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# CLIENT ALERT

## Email Exchange Constitutes "Timely, Formal Challenge" for Purposes of Avoiding Blue & Gold Waiver Rule

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Last week, in *SEKRI, Inc. v. U.S.*, No. 21-1936 (Fed. Cir. May 13, 2022), the U.S. Court of Appeals for the Federal Circuit appeared to chip away at the scope of the *Blue & Gold* waiver rule. The Court held that SEKRI, Inc. ("SEKRI")—which neither submitted a proposal nor filed a protest prior to the relevant proposal submission deadline—had standing to challenge the terms of a solicitation, and was not untimely in doing so, because its representative had exchanged emails with the agency regarding the terms of the underlying solicitation. While the Federal Circuit cabined its holding to the specific facts at issue, the ruling raises questions about whether the *Blue & Gold* waiver rule is susceptible to further limitation under a similar rationale.

As background, the Javits-Wagner-O'Day ("JWOD") Act requires the government to procure certain commodities from nonprofit agencies that employ persons who are blind or otherwise severely disabled. The AbilityOne Program implements the procurement system mandated by the JWOD Act. And the FAR, at Subpart 8.7, similarly mandates that federal agencies utilize designated AbilityOne suppliers for specific commodities. *SEKRI* involved a Defense Logistics Agency ("DLA") procurement for one of those commodities: Advanced Tactical Assault Panels ("ATAP").

In April 2020, DLA sought, via a full-and-open, competitive bidding process, a single supplier for ATAP. SourceAmerica, a nonprofit agency supporting AbilityOne suppliers, notified DLA via a series of emails that SEKRI was a designated mandatory supplier of ATAP under the AbilityOne Program. In response, DLA explained that a full-and-open competition best met its needs, and DLA invited SEKRI to submit a proposal. Beyond that email correspondence, neither SourceAmerica nor SEKRI raised any objection or filed a pre-award protest prior to the proposal submission deadline.

More than three months after that deadline, SEKRI filed a protest at the Court of Federal Claims ("COFC") challenging DLA's solicitation as violating the JWOD Act and the FAR. The COFC dismissed the protest, holding that SEKRI lacked standing because it had not submitted a proposal, and that its protest was untimely. As to the latter finding, the COFC ruled that because SEKRI had not filed its complaint prior to the close of bidding, its "belated protest fits squarely within the *Blue & Gold* rule."

The Federal Circuit reversed. In so doing, the Court held that SEKRI had standing even though it did not submit a proposal because it was a designated mandatory source of ATAP under the AbilityOne Program as implemented by the FAR. The Court ruled that "it would not make sense to impose upon mandatory sources an affirmative obligation to monitor the federal government's solicitations to identify attempts to circumvent the AbilityOne Program."

In finding SEKRI's protest timely notwithstanding the *Blue & Gold* waiver rule, the Court relied on its recent decision in *Harmonia Holdings Grp., LLC v. U.S.*, 20 F.4th 759 (Fed Cir. 2021) (which we covered here). In *Harmonia*, the Court held a protester's timely, formal challenge to the terms of the solicitation—in that case, a pre-award agency level protest—"removes a case from the ambit of *Blue & Gold* and its progeny." Here, the Court explained that because SEKRI was a mandatory source supplier under the JWOD Act and the FAR, and DLA was notified of that fact via email before the proposal submission deadline, that sufficed to

"remove[] this case from the application of the *Blue & Gold* standard of waiver." The Court opined that allowing DLA to proceed with the solicitation despite knowledge of the availability of a mandatory source would "turn[] the JWOD Act on its head."

While the Federal Circuit's decision is limited to its facts, it nonetheless raises a number of questions regarding the future application of the *Blue & Gold* waiver rule. For example, does any email to a contracting agency questioning an agency's procurement plan constitute a "timely, formal challenge" to the terms of a solicitation, thereby satisfying the *Harmonia* standard? And does an email flagging an apparent agency violation of any statutory or regulatory mandate—*e.g.*, the Rule of Two, or lack of advanced planning to justify a sole source award—relieve a protester from its obligation to file a pre-award protest to preserve its rights?

For the time being, *SEKRI* should be read only to apply to procurements implicating AbilityOne commodities, *Blue & Gold* remains intact, and bidders who identify an error on the face of a solicitation should file a pre-award protest to protect their rights. But *SEKRI* opens the door to the possibility that, where a procuring agency fails to comply with mandatory statutory or FAR requirements, a protester may have rights to bring a challenge, and should not assume waiver, even if it did not file a pre-award protest.

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