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Dear Magic 8-Ball—Should I Protest? Critical Protest Implications Following the Federal Circuit's Expansion of *Blue & Gold's* Waiver Rule in *Inserso*

By Ethan M. Brown*

This article provides an overview and analysis of the Inserso *decision and its potential impact on future protests.*

Relying upon the cryptic answers provided by a Magic 8-Ball when deciding to file a protest at the U.S. Court of Federal Claims ("COFC") may sound farcical, but a recent decision[1] by a split panel of the U.S. Court of Appeals for the Federal Circuit may render this method commonplace. In *Inserso Corporation v. United States*, the Federal Circuit held that the *Blue & Gold* waiver rule regarding the timeliness of protests against patent solicitation errors barred Inserso's opportunity to protest the Defense Information Systems Agency's ("DISA's") allegedly improper disclosure of total evaluated pricing and previously unreleased evaluation methodology during debriefings with certain offerors.

THE COURT'S REASONING

In what can only be described as requiring an offeror to possess preternatural foresight of all potential agency errors in a procurement, the Federal Circuit reasoned that Inserso should have known the type of information it challenged was likely to be disclosed in the debriefings. In effect, the majority's decision unmoors the venerable *Blue & Gold* waiver rule from its narrow application by requiring—remarkably—that contractors protest non-patent, non-solicitation issues before the deadline for receipt of proposals. Yet the majority's opinion is not the only feature of this decision that should raise contractors' eyebrows. As noted below, the full-throated dissent questions, *inter alia*, the continuing validity of *Blue & Gold*.

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[1] http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/19-1933.OPINION.6-15-2020_1603407.pdf.

The Federal Circuit's seminal decision in *Blue & Gold Fleet, L.P. v. United States*[2] 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 Court of Federal Claims." A defect in a solicitation is patent if it is an obvious omission, inconsistency, or discrepancy of significance.[3] Additionally, a defect is patent if it could have been discovered by reasonable and customary care.[4] We have shaken our Magic 8-Ball to provide an overview and analysis of the *Inserso* decision and its potential impact on future protests below.

OVERVIEW

In March 2016, DISA issued the multibillion-dollar ENCORE III solicitation. A unique feature of the solicitation was its two-tiered competition structure. Specifically, the solicitation anticipated the award of up to 20 ID/IQ contracts for the "full and open" competition, and a similar number of awards under the "small business" competition. To increase the chances of receiving an award, several small businesses submitted proposals for the small-business competition and also teamed with other offerors in the full-and-open competition. Inserso only competed in the small-business competition. For the full-and-open competition, DISA notified all offerors of their award status on November 2, 2017. Less than a week later, DISA concluded its debriefing process for this portion of the competition. The debriefings included "the total evaluated price for the twenty [full and open competition] awardees and some previously undisclosed information on how DISA evaluated the cost element of the proposals."

Nearly a year later, DISA notified the small business offerors of their award status in September 2018, but Inserso did not receive an award. Upon receiving its debriefing, Inserso inquired whether any small business competition awardee who also competed in the full and open competition had received a similar debriefing in November 2017. DISA confirmed that debriefings for the full and open competition included similar information on the awardees' total evaluated pricing and DISA's proposal evaluation methodology.

THE PROTEST

On October 25, 2018, Inserso filed a protest at the COFC, alleging that the full-and-open competition debriefings created an improper competitive advantage—

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[2] 492 F.3d 1308, 1313 (Fed. Cir. 2007).

[3] *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312 (Fed. Cir. 2016).

[4] *Id.* at 1313.

specifically, an organizational conflict of interest ("OCI") in violation of FAR 9.504 and 9.505—for small-business offerors who participated in both competitions. Although the court recognized that DISA's disclosure of information during the debriefing may have risen to the level of an OCI, it determined that Inserso was not prejudiced by DISA's actions and ruled in favor of the government. Inserso appealed to the Federal Circuit.

THE APPEAL

Inserso fared no better on appeal. The Federal Circuit determined that Inserso knew prior to the conclusion of the small-business competition that the solicitation permitted small-business offerors to compete in both competitions, and the full-and-open competition had been completed in November 2017: "Inserso should have challenged the solicitation before the competition concluded because it knew, or should have known, that DISA would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards."

In the court's view, Inserso should have expected (1) disclosure of the awardees' total evaluated prices and DISA's evaluation methodology during debriefings because the former is required under FAR 15.503, and the latter qualifies as "competitively valuable information" under FAR 15.506, and (2) for certain offerors to use the competitive information gleaned from the full-and-open debriefing to augment their proposals in the small-business competition. Applying *Blue & Gold*'s waiver rule to the merits, the Federal Circuit held that, based on Inserso's knowledge of the information provided during the large-business competition debriefings, Inserso forfeited its right to protest the alleged OCI.

THE DISSENT

Judge Reyna's dissent took issue with the majority's reasoning. In his blistering opinion, Judge Reyna questioned both the validity of the *Blue & Gold* waiver rule and its application to the merits. As an initial matter, Judge Reyna argued that categorizing *Blue & Gold*'s prohibition on challenging patent solicitation errors after the closing of bidding as a "waiver" is a misnomer. Instead, Judge Reyna argued that the *Blue & Gold* waiver is a judicially-created timeliness doctrine barring otherwise timely claims under the statute, mandating a six-year statute of limitations for COFC bid protest jurisdiction. Because the judicially created *Blue & Gold* waiver rule narrows the statute of limitations in the face of clear legislative intent, the waiver is at odds with the recent United States Supreme Court decision in *SCA Hygiene Products AB v. First Quality Baby Products LLC*. Judge Reyna also disagreed with the majority's application of *Blue & Gold* to the merits, noting that (1) the *Blue & Gold* time bar applies to patent

errors, but Inserso's claim arose from agency conduct taking place over a year after the solicitation had been released, and nothing in the solicitation indicated that the timing of the two competitions would diverge to such a degree, and (2) the majority's extension of the *Blue & Gold* waiver rule to non-solicitation challenges conflicts with the underpinnings of the *Blue & Gold* decision.

TAKEAWAYS

Key takeaways from the *Inserso* decision include the impacts on the timing and frequency of protests filed at the COFC that will surely affect contractors.

- *The Continuing Viability of the* Blue & Gold *Waiver Rule*— Despite Judge Reyna's impassioned dissent, *Blue & Gold* remains good law. Thus, contractors must remain vigilant of patent errors in solicitations to not run afoul of *Blue & Gold*'s waiver rule. Yet the dissent injected some uncertainty into the continuing validity of the waiver rule, and it bears watching whether the Federal Circuit, or the U.S. Supreme Court, will address the merits of Judge Reyna's dissent in the future. Regardless, the dissent provides potential arguments for a COFC protester at odds with *Blue & Gold*'s waiver rule.
- *Extending* Blue & Gold's *Reach*—The majority's application of *Blue & Gold*'s waiver rule to non-patent, non-solicitation defects creates significant issues for contractors considering protesting at the COFC. In part, conformance with the majority's opinion requires a contractor to not only anticipate potential agency procurement errors not obvious from the terms of a solicitation, but also to weigh filing a defensive protest before the close of bidding to protect its rights. In short, contractors must develop acute foresight to anticipate the infinitesimal number of potential procurement issues that could arise before bids are due, lest the *Blue & Gold* waiver rule bar a subsequent protest at the COFC. Whether this decision will result in an increased number of protests at the COFC remains to be seen.
- *Greater Burden on Contractors*—Considering the relatively steep cost of filing and litigating a protest at the COFC, as compared to protests at the Government Accountability Office, the majority's opinion places an untoward burden on contractors—especially small-business contractors—of spending additional time and resources parsing every word of a solicitation and questioning every agency procurement action for potential protest grounds. Indeed, Judge Reyna's dissent expressed similar concern that the majority's extension of *Blue & Gold*'s waiver rule to other than non-patent solicitation errors, such as OCIs, "places an undue and unjustified burden on contractors to actively investigate,

anticipate, and preemptively challenge all conflicts of interest that could potentially arise under a solicitation."

CONCLUSION

Although the aftershocks created by the majority's decision will be felt across the COFC bid protest landscape, the real impact will be borne by contractors. The majority's expansive application of the *Blue & Gold* waiver rule may require contractors to expend additional time, money, and resources to identify potential non-solicitation protest grounds—no matter how speculative—prior to the submission of proposals or risk waiver of the protest. Whether relying on the skills of Nostradamus or a quarter for Zoltar's predictions, hunches, suspicions, and speculation now appear to play a role in the decision whether to protest at the COFC that should not be diminished. And what does our Magic 8-Ball think of that?