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"You Got To Know When To Protest": Federal Circuit's Inserso Decision Stretches the Blue & Gold Waiver Rule For Bid Protests To New Lengths

Article By:

Adam A. Bartolanzo

John W. Chierichella

You got to know when to hold 'em,
Know when to fold 'em,
Know when to walk way,
And know when to run.

Such is the advice of the unnamed gambler from the late Kenny Rogers' 1978 hit single, "The Gambler." While the eponymous hero of that song may have believed his advice to be sound, there remains the undeniable fact that regardless of whatever skill you may have "out of readin' people's faces," there always will be an element of chance to whether you will win at the table. You can never know when to hold 'em or when to fold 'em a hundred percent of the time. More often than not, for the casual card player, luck is the determinative factor. Indeed, it is the risk of not really knowing whether "every hand's a winner" or "every hand's a loser" that makes the game exciting in the first place.

But while risk may be fun in poker, that is certainly not the case when it comes to protesting a government contract solicitation or award. As most contractors know, a good protest requires a lot of thought and commitment to convince an agency or tribunal of why corrective action should be taken. The last thing a protester wants is to learn – too late – that its protest is untimely. A recent decision by the U.S. Court of Appeals for the Federal Circuit, however, places this risk more heavily on contractors' shoulders by requiring any protest grounds concerning a solicitation be brought before the time of final proposal submission where "the law and facts" make it reasonably known to the contractor that a procurement error is likely to occur under the terms of a solicitation.

The case – *Inserso Corp. v. United States*, 961 F.3d 1343 (Fed. Cir. 2020) – involved a solicitation issued by the U.S. Defense Information Systems Agency ("DISA") calling for multiple awards to be made to firms for the opportunity to sell information technology services to various federal government agencies. DISA split the requirement into two competitions: one for contracts to be awarded on a "full and open" basis, and one for contracts to be awarded to small businesses. The

solicitation allowed offerors to compete in both competitions. While the first round of both competitions began on the same date, the timing of the two quickly diverged. Ultimately, the "full and open" awards were made months earlier than those made to small businesses, with DISA providing debriefings to unsuccessful offerors in the "full and open" competition while the small business competition was pending.

Inserso Corp. ("Inserso") submitted an offer only for the small business competition, which it lost because its offer was the 23rd lowest in a competition for 20 slots. Inserso received from DISA a post-award debriefing that included the total evaluated price for each of the awardees and some previously undisclosed information about how DISA evaluated the cost element of the proposals. After following-up with the agency, Inserso was informed that offerors in the "full and open" competition – some of which submitted offers in the small business competition – had received the same kind of information from DISA. As a result, Inserso, which had not been (and could not have been) privy to the debriefings on the "full and open" awards, filed a protest in the U.S. Court of Federal Claims ("COFC"), alleging that DISA's unequal disclosure of information created an organizational conflict of interest ("OCI") and resulted in disparate treatment of bidders. While the COFC acknowledged the agency may have violated regulations against unmitigated OCIs and against treating offerors unequally, the COFC denied Inserso's protest for failure to demonstrate competitive prejudice.

On appeal, the Federal Circuit agreed with the COFC's decision, but for a different reason. Specifically, the Court held that Inserso had waived its protest grounds by not raising them before the time for submission of final proposals in the small business competition. The Federal Circuit relied upon its precedent in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), which recognized 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." According to the Court in *Inserso*, this waiver rule "applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so," including those involving the disclosure of pricing information during a debriefing.

Applying the *Blue & Gold* waiver rule, the Federal Circuit found Inserso knew or should have known that DISA would disclose the total evaluated prices, and information relating to the agency's evaluation of the cost element, to the bidders in the "full and open" competition at the time of, and shortly after, the notification of awards in that competition. The Court observed that Inserso knew (1) the solicitation allowed for overlap of offerors between the two competitions, and (2) the "full and open" competition had ended months earlier than the small business competition. Thus, given FAR Part 15.5 required DISA to disclose to unsuccessful offerors requesting a debriefing information relating to total evaluated prices, as well as certain other information relating to the evaluation of offerors more generally, Inserso should have known at the time the "full and open" competition ended that DISA would disclose the challenged information to offerors as part of their required debriefings.

The Federal Circuit rejected Inserso's argument that DISA should not have conducted the debriefings until after the small business competition had concluded, because even though such a delay was technically allowed under the rules, it was unreasonable "for Inserso to have believed that DISA would delay – for three quarters of a year – the post-award debriefing of the bidders in the full-and-open competition" when no one had called the issue of unequal disclosure of information to the agency's attention. Further, the Federal Circuit noted a post-award protest at the Government Accountability Office ("GAO") challenging the "full and open" competition should have put Inserso

on notice that debriefings in that competition had occurred well in advance of the conclusion of the small business competition. Thus, because "[t]he law and facts made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices that Inserso now challenges," the Federal Circuit ruled Inserso had waived its protest grounds by not bringing them before the time required for submission of final proposals in the small business competition.

In a dissenting opinion, Judge Reyna criticized the majority's opinion for three reasons. First, Judge Reyna called into question the continued viability of the *Blue & Gold* waiver rule in light of the Supreme Court's decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, — U.S. –, 137 S. Ct. 954, 197 L.Ed.2d 292 (2017). In *SCA Hygiene*, the Supreme Court struck down the application of a laches defense in an infringement case because Congress had provided a 6-year statute of limitations for the timeliness of such claims. Much like the claim in that case, Judge Reyna noted Congress had mandated in the Tucker Act a 6-year statute of limitations for protest actions before the COFC. By implementing a judicially created timeliness rule for pre-award protests based on patent errors in a solicitation, the majority had, in Judge Reyna's opinion, overridden the COFC's statute of limitations based on "policy concerns" – a result Judge Reyna believed was precluded by the Supreme Court's holding in *SCA Hygiene*.

Second, even if the rule were still viable, Judge Reyna argued the *Blue & Gold* waiver rule did not apply to Inserso's protest grounds. Judge Reyna explained that *Blue & Gold*'s time bar "applies only to challenges against *patent errors* in the solicitation." But in the case before the Court, there was "no obvious error, inconsistency, or discrepancy from the face of the solicitation indicating that the government would unequally disclose competitive pricing information." Rather, the solicitation at issue informed bidders that the Government recognized that pricing information from one competition could be competitively valuable in the other, and that it would take necessary measures to prevent unequal disclosure of such information, including by stating the Government would identify any potential OCIs. According to Judge Reyna, the majority ignored these aspects of the solicitation, and in doing so, "*place[d] an undue and unjustified burden on contractors to actively investigate, anticipate, and preemptively challenge all conflicts of interest that could potentially arise under [the] solicitation*" (emphasis added). Because the Federal Circuit had "never previously extended *Blue & Gold* beyond challenges to the solicitation," Judge Reyna disagreed with the majority's decision to place this "undue and unjustified burden" on Inserso.

Third, Judge Reyna would have decided the case on the merits due to the parties' not having fully briefed the applicability of *Blue & Gold* before the COFC or on appeal.

So, what does this all mean for government contractors? Is there now, in Judge Reyna's words, a burden on them "to actively investigate, anticipate, and preemptively challenge all conflicts of interest that could potentially arise under a solicitation"?

Judge Reyna's opinion, of course, is just that – his opinion. But the circumstances at play in *Inserso* do beg the questions of what "law" and what "facts" can be reasonably known before the time for submission of proposals to require a pre-award protest to be brought. What if, for example, DISA had supplied the unsuccessful offerors in the "full and open" competition information that was less readily apparent to have been required to be disclosed by the debriefing regulations in FAR Part 15 than that challenged by Inserso? What if the disclosures were authorized, not by FAR Part 15, but by another regulation? Would Inserso have been required to dig through the annals of the FAR and, by extension, the DFARS, to consider what competitively useful information DISA could have shared with its competitors? And what if the "full and open" competition had ended not months, but weeks or even days before the conclusion of the small business competition? Would there still have been a

post-award protest at the GAO that would have notified Inserso in time, as the majority's opinion states was the case? Or would Inserso not have been expected to search the GAO's bid protest docket for signs of post-award debriefings having taken place already in the "full and open" competition, if the deadline for submission of its proposal in the other competition were just days away?

It boggles one's mind to think of all of the possibilities of which Inserso "should have known" when it submitted its final proposal revisions. But these hypotheticals reveal a flaw with the Federal Circuit's *Inserso* decision that is shared with the advice of Kenny Rogers' gambler – that is, "knowing" when to protest, like "knowing" when to hold or fold your cards, may now be nothing more than a matter of chance. This gambling transaction could be avoided, perhaps, if a contractor brought its protest before the GAO instead, where the *Blue & Gold* waiver rule does not apply. Even in that forum, however, there is a regulatory bar requiring "improprieties in a solicitation which are apparent prior to…the time set for receipt of initial proposals" to be alleged before that time – a bar the GAO, borrowing the reasoning of the majority's decision in *Inserso*, may now interpret to extend to improprieties "likely to occur" based on "the law and facts" surrounding the procurement. It also remains possible that either the Federal Circuit sitting *en banc* or the Supreme Court could overturn *Blue & Gold* and *Inserso* under the reasoning in *SCA Hygiene*, which is what Judge Reyna in his dissent hinted should be done.

Only time will tell. Until then, contractors may want to consider a "suspect something, say something" approach to bringing protests before the COFC: even if there is a suspicion before the time of proposal submission that a procurement error could occur based on "the law and facts" at hand, it should be brought to the attention of government contract counsel immediately, so a protest can be filed in time and the risk of waiver avoided. The protest may be dismissed as premature. But that is far preferable to holding your cards and ending up with a losing hand.

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