the solicitation to replace the engineering services NAICS code with the architectural services NAICS code, and that code's corresponding size standard of \$8 million.

The change in NAICS codes — and thus in size standards — prejudiced Paradigm, as it qualified as a small business under the \$16.5 million standard but not under the much smaller \$8 million standard.

Paradigm first appealed the changed designation to OHA, which affirmed the solicitation's designation as proper, finding the VA had properly considered the primary purpose of the procurement. Unsatisfied with the result, Paradigm took the case to the Court of Federal Claims, appealing both the VA's assignment of the final NAICS code and OHA's decision upholding that assignment.

Analysis

The Court of Federal Claims, after finding jurisdiction to review OHA's decision under the Tucker Act, found the plaintiff a "prospective bidder [who] diligently pursued its rights [in alleging a] nontrivial competitive injury," as so had standing as an interested party.

The court noted, however, its own highly deferential posture on review of any agency's procurement decisions, and that decisions of OHA judges warrant special deference, given the judges' administrative expertise and familiarity with the SBA regulatory scheme.

The court summarily dismissed the direct challenge of the VA's decision for lack of jurisdiction, leaving only the OHA decision before the court.

The protester argued that OHA's decision was arbitrary, capricious and an abuse of discretion because engineering-related salary costs were the largest cost component of the independent government cost estimate.

The government countered that OHA's decision, based on the actual description of the work required, was rational and that Paradigm failed to meet its burden in surmounting the special deference afforded to OHA decisions. The court found the government's argument more persuasive.

The record showed that OHA compared the scope of the work as described in the solicitation with the descriptions found in the NAICS manual. OHA found the work did not "involve applying physical laws and principles of engineering," as designing the HVAC system did not qualify as "cutting-edge engineering." Rather the work mostly entailed designing the renovations, which fit squarely within the definition of the architectural services NAICS code.

The court found unpersuasive the protester's allegation that OHA ignored the independent government cost estimate in making its determination, because each of the labor categories Paradigm pointed to as engineering-related also related to architectural services: "Supervisors, Designers, Drafters, Specification Writers, and Typists."

The protester sought to buttress its defense at oral argument by analogizing to RLB Contracting Inc.,^[5] a case in which both the contracting officer's and OHA's determinations were found arbitrary and capricious.

The court distinguished the earlier precedent, in which both the contracting officer and OHA failed to quantitatively analyze the extent of dredging work the contract contained, on the basis that here OHA properly "looked behind the tasks in the Statement of Work" in determining that "design[ing] the HVAC, window replacement, bid plans, and construction plans" properly constituted design services. Thus, the principal purpose of the solicitation was to procure architectural services.

The court found that OHA's application of the principal purpose test accorded with the Federal Acquisition Regulation and the SBA's regulations.^[6]

Although the regulations provide that procurements are usually classified according to their greatest cost component, an agency retains discretion to conduct its own principal purpose analysis. The court announced that, "when two NAICS Codes may be plausibly related and the [a]gency's choice is upheld by the OHA with reasoned explanation for that choice, this [c]ourt has nothing further to do."

The court did do more, however, and considered the protester's alternative challenge — that OHA erred by ignoring the VA's use of the engineering services NAICS codes in allegedly similar procurements in the past. The court noted that, in 2011, the FAR Council removed the requirement to consider previous procurements as a basis for NAICS code determinations.

The amended SBA and FAR regulations give primary consideration to the NAICS Manual, the product or service description, the relative value of components, and the function of the goods or services.^[7] The court determined that OHA's interpretations of the regulations were consistent with the regulatory text,

which was specifically amended to remove the prior language requiring comparison to previous procurements, and were reasonable.

Takeaways

In *Paradigm*, the Court of Federal Claims drew a bright-line rule that where two NAICS codes are plausibly related to a procurement, OHA need only to provide a reasoned explanation supporting its decision to uphold the agency's choice. Would-be protesters should bear in mind the high bar to overcome the court's special deference to OHA's administrative expertise in matters pertaining to size standards and associated NAICS codes.

James A. Tucker is an associate and Markus Speidel is a law clerk at Morrison & Foerster LLP.

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[1] *NCI Information Sys. Inc., B-417805.5 et al.*, Mar. 12, 2020.

[2] *Office Design Grp. v. U.S.*, 2019-1337 (Fed. Cir. Mar. 6, 2020).

[3] See *Enhanced Veterans Solutions Inc. v. U.S.*, 131 Fed. Cl. 565, 588 (2017); *Red River Comput. Co. v. U.S.*, 120 Fed. Cl. 227, 238 (2015); *Sci. Applications Int'l Corp. v. U.S.*, 108 Fed. Cl. 235, 272; *Chenega Mgmt. LLC v. U.S.*, 96 Fed. Cl. 556, 585 (2010); *Hamilton Sundstrand Power Sys. v. U.S.*, 75 Fed. Cl. 512, 516 (2007).

[4] *Paradigm Engineers and Constructors PLLC v. U.S.*, No. 19-2014C (Fed. Cl., Mar. 25, 2020).

[5] *RLB Contracting Inc. v. U.S.*, 118 Fed. Cl. 750 (2014).

[6] FAR 19.303(a)(2) and 13 C.F.R. § 121.402(b).

[7] 13 C.F.R. § 121.402(b)(1) and FAR 19.303(a)(2).