

ALERT

# Blue & Gold Safe For Now: Federal Circuit Holds That a Timely Agency-Level Pre-Award Solicitation Challenge Preserves a Protester's Post-Award Solicitation Protest

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**WHAT:** On December 7, 2021, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued a decision in *Harmonia Holdings Grp., LLC v. United States*, No. 2020-1538, preserving the waiver rule established in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), with a caution about potential relief. Bid protest practitioners have been awaiting the *Harmonia* decision after Judge Reyna dissented in *Insero Corp. v. United States*, 961 F.3d 1343 (Fed. Cir. 2020) and called into question *Blue & Gold's* continuing vitality. Judge Reyna also authored the *Harmonia* decision.

*Harmonia* appealed the Court of Federal Claims' (COFC) holding that *Harmonia* waived its right to protest, post-award, amendments to a solicitation by "failing to timely and diligently" pursue its objections at the COFC after the agency denied its timely pre-award agency protest. The Federal Circuit reversed, holding that *Harmonia's* timely pre-award agency protest was sufficient to avoid waiver of its solicitation challenge, even though *Harmonia* had waited months before filing its post-award protest at COFC.

**WHAT DOES IT MEAN FOR INDUSTRY:** *Blue & Gold* remains the law. That means – whether at COFC, the U.S. Government Accountability Office (GAO), or an agency – industry must continue to challenge solicitation terms before the proposal deadline or risk losing those challenges forever. The Federal Circuit had already signaled that a timely pre-award agency or GAO protest would preserve a later challenge at COFC, but had also focused on the diligence of

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pursuing those challenges. See, e.g., *Bannum, Inc. v. United States*, 779 F.3d 1376 (Fed. Cir. 2015). *Harmonia* clarified that a timely pre-award agency protest avoids waiver altogether, but that delay in pursuing the challenge at COFC may have other “consequences” in terms of the relief granted. Thus, contractors should still bring solicitation challenges early and pursue all reviews diligently.

The relevant facts of *Harmonia* begin after offerors submitted proposals to the U.S. Customs and Border Protection (CBP) in late September 2018. After the proposal deadline, CBP issued two solicitation amendments, Amendments 9 and 10. CBP allowed offerors to revise their proposals pursuant to the amendments, but restricted which aspects of their proposals they could revise. *Harmonia* filed an agency-level pre-award protest challenging this restriction prior to the deadline for revised proposals; it also submitted a revised proposal in response to Amendments 9 and 10. CBP rejected *Harmonia*'s protest in December 2018 and subsequently awarded the contract to another offeror in April 2019. *Harmonia* filed a post-award protest at the COFC in May 2019, renewing its challenge that CBP improperly restricted proposal revisions in response to Amendments 9 and 10. The United States argued that *Harmonia* had waived this challenge.

Relying on the Federal Circuit's decision in *Blue & Gold*, which held that an offeror that has the opportunity to object to the terms of a solicitation with a patent error or ambiguity and fails to do so prior to the close of the bidding process waives its ability to raise the solicitation challenge at the COFC, the COFC found that *Harmonia* did not waive its challenge to Amendments 9 and 10 because it had challenged them in its pre-award agency protest. The COFC also noted the Federal Circuit's comment in *Bannum* that “filing a formal, agency-level protest before the award would likely preserve a protestor's post-award challenge to a solicitation.” Nonetheless, the COFC found that *Harmonia* waived its solicitation challenge because it waited five months before filing its pre-award protest at the COFC, a delay that the COFC characterized as a failure to “diligently or timely pursue its position.” The COFC stressed the principle in *COMINT Sys. Corp. v. United States*, 700 F.3d 1377 (Fed. Cir. 2012), that a challenge to the solicitation should be brought prior to award where there is adequate time to do so. “[W]hile *Harmonia* facially met the requirements under *Blue & Gold*, *Harmonia* nevertheless waived its right to bring those claims before this Court by failing to timely and diligently pursue its objections to Amendments 9 and 10.”

At the Federal Circuit, *Harmonia* argued that the COFC “improperly extended the law of *Blue & Gold* by finding waiver even though *Harmonia* had formally preserved its challenged by timely submitting its pre-award bid protest to CBP.” Recognizing that *Blue & Gold*'s waiver rule is predicated on “avoiding delay that could benefit the delaying party” and “preserving challenges and providing notice to interested parties,” the Federal Circuit concluded that *Harmonia*'s timely agency-level pre-award protest “removes this case from the ambit of *Blue & Gold* and its progeny.” The Court cautioned, however, that it was not “condoning delay” and stated that on remand, the COFC has “relatively broad authority” to fashion an appropriate remedy, which might not be the relief sought to submit a fully revised proposal. But it distinguished issues about the potential remedy from the waiver doctrine in *Blue & Gold*.

The takeaway from *Harmonia* is that filing a timely pre-award protest should avoid waiver of that solicitation challenge in a later protest at the COFC. Nonetheless, to get meaningful relief, protesters also should ensure that they pursue any COFC action as quickly and diligently as possible.