The 6 Most Important Bid Protest Decisions Of 2021

By **Aron Beezley, Patrick Quigley and Lisa Markman** (December 17, 2021)

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In 2021, 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 six bid protest decisions worthy of note:

- InfoPoint LLC;[1]
- Medline Industries Inc.; Concordance Healthcare Solutions LLC v. United States;[2]
- NIKA Technologies Inc. v. United States;[3]
- SAGAM Securite Senegal v. United States[4]
- Sierra Nevada Corp. v. United States;[5] and
- VS2 LLC v. United States.[6]

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

1. InfoPoint LLC

The Facts

In InfoPoint LLC, the GAO interpreted the 2020 National Defense Authorization Act, Small Business Act and related Small Business Administration regulations as prohibiting the Air Force from excluding a joint venture offeror from consideration for not possessing a facility clearance where all members of the joint venture otherwise held the required clearance individually.

The Air Force issued a fair opportunity proposal request under the One Acquisition Solution for Integrated Services small business pool. The fair opportunity proposal request required that an offeror possess a top secret facility clearance at the time of proposal.

The fair opportunity proposal request further stated that "[t]he individual partners to the [joint venture] having the [facility clearance] is not sufficient." In response to questions, the Air Force stated that a joint venture offeror itself had to satisfy the facility clearance requirement.

InfoPoint filed a pre-award protest at the GAO, arguing that the fair opportunity proposal request terms were inconsistent with Section 644 of the Small Business Act and SBA regulations,[7] which permit a joint venture offeror to rely on the qualifications of its members, including facility clearances, in evaluations.

The GAO invited the SBA to provide its views on the protest. The SBA joined the protester's argument, further arguing that the Air Force's fair opportunity proposal request was inconsistent with Section 1629 of the 2020 NDAA, which stated:

Termination of requirement for Department of Defense facility access clearances for joint ventures composed of previously-cleared entities.

A clearance for access to a U.S. Department of Defense installation or facility may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.[8]

The Air Force argued that Section 1629 did not apply because the DOD had not yet issued regulations implementing the 2020 NDAA.

The GAO held that, because the 2020 NDAA did not require that the DOD issue regulations to implement Section 1629, the section was effective upon enactment and was an "unambiguous command by Congress through a statute." The GAO further rejected arguments from the Air Force that the SBA's regulations were permissive, deferring to the SBA's interpretation of its regulations.

The Air Force next argued that the GAO should defer to the DOD's regulations related to the conflicting DOD security requirements, where Congress had delegated authority to the DOD on security clearances. The GAO also rejected this argument, noting that because the DOD had not issued regulations or otherwise interpreted the 2020 NDAA, no deference was owed to these older DOD regulations.

Similarly, the GAO rejected the Air Force's argument that the plain reading of the 2020 NDAA would create conflicts with existing policies, where the GAO found Section 1629 to be an unambiguous command.

Sustaining the protest, the GAO concluded that Section 1629 "unambiguously prohibits DoD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances."

The GAO also concluded that the Small Business Act and SBA regulations were consistent with the 2020 NDAA, allowing joint venturers to be awarded contracts requiring facility clearances where either the joint venture itself of the individual members held a facility clearance.

The Takeaway

InfoPoint LLC provides important clarity for small business joint venturers seeking to submit proposals on DOD procurements. The decision is also notable for its underlying dicta, giving immediate effect to portions of the 2020 NDAA and declining to defer to the Air Force in interpreting arguably conflicting DOD regulations over the statute's plain language.

2. Medline Industries Inc.; Concordance Healthcare Solutions LLC

The Facts

The Defense Logistics Agency awarded contracts for medical and surgical supplies in 2016. The U.S. Department of Veterans Affairs made awards for its own medical and surgical supply contracts in October 2020.

After the VA's awards, the VA announced it was moving its program, worth an estimated $10 billion to $27 billion, to DLA. Under the transfer plan, DLA contractors would receive a windfall, essentially doubling the size of their existing indefinite-delivery indefinite-quantity contracts. The VA contractors, in turn, "would be left holding the bag, not knowing when or if the VA would terminate their contracts as the requirements transitioned," according to

the Court of Federal Claims.

The court continued that "As if this were not chaotic enough, all the while, the VA undertook corrective action pursuant to protests at the" GAO that were filed previously by Concordance. Thereafter, that corrective action, as well as the transfer to DLA and the VA procurement itself, were challenged in the COFC.

Yet, several offerors, including the protesters, were still compelled by the VA "to submit revised bids for a 'Schrödinger's procurement' with the VA." Those offerors' proposals were due during the period where they were challenging the transfer of the VA contracts to DLA, in addition to challenging the VA's corrective action in response to the earlier GAO protests, before the COFC.

When presented with opening briefs from Concordance and Medline detailing myriad legal violations and the problematic agency record — including various ethical and legal objections by both VA counsel and procurement officials — the government sought to secure a partial remand without explicitly confessing error by "spinning off several claims into a new case while refusing to stay the action."

The government's request in this regard — which was filed "on a Friday afternoon preceding a three-day holiday weekend, mere days before the deadline to file its own responses to the plaintiffs' opening merits briefs" — "added bedlam to already existing chaos," the COFC noted. Ultimately, the COFC denied the government's remand request.

Subsequently, the COFC ruled in favor of Concordance and Medline on the merits, (1) declaring the VA's conduct unlawful, (2) granting permanent injunctive relief, (3) finding that the VA breached its implied duty to fairly and honestly consider Concordance's proposal, and (4) awarding Concordance its bid preparation and proposal costs.

In its opinion, the COFC likened the VA's proposed transfer plan to the avoidable downfall of the prideful sea captain from Henry Wadsworth Longfellow's 1840 poem, "The Wreck of the Hesperus," saying the VA had acted against the advice of senior VA procurement and legal officials who had raised ethical and legal concerns regarding the transfer plan early on — including a belief that the VA's actions would not hold up in court.

"Like the experienced crew of the Hesperus, agency personnel warned of the perils of a plotted course and when ignored, '[d]own came the storm and smote amain, the vessel in her strength' leaving behind only a 'dreary wreck' awash upon the shoals," the COFC said.

The Takeaway

As the court noted, "[t]he factual and procedural background of this case is complex." Accordingly, there are several takeaways.

For protesters, this case illustrates that the government is not above the law, and that tenacious pursuit of protest rights, even in the face of entrenched government opposition, can pay off. This case also illustrates the increasingly important role that the COFC now plays in resolving protests and holding procuring agencies accountable, particularly in large procurements. The record is usually much larger at the COFC than at the GAO, often resulting in a more fulsome ventilation of the protest issues at the COFC.

For agency officials, this case illustrates the importance of standing up to conduct within the agency that is unethical or unlawful. "Sundry [VA] employees' concerns, both ethical and

legal," may have been ignored by senior VA officials in this case, but not by a federal judge.

3. NIKA Technologies Inc.

The Facts

The Federal Circuit decided a case this year that answered the question of when a debriefing closes in a DoD procurement involving competitive proposals. In a negotiated procurement, agencies are generally required to provide a debriefing, when timely requested, to disappointed offerors.[9]

Debriefings not only provide a disappointed offeror with "the basis for the selection decision and contract award," but also start a series of short-fuse clocks running under the regulations and the Competition in Contracting Act for GAO bid protest jurisdiction[10] and for an injunction-like automatic stay of contract performance while the GAO considers the protest.[11]

Under CICA, as long as a disappointed offeror files its bid protest at the GAO within five days of receiving a debriefing on the date offered, it is guaranteed a stay of contract performance, unless the agency takes the rare action to override the stay.

In 2018, Congress created an enhanced debriefing process for DOD agencies. Thus, there is now "an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing," which the agency must then answer within five business days."[12]

Under this procedure, the debriefing is not considered closed until the agency answers the follow-up questions.[13] An open question, however, was when a debriefing closed if a disappointed offeror could ask follow-up debriefing questions but did not do so, a question the Federal Circuit has now answered.

In 2020, NIKA Technologies, an unsuccessful offeror in an Army Corps of Engineers procurement, received a debriefing on March 4, and had an opportunity to submit follow-up debriefing questions within two business days, i.e., by March 6.[14] NIKA did not submit follow-up questions and filed a GAO protest on March 10.

The filing date was six days after receiving the original debriefing but only four days after the date on which NIKA could have submitted follow-up debriefing questions but chose not to. The Corps refused to stay contract performance during the GAO protest. NIKA went to the COFC to challenge the Corps' refusal to stay performance, leaving the GAO to decide the protest merits.

The COFC found in NIKA's favor, determining that a debriefing included the two-day window following receipt of a debriefing in which a protester has the right to ask follow-up questions. Thus, the COFC held that NIKA's debriefing did not close until Mach 6, two days after NIKA received the original debriefing, which was the period during which it could have asked questions.

Since NIKA filed its GAO protest within five days of the end of the two-day window, it was timely, and the Corps had to stay performance while the GAO protest was pending.

The government appealed and, approximately 10 months later, the Federal Circuit reversed. NIKA, which had lost the underlying GAO protest on the merits in the meantime,[15] did not

join the appeal. The Federal Circuit undertook a plain-language review of the CICA text and held that "the deadline for invoking the automatic stay is five days after the written debriefing is supplied (unless ... the protester submits additional questions)."[16]

In other words, "the debriefing is not automatically held open for an additional two days." Instead, "the timer starts on the day that a bidder received its debriefing, not two days afterward." Thus, "when no additional questions are submitted, the 'debriefing date' is simply the date upon which the party receives its debriefing." On the other hand, "when additional questions are submitted, the deadline is extended."

The Takeaway

Clarity about bid protest filing deadlines is an essential tool of the trade, so any Federal Circuit decision in that space is noteworthy.

The main takeaway is that, when in doubt about whether to protest a DOD procurement decision, an offeror should always ask follow-up debriefing questions to keep the debriefing open so that the protest filing deadline clock is not yet running.

The extra time is probably helpful to a disappointed offeror to figure out next steps, and the extra information might help narrow any potential protest grounds.

4. SAGAM Securite Senegal

The Facts

In 2019, the U.S. Department of State issued a lowest price, technically acceptable solicitation for guard services at the U.S. Embassy in Dakar, Senegal, which SAGAM Securite Senegal had been providing for 35 years. During discussions, the contracting officer disclosed details of SAGAM's proposal to the only other offeror in the competitive range, Torres-SAS Security LLC Joint Venture, which subsequently won the contract.

SAGAM filed a GAO protest challenging Torres' pricing, and the State Department took corrective action. The department then discovered that the contracting officer had violated the Procurement Integrity Act[17] by disclosing SAGAM's proposal details to Torres and, thus, canceled the solicitation. SAGAM then filed a second GAO protest, alleging that the PIA violation rendered the solicitation cancellation improper. The GAO dismissed that protest as untimely.[18]

SAGAM then protested at the COFC in March 2021. Torres expressly declined to intervene then. SAGAM filed a redacted complaint in April 2021, requesting that Torres be disqualified, and that award be made to SAGAM, the only remaining offeror. Torres still did not move to intervene. In a June 2021 decision, the court directed the State Department to (1) restore the competition; (2) disqualify Torres; and (3) make an award to the remaining offeror, if found responsible.[19]

The government noticed an appeal in August 2021. Finally, in September, Torres sought to intervene in the COFC case to participate in the appeal. In its motion, Torres did not dispute that it had known of the protest from the outset but argued that intervention would not prejudice the other parties and that unusual circumstances outweighed any timeliness concerns.

Although intervention requirements are construed in favor of permitting intervention,

intervention requests usually may only be granted if timely.[20] Timeliness questions are fact-specific and a matter of the COFC's discretion.[21] The COFC denied Torres's post-judgment intervention motion based on the Sumitomo[22] factors — time aware of a case, prejudice to other parties and unusual circumstances — finding that it failed on all three.

The COFC noted that Torres knew about SAGAM's protest in March and had notice in April that its disqualification was at issue, but chose not to intervene until September, nearly six months later, and three weeks after the filing of the appeal notice.

The timeliness factor thus weighed heavily against intervention because "Torres made a tactical decision and sat out this litigation."[23] The court also found that no unusual circumstances existed that would justify untimely intervention.

In addition, the court noted the prejudice that SAGAM would suffer, if "forced to litigate against a second, late-arriving opponent and expend additional resources in doing so." Moreover, given that the government was appealing regardless of Torres' involvement, the government was "carrying Torres's water by appealing the court's judgment," limiting prejudice to Torres.

The Takeaway

This case illustrates the importance of timely intervention in bid protest litigation, first, to make sure that the intervention request is granted but, second, to maintain a seat at the table and advocate for keeping the contract award in place.

Indeed, "the loss of an award opportunity because of a decision not to intervene in a bid protest is not unusual—government errors often lead to an award to the protester, which is the result here." By intervening, the contract awardee is able to participate in protest proceedings and protect its own interests.

5. Sierra Nevada Corp.

The Facts

In 2014, the Air Force awarded Sikorsky Aircraft Corporation a contract to develop the Combat Rescue Helicopter to replace an aging helicopter type. During Sikorsky's CRH development contract performance, the requirement baseline evolved, driving the need for a new contract vehicle.

Thus, in October 2019, the Air Force issued a sources sought synopsis to conduct market research on the ability of companies to deliver capability upgrades. The Air Force identified "capable vendors," i.e., those capable of performing required development contract activities, when provided with a technical data package.

A technical data package normally includes technical design and manufacturing information to enable the construction or manufacture of a defense item component modification, or to enable the performance of certain maintenance or production processes.

For the CRH upgrade contract, the technical data package included information such as interface control documents and wiring diagrams that were specific to the requested modifications. The Air Force included Sierra Nevada Corporation as one of these capable vendors. In March 2020, the Air Force concluded that industry feedback demonstrated a need for a full technical data package to implement the required capability upgrades.

In January 2021, the Air Force issued a justification and approval to move forward on a sole-source basis with an award to Sikorsky of a five-year, $980 million CRH upgrade contract, with a seven-year delivery period. The main reason for the sole-source award decision was that Sikorsky alone possessed the required technical data package.

SNC filed a COFC bid protest alleging, among other things, that the duration of the sole-source award violated CICA. The court agreed that the justification and approval did not justify a long-term sole-source, single-award, indefinite-delivery/indefinite-quantity contract to Sikorsky.

Of note, the CRH technical data package was a deliverable to the Air Force under that contract that was only unavailable because the delivery date had not yet arrived — but which was long before the anticipated end date of the sole-source contract — and because there was a potential data rights dispute between Sikorsky and the Air Force.

While the record generally supported a sole-source award for the period the technical data package was unavailable, the scope of the contemplated contract exceeded the Air Force's demonstrated need. Moreover, the justification and approval did not explain how the current technical data package unavailability justified a sole-source award for the entire period contemplated.

The Takeaway

While many government contractors know that the law allows sole-source acquisition options despite CICA's general requirement for full and open competition, they may not realize that an agency's discretion in this area is not unlimited. This case shows that agencies need to justify both why they need a sole-source contract and the length of time that contract must last. A failure to justify both aspects of a sole-source award provides an opportunity for contractors to seek a judicial remedy.

6. VS2 LLC

The Facts

The U.S. Army awarded VS2 LLC a task order in or about July 2020 for logistics support services. Vectrus Mission Solutions Corporation bid unsuccessfully and then filed a GAO bid protest challenging the Army's most probable cost adjustment to Vectrus's proposed cost/price.

The GAO sustained Vectrus's protest and made the rare recommendation that "the Army terminate the task order issued to VS2 and issue the award, instead, to Vectrus, 'if otherwise proper.'"

On Dec. 4, 2020, the Army terminated VS2's award and awarded the task order to Vectrus. On Dec. 11, VS2 filed a GAO protest challenging the Army's decision to award to Vectrus. On Feb. 25, 2021, the GAO dismissed VS2's protest as an untimely request for reconsideration of the Vectrus protest decision, also finding that "at least one argument, regarding past performance, should have been raised in that earlier GAO proceeding."

On March 4, VS2 filed a COFC complaint, contending "that GAO's recommendation was flawed—and, thus, that the Agency should not have followed it—but also that Vectrus's proposal failed to comply with material terms of the solicitation and otherwise was not

awardable."

The government's and Vectrus's responses to VS2's complaint were an "attempt to land a massive knock-out punch," in the form of a novel waiver argument under Blue & Gold Fleet LP v. U.S.,[24] from the Federal Circuit in 2007, the leading case on bid protest timeliness, that would have the effect of rendering VS2's entire protest untimely.

The Blue & Gold rule holds that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the" COFC.

The novel Blue & Gold waiver argument that the government and Vectrus made was that Blue & Gold should also — for the first time — be applied to corrective action challenges, i.e., VS2 was required to have objected to the corrective action before it was completed to preserve VS2's ability to timely challenge that action before the COFC.

The COFC rejected that argument, holding that it "threatens to reforge Blue & Gold from a sensible shield against gamesmanship and unjustifiable delay into a broadsword capable of cutting down even meritorious arguments in a manner ... the Federal Circuit, has never sanctioned."

VS2 convinced the COFC that the GAO's decision in the Vectrus protest was "clearly erroneous as a matter of law" and that "the Agency failed to support its decision to switch the contract award from VS2 to Vectrus."

The Takeaway

The Blue & Gold waiver rule has been at issue in many recent, important cases, and the COFC has grappled with its appropriate application, and even whether the waiver rule — as a judicially-created time bar — is, ultimately, legally viable. However, as the court in VS2 affirmed, Blue & Gold remains binding precedent, "'[u]nless the Supreme Court or an en banc decision of the Federal Circuit' decides otherwise[.]"

The VS2 holding is also important in that it is yet another judicial rejection of Blue & Gold mission-creep. As the court noted, "any waiver doctrine should be applied in narrowly defined circumstances."

Although the VS2 decision seemingly invites further clarification from the Federal Circuit, that court issued a much anticipated decision on Dec. 7 in Harmonia Holdings,[25] where it reversed the COFC's finding that the protester waived its claim, but did little to clarify or circumscribe the doctrine's application.

The application of the Blue & Gold waiver rule will continue to be of importance to the government contracts bar, as well as the government, because it dictates when contractors must protest an agency's procurement actions.

Conclusion

The decisions discussed in this article are, in our view, the six most important bid protest decisions of 2021. These cases will have a significant impact on protests involving questions of the timeliness of protests after enhanced debriefings or corrective action, the timeliness of intervention motions, security clearance requirements for joint venture offerors, the

rationality of sole-source award decisions, and the reasonableness of agency decisions in major procurements.

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[1] InfoPoint LLC, B-419856, 2021 CPD ¶290 (Comp. Gen. Aug. 27, 2021).

[2] Medline Indus., Inc.; Concordance Healthcare Solutions, LLC v. United States, --- Fed. Cl. ----, 2021 WL 3483429 (2021).

[3] NIKA Techs., Inc. v. United States, 987 F.3d 1025 (Fed. Cir. 2021).

[4] SAGAM Securite Senegal v. United States, 154 Fed. Cl. 653 (2021).

[5] Sierra Nevada Corp. v. United States, 154 Fed. Cl. 424 (2021).

[6] VS2, LLC v. United States, --- Fed. Cl. ----, 2021 WL 4167380 (2021)

[7] 13 C.F.R. § 121.103(h)(4).

[8] Pub. L. No. 116-92 § 1629; 133 Stat. 1198, 1741 (2019).

[9] FAR 15.506.

[10] 4 C.F.R. §21.2(a)(2).

[11] 31 U.S.C. §3553(d)(3), (4)(A)(ii).

[12] 10 U.S.C. §2305(b)(5)(B)(vii), (5)(C).

[13] 31 U.S.C. §3553(d)(4)(B).

[14] NIKA Techs., Inc. v. United States, 147 Fed. Cl. 690, 692 (2020).

[15] NIKA Techs., Inc., B-418563, 2020 WL 3100590 (Comp. Gen. June 5, 2020).

[16] The Federal Circuit also determined that the case was not moot, even though the underlying GAO protest was resolved and the CICA stay had ended, because the issue was

"capable of repetition but evading review."

[17] 41 U.S.C. §§2101-2107.

[18] SAGAM Securite Senegal, B-418583.2, 2021 CPD ¶155 (Comp. Gen. Mar. 22, 2021).

[19] SAGAM Securite Senegal v. United States, No. 21-1138C, 2021 WL 3140559, at *18 (Fed. Cl. June 25, 2021).

[20] R. Ct. Fed. Cl. 24; Am. Mar. Transp., Inc. v. United States, 870 F.2d 1559, 1561 (Fed. Cir. 1989).

[21] NAACP v. New York, 413 U.S. 345, 366 (1973).

[22] In Sumitomo, the court set forth three factors to determine whether a motion to intervene is timely:

(1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his right to intervene in the case before he applied to intervene;

(2) whether the prejudice to the rights of existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention[; and]

(3) [the] existence of unusual circumstances militating either for or against a determination that the application is timely.

Sumitomo Metal Indus., Ltd. v. Babcock & Wilcox Co., 669 F.2d 703, 707 (C.C.P.A. 1982).

[23] The Court analogized Torres's tactical decision here to those made by the parties in Belton Industries, Inc., noting that the Federal Circuit's description of the prejudicial effect of untimely post-judgment motions to intervene is instructive in this case. Belton Indus., Inc. v. United States, 6 F.3d 756, 762 (Fed. Cir. 1993) ("Both Sri Lanka and Peru were content to sit on the sidelines during this dispute and let other parties, particularly the United States Government do the heavy lifting. They sought to intervene only when they realized, too late, that these other parties would not do all of their work for them.").

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

[25] Harmonia Holdings Group, LLC v. United States, --- F.3d --- (Fed. Cir. 2021).