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¶ 18 APPEALS TO WATCH: *SEKRI* Asks The Federal Circuit To Walk Another Protest Timing Tightrope

A special column by Nathaniel Castellano, a Murray J. Schooner Procurement Scholar; the ideas presented here, particularly those that may prove to be in error, are the author's own and should not be attributed to any other.

We couldn't blame the bid protest bar for hoping that the U.S. Court of Appeals for the Federal Circuit's 2022 docket would provide some respite from protest timeliness decisions. After all, it has only been a few months since the Federal Circuit calmed our nerves by avoiding serious disruption to the bid protest timeliness rules in *Harmonia Holdings Group, LLC v. U.S.*, 20 F.4th 759 (Fed. Cir. 2021), 3 GC ¶ 376. See *Harmonia Delayed: Anticipating the Federal Circuit's Next Decision on Bid Protest Timeliness*, 35 NCRNL ¶ 61; *Postscript: Harmonia Better Late Than Never*, 36 NCRNL ¶ 6.

And we have barely had time to grapple with the potential implications of the divided 2020 decision in *Insero Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020), 62 GC ¶ 180, where Judge Jimmie V. Reyna's dissenting opinion questioned whether the timeliness rule in *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320, can be reconciled with U.S. Supreme Court precedent, and the majority opinion arguably created a divide between the protest rules that apply to organizational conflict of interest allegations before the Government Accountability Office and the U.S. Court of Federal Claims. See *Preaward Protests: When Are They Mandatory?*, 34 NCRNL ¶ 40. Compare *Perspecta Enterprise Solutions, LLC v. U.S.*, 151 Fed. Cl. 772 (2020), 63 GC ¶ 29, with *Honeywell Technical Solutions, Inc.*, Comp. Gen. Dec. B-400771, 2009 CPD ¶ 49, 2009 WL 564602, 51 GC ¶ 141.

Alas, in the first week of January 2022, the Federal Circuit heard argument in *SEKRI, Inc. v. U.S.*, No. 21-1936, an appeal that asks the Federal Circuit to explain how a case arising from a relatively unique area of procurement law fits into the general timeliness standards that govern most COFC protests. There are routes to a clean resolution, but there is also risk of an overbroad decision that “unnecessarily creates precedential analysis that is likely to cause unpredictable second and third order effects in future bid protest timeliness determinations.” *Per Aarsleff A/S v.*

U.S., 829 F.3d 1303 (Fed. Cir. 2016), 58 GC ¶ 255 (Reyna, J. concurring). There is also some risk that the Federal Circuit's decision could create another divide between what actions constitute an agency-level protest at the GAO and the COFC, which the GAO recently addressed in *Science & Technology Corp.*, Comp. Gen. Dec. B-420216, 2022 CPD ¶ 1, 2022 WL 102201.

The **SEKRI** Protest

The context for the appeal is laid out well in Judge Hertling's opinion, *SEKRI, Inc. v. U.S.*, 152 Fed. Cl. 742 (2021). To summarize, SEKRI is not a typical protester, nor a typical federal contractor. SEKRI is a nonprofit organization that operates facilities to employ individuals with disabilities. Pursuant to the Javits-Wagner-O'Day (JWOD) Act, 41 USCA §§ 8501–8506, SEKRI is designated as the mandatory source provider for certain purchases of Advanced Tactical Assault Panels (ATAPs), which are components of protective ballistic vests. Under the JWOD Act and associated regulations, SEKRI does not win its Government contracts by submitting proposals against competitive solicitations; rather, SEKRI is the mandatory source for its items designated on the “Procurement List,” and if an agency wants to purchase an item on the Procurement List, the agency must go to the mandatory source. See Federal Acquisition Regulation 8.002(a).

The Defense Logistics Agency issued a competitive solicitation for certain items and eventually amended that solicitation to call for ATAPs. SEKRI learned about the solicitation amendment before the proposal submission deadline, and, as the mandatory source for ATAPs, SEKRI coordinated with SourceAmerica (the designated central nonprofit organization under the JWOD Act), which apparently contacted DLA on SEKRI's behalf. SEKRI did not submit a proposal in response to the solicitation, and other than its outreach through SourceAmerica, SEKRI did not file a formal protest before the proposal submission deadline.

Several months after the proposal submission deadline, but before DLA made award, SEKRI filed a complaint protesting the solicitation at the COFC. Judge Hertling dismissed SEKRI's complaint based on threshold timeliness issues.

The court principally questioned how SEKRI could qualify as an “interested party” to protest. This analysis is driven by the Federal Circuit's interpretation of 28 USCA § 1491(b) to impose the same “interested party” standing restrictions that apply to GAO protests. *American Federation of Government Employees, AFL-CIO v. U.S.*, 258 F.3d 1294 (Fed. Cir. 2001), 43 GC ¶ 292; *Aero Spray, Inc. v. U.S.*, 156 Fed. Cl. 548 (2021), 63 GC ¶ 338 (discussing development of standard).

Under the Federal Circuit's precedent, to be an interested party a protester must (1) be an actual or prospective offeror and (2) have a direct economic interest in the procurement. To satisfy the first element, the protester must either (a) submit a timely proposal to become an “actual offeror” or (b) diligently pursue its protest rights before the proposal submission deadline to maintain “prospective offeror” status. The protest need not necessarily be filed at the COFC; it could also be a protest at the GAO or the agency, so long as the protest rights are diligently pursued. *CGI Federal, Inc. v. U.S.*, 779 F.3d 1346 (Fed. Cir. 2015), 57 GC ¶ 80.

The Federal Circuit has not squarely addressed what kind of actions are necessary to diligently pursue protest rights when communicating with an agency, but it provided some guidance in *Bannum, Inc. v. U.S.*, 779 F.3d 1376 (Fed. Cir. 2015), 57 GC ¶ 87, noting that “mere notice of dissatisfaction or objection is insufficient to preserve [the protester's] defective-solicitation challenge” and stating:

Requiring that the prescribed formal routes for protest be followed (to avoid waiver) reduces uncertainty about whether the issue is joined and must be resolved, and thereby helps prevent both the wasted and duplicative expenses (of all bidders and the government) and the delayed implementation of the contract that would likely follow from laxer standards of timely presentation of solicitation challenges.

Judge Hertling found that SEKRI had conceded it did not submit a bid in response to the solicitation, notwithstanding SEKRI's mandatory source status, and that based on the evidence presented SEKRI did not file a protest or otherwise diligently pursue its protest rights before the proposal submission deadline in a manner that satisfied the *Bannum* guidance. Accordingly, Judge Hertling concluded that SEKRI was not an interested party. For the same reasons, Judge Hertling explained that SEKRI could not satisfy the *Blue & Gold* rule even if it did have standing, because SEKRI was challenging the solicitation but did not protest before the proposal submission deadline.

Critically, these findings rest on Judge Hertling's fact-specific determination, based on the evidence presented, of what SEKRI knew about the solicitation, when SEKRI learned that information, and what SEKRI did in response:

SEKRI lacks standing for the same reason it would lose on the merits under *Blue & Gold Fleet*. It did not do anything in response to the solicitation; it neither submitted a bid nor objected to the DLA or any other entity prior to the proposal deadline, despite knowing that the DLA was procuring ATAP through competition. SEKRI did not diligently pursue its protest rights through the SourceAmerica emails. SourceAmerica merely inquired on SEKRI's behalf whether the DLA would be willing to move forward with SourceAmerica, and the DLA replied that it was proceeding through competition. SEKRI then did not formally protest the solicitation until January 21, 2021, when it filed the present action in this court, 106 days after the close of the solicitation. SEKRI also failed to protest or complain informally to the DLA in a manner that might have salvaged its ability to claim status as a prospective bidder.

Judge Hertling recognized that, given the unique posture of a mandatory source provider, the traditional interested party standard may not be appropriate, but absent some exception recognized by the Federal Circuit, Judge Hertling concluded that dismissal was unavoidable:

The Court notes that it makes sense intuitively that a mandatory source of supply in SEKRI's situation would have standing to challenge the solicitation even without being an actual or prospective bidder, because SEKRI is challenging the mere fact that there was an open solicitation for bids at all. The Federal Circuit precedents have never addressed the precise situation confronting the Court. The test established by those precedents, however, is clear and is not limited to the facts of the cases that were before the Court of Appeals as it devised the test. Until the Federal Circuit clarifies the issue or creates a relevant exception to its test for standing under [28 USCA] § 1491(b), it is not for this Court to carve out its own exception in the face of binding precedent.

Oral Argument

SEKRI appealed. The merits panel that heard oral argument foreshadows bold, independent analysis. Judge Pauline Newman, who presided, has been described as the Federal Circuit's own "Great Dissenter." Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors,"* 40 PUB. CONT. L.J. 275 (2011). Judge Reyna, who also sat for argument, authored the unanimous opinion in *Harmonia* and dissenting opinion in *Insero*, both noted above, as well as the dissenting analysis that was eventually adopted by the U.S. Supreme Court in *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969 (2016), 58 GC ¶ 227. The final panel member, Judge Tiffany Cunningham, is among the most recent Federal Circuit appointees and undoubtedly brings a fresh perspective to the existing bid protest precedent.

If the *SEKRI* protest weren't complicated enough already, it certainly was after argument. First,

the primary cause of confusion surfaced when the Government opened its argument by raising an issue for the first time on appeal, asserting that SEKRI was not actually a mandatory source for this procurement at all. As Judge Reyna recognized and Government counsel conceded, the Government never raised this argument before the COFC and never even raised the issue in its briefs on appeal. Nevertheless, the Government argued that because SEKRI is (allegedly) not a mandatory source for the procurement, SEKRI does not have a direct economic interest in the procurement and for that reason cannot qualify as an interested party with standing.

Second, the panel questioned whether SEKRI needed to submit a proposal to establish interested party status and standing given its mandatory source status and the unique rules of the JWOD Act. Consistent with the excerpt from Judge Hertling's opinion above and the plain text of 28 USCA § 1491(b), there is some appeal to the notion that if a company has a statutory right to receive a contract for certain goods, that company is necessarily an "interested party" to challenge a solicitation that would awarding a contract for those goods to another entity.

Third, further confusion came from an exchange between Judge Reyna and Government counsel as to whether *Blue & Gold* required SEKRI to protest before the proposal submission deadline or before award. Judge Reyna questioned whether SEKRI satisfied *Blue & Gold* by filing its complaint before the date of award (regardless of the proposal submission deadline), based on decisions like *Harmonia* and *COMINT Systems Corp v. U.S.*, 700 F.3d 1377 (Fed. Cir. 2012), 55 GC ¶ 39. Practitioners would likely be surprised by such a holding. In *COMINT*, the challenged amendment was issued after the proposal submission deadline; there was no dispute that the protester *could not* have challenged the amendment before submitting the proposal, so the Federal Circuit extended *Blue & Gold* to require the protester to file before award or as soon as practicable thereafter. See *VS2, LLC v. U.S.*, 155 Fed. Cl. 738 (2021), 63 GC ¶ 288 (discussing practical impact of *COMINT*). In *Harmonia*, the protester *did* file its agency-level protest before the proposal submission deadline associated with the amendments that the protester challenged, so there was no question as to whether the agency-level protest was filed in accordance with *Blue & Gold* (only whether the protester had to proceed immediately to the GAO or COFC once the agency denied its protest to satisfy *Blue & Gold*).

Finally, the panel questioned whether the exchanges among SEKRI, SourceAmerica, and the DLA might qualify as a timely agency-level protest that would preserve SEKRI's interested party status and satisfy *Blue & Gold*. Curiously, neither the briefing before the Federal Circuit nor the oral argument appears to address whether Judge Hertling's finding on that issue is a finding of fact to be reviewed for clear error, or an issue of law to be reviewed *de novo*.

Potential Outcomes

There are several ways for the Federal Circuit to resolve this unique case without disrupting the current timeliness rules depended on by the rest of the protest system. First, the panel could issue a nonprecedential opinion. The existing Federal Circuit precedent applicable in this case (and applied in Judge Hertling's opinion) is largely settled. Whether the panel agrees or disagrees with the outcome in this case does not require another precedential decision that must be reconciled with existing precedent.

Second, because Judge Hertling's opinion turns on his fact-based determination that SEKRI did not do enough to diligently pursue its protest rights or file an agency-level protest before the pro-

positional submission deadline, the cleanest route to resolving this case is likely to focus on whether Judge Hertling's decision withstands the appropriate standard of review. The findings that Judge Hertling made here seem akin to findings of competitive prejudice, which are considered factual findings on the record before the court (as opposed to a finding on the administrative record) and are reviewed under the clear error standard. *Bannum, Inc. v. U.S.*, 404 F.3d 1346 (Fed. Cir. 2005), 47 GC ¶ 266; *CliniComp International, Inc. v. U.S.*, 904 F.3d 1353 (Fed. Cir. 2018), 60 GC ¶ 295. However, to the extent the panel concludes that the COFC applied the wrong legal standard, that may raise an issue of law that warrants clarification and perhaps remand, comparable to the outcome in *Harmonia*. Insofar as the Federal Circuit addresses this issue, it will be interesting to see how the Federal Circuit's standard for what constitutes an agency-level protest compares to the GAO's standard for the same. As the GAO recently reiterated, the GAO "has long held that, to be regarded as a protest, a written statement need not state explicitly that it is or is not a protest, but it must convey the intent to protest by a specific expression of dissatisfaction with the agency's procurement actions and a request for relief.... In contrast...a letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest." *Science & Technology Corp.*, Comp. Gen. Dec. B-420216, 2022 CPD ¶ 1, 2022 WL 102201.

Third, if the panel concludes that the existing framework of interested party and *Blue & Gold* precedent does not appropriately accommodate protests brought by mandatory source providers—then the panel may consider recognizing a narrow exception to those rules that better accommodates mandatory source providers. The Federal Circuit crafted the interested party standard and the *Blue & Gold* rule; when those rules do not serve their intended purpose in the context of a certain type of protest, the Federal Circuit may consider adjusting the rules to recognize exceptions in unique circumstances (although doing so may require en banc action). To be sure, a case-specific exception to the "actual or prospective offeror standard" wouldn't necessarily guarantee that SEKRI has standing in this protest, because (assuming the issue is remanded) the COFC would presumably need to confirm that SEKRI is in fact a mandatory source (in light of the issue that the Government raised for the first time on appeal) and therefore has the necessary direct economic interest to protest. And, a case-specific exception to *Blue & Gold* would not necessarily excuse any undue delay that the trial court might find in SEKRI's actions, because, as confirmed in *Harmonia*, the COFC can take such issues into account when determining what relief, if any, is warranted.

In short, *SEKRI* presents a complicated appeal arising out of a unique area of procurement law. Despite the various sources of apparent confusion during oral argument, the appeal can and should be resolved without disrupting the relatively settled timeliness rules that govern COFC protests. Until the panel issues its decision, we can only hope for the best and keep watch. *Nathaniel E. Castellano*