SPEAK NOW OR FOREVER HOLD YOUR PROTEST: EXAMINING THE DIVERGENT TIMELINESS RULES FOR SOLICITATION PROTESTS AT THE GAO AND THE COURT OF FEDERAL CLAIMS

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ABSTRACT

A potential offeror that is dissatisfied with the terms of a solicitation may communicate with an agency regarding those terms prior to the close of the solicitation and request that the agency amend the terms or otherwise take action to address the potential offeror's concern. Indeed, the Federal Acquisition Regulation (FAR) expressly encourages the offeror to do so. However, by communicating with an agency regarding solicitation terms and requesting a remedy, a potential offeror may inadvertently trigger the start of the protest period at the United States Government Accountability Office (GAO) if it receives an adverse agency response. That same communication, however, may also preserve the offeror's ability to timely file a protest regarding the terms of the solicitation at the United States Court of Federal Claims, including, in certain circumstances, after award. This article examines the divergent timeliness rules at those fora.

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I. INTRODUCTION

A potential offeror that is dissatisfied with the terms of a solicitation may communicate with an agency regarding those terms prior to the close of the solicitation and request that the agency amend the terms or otherwise take action to address the potential offeror's concern. Indeed, the Federal Acquisition Regulation (FAR) expressly encourages the offeror to do so.

However, by communicating with an agency regarding solicitation terms and requesting a remedy, a potential offeror may inadvertently trigger the start of the protest period at the United States Government Accountability Office (GAO) if it receives an adverse agency response. Specifically, the GAO has found that an email or letter from a contractor to an agency that expresses dissatisfaction with the terms of a solicitation and includes a request for relief may qualify as an agency-level protest, regardless of whether the communication was intended to be a protest. In such a situation, an agency's adverse response to the communication would amount to a denial of an agency-level protest, which, under GAO's timeliness rules, would require the contractor to bring a protest at the GAO within ten days of the adverse response. That same communication, however, may also preserve the offeror's ability to timely file a protest regarding the terms of the solicitation at the Court of Federal Claims (COFC), as the United States Court of Appeals for the Federal Circuit has held that an offeror's "timely, formal challenge" of a solicitation removes a

subsequent protest from the "ambit" of *Blue & Gold*.[1] Contractors, therefore, need to be cognizant of the effects that a communication may have on a subsequent protest.

This article addresses the divergent timeliness rules at the GAO and the Court of Federal Claims with respect to how communications with an agency regarding the terms of a solicitation can affect the timeliness of subsequent protests regarding those same terms. Section II provides an overview of the GAO's and Court of Federal Claims' timeliness rules. Section III explains how communications regarding the terms of a solicitation can have different results in terms of timeliness for a subsequent protest depending on whether the protest is filed at the GAO or the Court of Federal Claims. Section III also addresses practical considerations for offerors that are dissatisfied with the terms of a solicitation.

II. BACKGROUND ON PROTEST TIMELINESS RULES AND COMMUNICATIONS REGARDING THE TERMS OF A SOLICITATION

A. Timeliness Rules at the GAO and the Court of Federal Claims

As discussed below, the GAO's timeliness rules for challenging the terms of a solicitation are established in its regulations, while the Court of Federal Claims' timeliness rules generally are governed by the United States Court of Appeals for the Federal Circuit's *Blue & Gold* doctrine and its subsequent case law interpreting that doctrine.

1. GAO

The GAO's timeliness regulations are set forth at 4 C.F.R. § 21.2. Pursuant to 4 C.F.R. § 21.2(a)(1),"[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to . . . the time set for receipt of initial proposals" (*i.e.*, a patent error or ambiguity) must be filed prior to "the time set for receipt of initial proposals."[2] Failure to file such a protest prior to the closing time of the solicitation generally will result in the protest being dismissed as untimely.[3] In contrast, a protest challenging other improprieties, such as those that are not apparent (*i.e.*, latent errors or ambiguities) in the solicitation,[4] or those that occur after the due date for proposal submissions (*e.g.*, exclusions from the competitive range, proposal rejections, and award decisions), must be filed within ten days of when a protester knew or should have known its

1. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007).
2. 4 C.F.R. § 21.2(a)(1) (2023).
3. *See, e.g.*, Monbo Grp. Int'l, B-420765 et al., 2022 CPD ¶ 121 (Comp. Gen. June 8, 2022) (dismissing a protest challenging the terms of a solicitation when it was filed after the due date for initial proposals).
4. "[A] latent ambiguity, not apparent from the face of the solicitation, may be protested after the proposal submission deadline . . . ." Vedetta 2 Mondialpol S.p.A., B-420161, 2021 CPD ¶ 390, at 6 (Comp. Gen. Dec. 15, 2021).

protest ground.[5] The GAO has explained that its timeliness rules for challenging solicitation defects "afford the parties an opportunity to resolve ambiguities prior to the submission of offers, so that such provisions can be remedied before offerors formulate their proposals,"[6] and give "parties a fair opportunity to present their cases and resolv[e] protests expeditiously without unduly disrupting or delaying the procurement process."[7]

Importantly, the GAO's timeliness regulations also include another provision—4 C.F.R. § 21.2(a)(3)—specific to protests in which the protester has previously brought an agency-level protest:

> If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.[8]

GAO has made clear that this specific provision trumps the more general ones discussed above. When there is an agency-level protest of a solicitation impropriety, the deadline for a subsequent protest is ten days after actual or constructive knowledge of the agency's adverse response, regardless of when the deadline for proposals might fall. The regulation at 4 C.F.R. § 21.2(a)(3), therefore, can reduce the time typically afforded under section 21.2(a)(1) for such protests to be filed at the GAO (*i.e.*, the due date for proposal submissions). This result will occur if an agency-level protest is submitted more than ten days before the due date and the agency also responds adversely more than ten days before the due date. In this circumstance, the protester would only have ten days from the adverse agency response to file a protest at the GAO involving the solicitation impropriety, and those ten days would expire before the due date for proposal submissions.[9]

5. 4 C.F.R. § 21.2(a)(1), (2) (2023); *see also* Applied Sci. & Info. Sys., Inc., B-418068 et al., 2020 CPD ¶ 122, at 4 (Comp. Gen. Dec. 26, 2019).

6. One Cmty. Auto, LLC, B-419311, 2020 CPD ¶ 405, at 3 (Comp. Gen. Dec. 16, 2020).

7. VSolvit, LLC, B-421048 et al., 2022 CPD ¶ 310, at 6 (Comp. Gen. Dec. 6, 2022) (quoting Verizon Wireless, B-406854 et al., 2012 CPD ¶ 260, at 4 (Comp. Gen. Sept. 17, 2012)).

8. 4 C.F.R. § 21.2(a)(3) (2023).

9. *See*, *e.g.*, Sci. & Tech. Corp., B-420216, 2022 CPD ¶ 1, at 6 (Comp. Gen. Jan. 3, 2022) (dismissing a solicitation protest ground as untimely, even though it was filed prior to the due date for proposal submissions, when it was not filed within ten days from when the protester received an adverse agency response to its agency-level protest); Coulson Aviation (USA), Inc., B-411525 et al., 2015 CPD ¶ 272, at 5 (Comp. Gen. Aug. 14, 2015) (dismissing a solicitation protest ground as untimely, even though it was filed prior to the due date for proposal submissions, when communications constituting agency-level protests were sent to the agency and protester did not file its subsequent GAO protest within ten days of the adverse agency responses); Sletager, Inc., B-240789.2 et al., 91-1 CPD ¶ 101, at 2–3 (Comp. Gen. Feb. 1, 1991) (dismissing a solicitation protest ground as untimely, even though it was filed prior to the due date for proposal submissions, when it was filed two months after the agency denied its agency-level protest).

However, 4 C.F.R. § 21.2(a)(3) also may extend the time for a solicitation protest to be filed at the GAO. This result will occur if an agency-level protest is submitted any time before the due date for proposal submissions and the agency adversely responds less than ten days before the due date.[10] In that scenario, the ten-day period for filing a protest at the GAO would extend beyond the due date for proposal submissions.[11] That said, a solicitation protest at the GAO following an agency-level protest generally cannot be tolled for more than ten days after the due date for proposal submissions because the GAO considers the passing of the due date to constitute an adverse agency response to the agency-level protest, thereby triggering the ten-day period for filing a protest at the GAO.[12]

2. Court of Federal Claims

The Tucker Act provides the Court of Federal Claims with jurisdiction over both pre-award and post-award bid protests.[13] The six-year statute of limitations applicable to bid protests in the Court of the Federal Claims is the same as the general statute of limitations for actions brought in the Court of Federal Claims.[14] Thus, a bid protest must be filed at the Court of Federal Claims within six years of when the claim accrues.[15]

10. *See*, *e.g.*, ILC Dover, Inc., B-244389, 91-2 CPD ¶ 188, at 2 (Comp. Gen. Aug. 22, 1991) (stating that, if protester's communication with agency constituted an agency-level protest, its subsequent GAO protest filed one day after solicitation's closing date "would be timely," where communication was made before the closing date and agency adversely responded within ten days before the closing date).

11. On a number of occasions, protesters have argued that a prior correspondence constituted an agency-level protest in an attempt to trigger this tolling mechanism when filing a subsequent GAO protest that, otherwise, would have been out of time under 4 C.F.R. § 21.2(a)(1) (2023). *See*, *e.g.*, UXB-KEMRON Remediation Servs., LLC, B-401017.4, 2010 CPD ¶ 251, at 3–4 (Comp. Gen. Oct. 25, 2010) ("Because UXB-KEMRON's complaint to the Ombudsman was not an agency-level protest, it did not satisfy the timeliness requirement that alleged solicitation improprieties be protested, either to the agency or our Office, prior to the closing date for receipt of proposals."); Masai Tech. Corp., B-400106, 2008 CPD ¶ 100, at 4 (Comp. Gen. May 27, 2008) ("We conclude that the April 14 e-mail was not an agency-level protest because it did not go beyond suggesting the idea of a set-aside, and did not request the CO take corrective action. Accordingly, this protest asserting that Army's requirement should be set aside for HUBZone small business, which was filed in our Office after the deadline for submitting responses to the RFQ, is untimely."); *ILC Dover*, 91-2 CPD ¶ 188, at 1–2 ("Under these rules, if we consider Dover's March 11 letter to constitute an agency-level protest, its subsequent protest to our Office would be timely. However, we agree with [the intervenor] that the letter does not constitute a protest." (citing 4 C.F.R. § 21.2(a)(1), (3))).

12. *See infra* Part II.C.1.b.

13. *See* 28 U.S.C. § 1491(b)(1) (stating that the Court of Federal Claims has jurisdiction over protests "without regard to whether suit is instituted before or after the contract is awarded").

14. *See* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."); *see also* PlanetSpace, Inc. v. United States, 92 Fed. Cl. 520, 531 (2010) ("This bid protest is properly before the court pursuant to 28 U.S.C. § 1491(b) and thus is governed by the Tucker Act's six-year statute of limitations set forth at 28 U.S.C. § 2501.").

15. *See* 28 U.S.C. § 2501.

The Court of Federal Claims is, of course, not subject to the GAO's timeliness regulations.[16] However, in *Blue & Gold Fleet, L.P. v. United States*,[17] the United States Court of Appeals for the Federal Circuit created a "waiver rule" that was "similar" to the GAO's timeliness rule in 4 C.F.R. § 21.2(a)(1) providing that a protester challenging an impropriety apparent in the solicitation must file its protest at the Court of Federal Claims prior to the due date for proposal submission.[18] Specifically, although the Federal Circuit acknowledged that the Tucker Act "contains no time limit requiring a solicitation to be challenged before the close of bidding," the Federal Circuit nevertheless created a rule providing 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 afterwards in a [bid protest] action in the Court of Federal Claims.[19]

The Federal Circuit identified four bases supporting the creation of its *Blue & Gold* timeliness rule: (1) the GAO's timeliness regulation at 4 C.F.R. § 21.2(a)(1); (2) the statement in 28 U.S.C. § 1491(b)(3) that the Court of Federal Claims "shall give due regard to . . . the need for expeditious resolution of the action"; (3) the doctrine of patent ambiguity; and (4) the doctrines of laches and equitable estoppel in patent cases.[20] In relying on the GAO's timeliness regulation, the Federal Circuit stated that "several decisions of the Court of Federal Claims have recognized the utility of the GAO timeliness regulation," as, when there is a patent impropriety in a solicitation, "the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise the objection in a timely fashion."[21] Thus, according to the Federal Circuit, the GAO's timeliness regulation provides "support" for the timeliness rule created in *Blue & Gold*.[22]

Although under *Blue & Gold*, patent ambiguities in a solicitation generally must be challenged prior to the due date for proposals, latent ambiguities

16. *See* Wit Assocs., Inc. v. United States, 62 Fed. Cl. 657, 661 (2004) (stating that the Court of Federal Claims is not subject to "the stock of the limitations the GAO has imposed upon itself").

17. 492 F.3d 1308 (Fed. Cir. 2007).

18. *See id.* at 1313–14.

19. *Id.* at 1315. The Federal Circuit recently held that the *Blue & Gold* rule is not a jurisdictional rule; rather, the *Blue & Gold* rule "is more akin to a nonjurisdictional claims-processing rule since it 'seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" M.R. Pittman Grp., LLC v. United States, 68 F.4th 1275, 1280 (Fed. Cir. 2023) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)). Recent case law from the U.S. Supreme Court, which post-dates *Blue & Gold*, has called the validity of *Blue & Gold* doctrine into question, as the doctrine applies a time bar that is more stringent than the applicable statute of limitations. *See generally* Thomas E. Daley, *Timeliness at the Court of Federal Claims: Reexamining the* Blue & Gold *Doctrine in Light of* SCA Hygiene *and* Petrella, 51 Pub. Cont. L.J. 491, 493 (2022); *see also* Inserso Corp. v. United States, 961 F.3d 1343, 1356 (Fed. Cir. 2020) (Reyna, J., dissenting).

20. *See* Daley, *supra* note 19, at 494–96.

21. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1314 (internal quotation marks and citation omitted).

22. *See id.*

in a solicitation generally do not need to be challenged prior to the close of the solicitation.[23] In other words, whether a protest challenging the terms of a solicitation is untimely may turn on whether the ambiguity is patent or latent.[24] The patent or latent distinction under *Blue & Gold* mirrors the GAO's regulation, which, as discussed above, only requires that patent ambiguities in a solicitation be protested prior to the close of the solicitation.[25]

B. Communications Between an Agency and Offeror Prior to the Close of a Solicitation

The FAR generally encourages communications between agencies and potential offerors regarding solicitations prior to the due date for proposals, provided that such communications comply with the various procurement-integrity and conflict-of-interest rules that apply to federal procurements.[26] For instance, FAR 1.102-2(a) provides that "[t]he Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace."[27] The regulation at FAR 15.201(a) further states that "exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged."[28] The "exchanges of information" may address, among other things, "the suitability of the proposal instructions and evaluation criteria."[29] Those exchanges may occur in the public space (*e.g.*, at vendor conferences), and they may occur privately during "one-on-one meetings with potential offerors."[30]

The stated purpose of these pre–award communications

> is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.[31]

Permitting informal communications between agencies and offerors makes sense, as it allows offerors to provide feedback on government requirements without having to resort to more formalized and expensive means, such as filing a bid protest. Furthermore, sending a letter suggesting a course of action or expressing a concern about an upcoming procurement, as opposed to filing

23. *See* G4S Secure Integration LLC v. United States, 161 Fed. Cl. 387, 406–07 (2022). There are exceptions to the *Blue & Gold* doctrine, such as when "bringing the challenge prior to the award is not practicable." COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012).
24. See *G4S Secure Integration LLC*, 161 Fed. Cl. at 406.
25. *See supra* Part II.A.1.
26. *See* FAR 15.201(a).
27. FAR 1.102-2(a)(4).
28. FAR 15.201(a).
29. FAR 15.201(c).
30. FAR 15.201(c)(4).
31. FAR 15.201(b).

a protest, may allow an offeror to maintain an amicable relationship with the agency. From the agency's standpoint, responding to a letter, as opposed to a protest, requires less time and fewer resources and typically is preferable to defending against a bid protest. Indeed, the FAR requires that, "[p]rior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions."[32]

C. Effect of Communications That Occur Prior to the Close of a Solicitation on Protest Timeliness

As discussed below, although contractor-agency communications regarding a solicitation are encouraged, those communications can affect whether a subsequent protest is timely under the GAO's regulations, as well as whether it is timely under *Blue & Gold*.

1. The Timeframe for Filing a Solicitation Protest at the GAO Is a Function of Whether the Offeror's Communication Constitutes an "Agency-Level Protest" and Whether the Agency's Response (or Lack Thereof) Is Considered "Adverse."

As explained above, a communication with an agency that constitutes an agency-level protest will require, pursuant to 4 C.F.R. § 21.2(a)(3), that the potential offeror file any subsequent protest with the GAO within ten days from the agency's adverse response.[33] Consistent with this mandate, an agency-level protest and an adverse agency response may set in motion: (1) a reduced timeframe for filing a GAO protest when both the agency-level protest and the adverse agency response occur more than ten days before the due date for proposal submissions; or (2) an extended deadline for filing a subsequent GAO protest if the adverse agency response occurs within ten days before proposal submissions are due.

a. What Constitutes an "Agency-Level Protest"?

In determining what constitutes an agency-level protest, the GAO has developed a standard that is loosely based on FAR 33.103(d), the provision governing agency-level protests.[34] This provision requires, in part, that an agency-level protest contain a "[d]etailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester";[35] a "[r]equest for a ruling by the agency";[36] and a "[s]tatement as to the form of relief requested."[37] As stated in FAR 33.103(d), these requirements

32. FAR 33.103(b).
33. *See* 4 C.F.R. § 21.2(a)(3) (2023).
34. *See, e.g.*, W. Star Hosp. Auth., Inc., B-414198.2 et al., 2017 CPD ¶ 183, at 6 (Comp. Gen. June 7, 2017).
35. FAR 33.103(d)(2)(iii).
36. FAR 33.103(d)(2)(v).
37. FAR 33.103(d)(2)(vi). Additional requirements include the protester's name, address, and fax and telephone numbers, the solicitation or contract number, copies of relevant documents, all

aim "to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency."[38]

However, for the purposes of determining timeliness under Section 21.2(a)(3), the GAO's standard for what constitutes an agency-level protest is more relaxed than what FAR 33.103(d) requires. Indeed, the GAO has explained that "a letter or e-mail does not have to state explicitly that it is intended as a protest," but needs to "express dissatisfaction with an agency decision and request corrective action."[39] The GAO has also explained that "a letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest."[40]

To illustrate, in *Coulson Aviation (USA), Inc.*, the GAO determined that several informal communications from an offeror to an agency, occurring more than ten days before the due date for proposal submissions, constituted agency-level protests; the GAO also found that the same protest ground subsequently raised in a GAO protest was untimely when it was not filed within ten days of the adverse agency responses (also occurring more than ten days before the due date).[41] The GAO reached this conclusion even though the protester "assert[ed] that it did not intend for the letters to be protests, but sought to resolve [its] concerns through frank and open discussions under FAR § 33.103(b)."[42]

Specifically, the solicitation at issue in *Coulson*, whereby the U.S. Air Force sought proposals for the design, manufacture, and installation of a Retardant Delivery System for seven HC-130H aircraft for fighting forest fires, was issued under FAR Part 15.[43] Coulson sent several letters to the agency, prior to the due date for proposal submissions, wherein Coulson "asserted that it offers a commercial item that is suitable to meet the Air Force's needs, and, that the Air Force was therefore required to proceed with the procurement under FAR Part 12."[44] Coulson also specifically requested corrective action by asking that the Air Force revise the request for proposal (RFP) to follow the commercial item procurement procedures under FAR Part 12.[45]

After multiple rejections by the Air Force to issuing the procurement under FAR Part 12, Coulson filed its protest at the GAO, prior to the due date for proposal submissions, and included a protest ground related to the agency's failure to issue the procurement under FAR Part 12.[46] The GAO found the protest ground to be untimely even though it was filed prior to the solicitation

information establishing that the protester is an interested party, and all information establishing the timeliness of the protests. *See* FAR 33.103(d)(2).

38. FAR 33.103(d).

39. *W. Star Hosp. Auth., Inc.*, 2017 CPD ¶ 183, at 6; *see also* Coulson Aviation (USA), Inc., 2015 CPD ¶ 272, at 5–6 (Comp. Gen. Aug. 14, 2015).

40. *Coulson*, 2015 CPD ¶ 272, at 5–6.

41. *Id.* at 5.

42. *Id.* at 7.

43. *Id.* at 2–3.

44. *Id.* at 6.

45. *Id.*

46. *Id.* at 4.

due date.[47] Citing its timeliness regulation at 4 C.F.R. § 21.2(a)(3) and its "long held" standard that "to be regarded as a protest, a written statement need not state explicitly that it is or is intended to be a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief,"[48] the GAO concluded that Coulson's letters to the contracting officer constituted agency-level protests.[49] The GAO explained that "Coulson's letters clearly expressed dissatisfaction with the solicitation by disagreeing with the Air Force's decision to use FAR part 15, rather than FAR part 12," and also "specifically requested corrective action by asking that the Air Force revise the RFP to follow the commercial item procurement procedures under FAR part 12."[50] Therefore, the GAO concluded that "Coulson's letters conveyed the intent to protest."[51]

In a contrasting example, in *Masai Technologies Corp.*, the GAO found the protest was untimely when filed one hour and forty-four minutes after the deadline for proposal submissions, notwithstanding the protester's assertion that the protest was timely filed within ten days of receiving an adverse agency response to its alleged agency-level protest.[52] The GAO, however, found that the relevant communication did not constitute an agency-level protest. Specifically, the communication "was not labeled as an agency-level protest . . . but simply stated, in part, that '[t]his would have been a prime candidate for Small Business/8a/Hubzone/other set-aside . . . I wonder if there was market research conducted?'"[53] The agency responded by stating that it "would not set aside the requirement for small businesses."[54]

The GAO explained that, "[w]hile a letter (or e-mail) does not have to state explicitly that it is intended as a protest for it to be so considered, it must, at least, express dissatisfaction with an agency decision and request corrective action."[55] Concluding that the offeror's communication did not constitute an agency-level protest "because it did not go beyond suggesting the idea of a set-aside, and did not request the [agency] take corrective action," the GAO found that the protest was untimely, as it was filed after the due date for proposal submission.[56] Interestingly, the GAO also contrasted the set-aside inquiry with other correspondence that the protester had with the agency unrelated to the set-aside issue, which the protester "clearly labeled as an agency-level protest."[57] The GAO noted that the set-aside "e-mail is distinctly different in tone" from the agency-level protest, and that "the clear language

47. *Id.* at 5.
48. *Id.*
49. *Id.*
50. *Id.* at 7.
51. *Id.*
52. Masai Tech. Corp., B-400106, 2008 CPD ¶ 100, at 3 (Comp. Gen. May 27, 2008).
53. *Id.* at 2.
54. *Id.* at 3.
55. *Id.*
56. *Id.* at 4.
57. *See id.* at 2.

that [the protester] used in its April 10 letter, expressing that the letter was an agency-level protest, demonstrates that [the protester] apparently knows how to file a protest when it seeks to do so."[58]

As reflected in these two illustrative examples, whether a communication will be deemed to be an agency-level protest by the GAO can turn on a number of subtle factors, such as the tone of the communication (including how the tone compares to prior correspondence with the agency), whether the request is in the form of a question or a demand, the specificity of the request, and the labelling of the communication. As further discussed below, protesters should be aware that their pre-solicitation close communications with an agency have the potential to trigger this shortened timeframe within which to file a subsequent protest at the GAO and carefully craft their communication so as to avoid inadvertently triggering it.

b. What Constitutes an "Adverse Agency Response"?

A potential offeror has ten calendar days from when the offeror has actual or constructive knowledge of an adverse agency response to an agency-level protest to file a corresponding protest at the GAO.[59] While an expressly adverse response or action by an agency can, in many cases, be easy to identify, the GAO also considers certain less-obvious events to constitute adverse agency action. Indeed, for purposes of determining timeliness under 4 C.F.R. § 21.2(a)(3), the GAO applies the definition for "[a]dverse agency action" contained in its Bid Protest Regulations at 4 C.F.R. § 21.0(e), which provides:

> Adverse agency action is any action *or inaction* by the agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.[60]

Thus, in addition to any agency action that is expressly adverse, such as an explicit denial of a contractor's specific request, inaction that is unfavorable to the protester may be viewed as adverse agency action, thereby triggering the ten-day period for protest under 4 C.F.R. § 21.2(a)(3).[61]

For instance, in *Carlisle Tire & Rubber Co.*, Carlisle, a large business concern, attempted to raise a protest ground at the GAO which it had previously raised with the procuring agency, the General Services Administration (GSA), in an agency-level protest regarding the small business set-aside of a solicitation for "playground equipment and related replacement parts."[62] Carlisle submitted its agency-level protest on March 23, 1989.[63] Despite this protest, "the agency proceeded with the procurement and received proposals on March 28[, 1989],

58. *Id.* at 3.
59. 4 C.F.R. § 21.2(a)(3) (2023).
60. 4 C.F.R. § 21.0(e) (emphasis added).
61. 4 C.F.R. § 21.2(a)(3).
62. *Id.* at 1.
63. *Id.*

the scheduled closing date for submission of initial proposals."[64] The agency subsequently "denied Carlisle's protest" in a letter dated April 13, 1989, which was "apparently received by the protester on April 20[, 1989]," and Carlisle filed its protest at the GAO on May 4, 1989.[65] Importantly, the GAO viewed the operative agency action, for purposes of determining timeliness, to be the agency's "proceeding with accepting offers" on the due date—*not* the date of the denial letter, or the date that the letter was apparently received.[66] In reaching that conclusion, the GAO applied the definition, discussed above, for "adverse agency action" in GAO's bid protest regulations:

> It is our general view that, once the contracting activity proceeds with accepting offers, the protester is on notice that the contracting activity will not undertake the requested corrective action; timeliness is thus measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest.[67]

Other agency actions subsequent to an agency-level protest, such as a solicitation amendment, must be reviewed by contractors engaging in agency-level protests for whether the action is prejudicial to the agency-level protester's request.[68] For instance, an amendment issued subsequent to an agency-level protest that did not address the issue raised by the protester, but called for offerors to submit best and final offers, was found to constitute an adverse agency action for purposes of assessing timeliness of the subsequently filed GAO protest.[69] On the other hand, an amendment issued that does not address the protest ground, and otherwise does not "foreclose[] the possibility of further consideration" of the issue by the agency, has been found not to constitute an adverse agency action.[70]

Given that the GAO considers such a broad range of inaction, including the passage of the due date for proposal submissions, to constitute an adverse agency response, it is unlikely that a potential offeror's communication with the agency regarding the terms of a solicitation will preserve a subsequent GAO protest beyond ten days from the due date.[71] Indeed, if the communication does not constitute an agency-level protest, then the offeror would need to file its solicitation protest before the due date for proposal submissions, in accordance with 4 C.F.R. § 21.2(a)(1).[72] But if the communication does

64. *Id.*
65. *Id.*
66. *Id.* at 2.
67. *Id.*
68. *See generally* COMINT Sys. Corp. v. U.S., 700 F.3d 1377, 1382 (Fed. Cir. 2012) (discussing the *Blue & Gold* waiver rule's application to a solicitation amendment issued after close of the bidding process).
69. Int'l Rsch. Assocs., B-182344, 75-1 CPD ¶ 285, at 4 (Comp. Gen. May 8, 1975).
70. Reeves Bros. Inc., B-212215.2 et al., 84-1 CPD ¶ 490, at 3 (Comp. Gen. May 2, 1984).
71. *See* Jerald S. Howe, Jr., et al., *An Analysis of GAO's 2022 Bid Protest Statistics—Yet Fewer Protests, Continuing High Rate of Voluntary Corrective Action—Together with Last Year's Top Protest Decisions and Developments*, 65 Gov't Contractor ¶ 32, at 5–6 (2023) (describing two GAO decisions finding protests untimely when not filed within 10 days of adverse agency action).
72. *See COMINT Sys. Corp*, 700 F.3d at 1381 (finding that a protestor who does not raise a challenge to the solicitation before award fails to preserve its challenge).

constitute an agency-level protest, then the GAO is likely to view the passing of the due date as an adverse agency response, thereby triggering the ten-day protest period in accordance with 4 C.F.R. § 21.2(a)(3).

2. Communications That Occur Prior to the Close of a Solicitation May Impact Whether a Subsequent Court of Federal Claims Protest Is Timely Under *Blue & Gold*.

As discussed earlier in Section II.A.2, the *Blue & Gold* doctrine provides that a protester that "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 afterwards" in a bid protest in the Court of Federal Claims.[73] Although *Blue & Gold* provided that an "objection" to the terms of a solicitation prior to the close of the bidding process could preserve a subsequent protest of those terms, it neither defined the nature or type of "objection" that needed to be raised, nor how long a subsequent protest may be preserved.[74] In other words, *Blue & Gold* left open the question of whether a protester, in order to preserve its objection to the terms of the solicitation, needed to file an agency-level protest prior to the close of the solicitation or whether the protester could preserve its objection through less formal means, such as sending a letter or an email message to an agency regarding its challenge to the terms of the solicitation. The Federal Circuit subsequently clarified the nature of the objection that needed to be raised, as well as how long a subsequent protest may be preserved, under *Blue & Gold*, including in the three important decisions discussed below.

a. *Bannum*

In *Bannum, Inc. v. United States*, after proposals were submitted in connection with two solicitations for the operation of residential reentry centers (one in Mississippi and one in South Carolina), an agency amended the two solicitations to add a requirement that offerors comply with the Prison Rape Elimination Act of 2003.[75] The agency sent notices to the offerors in each procurement asking the offerors to sign the amendment and submit final proposal revisions, in which offerors could revise their price proposals.[76]

In the Mississippi procurement, the protester responded, prior to the due date for final proposal revisions, with a six-page letter titled "Final Proposal Revision # 3 and AGENCY PROTEST," in which the protester stated that it was *not* revising its previously submitted price proposal and that the prices contained therein "do not, and cannot, reflect any consideration for the effects" of the amendment involving the Prison Rape Elimination Act of 2003 because of the significant magnitude of the change that the amendment caused to the

73. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007).
74. *See id.* at 1313–16.
75. *Id.* at 1378.
76. *Id.*

protester's proposal.[77] The protester signed the amendment, but it added an asterisk stating that it had reserved "all rights and protests."[78] Similarly, in the South Carolina procurement, the same protester, in its response to the amendment involving the Prison Rape Elimination Act of 2003, which also was submitted prior to the due date for final proposal revisions, stated that it could not revise its price to reflect additional costs associated with complying with the Act and that it was reserving its right to seek "[requests for equitable adjustments], Claims, and Protests."[79] Following award decisions to other offerors in both procurements, the protester filed two protests in the Court of Federal Claims asserting that the solicitations were defective based on the requirement that offerors comply with the Prison Rape Elimination Act of 2003 and the lack of pricing guidance provided by the agency.[80]

The Federal Circuit found that the protester's challenges to the amendments concerning the Prison Rape Elimination Act of 2003 were untimely under *Blue & Gold* because the protester "waived the solicitation challenge by not properly raising it before the close of bidding."[81] Although the protester submitted responses declining to comply with the Prison Rape Elimination Act of 2003 prior to the due dates for final proposal revisions, the Federal Circuit stated that the "mere notice of dissatisfaction or objection is insufficient to preserve" a challenge to the terms of a solicitation under *Blue & Gold*.[82] Moreover, before the Federal Circuit, the protester did not contend that its communications with the agency constituted a protest, but, rather, characterized the communications as "ask[ing] for guidance."[83] Thus, the Court concluded in *Bannum* that the protester's "mere notice of dissatisfaction or objection" to the amendments was insufficient to preserve its subsequent protest challenging the amendments, and its protests were barred under *Blue & Gold*.[84]

b. *Harmonia Holdings Group*

In *Harmonia Holdings Group v. United States*, the Federal Circuit further addressed the meaning of when an "objection" raised prior to the close of the bidding process may preserve a subsequent protest in the Court of Federal Claims.[85]

In that case, after proposals were submitted, an agency issued two amendments to the solicitation, but it only allowed offerors to submit limited proposal revisions in response to those amendments.[86] On November 12, 2018, prior to the due date for limited proposal revisions, a protester submitted an agency-level protest in which it raised multiple challenges to the amendments,

77. *Id.*
78. *Id.*
79. *Id.* at 1379 (alteration in original).
80. *Id.* at 1378–79.
81. *Id.* at 1381.
82. *Id.* at 1380.
83. *Id.* at 1381.
84. *Id.* at 1380–81.
85. Harmonia Holdings Grp. v. United States, 20 F.4th 759 (Fed. Cir. 2021).
86. *Id.* at 763.

seeking to update the proposals in their entirety.[87] The agency ultimately denied the agency-level protest on December 6, 2018.[88]

In April 2019, the agency awarded a contract to the protester's competitor, and the protester filed a post–award protest in the Court of Federal Claims on May 7, 2019.[89] The protest challenged the agency's evaluation of the protester's proposal, as well as its denial of the agency-level protest, which had occurred approximately five months prior to the Court of Federal Claims protest.[90] The Court of Federal Claims determined that the protest ground challenging the denial of the agency-level protest involving the solicitation amendments was untimely under *Blue & Gold*.[91] The Court of Federal Claims concluded that, although the protester had "facially met the requirements under *Blue & Gold*" by timely filing its agency-level protest prior to the close of the solicitation, the protest ground was nevertheless barred because, in the Court of Federal Claims' view, the protester had acted unreasonably by failing to file its protest in the Court of Federal Claims until May 7, 2019, which was after the contract award and five months after its agency-level protest was denied on December 6, 2018.[92]

The Federal Circuit reversed the Court of Federal Claims' finding as to timeliness under *Blue & Gold*, reasoning that the protester's "undisputedly timely, formal challenge of the solicitation before [the agency] removes this case from the ambit of *Blue & Gold* and its progeny."[93] In other words, the pre-award agency-level protest that had been denied five months prior to the post-award protest, preserved the protester's "ability to file an action asserting the same grounds of objection that it asserted in its earlier, formal protest" before the agency, notwithstanding that the protest seemingly could have been brought in the Court of Federal Claims earlier in the procurement.[94]

Although the Federal Circuit found that the protest was not barred under *Blue & Gold*, the Federal Circuit stated that its "opinion should not be read as condoning delay in filing actions in the Court of Federal Claims."[95] "Under certain circumstances, delaying bidders may face adverse consequences, but we are not persuaded in this case that imposition of a *Blue & Gold* waiver should be one of those consequences."[96] The Federal Circuit noted that, on remand, the Court of Federal Claims could consider the protester's delay when deciding whether the issuance of injunctive relief was appropriate.[97]

87. *Id.*
88. *Id.*
89. *Id.* at 763–64.
90. *Id.* at 764.
91. *Id.* at 767 (citing Harmonia Holdings Grp., LLC v. United States, 146 Fed. Cl. 799, 812–14 (2020)).
92. *Id.* at 765, 767.
93. *Id.* at 767.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* The plaintiff's delay in bringing an action is a routine consideration when deciding whether to issue injunctive relief. *See* Daley, *supra* note 19, at 513–14.

c. *SEKRI, Inc.*

Most recently, in *SEKRI, Inc. v. United States*, the Federal Circuit addressed whether an email exchange regarding the terms of a solicitation could preserve a subsequent protest challenging those same terms in the Court of Federal Claims.[98] In *SEKRI*, after an agency had issued a solicitation for a competitive procurement for various items, the agency issued an amendment to the solicitation providing that it was now also seeking to acquire an item referred to as an Advanced Tactical Assault Panel.[99] The Advanced Tactical Assault Panel, however, was required to be purchased under the procurement system implementing the Javits-Wagner-O'Day Act (*i.e.*, the AbilityOne Program), which requires that certain items be purchased from suppliers that employ blind individuals.[100]

SEKRI, a nonprofit qualified as a mandatory source of Advanced Tactical Assault Panels under the AbilityOne Program, learned of the amendment and the agency's intent to acquire the panel via a competitive procurement process prior to the due date for proposals.[101] In June 2020, SourceAmerica, a nonprofit agency that assists with the AbilityOne program, "exchanged emails" with the agency regarding its intent to acquire the panel via a competitive procurement process and asked whether the agency would acquire the panel from SEKRI.[102] The agency responded that it intended to acquire the panel via the competitive solicitation that it had issued.[103]

Several months later, in October 2020, the solicitation closed.[104] SEKRI did not submit a proposal in response to the solicitation or otherwise take any additional actions to object to the agency's procurement of the panels via a competitive procurement process.[105] In January 2021, several months after the solicitation closed but prior to award, SEKRI filed a protest with the Court of Federal Claims.[106] The Court of Federal Claims found that SEKRI lacked standing because it was not an actual or prospective offeror, as it had not submitted a proposal in response to the solicitation or objected to the agency's use of a competitive procurement process prior to the close of the solicitation, and that its protest was barred under *Blue & Gold*.[107]

On appeal, the Federal Circuit found that SEKRI was a prospective bidder and therefore had standing to protest because SEKRI was "the designated mandatory source of [Advanced Tactical Assault Panel] in the AbilityOne Program" and SourceAmerica notified the agency of SEKRI's mandatory status

98. SEKRI, Inc. v. United States, 34 F.4th 1063, 1069 (Fed. Cir. 2022), *remanded to* 163 Fed. Cl. 562 (2022).
99. *Id.* at 1068.
100. *Id.* at 1066, 1068.
101. *Id.* at 1069.
102. *Id.*
103. *Id.*
104. *Id.*
105. *See id.* at 1069–70.
106. *Id.* at 1069.
107. *Id.* at 1070.

earlier in the procurement process.[108] Regarding *Blue & Gold*, the Federal Circuit stated:

> We recently held that a bidder's "timely, formal challenge of the solicitation before [the agency] removes [a] case from the ambit of *Blue & Gold* and its progeny." *Harmonia Holdings Grp., LLC v. United States*, 20 F.4th 759, 767 (Fed. Cir. 2021). *Harmonia* did not involve a mandatory source participating in the AbilityOne Program, but it is nevertheless instructive. Here, SEKRI, through SourceAmerica—early in the bidding period and shortly after SEKRI learned of the solicitation—gave notice to DLA that it was a mandatory source of [Advanced Tactical Assault Panel] participating in the AbilityOne Program. DLA confirmed its receipt of the SourceAmerica contact, and it responded with its determination that it would proceed with a competitive bid. Based on these facts, SEKRI satisfied its obligation under *Harmonia* to submit a "timely, formal challenge" of the solicitation. Thereafter, SEKRI filed its bid protest action before the Court of Federal Claims shortly after the close of the bidding period and prior to any award determination. SEKRI thus did not waive its right to bring its bid protest under *Blue & Gold*.[109]

Thus, the Federal Circuit found that the email exchange between SourceAmerica and the agency preserved SEKRI's subsequent protest in the Court of Federal Claims.[110]

III. COMMUNICATIONS THAT OCCUR PRIOR TO THE CLOSE OF THE SOLICITATION CAN IMPACT TIMELINESS AT THE GAO AND COURT OF FEDERAL CLAIMS IN DIVERGENT WAYS.

A. Communication Occurring Prior to the Close of a Solicitation May Limit the Time Within Which a Subsequent GAO Must Be Filed, but It Also May Preserve the Timeliness of a Subsequent COFC Protest.

As discussed above, a communication that GAO considers to be an agency-level protest that is adversely responded to more than ten days before the due date for proposals generally has the effect of reducing the time typically afforded under 4 C.F.R. § 21.2(a)(1) for patent solicitation impropriety protests to be filed at the GAO (*i.e.*, the due date for proposal submissions) because a protester must file its protest at the GAO within ten days of receiving an adverse agency decision.[111] Offerors inclined to communicate with an agency regarding the terms of a solicitation via email or letters should evaluate whether those communications could be considered an agency-level protest by the GAO, as the GAO's standard for finding that a communication constitutes an agency-level protest is not particularly high. Indeed, the GAO may consider a letter or email that an offeror sends to an agency regarding the

108. *Id.* at 1071.

109. *Id.* at 1073 (alterations in original). The Federal Circuit also stated that the "government cites no case in which we have extended the requirements of *Blue & Gold* to mandatory sources of supply in the AbilityOne Program." *Id.* at 1073–74.

110. *See id.* at 1074.

111. *See supra* Part II.C.1.a.

terms of a solicitation, as offerors are encouraged to do under the FAR,[112] to be an agency-level protest.[113]

Thus, if a contractor transmits a communication requesting relief from the terms of a solicitation, regardless of whether it is labeled or otherwise intended to be an agency-level protest, and receives a response that the GAO might consider to be an "adverse agency response,"[114] the contractor, to the extent that it does not want to lose the opportunity to litigate the issue at the GAO, may need to file a corresponding protest at the GAO within ten days of receiving the agency response in order to preserve timeliness of the protest.[115] Given the GAO's expansive view of what constitutes an agency-level protest,[116] a contractor who prefers litigating the issue at the GAO may need to file such a protest notwithstanding that it may have preferred to have continued to informally discuss the issue with the agency.[117] Additionally, counsel representing a contractor with a solicitation issue should determine whether the contractor has previously communicated with the agency regarding the issue and, if so, whether there is risk that the GAO could consider the communication an agency-level protest.

Contrastingly, for protests filed at the Court of Federal Claims, engaging in communications regarding the terms of a solicitation prior to the close of the solicitation and receiving an adverse response from the agency would *not* require a protester to bring the protest within ten days of receiving the adverse decision. The regulation at 4 C.F.R. § 21.2(a)(3) does not apply to protests brought at the Court of Federal Claims,[118] and neither *Blue & Gold*, nor any Federal Circuit decision interpreting *Blue & Gold*, has purported to incorporate the timeliness restrictions of section 21.2(a)(3) into the *Blue & Gold* doctrine.[119] In fact, not only do such communications not trigger an obligation to file a protest in the Court of Federal Claims within ten days in order to be timely, but the communications may actually preserve the timeliness of a subsequent protest in the Court of Federal Claims if the communications constitute a "timely, formal challenge" to the terms of the solicitation before

112. *See* FAR 15.201(a) ("Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged.").

113. *See, e.g.*, Sci. & Tech. Corp., B-420216, 2022 CPD ¶ 1, at 7 (Comp. Gen. Jan. 3, 2022) (dismissing a protest ground as untimely when it was not filed within ten days of when the protester received an adverse agency response to a letter regarding the terms of a solicitation).

114. *See* 4 C.F.R. § 21.0(e) (2023).

115. *See id.* § 21.2(a)(3).

116. *See supra* Part II.C.

117. In certain circumstances, a protest ground involving an apparent solicitation impropriety may be preserved beyond the due date for proposal submissions when a communication constituting an agency-level protest is submitted prior to the proposal due date and the agency adversely responds less than ten days before the due date. *See* 4 C.F.R. § 21.2(a)(3). Even then, the additional time afforded would be limited to the difference between the due date and the date that is ten days after the adverse agency response.

118. *See* CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 568 (2004), *aff'd*, 163 F. App'x. 853 (Fed. Cir. 2005) ("The Court of Federal Claims, however, is not bound by the bid protest timeliness rules of the GAO.") (citing 28 U.S.C. § 1491(b)(3)).

119. *See* Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

the agency.[120] This may be true even when the protest is brought months after award, such as in *Harmonia*,[121] although, as further discussed below, such an approach might be risky because the delay could reduce the likelihood that the Court of Federal Claims will grant the requested relief.

A contractor that is comfortable litigating the issue exclusively at the Court of Federal Claims,[122] therefore, has more options when communicating with the agency prior to the due date for proposal submissions. The contractor could continue to communicate with the agency regarding the solicitation terms without having to be concerned that, in doing so, it has inadvertently triggered a shortened time period to file a subsequent protest. Indeed, the contractor could, for example, after receiving an adverse agency response, submit additional letters or emails to the agency that provide additional information regarding its concerns with the solicitation's terms and ask the agency to reconsider its adverse response.

Furthermore, given that the timeliness mechanisms of 4 C.F.R. § 21.2(a)(3) do not apply at the Court of Federal Claims,[123] there is no downside, for purposes of preserving a subsequent protest at the Court of Federal Claims, to a protester strongly wording its dissatisfaction with the solicitation's terms or bringing a formal agency-level protest. In fact, such a strategy may help ensure that the communication constitutes a "timely, formal challenge," consistent with *Harmonia* and *SEKRI*, thereby preserving the opportunity to protest at the Court of Federal Claims if the agency declines to provide the requested relief.[124] Contractors, therefore, may, in certain situations, wish to sharpen their communications in accordance with the Federal Circuit precedent discussed above in order to increase the likelihood of the communication qualifying as a "timely, formal challenge."[125]

In addition, provided that a contractor's communications are sufficient to constitute a "timely, formal challenge,"[126] the contractor may even cease communication with the agency regarding the solicitation terms, submit

120. *See* Harmonia Holdings Grp., LLC v. United States, 20 F.4th 759, 767 (Fed. Cir. 2021).

121. *See id.* Although beyond the scope of this article, it is interesting that the Federal Circuit relied on 4 C.F.R. § 21.2(a)(1) when creating the *Blue & Gold* doctrine, but it has not invoked timeliness mechanisms similar to those in Section 21.2(a)(3) for agency-level protests, despite having the opportunity to do so in cases like *Harmonia*. *Id.*

122. A contractor may want to consider additional factors when deciding to forgo filing a bid protest at the GAO, including any favorable precedent, as well as the automatic stay provided to protesters at the GAO by the Competition in Contracting Act. *See* 31 U.S.C. § 3553(c)(1) (providing that, except for certain limited circumstances, "a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending."). Additionally, the contractor should consider the additional cost associated with litigating the issue at the Court of Federal Claims and should consider that the Court is not subject to a requirement that it issue its decision within a certain amount of time. A contractor could also bring its solicitation protest at the GAO and, if unsuccessful, subsequently file another protest at the Court of Federal Claims.

123. *See CW Gov't Travel, Inc.*, 61 Fed. Cl. at 568.

124. The meaning of a "timely, formal challenge" is discussed further below in Part III.B.

125. *See Harmonia Holdings Grp.*, 20 F.4th at 766–67.

126. *See infra* III.B.

a proposal, wait for the agency to make an award decision, and then file a post-award protest that challenges the solicitation terms addressed in its earlier communications with the agency. This approach would be similar to how the protester proceeded in *SEKRI*. That said, although *SEKRI* appears to create a pathway for an offeror to timely file a protest at the Court of Federal Claims challenging the terms of a solicitation after award without having to file a pre-award protest with the agency or at the GAO, there would be significant risk in following that approach.

As an initial matter, the protester would lose the automatic stay that is provided for at the GAO but not at the Court of Federal Claims.[127] The agency and the Department of Justice also may be unwilling to voluntarily stay performance of the awarded contract given the protester's delay in bringing the protest. It also may be challenging for a contractor to obtain preliminary injunctive relief, as the Court of Federal Claims has explained that a protester's delay in bringing a protest can undermine the purpose of preliminary injunctive relief, which "is the preservation of the status quo."[128]

Furthermore, a protester's delay in bringing its protest may undermine its ability to obtain permanent injunctive relief. As the Federal Circuit in *Harmonia* explained, the Court of Federal Claims may consider the circumstances of a protester's delay in bringing a protest when deciding whether to grant injunctive relief.[129] Waiting to bring a challenge to the terms of a solicitation until after the award would likely cut against a protester's claim of irreparable harm, as case law provides that, "[w]hen significant delay in bringing a protest has contributed to the irreparable nature of the injuries alleged by the plaintiff, any self-inflicted harm should not be considered irreparable for purposes of the injunctive relief analysis."[130] The Court of Federal Claims also "has repeatedly held that a protester's delay in bringing a protest must be accounted for in the balance of hardships inquiry."[131] The Court of Federal Claims also has explained that the "public interest" factor generally will weigh in the government's favor when the protester unreasonably delays in bringing its protest.[132] Thus, there is significant risk if a protester waits to bring a protest challenging the terms of a solicitation until after award, even if such a protest would be timely under *SEKRI*, because the Court of Federal Claims may decline to issue injunctive relief to the extent that the protest ground succeeds on the merits.

127. *See* 31 U.S.C. § 3553(c)(1) (describing the GAO automatic stay); *see*, *e.g.*, 28 U.S.C. § 1491 (Tucker Act not requiring an automatic stay).

128. Timberline Helicopters, Inc. v. United States, 140 Fed. Cl. 117, 120 (2018) (quoting Cont'l Serv. Grp. v. United States, 722 F. App'x 986, 994 (Fed. Cir. 2018)).

129. *Harmonia Holdings Grp.*, 20 F.4th at 767.

130. *See* Aircraft Charter Sols., Inc. v. United States, 109 Fed. Cl. 398, 416 (2013).

131. *See id.* at 417 (citations omitted).

132. *See* Software Testing Sols., Inc. v. United States, 58 Fed. Cl. 533, 538 (2003) ("Except in the most extraordinary circumstances, judicial infringement on the procurement process in the form of preliminary relief would be inappropriate where, as here, the plaintiff urging that a contract be suspended and an apparent awardee deposed waits an inordinate period of time—here nearly until the contract is completed—before pressing its claim.").

B. The Meaning of "Timely, Formal Challenge" Will Likely Be an Issue in Future Court of Federal Claims Protests.

Notwithstanding multiple Federal Circuit decisions discussing objections that occur prior to the close of a solicitation, the exact nature of the communications required to constitute an objection for purposes of preserving a protest ground under *Blue & Gold* remains amorphous. under *Harmonia*, a timely agency-level protest challenging the terms of a solicitation is plainly sufficient to preserve a subsequent protest raising those same challenges.[133] On the other hand, in *Bannum*, the Federal Circuit explained that a communication that merely provides "notice of dissatisfaction or objection is insufficient to preserve" a challenge to the terms of a solicitation under *Blue & Gold*.[134]

There is some tension between that statement in *Bannum* and the Federal Circuit's decision in *SEKRI*, which found that a letter identifying a company as a mandatory source of the products sought in a competitive solicitation was a "timely, formal challenge" that "removes" the subsequent Court of Federal Claims protest "from the ambit of *Blue & Gold* and its progeny."[135] The underlying Court of Federal Claims decision at issue in *SEKRI* reflects that the email exchange at issue was very limited. The email from SourceAmerica to the agency "explained that SEKRI is the nonprofit agency authorized to produce [Advanced Tactical Assault Panel] for the U.S. Army and inquired whether the '[agency] would be willing to move forward with SourceAmerica' for the item."[136] The agency "replied that it was proceeding under the terms" of the solicitation, and "SEKRI took no further action, either through administrative or judicial avenues, to challenge the solicitation and did not submit an offer."[137] The Court of Federal Claims stated that, "[a]t most the emails were an inquiry, not a complaint and certainly not a protest,"[138] which, under *Bannum*, was insufficient to preserve a subsequent protest.[139] On appeal, the Federal Circuit did not directly address the Court of Federal Claims' conclusion that the email exchange was, at most, an inquiry, but, instead, concluded that the exchange was a "'timely, formal challenge' of the solicitation."[140]

The definition of "timely, formal challenge" will likely continue to be developed in Court of Federal Claims and Federal Circuit case law, as the exact point at which a communication crosses over from a "notice of dissatisfaction or objection" under *Bannum* to a "timely, formal challenge" under

133. *See Harmonia Holdings Grp.*, 20 F.4th at 767 ("Harmonia's undisputedly timely, formal challenge of the solicitation before CBP removes this case from the ambit of *Blue & Gold* and its progeny.").

134. Bannum, Inc. v. United States, 779 F.3d 1376, 1380 (Fed. Cir. 2015).

135. *See* SEKRI, Inc. v. United States, 34 F.4th 1063, 1071, 1073 (Fed. Cir. 2022) (internal citation omitted).

136. SEKRI, Inc. v. United States, 152 Fed. Cl. 742, 756 (2021), *rev'd and remanded*, 34 F.4th 1063 (Fed. Cir. 2022).

137. *Id.*

138. *Id.*

139. *See Bannum*, 779 F.3d at 1380 ("[M]ere notice of dissatisfaction or objection is insufficient to preserve Bannum's defective-solicitation challenge.").

140. *SEKRI, Inc.*, 34 F.4th at 1073.

SEKRI is not well-defined. With *SEKRI* appearing to lower the threshold for what constitutes a timely, formal challenge, protesters may increasingly argue that communications that occurred prior to the close of the solicitation preserved the opportunity to protest.

C. The Standard for a "Timely, Formal Objection" Under Blue & Gold *May Be a Lower Standard Than an Agency-Level Protest Under 4 C.F.R. § 21.2(a)(3).*

Another interesting aspect of how the Court of Federal Claims' timeliness rules under the *Blue & Gold* doctrine and the GAO's timeliness regulations at 4 C.F.R. § 21.2(a)(3) differ is that the standard for qualifying as a "timely, formal challenge" under *Blue & Gold* appears to be even lower than the standard for qualifying as an agency-level protest under 4 C.F.R. § 21.2(a)(3). As discussed above, under *Bannum* a communication that merely provides "notice of dissatisfaction or objection is insufficient to preserve" a challenge to the terms of a solicitation under *Blue & Gold*.[141] At the GAO, a notice of dissatisfaction or objection, without a request for a relief, would likewise be insufficient for purposes of constituting an agency-level protest under 4 C.F.R. § 21.2(a)(3).[142]

The GAO, however, has explained that, "to be regarded as an agency-level protest, a written statement must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief."[143] As discussed in Part III.B, although the Federal Circuit has not expressly defined what constitutes a "timely, formal challenge" for purposes of *Blue & Gold*, it appears that such a challenge does not need to include an express request for relief, at least based on the communications at issue in *SEKRI*. Indeed, in *SEKRI*, the email to the agency "explained that SEKRI is the nonprofit agency authorized to produce [Advanced Tactical Assault Panel] for the U.S. Army and inquired whether the '[agency] would be willing to move forward with SourceAmerica' for the item."[144] The agency declined to do so and encouraged SEKRI to submit a proposal in response to the competitive procurement.[145] Neither the Court of Federal Claims, nor the Federal Circuit, identified an express request for relief in SEKRI's email to the agency.[146] Although the appropriate relief arguably would have been apparent

141. *Bannum*, 779 F.3d at 1380.

142. *See* CrowderGulf, LLC, B-418693.9 et al., 2022 CPD ¶ 90, at 9 (Comp. Gen. Mar. 25, 2022) ("[A] letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest.").

143. *Id*. (internal citations omitted).

144. SEKRI, Inc. v. United States, 152 Fed. Cl. 742, 756 (2021), *rev'd and remanded*, 34 F.4th 1063 (Fed. Cir. 2022).

145. *See id.*

146. *See id.*; *see also* SEKRI, Inc. v. United States, 34 F.4th 1063, 1073 (Fed. Cir. 2022) ("Here, SEKRI, through SourceAmerica—early in the bidding period and shortly after SEKRI learned of the solicitation—gave notice to [the Defense Logistics Agency (DLA)] that it was a mandatory source of ATAP participating in the AbilityOne Program. DLA confirmed its receipt of the SourceAmerica contact, and it responded with its determination that it would proceed with a competitive bid. Based on these facts, SEKRI satisfied its obligation under *Harmonia* to submit a 'timely, formal challenge' of the solicitation.").

from the face of the email (*i.e.*, to procure the item through SEKRI), it is nevertheless notable that the email constituted a "timely, formal challenge" notwithstanding that it does not appear to have expressly requested that the agency take certain action in response to the communication.[147] Thus, the definition of a "timely, formal challenge," as used in the context of the *Blue & Gold* doctrine, may be less demanding than the standard for constituting an agency-level protest, as used at the GAO, which also requires a request for relief.[148]

IV. CONCLUSION

As discussed above, the most glaring difference between the *Blue & Gold* timeliness rules applicable to the Court of Federal Claims and the GAO timeliness regulations is that, under *Blue & Gold*, a communication with an agency prior to the due date for proposal submissions may preserve the opportunity to bring a subsequent protest at the Court of Federal Claims until after the proposal due date and even after contract award, whereas, at the GAO, that same communication may shorten the time available to file at the GAO. Thus, when a solicitation defect is identified, a contractor should carefully consider (1) whether to informally communicate with the agency regarding the defect; (2) whether to request specific relief in the communication; and (3) whether, if an adverse response is received, its communications with the agency would result in the contractor needing to file a protest at the GAO within ten days. The failure to reasonably consider the timeliness rules governing protests at the GAO may result in an otherwise meritorious protest being dismissed. Alternatively, if a contractor wishes to preserve the option of filing a subsequent protest at the Court of Federal Claims, it should consider writing the communication in a manner that would result in the communication qualifying as a "timely, formal challenge" under Federal Circuit case law.

147. *Id.*

148. Coulson Aviation (USA), Inc., B-411525 et al., 2015 CPD ¶ 272, at 5–6 (Comp. Gen. Aug. 14, 2015).