5 Key Bid Protest Decisions Of 2020

By **Aron Beezley, Patrick Quigley and Sarah Osborne**

Aron Beezley

Patrick Quigley

Sarah Osborne

In 2020, the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, and the U.S. Government Accountability Office issued five decisions worthy of particular note:

- Inserso Corp. v. U.S.[1]
- Teledyne Brown Engineering Inc.[2]
- Kiewit Infrastructure West Co. v. U.S.[3]
- LAX Electronics Inc. v. U.S.[4]
- Centerra Integrated Facilities Services LLC.[5]

This article provides a brief overview of these five cases and discusses how they might shape the bid protest landscape going forward.[6]

Inserso

The Facts

In March 2016, the Defense Information Systems Agency posted the Encore III solicitation for indefinite-delivery, indefinite-quantity contracts for IT services. The competition was divided into two suites: one for full and open competition and the other restricted to small businesses.

Small businesses could compete in both suites but could only receive one award. Inserso only proposed in the small-business suite.

In November 2017, the agency notified unrestricted suite offerors of their award status and gave debriefings. Seven months later, in June 2018, the small-business-suite offerors, including Inserso, submitted final revised proposals and, three months later, in September 2018, received award status notices.

Inserso did not receive a small-business award due to its high price.

Inserso filed a GAO bid protest, but another disappointed offeror filed a protest at the Court of Federal Claims, depriving the GAO of jurisdiction over Inserso's protest.[7] A few weeks later, Inserso filed its own protest complaint with the claims court, alleging that the full-and-open-suite debriefings gave offerors who competed in both suites an advantage in the small-business competition by unfairly providing total evaluated prices for all full-and-open-suite awardees, as well as previously undisclosed information about the agency's evaluation methodology.

The claims court denied the protest, finding that the agency's actions, even if improper, did not prejudice Inserso. Inserso then appealed to the Federal Circuit.

The Majority Opinion

On appeal, Inserso argued that the claims court's findings regarding a lack of prejudice

were in error. The government asserted that Inserso's claims were untimely in any event.

The Federal Circuit then held that, because Inserso "did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition," Inserso forfeited the objection.

Citing its 2007 opinion in Blue & Gold Fleet[8] and its progeny, the Federal Circuit stated that Inserso "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," including total pricing, that would provide an advantage in the small-business competition.

The Federal Circuit also stated that enforcing its forfeiture rule met the congressional goal to "'give due regard to ... the need for expeditious resolution of protest claims."[9] Thus, the Federal Circuit vacated the claims court's judgment and remanded for entry of judgment on the ground of waiver.

The Dissent

In dissent, Circuit Judge Jimmie Reyna found three reasons why the Blue & Gold waiver rule was inappropriate.

First, the Blue & Gold rule is not a true waiver rule but is rather a judicially created timeliness doctrine of the type that the U.S. Supreme Court rejected in a 2017 patent case, SCA Hygiene Products Aktiebolag v. First Quality Baby Products LLC.[10] Based on that case, the six-year statute of limitations for claims court jurisdiction over protests, mandated by Congress, is the sole legitimate timeliness rule and conflicts with the Blue & Gold timeliness rule.

Second, 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.[11]

Third, the majority should not have decided the case because the post-SCA Hygiene vitality of the waiver issue was not fully developed, fully briefed or decided at the lower court.

The Takeaway

This case is important for the bid protest bar because of the potential impact it may have on expanding or curtailing Blue & Gold, a mainstay of protest timeliness arguments at the federal claims court. The majority opinion 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 expanding the reach of the waiver rule to issues beyond solicitation challenges.

For contractors weighing timeliness concerns, unfortunately, this ruling injects uncertainty into whether and when to pursue a claim at federal claims court, and raises the possibility of the need for protective protests to avoid future timeliness problems, a scenario recognized in Inserso's sister case at the claims court, Technatomy Corp. v. U.S.[12]

Conversely, no future protest raising a Blue & Gold waiver issue can be briefed at the federal claims court or the Federal Circuit without addressing the dissent here and, by

extension, the applicability of SCA Hygiene.[13] This issue is likely to return to the Federal Circuit as the claims court attempts to apply — or distinguish — Inserso in the future.

Teledyne

The Facts

This case, which will forever be known as "the foosball protest," started with Teledyne filing a GAO bid protest challenging the NASA award of a contract to SGT LLC, for services at Marshall Space Flight Center in Huntsville, Alabama. Teledyne argued that a NASA employee who participated in the acquisition had an improper personal conflict of interest that tainted the acquisition.

Specifically, Teledyne alleged that this NASA employee — referred to by the GAO as "Mr. X" — had an ongoing personal relationship with an individual holding a high-level position with an incumbent contractor that was also a major subcontractor of SGT.

Teledyne argued that the ongoing relationship — which involved a weekly social gathering centered around competitive foosball[14] — and Mr. X's extensive acquisition-related activities, including a leadership role in the development of virtually every aspect of NASA's acquisition, tainted the procurement.

NASA responded that, although it was aware of Mr. X's relationship, it brought the matter to the attention of a NASA ethics attorney and took measures to mitigate the effect of the relationship that eliminated the possibility of prejudice either in favor of SGT or against other offerors.

The GAO, in turn, had several concerns with NASA's position. First, the NASA ethics attorney concluded that Mr. X should be removed from the source evaluation board or refrain from attending the weekly social gatherings, even though there was no strict statutory or regulatory requirement precluding Mr. X's participation as a member of the board.

Thus, the ethics attorney's opinion recognized the overarching Federal Acquisition Regulation mandate that "government employees strictly avoid not only actual conflicts of interest, but also avoid even the appearance of a conflict of interest."

Second, even if the GAO were to conclude that NASA's decision to permit Mr. X to participate as a member of the source evaluation board was reasonable, none of NASA's ethics reviews considered Mr. X's "extensive, ongoing participation in the agency's acquisition activities as the lead of the PDT [procurement development team]."

Third, NASA "also entirely failed to investigate any concerns that might arise because of Mr. X's relationship with" another participant at the weekly "competitive foosball" gathering, who apparently was an employee of an entity related to the awardee, SGT.

Fourth, the GAO stated that, although NASA adopted some mitigation measures, "it is not evident how those measures could be adequate in light of the totality of the circumstances" or that they provided an effective means for ensuring that no other offeror was prejudiced.

In any event, the GAO noted that where, as here, the record establishes that a conflict or apparent conflict of interest exists, and the agency did not satisfactorily resolve the issue, to maintain the integrity of the procurement process, the GAO will presume that the protester

was prejudiced.

Accordingly, the GAO sustained the protest and recommended, among other things, that NASA terminate the contract award, "begin its acquisition anew, and proceed without the involvement of individuals who have a conflict of interest."

The Takeaway

This case is particularly noteworthy because the GAO found that the circumstances at hand — even when viewed in a light most favorable to Mr. X — created at least the appearance of a conflict of interest.

Indeed, the GAO stated that:

> [The GAO] cannot know whether any improper influence has occurred, nor, as a practical matter, can the agency now determine, after the fact, or with any reasonable degree of certainty, whether the acquisition has been tainted by Mr. X's actions.

According to the GAO, that is why government employees "are required to avoid strictly not only actual conflicts of interest, but also even the appearance of any conflict of interest."

In the final analysis, the GAO found that Mr. X's actions created a concern that the integrity of the acquisition process was, or may have been, compromised. It is:

> precisely for this reason [that the GAO's decisions] uniformly apply a presumption of prejudice, both in circumstances where the record demonstrates an actual conflict of interest, as well as those instances where there is an apparent conflict of interest.

Kiewit

The Facts

The issues in Kiewit Infrastructure West Co. relate to an invitation for bids issued by the National Guard for the replacement of an aircraft ramp at an Oregon airbase. The contract was to go to the lowest priced bidder. Kiewit was one of two bidders and had the lower priced bid.

After Kiewit was determined to be the lowest priced bidder, the agency prepared an internal memorandum stating that Kiewit's price was reasonable. The agency noted that Kiewit's bid was higher than the independent government cost estimate but determined that Kiewit's bid was reasonable by comparison to the other bid received.

The agency later issued an amendment to the invitation for bids which purported to cancel the invitation for bids, and convert it into a negotiated procurement. Under FAR 14.404-1, an invitation for bids may be canceled for a compelling reason, which may include that all bids are unreasonably priced. In such cases, the FAR provides that the acquisition should be completed through negotiation.

The agency justified its cancellation of the invitation for bids with a determination and findings stating that both bids were unreasonably priced in comparison to the independent government cost estimate and to each other.

In the determination, the agency also speculated as to why the bids were not in line with the independent government cost estimate, calling into question the accuracy of the cost estimate, but did not address whether the cost estimate could still be used as a measure of price reasonableness. The determination also made no mention of the earlier-prepared memorandum which found Kiewit's price to be reasonable.

Kiewit protested the agency's decision to cancel the invitation for bids, first going before the GAO, which denied Kiewit's protest. Kiewit then brought its protest to the federal claims court, which sided with Kiewit.

The claims court rejected the agency's interpretation of the FAR, which was that receiving unreasonable prices was a per se compelling reason to cancel an invitation for bids, because that interpretation rendered FAR 14.404-1's use of the word "compelling" superfluous, and would otherwise mean that any time an agency cited price reasonableness, it could justify cancellation of an invitation for bids.

The claims court held that the agency's conclusion in the determination and findings that the bids received were unreasonable was not compelling because the agency simply cited FAR 14.404-1 without any meaningful analysis and without an express rejection of its earlier conclusion that Kiewit's price was reasonable.

Additionally, the determination raised unresolved questions about the independent government cost estimate's accuracy but then relied on the estimate to measure price reasonableness. In short, the agency had not shown that it had a compelling reason to cancel the invitation for bids on the basis of price reasonableness.

The Takeaway

Kiewit serves as a reminder of the need to preserve the integrity of the competitive bid system. An agency can cancel an invitation for bids after bid opening, but it must have a compelling reason to do so.

To show that it has a compelling reason, the agency must provide an explanation as to how it reached its conclusion that cancellation was appropriate. Without such an explanation, or if the explanation is otherwise contradicted by other agency actions, the reason cannot be considered compelling.

Notably, the GAO essentially accepted the agency's argument — which was later rejected by the claims court — that the agency need only state that prices received were unreasonably high and that this is a per se compelling reason to cancel the invitation for bids. Kiewit requires more from agencies and encourages protesters to hold agencies accountable to the stricter standard.

Lax Electronics

The Facts

In Lax Electronics, the Federal Circuit boiled down its recent decisions interpreting the "in connection with" requirement to invoke protest jurisdiction under Title 29 of the U.S. Code, Section 1491.

The case started with a compliance audit. The Defense Logistics Agency, or DLA, found that parts manufactured by LAX Electronics, doing business as Automatic Connector, did not

conform to required standards. Despite Automatic's disagreement and submission of a corrective action report, the DLA removed Automatic from its qualified parts list.

Automatic filed suit in federal claims court, invoking the court's protest jurisdiction under 29 U.S.C. Section 1491(b)(1), and seeking injunctive relief for DLA's alleged violation of requirements in the DOD Manual.[15] Automatic submitted an affidavit that cited specific solicitations upon which it was precluded from bidding as a result of the removal.

The claims court determined that the claim was miscast as a protest because it was undisputed that a DLA audit, unconnected to a specific procurement or planned procurement, was the precipitating event to plaintiff's removal from the qualified parts list.[16]

The claims court stated that the claims were analogous to those in Geiler/Schrudde & Zimmerman v. U.S., a case in which a service-disabled, veteran-owned small business protested the revocation of that status, but that the Federal Circuit found that claiming generally that the revocation would affect future procurements was too tenuous to invoke federal claims court jurisdiction under Section 1491.[17]

The claims court found Automatic's arguments were similarly tenuous and determined it lacked jurisdiction because of the lack of "necessary factual connection between the alleged impropriety and a procurement or proposed procurement."[18]

The Federal Circuit disagreed, noting that an intervening decision, Acetris Health LLC v. U.S. made clear that Geiler was distinguishable from Automatic's case, such that protest jurisdiction did exist.[19]

The conclusion that the Geiler plaintiff failed to meet the "in connection with" requirement rested on the plaintiff's inability to identify a procurement at issue — the plaintiff "did not challenge a specific procurement, or even allege that the Geiler entities were preparing to bid for a specific procurement that required [a service-disabled veteran-owned small business] status.'"[20]

In contrast, in Acetris, the plaintiff alleged that a definitive position taken by the government would render the plaintiff ineligible to compete for future procurements on which it was likely to bid.

The Acetris court emphasized that the word "procurement" in Section 1491(b)(1) includes all stages of the process of acquiring property, and that a proposed procurement "broadly encompasses all contemplated future procurements by the Agency."[21] Thus, the Acetris plaintiff's protest grounds were in connection with a procurement, giving the claims court jurisdiction under Section 1491.

Turning to Automatic, the Federal Circuit noted that Automatic identified specific and likely future procurements for the parts for which it was excluded from the qualifed products list, and for which it would have been a likely bidder absent DLA's action. Thus, the alleged legal violation by DLA "resulted in a disqualification from likely future procurements in which the plaintiff was likely to bid," and met the in connection requirement under Section 1491.

The Takeaway

The Lax Electronics decision emphasizes the breadth of bid protest jurisdiction under Section 1491 by concluding that agency action well outside of the procurement process — a

compliance audit — may meet the in connection with requirement if the protester can establish that the action will affect specific or likely future procurements.

While protest jurisdiction under Section 1491 is broad, would-be protesters should be mindful of the specificity required to invoke it. General lamentations of disqualifications from future bids may not be sufficient.

Centerra

The Facts

The Centerra Integrated Facilities Services protest involved a procurement by the Bonneville Power Administration, or BPA, a U.S. Department of Energy agency. In June 2019, the BPA requested offers for facility management services. Centerra and Jones Lang LaSalle Americas Inc. submitted offers. The BPA selected Jones Lang.

On March 19, the BPA gave Centerra a written debriefing, which said that Centerra could submit follow-up questions, and that the BPA's response to any follow-up questions would close the debriefing.

On March 24, Centerra submitted questions. On March 27, the BPA responded and stated that the debriefing was closed. On April 1, Centerra filed its GAO protest.

The GAO dismissed the protest as untimely, focusing on the timing of Centerra's debriefing. Under the GAO's bid protest regulations, to be timely, a post-award protest must generally be filed within the earlier of 10 days of when the protester knew or should have known the basis of protest.[22]

An exception exists when a protest challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required."[23] In such cases, a protester may not file any protest before the debriefing date, but must file a protest within 10 days after the date on which the debriefing is held.[24]

Here, the problem was that the BPA is outside the normal procurement rules, based on its organic statute.[25] Although the BPA encourages the use of debriefings, no statute or regulation requires them, unlike the case with many competitive federal procurements.

Instead, the BPA's debriefing policy is merely that, a policy. So, the debriefing Centerra received was not a required debriefing of the type that would toll the requirement to file a protest until after the debriefing was concluded.

Centerra had almost all the information it needed to file a protest based on the initial March 19 written debriefing, and a protester may not delay a protest filing until it has all possible information. Thus, to be timely, Centerra would have had to file its protest no later than March 30, given that March 29 — day 10 after the debriefing — was a Sunday. If more facts arose later, Centerra could have supplemented its protest, but it could not delay its initial protest filing deadline.

The Takeaway

The Centerra protest is a continuing reminder of the importance of being aware of the GAO's protest timeliness rules and, in particular, distinguishing required and voluntary

debriefings. If any doubt exists about whether a debriefing is required, the safer course is generally to file the protest within 10 days of learning most of the bases of the protest, which usually happens at the initial debriefing or brief explanation, supplementing any arguments later, if further facts are discovered. Otherwise, the protester risks summary dismissal of its entire protest.[26]

Conclusion

The decisions discussed in this article are, in our view, the five most important bid protest decisions of 2020. These cases will have a significant impact for years to come on protests involving waiver issues, conflicts of interest, the conversion of invitations for bids into requests for proposals, the broad nature of federal claims court jurisdiction, and the effect of debriefings on the timeliness of GAO protests.

Aron Beezley is a partner, Patrick Quigley is counsel and Sarah Osborne is an associate at Bradley Arant Boult Cummings LLP.

Bradley Arant attorney Lisa Markman and associate Nathaniel Greeson contributed to this article.

Disclosure: Bradley Arant Boult Cummings LLP represented the protester Kiewit Infrastructure West Co. in the case discussed above.

[1] Inserso Corp. v. U.S., 961 F.3d 1343 (Fed. Cir. 2020).

[2] Teledyne Brown Engineering Inc., B-418835, et al., 2020 CPD ¶ 303 (Comp. Gen. Sept. 28, 2020).

[3] Kiewit Infrastructure West Co. v. U.S., 147 Fed. Cl. 700 (2020).

[4] LAX Elecs. Inc. v. U.S., No. 2020-1498, 2020 WL 6437779 (Fed. Cir. Nov. 3, 2020).

[5] Centerra Integrated Facilities Servs. LLC, B-418628, 2020 CPD ¶ 155 (Comp. Gen. Apr. 23, 2020).

[6] Although the Amazon and Oracle protests of the Defense Department's Joint Enterprise Defense Infrastructure (JEDI) contract have generated intense public interest over the past nearly year and a half, we do not cover those cases here specifically because others have dealt with them in far greater detail elsewhere.

[7] 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.").

[8] Blue & Gold Fleet L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

[9] See 28 U.S.C. § 1491(b)(3).

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

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

[12] In Technatomy, 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." 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.

[13] Indeed, one case implicating waiver issues was already decided this year, but the briefings occurred before the Inserso appeal was decided: Boeing Co. v. United States, No. 2019-2148 (Aug. 10, 2020). Another important case dealing with waiver issues — which is currently pending before the Federal Circuit, further exploring and litigating the contours of Blue & Gold — is Harmonia Holdings Group LLC v. United States, No. 2020-1538.

[14] Merriam-Webster defines "foosball" as "a table game resembling soccer in which the ball is moved by manipulating rods to which small figures of players are attached." However, the authors of this article have been unable to locate a uniform definition of "competitive foosball," and it is otherwise unclear how "competitive foosball" differs materially, if at all, from plain old "foosball." Moreover, we note that a search of the GAO case law yields no other published GAO decision which discusses — or even references — either "competitive foosball" or regular "foosball."

[15] Plaintiff also brought a claim for declaratory relief under 28 U.S.C. § 2201 for an alleged violation of FAR 9.205(a), which was dismissed by the COFC for failure to state a claim for relief. The dismissal was affirmed on appeal. We do not discuss the disposition of that claim here.

[16] LAX Elecs., Inc. v. United States, No. 19-1668C, 2019 WL 6880939, at *2 (Fed. Cl. Dec. 17, 2019), aff'd in part, vacated in part, remanded, No. 2020-1498, 2020 WL 6437779 (Fed. Cir. Nov. 3, 2020).

[17] Geiler/Schrudde & Zimmerman v. United States, 743 F. App'x 974, 978 (Fed. Cir. 2018) (per curiuam).

[18] LAX Elecs., Inc., 2019 WL 6880939, at *3.

[19] Acetris Health, LLC v. U.S., 949 F.3d 719 (Fed. Cir. 2020).

[20] LAX Elecs., Inc., 2020 WL 6437779, at *4 (quoting Geiler, 743 F. App'x at 978) (emphases added).

[21] Acetris, 949 F.3d at 728 (internal citations omitted).

[22] 4 C.F.R. § 21.2(a)(2).

[23] 4 C.F.R. § 21.2(a)(2); 41 U.S.C. § 3704(a) ("When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.") (emphasis added).

[24] 4 C.F.R. § 21.2(a)(2).

[25] See 16 U.S.C. §§ 832-832m.

[26] The topic of the effect of debriefings on bid protest timing continues to be a live one. Earlier this year, the COFC decided a case involving the issue of when a debriefing is considered closed under the Defense Department's enhanced post-award debriefing procedures for the purpose of triggering an automatic stay of contract performance pursuant to the Competition in Contracting Act, a case that the Department of Justice is now appealing. NIKA Techs., Inc. v. United States, 147 Fed. Cl. 690 (2020), appeal docketed, No. 20-1924 (Fed. Cir. June 25, 2020).