

## CLIENT ALERT

### Federal Circuit Keeps Blue & Gold Waiver Rule, But Questions Remain

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Over a year after hearing oral argument, the Federal Circuit has now issued its highly anticipated decision in *Harmonia Holdings Group, LLC v. U.S., No. 20-1538* (Fed. Cir. Dec. 7, 2021). The decision itself is short and arguably noncontroversial, but what it does and does not say about the longstanding *Blue & Gold* waiver rule has potentially significant implications for Court of Federal Claims (“COFC”) bid protests going forward.

As background, the Federal Circuit in *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), held 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” in a subsequent COFC bid protest. In recent years, the Federal Circuit and the COFC have applied the *Blue & Gold* rule to virtually all manner of pre-award bid protests. In *Insero Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020), for example, the Federal Circuit even went so far as to hold that a small business waived its argument by not filing a pre-award protest challenging the release of competitive information in a parallel large business procurement. However, expansion of the *Blue & Gold* rule has not been without controversy. Most notably, in a robust dissent in *Insero*, Judge Reyna questioned the continuing viability of *Blue & Gold*, and suggested that the prejudicial effects of delay should instead be considered at the injunctive relief phase—a concept numerous COFC opinions have seemingly endorsed.

Against this backdrop, in November 2018, Harmonia filed an agency-level bid protest with Customs and Border Protection (“CBP”) challenging a solicitation amendment in a then-ongoing procurement. CBP denied the protest in December 2018, and ultimately awarded the contract to Harmonia’s competitor in April 2019. In early May 2019, Harmonia filed a bid protest with the COFC, challenging the award and re-raising its challenges to the pre-award solicitation amendment. But the COFC dismissed Harmonia’s pre-award challenges: citing *Blue & Gold*, the COFC held that Harmonia waived those challenges by failing to diligently pursue them following CBP’s denial of its agency-level protest five months earlier.

Harmonia appealed that decision to the Federal Circuit, which heard oral argument in November 2020. This week, the Federal Circuit issued its decision reversing. While some had anticipated a broad reconsideration of *Blue & Gold*—in part because Judge Reyna was a member of the *Harmonia* panel—the decision took a narrow tack, holding only that Harmonia’s filing of a pre-award protest with CBP constituted sufficient pursuit of its challenge for *Blue & Gold* purposes. The Court explained that the *Blue & Gold* rule is predicated, in part, on “the notion of preserving challenges and providing notice to interested parties,” and held that “Harmonia’s undisputedly timely, formal challenge of the solicitation before CBP removes this case from the ambit of *Blue & Gold* and its progeny.” The Court did warn, however, that its opinion “should not be read as condoning delay in filing,” and emphasized that the COFC has “relatively broad authority” to fashion an appropriate remedy in a given case.

What are the takeaways from *Harmonia*? First and foremost, *Blue & Gold* lives! Beyond that, it remains to be seen how the COFC on remand will treat this specific case, and whether the COFC and/or Federal Circuit will increasingly address filing delay in terms of remedy, as opposed to threshold waiver. But either way, the *Harmonia* decision—and the years it took for the protester to

reach this point—is a reminder for offerors to be vigilant in identifying potential pre-award concerns and to address them in a timely fashion.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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