COURT OF FEDERAL CLAIMS HAS JURISDICTION OVER REMOVAL FROM QUALIFIED PARTS LIST

Reversing a Court of Federal Claims ruling, the Court of Appeals for the Federal Circuit ("CAFC") recently held that a bidder that had been removed from a Qualified Parts List ("QPL"), and thereby barred from responding to solicitations subject that QPL, could challenge its removal under the Tucker Act bid protest jurisdiction, 18 USC § 1491(b)(1). *Lax Electronics, Inc. DBA Automatic Connector v. United States,* (Fed Cl. No. 2020-1498) (Nov. 3, 2020).

A QPL designates government approved sources of supply, frequently for spare parts for weapon systems. The Federal Acquisition Regulation states that "Qualification and listing in a QPL[] is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status." FAR 9.203(a).

The Defense Logistics Agency ("DLA") frequently buys spare parts that require the parts to meet certain specifications as shown by their listing as an approved source of supply in the QPL. Contractors that are not on the list cannot respond to a solicitation for a QPL item, unless they can be qualified prior to award.

The DLA removed Automatic Connector from a QPL for certain electronic connectors, and the contractor challenged the removal. Automatic sought relief from the Court of Federal Claims. Automatic's complaint noted that DLA continued to solicit bids for the parts that it could no longer supply, given its removal from the QPL DLA was continuing to bar the company from a continuing stream of solicitations for the connectors while refusing to provide the company with any reasonable opportunity to arrange for qualification for the new awards.

The government moved to dismiss due to lack of subject-matter jurisdiction under §1491(b), stating that the statute only granted jurisdiction on an action by an interested party objecting to an alleged violation of statute or regulation in connection with a procurement or proposed procurement. The government disputed that Automatic Connector was an "interested party" and asserted that there was no "procurement or proposed procurement."

The CAFC disagreed. The government principally relied on 2018 case, *Geiler/Schrudde & Zimmerman v. United States*, 743 F. App'x 974, 977 (Fed. Cir. 2018) (per curiam, where the Court found no jurisdiction because the plaintiffs had "failed to establish that the alleged violations occurred in connection with a procurement or proposed procurement." No future procurements were asserted. Subsequent to that case, in *Acetris Health, LLC v United States,* 949 F.3d 719 (Fed. Cir 2020), the Court made it clear that the Claims Court had jurisdiction to hear a bid protest challenge to the government's position that it could make a plaintiff ineligible to compete for future government procurements for which it was likely to submit bids, and there was no jurisdiction to examine the government's actions. Here, there was

a non-speculative stream of future government procurements that Automatic Connector was likely to bid on. DLA's removal of Automatic Connector resulted in a disqualification from likely future procurements on which the company was likely to bid. Accordingly, the Court vacated the Court of Federal Claims decision and remanded for further proceedings.

Takeaway: If your company is removed from a QPL, the Court of Federal Claims will have jurisdiction under its bid protest statute, even if there is no pending procurement, but there are future procurements on which you are likely to bid based on that QPL.

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