Fed. Circ. Inserso Ruling Brings Bid Protest Considerations

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In a split decision with far-reaching implications for both government contractors and the private bar, the U.S. Court of Appeals for the Federal Circuit, in Inserso Corporation v. U.S., recently addressed timeliness and waiver issues in the bid protest context. The facts of this significant case, the majority and dissenting opinions, as well as key takeaways for federal contractors and their attorneys, are discussed below.

The Facts

The U.S. Defense Information Systems Agency publicly posted a solicitation, referred to as "Encore III," on March 2, 2016. The solicitation invited companies to bid on the opportunity to enter into indefinite-delivery/indefinite-quantity contracts for information technology services.

The agency divided the competition into two so-called suites. One would award a suite of contracts in a full and open competition, and the other would award a suite of contracts in a competition among small businesses. The solicitation stated that small businesses could compete in both competitions but could only receive one award.

Bidders for both competitions submitted their initial proposals in October 2016. Inserso Corporation, the protester, only competed in the small-business competition. On Nov. 2, 2017, the agency notified offerors in the full-and-open competition of their award status. By Nov. 8, 2017, the agency completed post-award debriefings of the full-and-open-competition offerors.

In June 2018, the small-business-competition offerors, including the protester, submitted their final revised proposals. On Sept. 7, 2018, the agency notified the small-business offerors of their award status. The protester did not receive a small-business award due to its comparatively high price.

On Sept. 12, 2018, the protester filed a bid protest with the U.S. Government Accountability Office, but the GAO dismissed that protest because another company filed a protest at the U.S. Court of Federal Claims involving the same solicitation.[1]

On Oct. 25, 2018, the protester filed its own complaint with the COFC, alleging that the agency's debriefing of the full-and-open-competition offerors provided offerors who had competed in both suites with an advantage in the small-business competition. Specifically, the protester alleged that certain offerors were unfairly provided the total evaluated price for all full-and-open-competition awardees, as well as previously undisclosed information regarding the agency's evaluation methodology.

The COFC ruled against the protester, finding that the agency's actions, even if improper, did not prejudice the protester. The protester then appealed to the Federal Circuit.

The Majority Opinion

On appeal, the protester argued that the COFC's findings regarding a lack of prejudice were

in error. The government argued to the contrary and asserted that the protester's claims were untimely in any event.

The Federal Circuit then held that, because the protester "did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition," the protester "forfeited the objection." Citing its 2007 opinion in Blue & Gold Fleet LP v. U.S.[2] and its progeny, the Federal Circuit opined that the protester "should have challenged the solicitation before the competition concluded because it knew, or should have known, that [the agency] would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards."

The Federal Circuit then stated that the protester knew that the solicitation process was divided into two competitions and that small businesses could compete for both suites. The Federal Circuit also stated that the protester "knew that the full-and-open competition had been completed in November 2017." Further, the Federal Circuit stated that the protester should have known that the debriefings would contain information, including total pricing, that would provide a competitive advantage in the small-business competition.

The Federal Circuit went on to state:
Because a bidder in the small-business competition exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before the awards were made, [the protester] forfeited its right to raise its challenge by waiting until awards were made.

The Federal Circuit concluded by stating that enforcing its "forfeiture rule implements Congress's directive that courts 'shall give due regard to ... the need for expeditions resolution' of protest claims."[3]

The Federal Circuit vacated the COFC's judgment and remanded for entry of judgment on the ground of waiver.

The Dissent

The Federal Circuit was divided on the appropriateness of applying the Blue & Gold waiver rule. The dissenting opinion provided three separate rationales arguing against the application of Blue & Gold to the facts present.

First, the dissent argued that Blue & Gold is not actually a waiver rule in the true sense of the phrase, but rather a judicially created timeliness doctrine that the U.S. Supreme Court rejected in its rationale in SCA Hygiene Products Aktiebolag v. First Quality Baby Products LLC, discussing separation of powers on timeliness issues.[4] Specifically, that the congressionally mandated six-year statute of limitations for COFC jurisdiction over bid protest claims is the sole legitimate timeliness rule, and that the judicially created Blue & Gold "time bar directly conflicts with the reasoning in SCA Hygiene."

Second, the dissent asserts that, even if the Blue & Gold waiver rule survives post-SCA Hygiene, the majority misapplied the rule because it applies "only to challenges of patent errors in a solicitation," which were not present in the instant case.

This aspect of the dissent is factual in nature, because the majority opinion relies on an interpretation of the facts that imputes knowledge onto the protester such that the solicitation defect was patent and not latent.[5]

Finally, the dissent raises concern over the majority's procedural decision to decide the case in the first instance, because the waiver issue was not fully developed, fully briefed or decided at the lower court. The dissent notes that neither party briefed Blue & Gold post-SCA Hygiene. The dissent maintains that the case should have been decided on the merits, and not the Blue & Gold waiver issue in the first instance.

The Key Takeaways

This case is important for government contractors, and the private bar representing those contractors, because of the potential impact it may have on expanding or ending Blue & Gold, which will affect timeliness considerations in pursuing protest claims.

The majority opinion directly expands the application of the Blue & Gold waiver rule to solicitation concerns that are not purely patent, but which become evident during the procurement process. The majority opinion also contemplates the expansion of the waiver rule to issues beyond solicitation challenges.

For contractors weighing timeliness concerns, this ruling injects uncertainty into whether and when to pursue a claim at the COFC. For example, had Inserso brought its claim when it learned of the initial suite's debriefing, as the majority requires, it would have had to weigh additional justiciability issues.

In Inserso's sister case, Technatomy Corp. v. U.S., a different but comparable fact pattern raised Blue & Gold waiver issues and the COFC found that requiring contractors to bring claims during the procurement process for fear of waiving rights "would open the floodgates to bid protests challenging evaluation minutiae brought by parties that had not yet even been excluded from a competitive range."[6] The expansion of the Blue & Gold waiver rule raises legal justiciability concerns, but also practical cost and customer-relation concerns for contractors who are aggrieved but reluctant to halt the government's procurement process to preserve their rights.

Conversely, no future claim raising a Blue & Gold waiver issue can be briefed at the COFC or the Federal Circuit without addressing Judge Jimmie Reyna's dissent in Inserso, and by extension, the application of SCA Hygiene. Blue & Gold has become a mainstay of the government's defense against bid protests, but its viability is now in question. The Inserso decision has expanded the potential universe for the application of the Blue & Gold waiver rule, but the dissent also set the parameters and rationale for circumscribing — or even abolishing — the judicially created time bar of Blue & Gold and its progeny.

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[1] See 4 C.F.R. § 21.11(b) ("GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction.").

[2] Blue & Gold Fleet L.P. v. U.S., 492 F.3d 1308, 1313 (Fed. Cir. 2007).

[3] See 28 U.S.C. § 1491(b)(3).

[4] SCA Hygiene Products Aktiebolag v. First Quality Baby Products LLC, 137 S. Ct. 954 (2017).

[5] The majority opinion is notable because it does contemplate the possibility of extending Blue & Gold beyond solicitation challenges, which, as the dissent notes, its in direct conflict with the rationale of Blue & Gold.

[6] Technatomy Corp. v. U.S., 144 Fed. Cl. 388, 392 (2019). The waiver issues in Technatomy concerned the agency's announced corrective action, but the COFC's concerns about standing and ripeness, which are derived from an agency's "final action," remain salient in both fact patterns.