

Federal Circuit Declines to Extend Blue & Gold Waiver Rule in AbilityOne Protest

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The U.S. Court of Appeals for the Federal Circuit, in [SEKRI, Inc. v. United States](#), recently added to the growing body of case law that has declined to extend the scope of the *Blue & Gold* waiver rule. Under the *Blue & Gold* rule, “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” court. This noteworthy decision is discussed below.

The Facts

The Javits-Wagner-O'Day Act establishes a procurement system, known as the [AbilityOne](#) Program, in which the government procures certain commodities and services from nonprofit agencies that employ persons who are blind or otherwise severely disabled.

In April 2020, the Defense Logistics Agency (DLA) issued a full-and-open competition solicitation for Advanced Tactical Assault Panels (ATAP), a military gear-carrying system for use by paratroopers. SourceAmerica, one of the central nonprofit agencies that helps administer the AbilityOne Program, then informed DLA that ATAP appeared on the AbilityOne Procurement List and that SEKRI — Southeastern Kentucky Rehabilitation Industries, Inc. — was the designated nonprofit agency authorized to supply ATAP.

On October 7, 2020, the solicitation period ended. On January 21, 2020, before an award was made, SEKRI filed a complaint in the U.S. Court of Federal Claims challenging, as contrary to law, DLA's procurement of ATAP via a competitive solicitation rather than through SEKRI as the mandatory source under the AbilityOne Program.

In March 2021, the court dismissed SEKRI's complaint because the court found that SEKRI was neither an actual nor a prospective bidder and thus did not have standing. The court also found that SEKRI failed to object to DLA's solicitation before the close of the bidding process and thus waived its objection under *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). Thereafter, SEKRI appealed to the Federal Circuit.

The Holding

The Federal Circuit reversed the court, finding that SEKRI had standing because it was the designated mandatory source for ATAP under the AbilityOne Program. The Federal Circuit also held that SEKRI did not waive its right to protest under *Blue & Gold*. Specifically, the Federal Circuit held that, per its decision in *Harmonia Holdings Grp., LLC v. United States*, 20 F.4th 759 (Fed. Cir. 2021) and the specific rules of the AbilityOne Program, SEKRI satisfied its obligation to submit a “timely, formal challenge” to the solicitation when SEKRI, through SourceAmerica, gave notice to DLA that SEKRI was the mandatory source of ATAP under the AbilityOne Program.

The Takeaway

The Federal Circuit’s *SEKRI* decision turned on unique facts involving the AbilityOne Program and, thus, was a case of first impression regarding that program. The case, nevertheless, has broader importance in that it represents yet another judicial narrowing and modification of the *Blue & Gold* waiver rule. In addition to the Federal Circuit’s 2021 decision in *Harmonia Holdings* (mentioned above), the Court of Federal Claims in [VS2 v. United States](#), for example, recently rejected a novel *Blue & Gold* waiver argument made by the government, holding that the argument in that case “threaten[ed] to reforge *Blue & Gold* from a sensible shield against gamesmanship and unjustifiable delay into a broadsword capable of cutting down even meritorious arguments in a manner . . . that [the] Federal Circuit has never sanctioned.” Taken together, the cases suggest that future attempts by the government to use the *Blue & Gold* waiver doctrine as a sweeping tool to dispose of cases will likely be examined more closely to determine whether the specific facts limit any potential waiver.

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