THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Steven L. Schooner

OCTOBER 2021 | VOLUME 35 | ISSUE 10

¶ 61 *Harmonia* Delayed: Anticipating The Federal Circuit's Next Decision On Bid Protest Timeliness

A special column by Nathaniel E. Castellano, a senior associate in the government contracts and national security practice group at Arnold & Porter; the ideas presented herein, particularly those that may prove to be in error, are his own.

Few matters occupy a bid protest lawyer's mind more than timeliness. The various rules that govern filing deadlines at the Government Accountability Office and U.S. Court of Federal Claims require constant, careful attention; they often drive litigation strategy and dominate parties' merits briefs. Indeed, this Report has dedicated several articles to protest timeliness issues. See, e.g., *Preaward Protests: When Are They Mandatory?*, 34 NCRNL ¶ 40; *Preproposal Protests: When Are They Mandatory?*, 30 NCRNL ¶ 43; *Postscript: Pathologies of the Protest System*, 27 NCRNL ¶ 38; *Protests of Solicitation Improprieties: Different Timeliness Rules*, 20 N&CR ¶ 41.

Naturally, then, when the U.S. Court of Appeals for the Federal Circuit is poised to decide a significant case that turns on protest timeliness, the bar awaits the opinion with much anticipation. The Federal Circuit heard just such a case nearly a year ago, on November 5, 2020: *Harmonia Holdings Group, LLC v. U.S.*, No. 2020-1538. As of this publication, *Harmonia* has been pending more than 330 days since argument, and counting. That is well over three times the average time it typically takes the Federal Circuit to issue precedential opinions in appeals from the Court of Federal Claims. Specifically, data compiled at the Morrison Foerster Federal Circuitry database (beginning November 1, 2019) shows that, on average, it takes the Federal Circuit 99.64 days after oral argument to issue a precedential decision in an appeal from the Court of Federal Claims. See https://federalcircuitry.mofo.com/statistics.

Appellate courts, of course, may take their time. And, there are plenty of disruptions—ranging from the quotidian to the pandemic—that might delay a decision for many months, without any impact to its substance. However, given the issues presented in *Harmonia*, the merits panel of judges assigned to the case, and the questions that those judges raised during argument, it is fair to read some intrigue into the amount of time that the Circuit has taken to resolve *Harmonia*. This article is intended to allow the Report's readers to do just that, teeing up the latest twists in the law

of bid protest timeliness so that, once the *Harmonia* decision issues, we may all have the context to appreciate it.

Context For Protest Timeliness At The Court Of Federal Claims: From *Blue & Gold* To *Inserso*

Whereas the timeliness rules at the GAO are primarily set by the GAO's regulations at 4 CFR § 21.2, no similar regulations apply to protests filed at the Court of Federal Claims. Instead, the timeliness rules at the court must be pieced together from a broad range of authorities.

Technically, all protests filed at the Court of Federal Claims are subject to the Tucker Act's general, six-year statute of limitations at 28 USCA § 2501. However, the statutory time bar is essentially irrelevant in the context of fast-paced bid protest litigation, where delays are most often measured by days and weeks (occasionally hours, minutes, and seconds)—not years.

That does not mean interested parties face no consequences for delay, however. Typically, a protester seeks injunctive relief from the court; a delayed filing may tilt the balance of harms and public interest against injunctive relief. Some risk also exists that the Court of Federal Claims may equitably bar a tardy protest under a theory of laches, although its judges appear divided as to whether and when laches apply to bid protests. See *ATSC Aviation, LLC v. U.S.*,141 Fed. Cl. 670 (2019); *Global Dynamics LLC v. U.S.*, 137 Fed. Cl. 105 (2018). A significant challenge in applying laches to bid protests is that a recent line of U.S. Supreme Court precedent rejects lower court attempts (including the Federal Circuit) to apply laches where Congress already has provided a statute of limitations. See *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Products*, 137 S. Ct. 954 (2017); *Petrella v. Metro-Goldwyn-Mayer Inc. v. U.S.*, 572 U.S. 663 (2014).

The primary bid protest timeliness rule applicable at the Court of Federal Claims is the so-called *Blue & Gold* rule, which 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 afterwards." *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1315 (Fed. Cir. 2007), 49 GC ¶ 320. The Federal Circuit found support for this rule in the patent ambiguity doctrine and equitable estoppel, as well as Tucker Act provisions that grant the Court of Federal Claims its modern bid protest jurisdiction, which advise that "[i]n exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." 28 U.S.C. § 1491(b)(3).

The *Blue & Gold* rule has expanded over time in various ways, too numerous and nuanced to even summarize here. In its latest and most controversial decision applying *Blue & Gold* to a bid protest, *Inserso Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020), 62 GC ¶ 180, a majority of the Federal Circuit panel explained that the rule broadly "applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so."

Federal Circuit Judge Reyna issued a thought-provoking dissent in *Inserso*, questioning whether the *Blue & Gold* rule is still valid in light of the Supreme Court precedent noted above in relation to laches and suggesting that the Court of Federal Claims best addresses delayed protest allegations in the context of remedy, not in terms of waiver or forfeiture: "[T]he majority's opinion turns on the so-called *Blue & Gold* 'waiver rule,' a hard-and-fast rule that this court created. This rule runs afoul of the separation of powers principle articulated in [*SCA Hygiene*] … and for this and other reasons should not be the deciding factor in this case."

However persuasive, Judge Reyna's dissenting opinion is, of course, a dissent; the majority dismissed his concerns in a footnote. 961 F.3d at 1349 n.1. And, despite the serious issues raised regarding the potential conflict between *Blue & Gold* and Supreme Court precedent, the Federal Circuit denied Inserso's petition for *en banc* review, without any substantive explanation.

Taken together: this tapestry of rules impacting protest timing at the Court of Federal Claims, and particularly Judge Reyna's dissent in *Inserso*, set the stage for *Harmonia*.

Harmonia

The *Harmonia* appeal asks the Federal Circuit to reconsider and clarify *Blue & Gold*. After Harmonia submitted its proposal, the agency issued a solicitation amendment, and Harmonia filed an agency-level preaward protest challenging the amendment. The agency denied Harmonia's protest. About five months later, the agency announced that Harmonia would not receive the award. Then, after receiving the award decision, Harmonia filed a postaward protest at the Court of Federal Claims raising essentially the same solicitation challenge as its preaward agency-level protest.

The court found that Harmonia, by submitting its agency-level protest before proposal submission, "facially met the requirements under *Blue & Gold*," but nevertheless dismissed the claim, refusing to "allow a protester to shield itself from waiver under the guise of *Blue & Gold* by waiting months after receiving an adverse agency-level protest decision before reviving its pre-award claims in a post-award protest." *Harmonia Holdings Group, LLC v. U.S.*, 146 Fed. Cl. 799 (2020).

Harmonia appealed. Judges Reyna, Schall, and Wallach heard the argument, each posing questions that indicate different views of the case. Judge Wallach, for his part, seemed persuaded by the Government's fundamental position that because (1) Harmonia knew the agency denied Harmonia's agency level protest and (2) Harmonia had plenty of time to pursue its solicitation challenge at another forum before the award announcement, Harmonia could not wait until after award to raise its solicitation challenge at the Court of Federal Claims.

Questions from Judges Reyna and Schall appear skeptical of the government's position, particularly that *Blue & Gold* requires a protester to file successive protests at some unspecified pace through multiple fora to avoid waiver or forfeiture. As part of a lengthy exchange, Judge Reyna questioned government counsel: "Is there a requirement under *Blue & Gold* that you file your pre-award protest before award and that you pursue it and conclude it before the awards are made?"

Whereas Judge Reyna's dissent in *Inserso* reveals aversion to any application of laches given the Tucker Act's statute of limitations and the *SCA Hygiene* line of cases, Judge Schall summarized the *Harmonia* appeal as one where laches might be the only guiding legal doctrine:

> In looking at *Blue & Gold Fleet*, the court recognized that one of the doctrines that has been recognized in this area is the doctrine of laches and equitable estoppel…. It seems to me that it may be an appropriate area to look into in this case, because otherwise we are sort of floating at sea without any real legal doctrine to bind us.
>
> On the one hand, you say correctly that you met the initial requirements of *Blue & Gold Fleet* by filing the agency level protest. That is certainly true…. On the other hand, there was a period of time here that passed and the government says that important policy considerations compelled you to move forward sooner than you did, and that is basically what I think the Court of Federal Claims picked up on.
>
> But it does seem to me to be an appropriate area to look at the doctrine of laches…. Assuming laches is

pertinent in this area, and by the language of *Blue & Gold Fleet* it is, can we decide the laches issue here or should it not be returned to the Court of Federal Claims…?

That is where things stand as of November 2020. While we, of course, cannot know what exactly the panel is working to resolve, it at least seems likely that the panel members—and perhaps other Federal Circuit judges that may have already reviewed a version of the opinion circulated before issuance—have not yet been able to reach a workable consensus on the future of the *Blue & Gold* rule. Only time will tell, but until then, perhaps the best we can do is think through the potential outcomes.

Potential Outcomes

The true impact of this decision will largely turn on the precise language that the Federal Circuit uses and how that language applies to future cases. At a high level, at least three scenarios seem possible.

First, the Federal Circuit could affirm and adopt the reasoning of the Court of Federal Claims that Harmonia fails against the *Blue & Gold* doctrine. That would expand *Blue & Gold* to mean that, while a timely agency-level protest to solicitation terms is sufficient to satisfy *Blue & Gold* in the first instance, once the agency denies that protest the protester is obligated to proceed with some unspecified haste to the GAO and/or the Court of Federal Claims to preserve its challenge.

It will be critical in this circumstance whether the decision is issued as a precedential opinion, binding on all future panels, or a nonprecedential opinion that could be persuasive but not binding on future cases. Pursuant to Federal Circuit Rule 36, the panel could conceivably affirm the decision without opinion, avoiding the issue entirely. That being said, a nonprecedential decision or summary affirmance in this case would appear contrary to the Federal Circuit's Internal Operating Procedures, http://www.cafc.uscourts.gov/rules-of-practice/internal-operating-procedures, which indicate that nonprecedential opinions are inappropriate when the decision addresses an important unsettled issue of law and is relevant to entities and practitioners beyond the parties. See Nathaniel E. Castellano, *Year in Review: The Federal Circuit's 2019 Government Contracts Decisions*, 69 Am. U. L. Rev. 1265, 1287 (Apr. 2020) (discussing significant decisions issued with nonprecedential designation despite internal policies).

Second, the Federal Circuit could reverse and narrowly hold that Harmonia satisfied the *Blue & Gold* rule by filing its agency-level protest before award. Such a decision, without more, could leave open a serious question of whether an offeror can, without consequence, file a preaward agency-level protest challenging the terms of a solicitation, learn that the agency denies that protest, wait months (perhaps indefinitely) to hear the outcome of the competition, and only then, if unsuccessful, file a postaward protest at the Court of Federal Claims again challenging the terms of the solicitation. Of course, as articulated by Government counsel during oral argument, that is essentially the same policy outcome that *Blue & Gold* sought to avoid. As Harmonia noted in oral argument, one potential solution to this problem may be found in Judge Reyna's dissenting opinion from *Inserso*, explaining that a protester's delay in challenging solicitation terms might be more appropriately addressed as part of the court's inquiry into remedy, rather than waiver.

Third, if the Federal Circuit reverses and remands with instruction to engage in the laches analysis contemplated by Judge Schall, that raises the question whether laches applies to bid protests at the Court of Federal Claims. While the Federal Circuit did invoke laches in *Blue & Gold*, as

discussed above, subsequent Supreme Court precedent confirms that courts are not to apply laches where Congress has already imposed a statute of limitations, and the Tucker Act does have a general statute of limitations.

But, it is not a foregone conclusion that the Tucker Act's statute of limitations would preclude application of laches in the context of a bid protest. Although the Supreme Court's holding in *SCA Hygiene* and *Petrella* are strong admonition against applying laches to bar a claim where a statute of limitation is applicable, it is not obvious that they preclude laches in the context of a protest under 28 USCA § 1491(b). Those cases involved statutes where Congress provided both a cause of action and a statute of limitations, leading the Supreme Court to conclude in *SCA Hygiene* that laches does not apply "when Congress enacts a statute of limitations." The Supreme Court clarified that laches is best suited for "claims of an equitable cast for which the Legislature has provided no fixed time limitation." Congress did not specify a statute of limitations when it passed the Administrative Dispute Resolution Act of 1996 and granted the Court of Federal Claims jurisdiction over bid protests under 28 USCA § 1491(b). Rather, Congress arguably left it to the Court of Federal Claims' judgment to determine when such protests are timely with the instruction that the Court "shall give due regard to the interests of national defense and national security and the need for expeditions resolution of the action." 28 USCA § 1491(b)(3). When Congress enacted the Tucker Act's general six-year statute of limitations in 1887, it is difficult to imagine that Congress intended to set the deadline for bid protest actions brought under a distinct waiver of sovereign immunity that would not exist until decades later. Tucker Act, ch. 359 § 1, 24 Stat. 505 (1887). Protests seeking to enjoin procurement programs are arguably the very "claims of an equitable cast for which the Legislature has provided no fixed time limitation" that the Supreme Court distinguished in *SCA Hygiene*.

Regardless, if the Federal Circuit reverses or remands without addressing the validity of a laches defense in bid protest actions in its decision here, it is only a matter of time before it is asked to do so.

Concluding Thoughts

While the bid protest bar eagerly awaits a decision in *Harmonia*, with good reason, we should not expect that decision to bring material clarity to the timeliness rules that apply at the Court of Federal Claims. The Federal Circuit's compilation of precedential decisions interpreting *Blue & Gold* will necessarily leave much to litigate in future protests, as do the timeliness rules at the GAO.

Given the serious issues raised in Judge Reyna's *Inserso* dissent, however, the *Blue & Gold* rule does appear ripe for the full court's consideration through *en banc* review. The Federal Circuit declined *en banc* review of *Inserso*, but nothing presents future parties from seeking *en banc* review of the same legal issue. And, just because the petition for review was denied in *Inserso*, that does not mean future petitions will meet the same fate. If *Harmonia* and other decisions continue to highlight the apparent (if not fatal) tensions between *Blue & Gold* and *SCA Hygiene*, the need for *en banc* review only grows.

Although there is nothing we can do to expedite the Federal Circuit's decision in *Harmonia*, the bar need not wait idly on the sidelines in future appeals involving the *Blue & Gold* rule. In any significant appeal or petition for review, interested members of the procurement community can and

should consider voicing their concerns and interests through *amicus* briefing. The Federal Circuit welcomes *amicus* briefing, particularly in the government contracts appeals that fall outside its core jurisdiction of patent litigation, and we should not hesitate to provide that friendly briefing in appropriate cases. See Jimmie V. Reyna & Nathaniel E. Castellano*, Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context Is Key*, 46 Pub. Cont. L.J. 209 (Fall 2016); Jayna Marie Rust, *How To Win Friends and Influence Government Contracts Law: Improving the Use of Amicus Briefs at the Federal Circuit*, 42 Pub. Cont. L.J. 185 (Fall 2012). *Nathaniel E. Castellano*