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¶ 61 DISCRETIONARY DISCUSSIONS: Federal Circuit Undercuts DFARS Presumption Of Discussions And Maybe More

A special column by Eric A. Valle, associate at PilieroMazza PLLC. Eric previously clerked for the Honorable Matthew H. Solomson at the U.S. Court of Federal Claims. 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.

On September 11, 2024, the U.S. Court of Appeals for the Federal Circuit issued its highly anticipated precedential decision in *Oak Grove Technologies, LLC v. U.S.*, Nos. 22-1556, 22-1557, ___ F.4th ___, 2024 WL 4138392 (Fed. Cir. Sept. 11, 2024). See *Eyes on the Docket: Significant Appeals Before the Federal Circuit*, 37 NCRNL ¶ 54. The Circuit's opinion on the "numerous procedural and substantive arguments" at issue in the *Oak Grove* appeal already has become the table talk of Government contract practitioners and commentators. This *Guest Appearance* is focused on one important aspect of the *Oak Grove* decision—the ability to protest an agency's decision to forgo discussions in a high-value Department of Defense procurement—and the implications for the procurement system. See also in this issue, *Keeping Up With the National Courts: September 2024 Developments*, 38 NCRNL ¶ 60.

Relevant Background

The relevant facts are uncomplicated. The Army issued a solicitation to procure training services and anticipated awarding a contract with a ceiling value of $245 million to the best value offeror. The solicitation included boilerplate language informing offerors "that award may be made without discussions," as well as other provisions conveying the same. The Army awarded the contract without conducting discussions.

Oak Grove Technologies, LLC then filed a protest at the U.S. Court of Federal Claims, asserting, among other things, that the agency's decision not to engage in discussions violated Defense Federal Acquisition Regulation Supplement 215.306 or was otherwise arbitrary and capricious. Court of Federal Claims Judge Solomson agreed with Oak Grove on this issue (among several others). *Oak Grove Technologies, LLC v. U.S.*, 155 Fed. Cl. 84 (2021).

As Judge Solomson explained, DFARS 215.306 provides that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers *should* conduct discussions." In his view, the provision "suggests that an agency must justify *not* engaging in discussions where the provision applies," an interpretation that appeared to be supported by the Army's (successful) argument to the Federal Circuit in *Dell Federal Systems, L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018), which recognized that "discussions normally are to take place in these types of acquisitions."

Judge Solomson then proceeded to assess "whether the Agency…sufficiently justified its decision not to engage in discussions" and concluded that it had not. In doing so, however, Judge Solomson had to address the timeliness of Oak Grove's postaward protest arguments. The Army and defendant-intervenor argued that Oak Grove waived its ability to challenge the Army's compliance with DFARS 215.306 on the basis that Oak Grove never challenged the solicitation terms, which warned offerors that the Army might make award without discussions. Judge Solomson squarely rejected the timeliness argument:

> In sum, none of the aforementioned documents in the administrative record reflect that the Agency ever considered during the procurement the requirement of DFARS 215.306 that "discussions normally are to take place in these types of acquisitions." If anything, the Agency incorrectly presumed that the default position favored not conducting discussions. Given the facts of this procurement—*i.e.*, where all offerors or nearly all offerors submitted non-compliant proposals—the Agency should have conducted discussions.
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> The government argues, however, that the Solicitation put the "offerors squarely on notice of the Government's intent to award the contract without discussions but reserved the right to do so in the 'sole discretion' of the contracting officer." The government is correct that "the solicitation did not reference DFARS 215.306, either expressly, or by incorporation," but the DFARS provision is a binding regulatory requirement, not a solicitation provision or contract clause that needs to be (or even should be) incorporated in [a Request for Proposals]. Thus, the government's assertion that the DFARS provision "was not included in the solicitation" is inapposite.

(cleaned up). Judge Solomson's approach to this issue was subsequently echoed by Judge Bruggink, who walked through the history of this issue at the Government Accountability Office and the DOD:

> Consistent with the Federal Circuit, this court has also interpreted DFARS 215.306 to create a presumption that agencies will conduct discussions for defense acquisitions of $100 million or more. For example, in *Oak Grove v. United States*, this court reviewed a $245 million Army procurement that proceeded without discussions. Applying *Dell Federal*, this court concluded that "conducting discussions" is the "default rule." This means that, even though the regulation does not mandate discussions, the agency must at least create a record to justify not using them.
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> Turning to the GAO, it too reads DFARS 215.306 to mean that "discussions are the expected course of action in [Department of Defense] procurements valued over $100 million." *Sci. Applications Int'l Corp. (SAIC)*, No. B-413501, 2016 WL 6892429, at *8 (Comp. Gen. Nov. 9, 2016)….
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> Finally, the Department of Defense itself agrees that DFARS 215.306 creates an expectation that discussions should occur. In an Acquisition Policy Memo, the Department stated that "[f]or acquisitions with an estimated value of $100 million or more,…contracting officer[s] should conduct discussions." Memorandum, Dep't of Defense, Defense Procurement Acquisition Policy, ¶ 1.4.2.2.8 (Apr. 1, 2016).
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> [T]he government argues that even if DFARS 215.306 required the agency to justify its decision, [the protester] waived that argument when it failed to object before the competition concluded.

> We disagree. Simply announcing an intent to proceed without discussions does not put contractors on notice that the government intends to violate DFARS 215.306, something the government aptly explained in *Dell Federal*. The government appeared to agree in that case that a challenge to the agency's decision could be brought after the competition concluded. Thus, if agencies reserve the right to hold discussions, *Blue & Gold* [*, L.P v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007)] will not protect the agency when it eventually forgoes them without explanation.

SLS Federal Services, LLC v. U.S., 163 Fed. Cl. 596 (2023) (cleaned up).

The Federal Circuit Reverses

On appeal in *Oak Grove*, the Federal Circuit reversed, concluding Oak Grove "waived this issue, consistent with [its] holding in *Blue & Gold, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007)." The Circuit explained 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." The Circuit then found that "the Army's intent not to conduct discussions—and, thus, the alleged violation of the DFARS provision—is obvious from the Solicitation" and that the protester waived its argument relating to the Army's failure to hold discussions by not raising the challenge "before the close of the bid process." The full discussion is excerpted here:

> [T]he Army's intent not to conduct discussions—and, thus, the alleged violation of the DFARS provision—is obvious from the Solicitation and certainly could have been discovered by Oak Grove through the exercise of reasonable and customary care. Indeed, multiple portions of the Solicitation informed the bidders that discussions would not be held, including the Solicitation's incorporation of FAR § 52.215-1 *without* its Alternate I.... The Solicitation also expressly states that "[t]he Government does not intend to hold discussions, but reserves the right to do so, at the sole discretion of the PCO [Procuring Contracting Officer]. Further, "offerors are cautioned that the award may not necessarily be made to the lowest priced offeror and that award may be made without discussions." Thus, Oak Grove's contention—that the Army's decision not to hold discussions violated DFARS § 215.306(c)—was obvious from the Solicitation itself and had to have been raised before the close of the bid process. As Oak Grove did not do so, this issue is waived under the *Blue & Gold* rule.
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> In finding that the *Blue & Gold* waiver rule did not apply, the Court of Federal Claims relied on our decision in *Dell Federal Systems, L.P. v. United States*, 906 F.3d 982 (Fed. Cir. 2018). *Dell*, however, considered the distinguishable circumstances in which the Army's contracting officer conceded that the agency had "likely violated…DFARS 215.306(c)(1)" and voluntarily took corrective action based on that determination. We were not asked to, and did not, resolve the issue of whether a solicitation's use of FAR 52.215-1 without Alternate I could trigger a *Blue & Gold* waiver. In *Dell*, we did not decide whether the contracting officer's statement was the correct interpretation of the regulation, and nothing about the government's concession in that case binds us here. We disagree with the trial court that *Dell* applies here.

(cleaned up).

While the Circuit's opinion ostensibly appears to be a straightforward application of *Blue & Gold*, it does not grapple with the most direct rationales that drove Judges Solomson and Bruggink to reject the Government's *Blue & Gold* arguments. As Judge Bruggink summarized in *SLS Federal Services*: "[s]imply announcing an intent to proceed without discussions does not put contractors on notice that the government intends to violate DFARS 215.306." And, in Judge Solomson's words:

> [T]he standard FAR 52.215-1 reserves flexibility to an agency to award without discussions, while the referenced Alternate version prefers discussions, just as the DFARS provision requires. Quite obviously, a solicitation provision that explicitly prefers discussions necessarily better effectuates the regulatory

> preference for discussions embodied in DFARS 215.306. But that does not demonstrate the converse—*i.e.*, that a solicitation that permits award without discussions is patently inconsistent with the DFARS provision.

155 Fed. Cl. 84, 113 (cleaned up).

Implications

While the Federal Circuit's treatment of the discussions issue was perhaps a clean way of quickly dispensing with an otherwise complex and nuanced issue, the implications for offerors and agencies moving forward are rather complicated.

First, based on the Federal Circuit's opinion in *Oak Grove*, for every DOD procurement valued at $100 million or more where the solicitation contains the standard FAR clause (without the Alternate) or other language reserving the agency's discretion to award without discussions, offerors must consider whether to protest the terms of the solicitation to, at least, preserve their rights to challenge the agency's hypothetical refusal to open discussions in the future. That is, at best, an uncomfortable way to start a procurement and an administrative hassle for the agency procurement team.

Second, a protest of the terms of such a solicitation presents its own complications. What are the chances of success in a protest challenging a solicitation as announcing the agency's intent to potentially violate the DFARS 215.306 presumption in favor of discussions? Such a protest would seem to pose a number of tricky questions. For example, what non-trivial competitive harm does a protester suffer by not knowing for certain, before it submits a proposal, whether an agency will eventually hold discussions and allow it to address deficiencies in the proposal? Would such a protest preserve the offeror's rights to challenge the agency's eventual refusal to open discussions? Even if the preaward protest failed due to a lack of prejudice? In some cases, the Circuit has held it may be enough for a prospective offeror to file a formal agency-level protest to preserve an issue for a future post-award protest, *Harmonia Holdings Group, LLC v. U.S.*, 20 F.4th 759, 767 (Fed. Cir. 2021), 63 GC ¶ 376. But it is not clear whether the same outcome would follow for the kind of preaward protest implicitly contemplated by *Oak Grove*. Nor is it clear how the potentially significant delay between any preaward protest and postaward protest could impact the protester's right to injunctive relief (as a protester almost always seeks). The type of preaward protest that the Federal Circuit encourages through *Oak Grove* seems to set up a jurisprudential mess—all in the name of a bid protest timeliness rule that the Federal Circuit invented as a prudential guardrail for the protest process.

Third, in light of those issues, is there even anything left to DFARS 215.306? Presumably, the DOD promulgated this rule for a reason, intending to push agencies toward opening discussions in large-dollar DOD procurements (or at least making sure that the contracting team documented the rationale for any decision to forgo such discussions). If all the contracting team has to do is include the standard FAR 52.215-1 provision (without its alternate), or similarly contradictory language, in a solicitation to preserve unprotestable discretion to open or forgo discussions, what is left of the presumption? What other regulatory obligations might fit this same mold? Procurement rules can certainly be enforced outside of the protest system—but who is going to enforce this presumption (or others)? *Eric A. Valle*

