

FEDERAL CIRCUIT ADOPTS FEDERAL CLAIMS STANDARD ON DISPARATE EVALUATIONS

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The Federal Circuit Court, never having previously had a standard for evaluating disparate evaluation claims in bid protests, adopted the Fed. Claims Standard of “substantively indistinguishable” IN denying the protest appeal of *Office Design Group v. U.S., Cuna Supply LLC*, 951 F.3d 1366 (Fed. Circ. 2020).

Office Design protested similar procurements for five regions of the Department of Veterans Affairs (“VA”) of healthcare furniture and related services. The RFP stated that contracts would be awarded based on a best-value tradeoff selection considering technical capability, past performance and price (in that order). The RFP included an evaluation questionnaire (Attachment 15) containing 33 yes or no questions from the RFP, and was stated to be used as a checklist to evaluate offeror’s technical proposals. The offeror received 2 points for each “yes” answer, and in order to receive a passing technical score, had to receive a “yes” for 20 of the 33 questions.

The VA concluded that it could only locate responses to 6 of the 33 questions in Attachment 15, for a failing score of 12 points. The VA awarded contracts to nine offerors under each of the five RFPs—with each awardee earning at least 40 technical points.

Office Design filed its initial protest at the Government Accountability Office (“GAO”), alleging disparate evaluation in its technical proposal and also alleging that VA improperly relied on Attachment 15 to evaluate its technical proposal. The GAO denied Office Design’s protest on both grounds, and then filed at the Claims Court, asserting the same two grounds. The Claims court held that Office Design had not shown that the VA’s alleged disparate treatment was prejudicial error, and that VA’s use of Attachment 15 was proper.

In its appeal Office Design raised the same two challenges it raised before the GAO and the Claims Court. The Court rejected the idea that the agency’s use of Attachment 15 was improper, noting that the RFP stated that it would be “used as a checklist that would be used to evaluate the technical proposals.”

Then the Court turned to the disparate evaluation protest, noting that the court has not yet articulated a standard for evaluating disparate evaluation claims. The court noted that at the Claims Court, a protester must show that the agency unreasonably downgraded its proposal for deficiencies that were “substantively indistinguishable” or nearly identical from those contained in other proposals, and agreed to adopt that standard. Turning to Office Design’s proposal, the court held that its proposal was substantially distinguishable from other proposals in several respects. Office Design failed to provide a description of its interior designer’s experience and qualifications on healthcare facilities. Unlike the awardees’ proposals, Office Design did not address the hardware and software requirements. There also were two other substantive differences between Office Design’s proposal and the awardees’ proposals. Although there was disparate evaluation in two instances (inventory and cataloging and description of materials

used), there was no prejudice to Office design by these two items. (Even if Office Design received the additional six points it gave the awardee, its technical score would still be well below the 40 point threshold for award.)

Takeaway. The Federal Circuit will use the “substantively indistinguishable” standard in reviewing appeals of disparate evaluations. And as always in all forums, a protester must show prejudice (i.e., but for the error, the protester had a substantial chance of receiving a contract award).

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