

ALERT

Extension of the Applicability of *Blue & Gold* to All Pre-Award Contexts

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In *Blue & Gold Fleet v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), the Federal Circuit, adopting the same position as the Government Accountability Office (GAO), held that where a party objects to a solicitation or challenges the solicitation as containing patent errors or ambiguities, the party must protest prior to the close of the bidding process or it waives its ability to raise the same objection in a post-award protest. 492 F.3d at 1313-15. In *Comint Systems Corp. v. United States*, CAFC No. 2012-5039, issued December 7, 2012, the Federal Circuit extended the applicability of *Blue & Gold* to apply in all cases where the protesting party had the opportunity to challenge aspects of a solicitation before the award, but failed to do so.

In *Comint Systems*, the agency issued a solicitation seeking offers for a multiple award, indefinite delivery/indefinite quantity contract for information technology services. Offerors were required to submit separate proposals for a Basic Contract as well as for Task Order 1 and Task Order 2. The solicitation stated that the agency would first evaluate the Basic Contract on a best value basis and offerors would then be evaluated for Task Orders 1 and 2. During its evaluation of bids, the agency decided to limit the initial award to only the Basic Contract. Accordingly, on January 19, 2011, the agency issued Amendment 5 to the solicitation informing offerors that Task Order 1 and 2 would not be awarded with the Basic Contract. Amendment 5 also stated that the agency would "*NOT* accept any revisions to the proposals." Slip op. at 4 (emphasis in original). Comint signed and returned Amendment 5 to the agency on January 20, 2011, confirming that it received the Amendment. An award was made on April 6, 2011. Following the award, Comint, a losing offeror, protested the award first to the agency and then at the Court of Federal Claims,

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arguing that Amendment 5 substantially changed the solicitation requiring the agency to cancel the solicitation or permit offerors to submit revised proposals.

The court held that Comint failed to preserve its challenge to Amendment 5 because it did not raise the issue before the contract was awarded. Comint argued that *Blue & Gold* did not explicitly apply in its case. Specifically, Comint asserted that it did not have an opportunity to challenge the solicitation "prior to the close of the bidding process" because Amendment 5 was adopted after the offerors had submitted their proposals and, moreover, Amendment 5 stated that the agency would not accept revised proposals as a result of the Amendment. The court disagreed, holding that the reasoning in *Blue & Gold* applies in all pre-award situations where the offeror could bring a protest prior to award. Here, even though proposals had been submitted, the court noted that there were several months between the issuance of Amendment 5 and the award of the contract during which Comint could have objected to the Amendment. Moreover, although Amendment 5 prohibited revised proposals, it did not prohibit Comint from protesting the amendment. Finally, the court noted that the GAO follows a similar rule, setting various time limits by which protests must be submitted. Slip. op. at 10 (citing 4 C.F.R. § 21.2).

Requiring an offeror to protest patent defects or ambiguities in a solicitation or solicitation amendment before award or waive the right to do so rests on the policy that an offeror should not be allowed to "wait and see" if it has received the contract award before challenging terms of the solicitation or amendment. As the court stated in *Blue & Gold*:

In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.

492 F.3d at 1314. *The Comint Systems* court reasoned that the policy behind *Blue & Gold* supports its extension to all pre-award situations where the offeror has the time and opportunity to raise its objections. Slip. op. at 10.

After *Comint Systems*, offerors should be aware that they cannot wait until after award to raise concerns regarding the terms of a solicitation or solicitation amendment, even if offerors are not permitted to submit revised proposals. Under *Comint Systems*, if an offeror has the time or the opportunity to challenge any aspect of the ground rules of the competition, it should consider preserving its rights through a protest filed prior to award of the contract.

Wiley Rein routinely represents contractors in connection with pre- and post-award protests before GAO and the Court of Federal Claims.