

Federal Circuit Panel Split Over Application and Survival of *Blue & Gold*

June 19, 2020

WHAT: In a split decision, a panel of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled that a disappointed offeror waived its right to claim that the Defense Information Systems Agency (DISA) treated offerors unequally in the small business round of the \$17.5 billion Encore III procurement. Although the protest focused on information revealed in debriefings from the earlier full and open competition round and allegations of an organizational conflict of interest, the majority, applying *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), found that the protester should have intuited before it submitted its small business proposal that certain offerors that failed to win a full and open contract would receive information in their debriefings they could then use to improve their competitive position when participating in the delayed small business round. The Court held that the protester thus “waived” its challenge by failing to protest that possibility before submitting its small business proposal. The decision is notable for the lengthy dissent from Judge Reyna that calls into question the continuing vitality of *Blue & Gold*.

WHEN: The Federal Circuit issued its opinion on June 15, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: The decision signals that at least two judges on the Federal Circuit expansively apply the Court’s holding in *Blue & Gold*, which held that a party that does not object to patent errors in the terms of a solicitation prior to the close of the bidding process waives its ability to raise those objections in a post-award protest at the Court of Federal Claims. Judge Reyna’s dissent, which relies on the United States Supreme Court decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017) to argue that the panel decision in *Blue & Gold*

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cannot stand, also portends a possible request for *en banc* review or a Supreme Court petition for certiorari. If the Federal Circuit *en banc*, or the Supreme Court, were to adopt Judge Reyna's view, it would signal a sea change in bid protests at the Court of Federal Claims and Federal Circuit, as solicitation challenges could be brought in post-award bid protests and still be timely. For the time being, offerors should expand their consideration of the potential competitive and strategic impact of actions that might otherwise seem speculative, and timely think about whether a protest is necessary to preserve objections.

In March 2016, DISA issued a multiphase Solicitation for DISA's multibillion-dollar Encore III contracts, which would provide information technology to the U.S. Department of Defense (DOD) and other federal agencies. The Solicitation called for two separate competitions—one as "full and open" and the other conducted for small businesses. Originally, DISA anticipated that offerors in both competitions would submit final proposals at the same time. In practice, however, the timelines for the two competitions diverged. The Solicitation expressly stated that small businesses could compete in both competitions, as joint ventures or partnerships, but could only receive one award.

Offerors for both competitions submitted original proposals by October 21, 2016. On November 2, 2017, DISA notified successful and unsuccessful offerors of the "full and open" competition, and debriefings were completed by the next week. As the result of multiple rounds of evaluation notices, the "small business" final proposal revisions were not ultimately requested until April 2018. DISA notified successful and unsuccessful offerors of the results in the "small business" competition on September 7, 2018.

The protester, Insero Corporation, submitted a proposal in the small business competition only and did not receive an award. During its debriefing and in follow-up communications, Insero learned that several awardees from the small business competition had also competed in the full and open competition as a part of a joint venture or partnership. This meant that these competitors were able to submit their revised proposals in the small business competition after the Agency's debriefing had disclosed the total evaluated prices of the winners in the full and open competition. Insero alleged that this gave those offerors a target range for the future that created an organizational conflict of interest under Federal Acquisition Regulation (FAR) 9.505 and constituted unfair and unequal treatment of the offerors.

Insero's argument failed at the Court of Federal Claims because Insero could not demonstrate prejudice. Upon appeal, however, a split panel of the Federal Circuit found that Insero should have known that the Encore III bidding process allowed certain businesses to compete in both sets of competitions and therefore should have known that those offerors would use the DISA debrief to strengthen their proposals in the small business competition. Applying *Blue & Gold*, the Federal Circuit held that Insero waived its rights to challenge this structure at the Court of Federal Claims by waiting until after award in the small business competition.

The majority decision suggests that the Federal Circuit is now expecting contractors to bring pre-award protests based on potential protest grounds beyond defects in the terms and text of a solicitation, even if the grounds might be speculative at the time. After all, although the majority found that Insero should have inferred that competitively-sensitive information could have been released in the debriefings from the full and open competition, Insero did not actually learn that such information had been provided until its own

debriefing. Of course, Inersso's debriefing was after all proposals had been submitted for both the full and open and small business competitions.

Judge Reyna dissented and argued that the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), undermines *Blue & Gold* waiver as a whole. According to Judge Reyna, *SCA Hygiene* "clarified that: '[w]hen Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief.'" Judge Reyna further noted that the Supreme Court "'stressed'" that "'courts are not at liberty to jettison Congress' judgment on the timeliness of suit,'" even if the statute of limitations gives rise to 'undesirable' 'policy outcomes.'" Thus, according to the dissent, *Blue & Gold* cannot stand because the Court of Federal Claims' jurisdictional statute at 28 U.S.C. § 2501 includes a specific six-year statute of limitations, regardless of the policy or objectives that underlie that decision. It is worth remembering that *Blue & Gold* relied on the U.S. Government Accountability Office's (GAO) timeliness rules as sound policy, but the Court of Federal Claims and Federal Circuit do not have similar rules or statutory proscriptions. Judge Reyna also disagreed with the majority's extension of *Blue & Gold* to " non-solicitation challenges" and its characterization of *Blue & Gold* as a "waiver," arguing that the majority's decision (and *Blue & Gold*) preclude a protest, regardless whether the protesting party intentionally relinquishes a known right. And, Judge Reyna's dissent takes issue with the fact that the majority decision rests on a theory that was not litigated at the Court of Federal Claims below.

The split decision in *Inersso* may open the door for *en banc* or Supreme Court review of the rule in *Blue & Gold*. Depending on whether the court believes there is a battle to be waged here, the outcome could create a significant difference between the timeliness rule for protests of solicitations at the Court of Federal Claims and the GAO.