Alert

June 1, 2023

COZEN O'CONNOR

Whose Standing Now? Federal Circuit Changes Jurisdiction Precedent for Bid Protests

On Monday, May 22, 2023, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) issued its decision in *M.R. Pittman Group, LLC v. United States,* Case No. 21-2325, in which it overturned years of precedent relating to whether the United States Court of Federal Claims (its lower court) (COFC) had subject matter jurisdiction to hear a bid protest of a solicitation relating to an ambiguity in the solicitation; and what that court should look to in making that determination. While the decision was not new, the underlying jurisdictional analysis is a significant change in direction. As discussed below, another recent decision has done a similar change in direction from years of precedent.

M.R. Pittman – An Introduction

The appeal came from a COFC finding that under the long-held precedent of *Blue & Gold* (discussed and cited below), the COFC lacked jurisdiction, where the basis of protest involved a question arising out of the underlying procurement solicitation, which had not been timely raised prior to the time proposals, were due.

For decades, the Federal Circuit (and COFC) has held that a bid protest based upon something in the solicitation (that is patent – open and obvious) needs to be protested *prior to* the time for submission of proposals. Otherwise, it is deemed waived, and the Court lacks subject matter jurisdiction to hear a protest on such a solicitation defect.

While the *Pittman* Court found that there was harmless error because the COFC should not have denied the protest based on a lack of subject matter jurisdiction, the Federal Circuit did not reverse the COFC. While concluding that the COFC's finding that *Blue & Gold* deprived it of jurisdiction was not proper, the Federal Circuit concluded that *Blue & Gold* is not a basis for finding a lack of jurisdiction. This is a real turn of events for those in the bid protest world.

RELEVANT FACTS

In the COFC protest case filed by Pittman, Pittman protested a U.S. Army Corps of Engineers (Corps) award for the repair of pumps in Louisiana. In its solicitation, the Corps stated that the procurement was a "100% Small business Set Aside procurement." The procurement announcement (but not the solicitation) stated that the procurement was limited to small businesses under NAICS Code 811310. While the solicitation apparently failed to reference the NAICS Code, it did include FAR 52.219-6, "Notice of Total Small Business Set-Aside," which stated that only offerors who were small businesses could submit a proposal and receive the award.

Pittman submitted a timely bid and was the lowest bidder, but the contracting officer found that it did not qualify as a small business under the NAICS Code. As a result, the Corps found Pittman was ineligible for the award, and the award went to the next lowest qualified small business, J. Star Enterprises, Inc.

Pittman filed a bid protest first with the United States Government Accountability Office (GAO) on February 3, 2021, arguing that the Corps' omission of the relevant NAICS Code from the face of the solicitation rendered the solicitation improperly treated as a small business set aside. In other words, Pittman argued, the lack of identifying the specific applicable NAICS Code in the solicitation rendered the procurement open to all and not limited to the NAICS Code-compliant small businesses. The GAO dismissed the protest by finding that Pittman had failed to challenge the solicitation in a timely manner. Presumably, this was due to the patent (open and obvious) ambiguity of referencing the NAICS Code and making the contract a small business set aside but

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not identifying the NAICS Code specifically in the solicitation.

After dismissal by the GAO, Pittman then went to the COFC for relief. (Bid protests can be filed at the GAO and COFC, subject to certain limitations and strategic differences.) It made basically the same argument it had made at the GAO.

The U.S. Government filed a combined opposition to the requested injunctive relief and motion to dismiss, claiming that Pittman had waived its protest grounds by failing to raise the issue in a timely manner prior to the close of bidding or submission of proposals, relying on *Blue & Gold*.

Following various procedural hearings and filings, the COFC concluded that the COFC lacked subject matter jurisdiction under COFC Rule of Procedure 12(h)(3) and granted the Government's motion to dismiss. In its ruling, the COFC found that "the waiver rule for bid protests adopted by the Federal Circuit [in *Blue & Gold*] forecloses [] Pittman's protest because the USACE's error was apparent from the onset and Pittman had [] the opportunity to object to the terms of this solicitation prior to the close of the bidding process, but failed to do so without any indication of good cause to excuse its delay."[1] In support of its finding, as the Federal Circuit cites, the COFC found a "glaring discrepancy within the solicitation itself between the omitted NAICS code and the expressly incorporated 'Notice of Total Small Business Set-Aside' FAR clause … and the omission of NAICS Code 811310 from the solicitation [was] obvious[.]"[2] This resulted in a finding that these omissions and inconsistencies were discoverable "by reasonable and customary care [.]"[3]

Following the denial of its motion for reconsideration, Pittman appealed to the Federal Circuit.

BLUE AND GOLD – The Precedent

Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007), stands for the proposition 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.
>
> [] We also explained that the rule reduces the need for the 'inefficient and costly' process of agency rebidding 'after offerors and the agency ha[ve] expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation.' [][4]

In its ruling, the Federal Circuit kept the precedent of *Blue & Gold* but changed the fact that it is no longer a jurisdictional question for the COFC.

DOES THE PRECEDENT REMAIN?

While *Blue & Gold* has been the rule for over 15 years (and to a certain extent, it actually strengthened prior decisional law), the Federal Circuit made a remarkable finding and change that is in line with other recent decisions from the Federal Circuit. Notwithstanding the existing precedents, the Federal Circuit ruled that:

> We hold that the *Blue & Gold* waiver rule—which seeks to reduce inefficiencies by requiring an objection to a solicitation be made prior to the close of bidding—is more akin to a ***non-jurisdictional*** claims-processing rule since it 'seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.' *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). For example, in *E.P.A. v. EME Homer City Generation, L.P.*, the Supreme Court found the Clean Air Act's requirement that, to maintain an objection in court on certain issues, one must first raise the objection 'with reasonable specificity' during agency rulemaking to be non-jurisdictional because that requirement 'd[id] not speak to a court's authority, but only to a party's procedural obligations.' 572 U.S. 489, 511–12 (2014) [remaining citations omitted]. Similarly, the requirement that a party object to a solicitation containing a patent error prior to the close of bidding does not speak to the Court of Federal Claim's authority to hear a case, but only to that party's procedural obligations.
>
> We thus conclude that the Court of Federal Claims erred in holding that M.R. Pittman's failure to object to the solicitation before the close of bidding created a jurisdictional defect. The

Court of Federal Claims did have jurisdiction over M.R. Pittman's claims under 28 U.S.C. § 1491(b)(1).[5]

This tears asunder over 15 years of precedent-making decisions, reversing findings in the past that the COFC lacked subject matter jurisdiction under *Blue & Gold.*

While the Federal Circuit concluded that the COFC improperly found that it lacked subject matter jurisdiction under COFC Rule 12(h)(3), the Federal Court found that, despite COFC procedural issues, those errors (finding a lack of jurisdiction) were harmless error as under COFC Rule 12(b)(6) (and other rules) the omitted NAICS Code and other ambiguities were patent (open and obvious) errors or ambiguities which required Pittman to protest prior to submission of a bid or proposal (which law has existed for decades where the issue is open and obvious to a reasonable bidder/offeror). Pittman failed to do this, resulting in it waiving its right and any standing it had to protest. As a result, while the COFC's finding that it lacked jurisdiction was improper, its conclusion that the omission was patent resulted in the decision being found to be proper and not reversible error.

IS THIS A NEW TREND?

While the *Pittman* outcome was not a surprise based on the facts presented, the finding that the precedential *Blue & Gold* decision does not create a question of subject matter jurisdiction is a surprise. Critically, the Federal Circuit has made similar rulings over the past year or so that also reverse or significantly change prior precedent. Is this a new trend? Only time will tell.

For example, on May 10, 2023, the Federal Circuit ruled in *CACI, Inc.-Federal v. U.S.,* Case No. 22-1488, that the COFC had incorrectly considered whether a contractor had statutory standing under the Tucker Act, 28 U.S.C. §1491(b)(1), where the contractor/protester had an organizational conflict of interest (OCI) and protested that finding. In *CACI*, the COFC found that the OCI (where a party gains a competitive advantage by, among other things, having internal technical knowledge such as that developed from helping the agency design the system to be procured or from other bases) that CACI had precluded it from bidding on and receiving the follow-on/related work. In this case, a former CACI employee had performed systems engineering work on the later-procured system and then left CACI. Following its analysis, the COFC ruled that the OCI was not eliminated by waiver, mitigation, or other provision and that, as such, CACI was barred from pursuing and receiving the underlying contract. As a result, it was not a proper offeror and, thus, lacked standing to protest.[6]

On appeal to the Federal Circuit, that appellate court ruled that the COFC was wrong in its standing analysis. Precedent established that the COFC has jurisdiction under the Tucker Act over actions brought by "an interested party objecting to… the award of a contract [by a federal agency]."[7] Under that interpretation, an "interested party" must be an "actual or prospective bidder[] or offeror[] whose direct economic interest would be affected by the award of the contract or by failure to award the contract.[8]

None of these standards or findings are unusual or in question. On the contrary, they are well and long recognized. Instead, what is unique here is the question of jurisdiction and standing, as the Federal Circuit has now redefined it in this case. "Standing" and "subject-matter jurisdiction" are interrelated but separate. A court can have jurisdiction, but there may be a want of standing by a protester (plaintiff) in a case. Prior case law treated "interested party" issues as one of jurisdiction. However, in *CACI*, and citing Supreme Court precedent, the Federal Circuit found that that prior caselaw is "no longer good law in this respect."[9] Citing various cases, the Federal Circuit concluded that "'the Supreme Court has…clarified that so-called 'statutory standing' defects do not implicate a court's subject-matter jurisdiction'…even when the cause of action relies on a waiver of sovereign immunity [such as here]."[10]

This is a significant change coming out of recent Supreme Court precedent but which now results in a need for new analysis and consideration of jurisdictional and standing issues in protests before the COFC on a going-forward basis.

CONCLUSION

It is well reported that the current Supreme Court of the United States has created some degree of

upheaval on significant social and legal topics across a wide range of topics, from abortion to arbitration, to criminal matters, to executive privilege issues. Those waves also impact more archaic issues, such as bid protest jurisdiction and standing at the COFC, resulting in manifest changes to long-standing Federal Circuit precedent. What is yet to come remains in question, but there can be little doubt that more change will come.

Pittman is also a good reminder of long-standing *and remaining* precedent relating to protests. For example, one must file a bid protest in a timely manner, either before submission of one's bid or proposal (if based on some defect or ambiguity that is patent or obvious in the solicitation) or if based on the award, in the timeframe called for in the regulations, depending upon the circumstances. It is also a reminder that if you have any question as to the terms, meaning, or understanding of something in a solicitation, ask questions promptly and be prepared to protest. It is better not to guess or sit on your rights, as you may lose a protest based on that fact.

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[1] Decision at 5 (citing COFC decision, *M.R. Pittman Grp., LLC v. United States,* 154 Fed. CL 241, 244 (Fed. Cl. 2021) (internal quotations and citation to *Blue & Gold* omitted)).

[2] *Id.* (citations omitted).

[3] *Id.*

[4] *Pittman* at 7 (citing *Blue & Gold* at 1313-14)

[5] Decision at 7-8 (emphasis added)

[6] *CACI* at 6-7.

[7] *CACI* at 7.

[8] *CACI* at 8 (citations omitted).

[9] *CACI* at 9.

[10] *Id.* (citations omitted).