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The Most Important Government Contracts Related Decisions of 2020

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Inserso Corporation v. United States, 961 F.3d 1343 (Fed. Cir. 2020)

This decision involves a bid protest, a subject that ordinarily would not be included in this panel discussion. *Inserso* deserves our attention for two reasons: (1) the question whether the equitable doctrine of laches can override a statute of limitations applicable to suits for damages, and (2) the powerful dissent by Judge Jimmie V. Reyna and its implications beyond the facts in *Inserso*.

Inserso involved the Encore III multiple award solicitation issued by the U.S. Defense Information Systems Agency ("DISA") for information technology services for various government agencies. The Federal Circuit held that Inserso's protest was barred by the court's standard announced in *Blue & Gold Fleet, L.P. v. United States*, 492 F. 3d 1308 (Fed. Cir. 2007) because Inserso did not file a timely protest objecting to the solicitation.

DISA divided the Encore III solicitation into two competitions, referred to as "suites," as follows: (1) a suite of contracts awarded using full and open competition, and (2) a suite of contracts for small businesses. Small businesses could compete in both competitions but could only receive one award. Firms could also compete through joint ventures or partnerships. Several firms bid in the small business phase and in the full and open competition as part of joint ventures. Inserso competed only in the small business competition.

The solicitation stated the competition for the two suites would begin simultaneously. However, DISA's timing did not go as planned. By November 8, 2017, DISA completed the full and open competition and the debriefing process for that suite. DISA, however, did not announce its award decisions for the small business suite until September 7, 2018, almost a year later. DISA attached a debriefing notice to the award announcement for the small business suite. Inserso noted to DISA that several awardees in the small business suite had competed in the full and open competition as part of joint ventures or partnerships and asked whether they had received similarly detailed debriefings during the full and open competition. Inserso said the earlier debriefing (for the full and open competition suite) would have provided unequal information, giving a competitive advantage to some bidders that also participated in the small business competition. DISA indicated that all unsuccessful bidders in both competitions received similarly detailed information in their debriefings.

In its protest, Inserso alleged that some offerors in the small business competition had the total evaluated price for all full and open competition awardees and information regarding DISA's evaluation methodology. This imbalance, Inserso alleged, created an improper organizational conflict of interest ("OCI"). Inserso challenged DISA's disclosure of information

in the full and open suite while some of those firms were still preparing bids for the small business suite. Inserso argued that DISA should have disclosed the same information to all bidders in the small business suite, and this failure gave bidders in the full and open suite an unfair competitive advantage. Knowledge of the winning total evaluated prices from the full and open competition would provide a small business competitor a target range to win an award.

The Court of Federal Claims ("COFC") granted the government's motion for judgment on the administrative record in the initial protest. The court found that "even if the Agency's limited distribution of information resulted in an OCI or disparate treatment, there [was] no evidence that prejudice resulted from such a distribution." Inserso appealed.

The Federal Circuit held the claim was barred by *Blue & Gold Fleet*, which adopted the Government Accountability Office ("GAO") rule that a party that fails to object to a patent error in a solicitation before the close of bidding waives the ability to raise the objection in a bid protest in the COFC. The court held that Inserso knew or should have known DISA would disclose information to bidders in the full and open competition at the time of and shortly after notification of awards. Competitors also knew there would be overlap of bidders in the two phases of competition.

Inserso argued DISA should not have conducted debriefings for the full and open competition before the small business competition closed. That would have meant delaying debriefing in the full and open competition for nine months.

According to the court, Inserso should have known that debriefings in the full and open competition would provide a competitive advantage in the small business competition. As a result, the court ruled Inserso's protest was untimely.

Judge Reyna dissented, stating:

1. The *Blue & Gold* "waiver rule" is undermined by the Supreme Court's decisions in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct 954 (2017) and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014). The "waiver rule" is a misnomer. "Waiver" refers to an intentional relinquishment of a known right. It is an equitable defense left to the court's discretion. The *Blue & Gold* rule does not fit this definition. Rather, *Blue & Gold* is a judicially-created time bar, under which dismissal is mandatory. The court gives no regard to the protester's intent and is afforded no discretion. The Supreme Court in *SCA Hygiene* held that when Congress enacts a statute of limitations, courts cannot jettison congressional judgment on the timeliness of filing suit. Therefore, the court cannot rely on the equitable doctrine of laches to preclude a claim within the statute of limitations. Under the Tucker Act, "every claim of which the United States Court of Federal Claims has jurisdiction … shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501. The prejudicial effects of

delay can only be considered in fashioning relief. The consequences of delay in commencing suit may be sufficient to warrant curtailment of the relief equitably awarded. It is also in the public interest that government errors in a solicitation not go unreviewed, even if the only feasible remedy is a declaratory judgment that the government erred. The court's statutory authority to give "due regard" to expeditious resolution is "not license to override the Claims Court's six-year statute of limitations."

2. The "waiver rule" does not apply to Inserso's claims because they did not arise from patent errors apparent from the solicitation itself. Inserso brought two grounds of protest: an OCI claim and, alternatively, a claim of unequal treatment of offerors. Both claims arose from the government's disclosure of allegedly competitive pricing information only to bidders in the full and open suite, and only as a result of a divergence in the timing of the two competitions. The solicitation noted the full and open and small business suite competitions would begin simultaneously. Instead, the agency completed the full and open suite competition months before the small business suite competition. There was no obvious error on the face of the solicitation. To the contrary, the solicitation stated the government recognized that pricing information from one suite could be competitively valuable in the other suite and the government would take measures to prevent unequal disclosure. Bidders do not have an obligation to anticipate and preemptively challenge all OCIs that could potentially arise under a solicitation. Rather, the government has the burden to investigate OCIs and "avoid, neutralize, or mitigate significant potential conflicts before contract award." Since OCIs undermine the integrity of the procurement process, a court should review the merits of OCIs rather than bar claims on timeliness grounds. Moreover, the *Blue & Gold* time bar cannot extend to non-solicitation challenges. The parties did not brief, and the parties did not discuss, the interplay between *Blue & Gold* and *SCA Hygiene*. The Claims Court did not address whether Inserso's claims were time-barred under *Blue & Gold* but instead reached the merit of Inserso's claims.

COMMENT

1. Blue & Gold "Waiver" At Issue in Pending Case

Judge Reyna's dissent reflects his keen understanding of government procurement. He may have another opportunity to voice his views on *Blue & Gold* as a judge on the panel in *Harmonia Holdings Group, LLC v. U.S.*, No. 2020-1538, where the bid protest "waiver" rule is again at issue. *See also* 146 Fed. Cl. 799 (2020) (decision below).

2. Laches Defense to Government Audit Claims

Inserso involved a bid protest. What other application might the ruling have? What about government claims arising out of Defense Contract Audit Agency ("DCAA") audits

conducted many years after the costs were incurred? The six-year Contract Disputes Act ("CDA") statute of limitations is the contractor's first line of defense. Could there be a laches defense on the ground of prejudicial delay even if the government asserted the claim within the six-year limitations period?

In *DRS Global*, a 2018 decision, the government disallowed various costs the contractor invoiced, asserting the costs were not substantiated. The contractor argued that any alleged lack of support for its costs was apparent when it submitted its invoices. Thus, the contractor argued, the government's claim accrued upon submission of the invoice, more than six years before the contracting officer issued the final decision. The ASBCA stated there is no blanket rule that government claims accrue when costs are invoiced or paid. The contractor did not include invoices and backup information in the record or otherwise establish that the government should reasonably have known of its claims outside the CDA limitations period. The ASBCA denied the contractor's motion for summary judgment but suggested the potential for a laches defense. *DRS Glob. Enter. Sols., Inc.*, ASBCA No. 61368, 18-1 BCA ¶ 37,131.

As to laches, the Board stated:

> We note that DRS's motion raises only the statute of limitations. Therefore, we need not address whether the more than 10 years that elapsed between payment of the invoices at issue and the issuance of the contracting officer's final decision calls for application of the doctrine of laches.

In *DRS*, the Board found facts that did not support a statute of limitations defense, but arguably supported a laches defense:

> DRS's contention that the government should have known of its claim in 2006 is undermined by letters DRS wrote to DCAA and DCMA in 2013 and 2014. In those letters, DRS complained that the audit did not take place until seven years after the fiscal year closed, and alleged that a series of corporate acquisitions and consolidations, combined with its bank's policy of purging records after seven years, resulted in the loss or destruction of the requested documentation. (R4, tab 8 at G-231, tab 9 at G-233) This raises a rather obvious question: if the records disappeared over the course of seven years, how could the government have known about the lack of substantiation in 2006, as DRS contends in its motion?

In a 2019 case, *URS Fed. Servs., Inc.*, ASBCA No. 61227, 19-1 BCA ¶ 37,431, the contractor asserted a laches defense against a government cost disallowance claim. The Board held that some, but not all, of the government's claims were barred by the CDA's statute of

limitations ("SOL"). As to the claims not barred by the SOL, the Board declined to grant the contractor's motion for summary judgment on the laches defense. More than ten years had passed between invoicing of certain disallowed costs and issuance of the final decision. The contractor provided a declaration from a vice president stating records had been lost in the intervening years, and employees with knowledge of the claims had left the company. The government countered that the contractor had "failed to make any representation that additional documentation ever existed or that the government's delay in asserting its claim caused appellant to be adversely affected." The Board found that there were material facts in dispute regarding whether or to what extent the contractor was prejudiced by government delay and denied the contractor's motion for summary judgment.

- Both *DRS* and *URS* post-dated the Supreme Court decisions in *SCA Hygiene* and *Petrella*. As those decisions likely render a laches argument dead on arrival where there is an applicable statute of limitations, laches is likely to be a nonstarter because of *SCA Hygiene* and *Petrella*.

- It is not easy to prevail on laches. Contractors have had particular difficulty establishing prejudice in asserting the laches defense against government cost disallowance claims. *See, e.g., S.E.R., Jobs For Progress, Inc. v. United States, 759 F.2d 1* (Fed. Cir. 1985); *JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991). There are few instances where even the government has won on a laches defense.

- In a rare case in 2018, the Armed Services Board of Contract Appeals held that a contractor's claim was barred by laches. *Anis Avasta Construction Co.*, ASBCA No. 61107, 18-1 BCA ¶ 37,036.

- In another 2018 case, a district court recognized the unavailability of the laches defense where there was an applicable SOL in a False Claims Act context. *See United States ex rel. Morgan v. Champion Fitness, Inc.*, 2018 WL 5114124, at *8 (C.D. Ill. Oct. 19, 2018) (relying on *SCA Hygiene* to hold doctrine of laches could not be asserted because of applicable statute of limitations at 31 U.S.C. § 3731(b)).

- In a 2018 Administrative Procedure Act ("APA") challenge relating to a federal grant, the court cited *SCA Hygiene*, but then examined whether laches applied using the traditional test instead of finding the defense was unavailable. *Healthy Futures of Texas v. Dep't of Health & Human Servs.*, 315 F. Supp. 3d 339 (D.D.C. 2018).

- Laches notably may still be a viable defense where there is no applicable statute of limitations. For example, laches could be in play for claims under contracts awarded before October 1, 1995. The Federal Acquisition Streamlining Act of 1994 ("FASA") revised the CDA to add the six-year statute of limitations. FASA did not specify whether the statute of limitations was retroactive. However, the implementing regulations in the FAR made clear that the limitations period was prospective only.

Therefore, the CDA statute of limitations does not apply to contracts awarded before October 1, 1995. FAR 33.206(a); *Motorola, Inc. v. West*, 125 F.3d 1470 (1997). Laches could apply in relation to claims arising under those contracts.

3. Laches Can Only Affect Equitable Relief

As stated by Judge Reyna in his dissent in *Inserso* and by the Supreme Court in *Petrella,* the laches doctrine can only affect how a court fashions *equitable* relief. Here is the pertinent portion of Judge Reyna's dissent in *Inserso*:

> Instead, we consider the prejudicial effects of delay at the remedy phase. [*Petrella*] at 685, 687, 134 S.Ct. 1962 (noting that in "extraordinary circumstances, ... the consequences of a delay in commencing suit may be sufficient to warrant ... curtailment of the relief equitably awarded"). Here, the Claims Court has the discretion to "award any relief that the court considers proper," including declaratory relief, injunctive relief, and monetary relief limited to bid and proposal costs. 28 U.S.C. § 1491(b)(2) (emphasis added). Additionally, the Claims Court "shall give due regard to ... the need for expeditious resolution of the action." *Id.*, § 1491(b)(3). Thus, the Claims Court is empowered to consider a protestor's prejudicial delay when fashioning relief. Additionally, it is in the public interest that government-made errors in a solicitation do not go unreviewed, even if the only feasible remedy given a protestor's delay is a declaratory judgment that the government erred. *See Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 429 (2018) (noting that an "important public interest" is served through "honest, open, and fair competition" because such competition "improves the overall value delivered to the government in the long term" (internal quotation marks omitted)).

Inserso Corp., 961 F.3d at 1355.

In *Petrella* the Supreme Court explained:

> [L]aches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation…. Both before and after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief.

Petrella, 572 U.S. at 678 (2014) (citations and footnote omitted). In keeping with the equitable origin of the doctrine, the court stated:

> Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff. And a plaintiff's delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the "profits of the infringer ... attributable to the infringement." § 504(b).

Id. at 667–68. In note 1, which comes directly at the end of the passage above, the court noted:

> As infringement remedies, the Copyright Act provides for injunctions, § 502, impoundment and disposition of infringing articles, § 503, damages and profits, § 504, costs and attorney's fees, § 505. Like other restitutional remedies, recovery of profits "is not easily characterized as legal or equitable," for it is an "amalgamation of rights and remedies drawn from both systems." Restatement (Third) of Restitution and Unjust Enrichment § 4, Comment b, p. 28 (2010). Given the "protean character" of the profits-recovery remedy, *see id.*, Comment c, at 30, we regard as appropriate its treatment as "equitable" in this case.

Id. at 668 n.1.

4. Misuse of the Term "Waiver" in Termination for Default Cases

The misuse of the term "waiver" is not unique to the context of the *Blue & Gold* rule. "Waiver" has long been misused (and continues to be misused) in the context of default terminations where the Government does not exercise its right to terminate for default within a reasonable amount of time. The Court of Claims explained more than fifty years ago that this is properly referred to as an "election," not "waiver":

> Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders the alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given. This is popularly if inaccurately referred to as a waiver of the right to terminate. 5 Williston, *Contracts, Third Ed.*, § 683.

Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969). *See also* Gilbert A. Cuneo, Waiver of the Due Date in Government Contracts, 43 VA. L. REV. 1 (1957) ("Waiver is… said to have a close relationship with election because choice of one thing waives the right to the other–a right which never vests. Ewart sharpens the distinction by stating that if you had a choice between a horse and a mule and you selected the horse, you would not say that you waived the mule.") (*citing* Ewart, Waiver Distributed 5, 13).

Even though the *Devito* court urged the use of the term "election" in place of "waiver," the courts and boards continue to use "waiver" – even, ironically "*Devito* waiver." *See, e.g.*, *H&KS Constr. Holding Corp.*, ASBCA No. 60164, 19-1 BCA ¶ 37,268 ("[T]his was a construction contract, to which the *DeVito* waiver would not normally apply.").

The Federal Circuit discussed the "election" doctrine and explained how it differs from "waiver" in the context of a *Winstar* damages case. *See Old Stone Corp. v. United States*, 450 F.3d 1360, 1374 (Fed. Cir. 2006) ("OSC's failure to promptly assert a breach of contract did not, of course, result in a waiver of its right to assert a breach at a later time and recover damages…. But here the restitution remedy is not precluded by inaction —"forbearance, failure or delay" in exercising the right to restitution—but rather by OSC's taking an action—election among inconsistent remedies by continuing to perform.").

There is an "estoppel" component to the election of remedies doctrine in the context of a termination for default as applied by the courts and boards. For the government to be barred from terminating a contract for default on the basis of having elected to have the contractor continue performance instead requires "(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) *reliance by the contractor* on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and express or implied consent." *Devito*, 188 Ct. Cl. at 990-991 (emphasis added). Though the Court of Claims did not use the term "estoppel" in *Devito*, the Board has used the term in describing the decision:

> The essence of the waiver of the delivery date doctrine as explained in *DeVito*, supra, is that through Government actions or inactions, and contractor reliance thereon, the Government is estopped from enforcing a specified contractual delivery date.

Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510.

This raises the possibility that the government could argue that restrictions on applying estoppel against the government in other contexts, discussed below, should be imposed here as well.

5. "Affirmative Misconduct" Needed to Apply Equitable Estoppel Against Government

The COFC and the Boards have adopted the rule that to apply equitable estoppel against the government, contractors must show "affirmative misconduct" in addition to the traditional elements of estoppel based on dicta in the Federal Circuit's decision in *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361 (Fed. Cir. 2003).

In an aside in his article on "waiver," Gilbert Cuneo anticipated the legal errors that led to the curtailment of the application of equitable estoppel against the government in contract claims.

> A dictum repeated with deafening frequency is that "there can be no estoppel against the Government or its agencies." Many cases, however, depending on that rule, involve ***actions of government agents which run counter to law***. Other cases stating that rule involve ***lack of authority on the part of the agent whose conduct is relied on to bind the Government***. Lack of authority is fatal to a claim of estoppel based on the conduct of an agent. That rule must not be confused where the doctrine of estoppel applies to the Government because of the authorized acts of its agent. The Government is bound by the doctrine of estoppel where (1) there is a waiver of sovereign immunity to suit, (2) the agent whose conduct is relied on to an estoppel acted within the scope of lawfully conferred authority, and (3) application of the doctrine does not bring a result inequitable or contrary to law. Hence, it may be concluded that in cases where sovereign immunity to suit has been waived, the Government can be estopped by conduct of its authorized agent in the same circumstances as a private individual, partnership, or corporation.

Gilbert A. Cuneo, *Waiver of the Due Date in Government Contracts*, 43 VA. L. REV. 1, 4 (1957) (emphasis added).

Cases relied on as the basis for the "affirmative misconduct" requirement for asserting estoppel against the government involved the scenarios Cuneo identified: (1) actions running contrary to law, and (2) lack of authority. *See, e.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) (government was not estopped from denying benefits where former government employee relied on advice of a Navy employee relations official regarding benefits requirements; government official lacked authority, and government could not be estopped from denying benefits not otherwise permitted by law); *Zacharin v. United States*, 213 F.3d 1366 (Fed. Cir. 2000) (government was not estopped from asserting patent infringement defense against former employees who relied on Army attorneys who filed their patent applications; government

attorneys lacked authority to change the statutory requirements for valid patents). In *Rumsfeld v. UT* and its progeny, the courts and boards fell victim to the confusion Cuneo contemplated, applying rules intended for instances where government agents lack authority to circumstances involving government agents acted *within* their delegated authority.

6. Relaxation of Undue Restrictions on Contractors

Judge Reyna's rigorous analysis calls to mind another Federal Circuit panel's decision last year in *DAI Global LLC v. Administrator of the United States Agency for International Development*, 945 F.3d 1196 (Fed. Cir. 2019), which held that the plain language of the CDA permits correction of any defect in certification, relaxing a judge-made restriction that only so-called "technical" defects were correctible. The *Inserso* dissent may inspire other curbs on judge-made law that impose undue restrictions on contractors.