

## **Federal Circuit Follows GAO Timeliness Rule for Solicitation Defect Protests**

In a case of first impression, the Court of Appeals for the Federal Circuit (CAFC) recently held that a party that has the opportunity to challenge the terms of a solicitation containing a patent error and fails to do so before close of the bidding process waives its ability to later raise the same challenge in a bid protest before the Court of Federal Claims (COFC). *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). This decision resolves the uncertainty surrounding whether COFC will hear solicitation defect protests that would be untimely at the Government Accountability Office (GAO).

### **Background**

GAO's longstanding rule is that "[p]rotests based upon alleged improprieties in a solicitation which are apparent [on the face of the solicitation] shall be filed prior to bid opening or the time set for receipt of initial proposals." 4 C.F.R. § 21.2(a)(1) (2007). GAO's bid protest rules contain an exception to the rule where a protester shows good cause for the delay or raises "issues significant to the procurement system." 4 C.F.R. § 21.2(c). GAO routinely dismisses protests which do not strictly adhere to the rule.

The statute which provides COFC's bid protest jurisdiction does not include any express timeliness rules, much less any timeliness rules relating to protests alleging solicitation defects. 28 U.S.C. § 1491 (b)(1) (2007). Perhaps as a result, COFC case law is inconsistent with respect to timeliness requirements for solicitation defect protests. In some cases, COFC has followed GAO's standard, stating that challenges to a solicitation must be raised prior to the deadline for receipt of offers. In other cases, COFC has departed from GAO's standard by entertaining post-award solicitation challenges. In *Blue & Gold*, the CAFC resolved the uncertainty in this area by holding that a party that fails to challenge a patent solicitation defect before close of the bidding process waives its ability to later raise that challenge before COFC.

### **The Decision**

*Blue & Gold* involved a National Park Service (Park Service) procurement for ferry transportation, concession sales, and other services at the Alcatraz Island National Historic Landmark site. The closing date for receipt of proposals was March 30, 2005. On September 26, 2005, the Park Service informed all offerors that it had selected Hornblower Yacht, Inc. (Hornblower) for contract award. Blue & Gold Fleet, L.P. (Blue & Gold) filed a protest at COFC on November 15, 2005, claiming that the solicitation violated the Service Contract Act by not requiring offerors to submit wages computed in accordance with the Act.

COFC held that Blue & Gold's protest constituted a challenge to a term of the solicitation and was therefore precluded by Blue & Gold's failure to file protest before the close for proposal submissions.

---

### **CONTACTS**

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

**E. Sanderson Hoe**  
202.496.7562

**Thomas C. Papson**  
202.496.7639

**Matthew T. Crosby**  
202.496.7407

---

*Blue & Gold Fleet, L.P., v. United States*, 70 Fed. Cl. 487 (2006). On appeal, Blue & Gold re-asserted its contention that the solicitation was improper for failing to require compliance with the Service Contract Act. CAFC disagreed, holding: "[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." The court found that Blue & Gold knew or should have known of the alleged solicitation impropriety before the deadline for proposal submissions. Therefore, the court concluded, the alleged solicitation error was patent, and Blue & Gold waived its ability to protest by failing to challenge the solicitation before close of the bidding process.

In support of its holding, the court cited the need for expeditious resolution of solicitation challenges, the need to maintain fairness in the competitive process, analogous intellectual property law principles of laches and equitable estoppel, GAO's timeliness rule for solicitation defect protests, and five COFC cases which "have recognized the utility" of GAO's rule. The court did, however, suggest that it might allow a post-award solicitation defect protest in circumstances where the protestor had good reason for delay in filing or where harm would result to a statute's intended beneficiaries.

### **Implications of the Decision**

*Blue & Gold* should substantially restrain the evolving trend of bringing solicitation defect claims at COFC that would have been untimely at GAO. Because of the significantly diminished chance that COFC will entertain such protests, parties need be even more vigilant for solicitation irregularities during the time before proposal submissions. Also, because the distinction between latent and patent defects is often unclear, a party that has a significant concern about a solicitation would be well advised to protest if less formal attempts resolve the issues with the agency are unsuccessful.

While *Blue & Gold* constrains post-award solicitation defect protests at COFC, nothing in the decision suggests that CAFC would take a similar approach to GAO's timeliness rule for post-award protests that allege non-solicitation defect improprieties. Therefore, COFC remains a viable alternative forum in circumstances where challenging an award at GAO would be untimely.

Interestingly, *Blue & Gold* does not address whether a solicitation defect protest at COFC must be filed before the deadline for proposal submissions or before contract award. CAFC stated only that such protests must be filed "prior to the close of the bidding process." This issue is unsettled because COFC case law is divergent in this area. Some cases state that solicitation challenges must be raised prior to submission of proposals; other cases state that such challenges may be raised before award of the contract. In view of *Blue & Gold's* ambiguity on this point, the safest course would be to file any solicitation defect protest before the deadline for proposal submissions.

#### **About Us**

McKenna Long & Aldridge LLP is an international law firm composed of lawyers and public-policy advisors with offices in Albany, Atlanta, Brussels, Denver, Los Angeles, New York, Philadelphia, Sacramento, San Diego, San Francisco, and Washington, D.C. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, international law, real estate, environmental, energy, and finance.

#### **Subscription Info**

If you would like others to receive future mailings of the Government Contracts Advisory, please email their contact information to us at [information@mckennalong.com](mailto:information@mckennalong.com)

If you would like to be removed from the Government Contracts Advisory mailing list, please email [information@mckennalong.com](mailto:information@mckennalong.com)

---

\*This **Government Contracts Advisory** is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinions are provided by the firm only upon engagement with respect to specific factual situations. This message is intended as a transactional message for clients of the firm. If you are not a client of the firm, you have received it for informational purposes only and should not consider it an advertisement or solicitation.

© Copyright 2007, McKenna Long & Aldridge LLP, 1900 K Street, NW, Washington DC, 20006