

# Fed. Circ. Inconsistent On Bid Protest Waiver Precedent

By **Aron Beezley and Nathaniel Greeson**

Earlier this summer, the U.S. Court of Appeals for the Federal Circuit issued a split decision in *Insero Corporation v. U.S.* that **we argued** had far-reaching implications for both government contractors and the private bar, relating to timeliness and waiver issues in the bid protest context.

The Federal Circuit recently issued another decision, *The Boeing Company v. U.S.*, discussing waiver in the claims context, but with a very different outcome than *Insero*, and which arguably circumscribes the further expansion of the waiver doctrine.

As the judicial pendulum swings back and forth on the proper application of the waiver doctrine — which was first articulated by the Federal Circuit in 2007 in *Blue & Gold Fleet v. U.S.* — practitioners and impacted government contractors are anxious to see how the courts will draw the boundaries on this important procedural element of bid protest and claims practices.

## Background

In 2017, Boeing filed an action in the U.S. Court of Federal Claims under the Contract Disputes Act, seeking recovery of amounts paid to the U.S. Department of Defense. Boeing alleged that the DOD breached the contract at issue and effected an illegal exaction by failing to negotiate an equitable adjustment in accordance with the Cost Accounting Standards statute.[1]

The Cost Accounting Standards statute which was incorporated into the contract and requires simultaneously adopted cost-increasing and cost-lowering changes in contractor accounting practices to be considered as a group, with the reductions offsetting the increases. Specifically, Boeing alleged that, by following Federal Acquisition Regulation 30.606's command to disregard cost-lowering changes to Boeing's accounting practices, and billing Boeing only for the cost-increasing changes, the DOD unlawfully charged it too much.

The government, in turn, argued before the Federal Claims Court that Boeing had waived its breach of contract claim by failing to challenge the legality of FAR 30.606 before entering into the contract.

The Federal Claims Court agreed, characterizing the conflict between FAR 30.606 and the Cost Accounting Standards statute as a patent ambiguity in the contract.[2] The court thus ruled that, because Boeing did not seek preaward clarification of the conflict, its contract claims were foreclosed as a matter of law.[3]

The Federal Claims Court further agreed with the government that jurisdiction was lacking with respect to Boeing's illegal exaction argument because the Cost Accounting Standards statute, on which the argument rested, "is not a money-mandating statute."

Boeing then timely appealed to the Federal Circuit, contending that the Federal Claims Court



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incorrectly ruled that Boeing waived its challenge to the lawfulness of FAR 30.606 and that the court erroneously determined that it lacked jurisdiction to consider Boeing's illegal exaction claim.

### **Federal Circuit's Waiver Holding**

The Federal Circuit reversed and remanded both of the Federal Claims Court holdings, finding that (1) the court misapplied the doctrine of waiver and that Boeing did not waive its breach of contract claim relating to the legality of FAR 30.606, and (2) that the court properly had jurisdiction over Boeing's illegal exaction claim.[4]

The Federal Circuit spent the bulk of its analysis discussing the Federal Claims Court's misapplication of the waiver doctrine, or as it has come to be known, the Blue & Gold waiver rule.[5] As a brief background, the Federal Circuit's holding in *Blue & Gold Fleet v. U.S.* stands for the premise 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 Court of Federal Claims." [6]

The progeny of the Blue & Gold decision have expanded the waiver doctrine beyond its initial context concerning preaward solicitation errors into patently ambiguous or defective preaward contract formation issues, including obvious omissions, inconsistencies or discrepancies of significance.

The most recent example of this expansion was the Federal Circuit's *Insero* decision in June, which expanded the doctrine into latently ambiguous solicitation issues.

Boeing made several arguments as to why the waiver rule was inapplicable to its set of facts. However, the Federal Circuit's reverse and remand holding relied solely on Boeing's primary argument: There was no forum that could, or would, have been able to adjudicate Boeing's objection to the legality of FAR 30.606. The Federal Circuit reasoned that without the possibility of substantive relief, either from the agency or from a judicial forum, Boeing could not, and did not, waive its ability to challenge FAR 30.606.

In this regard, the Federal Circuit noted that the DOD conceded it was not capable of addressing Boeing's concerns with FAR 30.606 during contract formation because adherence to this FAR clause is mandatory, and the contracting officer did not have the discretion to exempt or waive the application of FAR 30.606 to the contract.

Similarly, the Federal Circuit found that, in addition to the unavailability of agency relief, Boeing also faced the unavailability of judicial relief from the application of the FAR-mandated Cost Accounting Standards rule in question. The Federal Circuit found that there was not a judicial forum with jurisdiction to hear this issue at the time of contract formation, rejecting the government's assertion that Boeing could have brought either a bid protest or suit under the Administrative Procedures Act.

The Federal Circuit also observed there were ripeness issues that would have precluded Boeing from obtaining relief — the contract was negotiated in 2008 and the accounting issues did not surface until 2011.

Despite finding that there was no judicial relief for Boeing to seek, which reinforced its rationale for not finding waiver, the Federal Circuit was careful to hedge, stating that:

We do not decide whether failure to pursue a judicial remedy could ever support a determination of waiver in the contract context.

So, the Federal Circuit's narrow, but important, holding in *Boeing* is to affirm that the contract formation waiver doctrine is limited to "an objection that the agency itself could have resolved favorably to the objector if the objection had merit."

Despite the Federal Circuit's narrow holding, the several pages of analysis and dicta provide additional, persuasive arguments and guideposts for practitioners to navigate future Blue & Gold waiver arguments.

### **Boeing and Inerso — Where Do We Go From here?**

The Federal Circuit's decision in *Boeing* presents as a narrow holding reaffirming prior precedent, but it is still an important holding. In addition to the significance of the lower court reversal, the Federal Circuit dedicated most of its decisional analysis to the discussion of waiver, which provides insight into the Federal Circuit's rationale.

The discussion in *Boeing* that relied on strict adherence to prior precedent is confusing, however, in light of the Federal Circuit's recent decision in *Inerso*, which expanded the application of the doctrine outside of prior precedent.

While the discussion in *Boeing* is a welcome analysis by the Federal Circuit, the decision made clear no new guidelines were being precedentially set on which the lower court — or government contractors determining whether and when to litigate — can rely.

The problem this presents for government contractors and practitioners, as we see it, is there is a lack of decisional predictability around the issue of waiver, as illustrated by the outcomes of both recent decisions in *Inerso* and *Boeing*, where the Federal Circuit decided the Federal Claims Court got the waiver issue wrong.

Both government contractors, *Inerso* and *Boeing*, expended tremendous resources in litigation over a procedural issue. *Inerso* tried but ultimately failed to have its substantive argument heard because it was determined to have waived its right to challenge the government's actions. *Boeing*, after three years of litigation through two courts, is only now reaching the heart and substance of its claim on remand to the Federal Claims Court.

There is no doubt that the government contractor community would benefit from a better understanding and more predictable application of the waiver rule. Until the Federal Circuit provides some more clear guidelines, we are left to read the tea leaves, write articles and litigate our way to a better understanding.

So, as we zoom out to view the larger picture of the evolution of the waiver doctrine, we submit that the *Boeing* decision represents a "zig" back toward limiting the doctrine, whereas the *Inerso* majority opinion was a surprising "zag." This development is especially interesting because both opinions were penned by U.S. Circuit Judge Richard Taranto in the span of two months.

A simplistic distinction between these cases is that the fact patterns were dissimilar. But the different results cannot be so summarily distinguished.

*Boeing* and *Inerso*, at first blush, are unrelated but for the general issue of waiver. *Boeing* is a Contract Disputes Act claims case while *Inerso* is a bid protest case. The Federal Circuit

reversed the lower court in Boeing, finding Boeing did not waive its claim, but while the Federal Circuit also reversed the lower court in Inerso, it found that Inerso did waive its right to protest.

The two decisions seem inconsonant because Inerso expands the waiver doctrine, while Boeing seemingly reins it back in. However, looked at differently, Boeing is simply maintaining the status quo and reining back a misapplication of the existing precedent, leaving Inerso as the outlier. The extended discussion and rationale in Boeing makes the Inerso decision even more confusing.

For example, there were arguably justiciability and futility issues that Inerso would have encountered if it attempted to bring its protest, or seek agency relief, when the Inerso majority required it.[7] Specifically, if Inerso would have challenged the agency's actions preaward, there undoubtedly would have been justiciability questions of ripeness, harm and prejudice with which to contend.

Additionally, the futility rationale deployed by the Federal Circuit in Boeing concerning the agency's mandatory adherence to the FAR Cost Accounting Standards provision is essentially the same argument the government made in Inerso concerning its adherence to the FAR debriefing provision.

The Inerso majority opinion did not address these practical issues when determining whether waiver was appropriate, whereas the Boeing decision specifically discusses the ability for meaningful agency relief and ripeness as an apparent prerequisite to determining whether judicial review was available to the would-be claimant.

Even though Boeing cites to Inerso, there are enough factual differences between the two cases so that the decision in Boeing does not meaningfully engage with the Inerso rationale. The Boeing decision also does not engage with the Inerso dissent.

That the Inerso dissent was not addressed in Boeing is unsurprising given that the parties briefed the Boeing appeal between September 2019 and March, and the Inerso decision was published in June. However, we are anxiously awaiting a substantive discussion by the Federal Circuit of U.S. Circuit Judge Jimmie Reyna's Inerso dissent.

## **Key Takeaways**

As we await a fully briefed decision tackling Judge Reyna's Inerso dissent, or a decision issuing more concrete guidelines concerning the application of the waiver rule, the Federal Circuit's latest decision in Boeing provides some additional clarification on the type of issues to which the waiver doctrine does not apply.

Specifically, the waiver doctrine does not apply where an agency is unable to provide the relief that the party later sought in court. The Federal Circuit in Boeing also observed that its precedent does not require a contractor to have pursued judicial avenues of relief before award. Even though the Federal Circuit left the door open for a finding of waiver for failing to pursue judicial relief, it provided several persuasive arguments to help preclude such a finding in the future.

Waiver continues to be an important procedural issue for federal contractors, and bid protest and claims practitioners, to understand because of its ability to impact contractors' downstream rights to judicial intervention. Even more so because the waiver doctrine is not fully settled or uniformly and consistently applied.

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[1] See 41 U.S.C. § 1503(b).

[2] *Boeing Co. v. U.S.*, 143 Fed. Cl. 298, 309 (2019).

[3] *Id.* at 310.

[4] An analysis of Boeing's illegal exaction claim and the Federal Circuit's jurisdictional holding thereon is beyond the scope of this article.

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

[6] *Id.* at 1313.