TIMELINESS AT THE COURT OF FEDERAL CLAIMS: REEXAMINING THE *BLUE & GOLD* DOCTRINE IN LIGHT OF *SCA HYGIENE* AND *PETRELLA*

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ABSTRACT

Consistent application of the *Blue & Gold* doctrine has been a common issue in bid protests litigated before the U.S. Court of Federal Claims for the past fifteen years. In June 2020, U.S. Court of Appeals for the Federal Circuit Judge Jimmie V. Reyna's dissenting opinion in *Inserso Corp. v. United States* identified a conflict between the reasoning in *Blue & Gold* and the U.S. Supreme Court's decision in *SCA Hygiene*. The conflict undermines continued application of the *Blue & Gold* doctrine to bid protests, as the *Blue & Gold* doctrine impermissibly applies a timeliness rule that is more stringent than the statute of limitations applicable to bid protests in the Court of Federal Claims. Regardless, there are ways that the Court of Federal Claims could continue to account for the policy considerations identified in *Blue & Gold* without applying a doctrine that conflicts with Supreme Court precedent. This article proposes two alternatives: (1) considering a protestor's delay when determining the appropriate remedy; and (2) considering whether a protestor waived its claim using a traditional waiver analysis.

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I. INTRODUCTION

In its 2007 decision *Blue & Gold Fleet, L.P. v. United States*,[1] the U.S. Court of Appeals for the Federal Circuit [hereinafter the Federal Circuit] 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 afterwards."[2] This rule has come to be known as the "*Blue & Gold* rule" or the "*Blue & Gold* doctrine,"[3] and it is a firmly established principle in bid protests filed at the U.S. Court of Federal Claims.[4]

Although the validity of the *Blue & Gold* rule has been described as "well-settled,"[5] in June 2020, Judge Jimmie V. Reyna of the Federal Circuit issued a dissenting opinion in *Inserso Corp. v. United States*,[6] asserting that *Blue & Gold* conflicts with the U.S. Supreme Court's 2017 decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*.[7]

This article discusses the origins of the *Blue & Gold* doctrine and describes how the Federal Circuit and Court of Federal Claims have interpreted the doctrine. This article also discusses the issues raised in Judge Reyna's dissent and concludes that *Blue & Gold* conflicts with Supreme Court precedent. This article concludes that the bases identified in *Blue & Gold* to justify the creation of the *Blue & Gold* doctrine do not support continued application of the doctrine.

Important policy considerations are, however, identified in *Blue & Gold*—such as avoiding costly and after-the-fact litigation—that could be considered at the remedy stage of a bid protest. Although the policy considerations do not justify continued application of a doctrine that conflicts with Supreme Court precedent, the Court of Federal Claims could still address such considerations when deciding whether to grant a protester's requested relief. Alternatively, the Court of Federal Claims could consider whether a protestor has "waived" its claim using a traditional waiver analysis, rather than applying the *Blue & Gold* rule.

II. BACKGROUND

The *Blue & Gold* decision and subsequent cases following the decision are discussed below in chronological order.

1. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007).
2. *Id.*
3. *See* Amazon Web Servs., Inc. v. United States, 153 Fed. Cl. 602, 605 (2021) (referring to "the Blue & Gold Waiver Doctrine"); BTAS, Inc. v. United States, 152 Fed. Cl. 194, 202 (2021) (referring to "the Blue and Gold rule").
4. *See, e.g.*, *Amazon Web Servs., Inc.*, 153 Fed. Cl. at 602.
5. Three S Consulting v. United States, 104 Fed. Cl. 510, 520 n.7 (2012), *aff'd*, 562 F. App'x 964 (Fed. Cir. 2014).
6. Inserso Corp. v. United States, 961 F.3d 1343, 1353 (Fed. Cir. 2020) (Reyna, J., dissenting).
7. *Id.*; SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017).

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A. Blue & Gold

In *Blue & Gold*, an incumbent ferry operator, Blue & Gold Fleet, L.P., challenged the National Park Service's decision to award a contract to Hornblower Yachts, Inc. (Hornblower).[8] In its protest, Blue & Gold Fleet argued that "Hornblower's proposal did not include the wages and benefits for its employees required by the Service Contract Act" and that "the Park Service mistakenly evaluated Hornblower's proposal as financially viable."[9]

The Federal Circuit determined that Blue & Gold Fleet "waived its opportunity to raise the [Service Contracting Act] issue prior to the closing of the bidding process."[10] The Federal Circuit explained that, even though Blue & Gold Fleet described its Service Contract Act argument as a challenge to the National Park Service's evaluation, the argument was "properly characterized as a challenge to the terms of the solicitation" because the National Park Service made the decision to not include Service Contract Act requirements "during the solicitation, not evaluation, phase of the bidding process."[11] Because Blue & Gold Fleet did not raise its Service Contract Act argument prior to the submission of proposals, it "waived" its right to raise the argument.[12]

In reaching that conclusion, the Federal Circuit addressed, as "an issue of first impression," whether a party must raise a challenge to the solicitation prior to the submission of proposals.[13] The Federal Circuit 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 subsequently in a bid protest action in the Court of Federal Claims.[14]

The Federal Circuit identified four bases to support its holding: (1) the language at 28 U.S.C. § 1491(b)(3); (2) the doctrine of patent ambiguity; (3) the timeliness regulation of the U.S. Government Accountability Office (GAO) at 4 C.F.R. § 21.2(a)(1); and (4) the "analogous doctrines of laches and equitable estoppel" in patent cases.[15]

Regarding the first basis, the Federal Circuit stated that 28 U.S.C. § 1491(b)(3) "mandates that 'the courts shall give due regard to the interests of national defense and national security and *the need for expeditious resolution of the action*.'"[16] According to the Federal Circuit, "a waiver rule, which requires

8. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1310–11 (Fed. Cir. 2007).
9. *Id.* at 1312.
10. *Id.* at 1315.
11. *Id.* at 1313.
12. *Id.* at 1315–16.
13. *Id.* at 1313.
14. *Id.*; *id.* at 1315 ("Accordingly, 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 § 1491(b) action in the Court of Federal Claims.").
15. *Id.* at 1313–14.
16. *Id.* at 1313 (emphasis in original) (quoting 28 U.S.C. § 1491(b)(3)).

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that a party object to solicitation terms during the bidding process, furthers this statutory mandate."[17]

Regarding the second basis, the Federal Circuit stated that, under the doctrine of patent ambiguity, "where a government solicitation contains a patent ambiguity,[18] the government contractor has 'a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation' in a subsequent action against the government."[19] The Federal Circuit noted that the patent ambiguity doctrine "was established to prevent contractors from taking advantage of the government" and avoid "costly litigation after the fact," concluding that those reasons "apply with equal force in the bid protest context."[20]

As to the third basis for the waiver rule, the Federal Circuit stated that the GAO had "adopt[ed] . . . a similar rule in its bid protest regulations."[21] The relevant GAO regulation provides that "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."[22] The Federal Circuit noted that "several decisions of the Court of Federal Claims have recognized the utility of the GAO timeliness regulation" and stated that "[t]he reasons expressed by the Court of Federal Claims mirror those underlying the patent ambiguity doctrine."[23]

For the fourth basis, the Federal Circuit stated that, "in the patent context, we have recognized that analogous doctrines of laches and equitable estoppel operate to bar relief even though there is no applicable statute of limitations."[24]

Thus, the Federal Circuit concluded:

> [W]hile it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to "give due regard to . . . the need for expeditious resolution of the action" and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule. Recognition of this rule finds further support in the GAO's bid protest regulations and in our analogous doctrines. Accordingly, 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 § 1491(b) action in the Court of Federal Claims.[25]

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17. *Id.*
18. A patent ambiguity exists when "the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties." Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1381 (Fed. Cir. 2000).
19. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1313 (quoting *Stratos Mobile Networks USA, LLC*, 213 F.3d at 1381).
20. *Id.* at 1313–14 (quoting Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1580 (Fed. Cir. 1993)).
21. *Id.* at 1314.
22. 4 C.F.R. § 21.2(a)(1).
23. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1314.
24. *Id.*
25. *Id.* at 1315 (omission in original).

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Following its decision in *Blue & Gold*, the Federal Circuit issued additional decisions providing that a protestor "waive[s] the ability to challenge the terms of the solicitation by failing to object prior to the close of bidding."[26]

B. COMINT Systems Corp.

In *COMINT Systems Corp. v. United States*,[27] the Federal Circuit addressed the scope of the *Blue & Gold* doctrine. In *COMINT*, the agency issued "Amendment 5" to the solicitation after proposals were submitted but prior to award, which canceled certain task orders because they no longer reflected the agency's needs.[28] Amendment 5 stated that the agency would not accept proposal revisions.[29] After award, a disappointed offeror filed a bid protest with the U.S. Court of Federal Claims arguing that Amendment 5 changed the solicitation so substantially as to require the agency to cancel the solicitation.[30]

In response to the government's argument that the protestor "failed to preserve its challenge to Amendment 5 by failing to raise it until after the contract was awarded," the protestor asserted that "*Blue & Gold's* holding does not explicitly apply to this case [because the protestor] had no opportunity to challenge the solicitation before 'the close of the bidding process,' Amendment 5 having been adopted after the bidding process closed."[31] The Federal Circuit rejected the protestor's argument, stating that Amendment 5 was "adopted before the award, and we think the reasoning of *Blue & Gold* applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so."[32] Thus, the protestor "failed to preserve its objections to Amendment 5 by not raising them until after the award of the contract."[33]

The Federal Circuit explained that its decision in *COMINT* would not require a protestor to bring a protest prior to award if doing so would be impracticable.[34] But if "there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract."[35] In *COMINT*, the Federal Circuit concluded that there was adequate time to file a protest prior

26. Moore's Cafeteria Servs. v. United States, 314 F. App'x 277, 279 (Fed. Cir. 2008) (per curiam) (citing *Blue & Gold Fleet, L.P.*, 492 F.3d at 1313); *see also* Allied Tech. Grp., Inc. v. United States, 649 F.3d 1320, 1327 (Fed. Cir. 2011) (stating that *Blue & Gold* "consider[ed] a disappointed bidder's argument on the basis of a patent ambiguity waived for failure to raise it prior to bidding" (citing *Blue & Gold Fleet, L.P.*, 492 F.3d at 1314)).

27. COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1379 (Fed. Cir. 2012).

28. *Id.* at 1380.

29. *Id.*

30. *Id.* at 1380–81.

31. *Id.* at 1381–82.

32. *Id.* at 1382.

33. *Id.* at 1383.

34. *Id.* at 1382.

35. *Id.*

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to award because the agency issued Amendment 5 on January 19, 2011, and did not award the contract until April 6, 2011.[36]

C. Inserso

In *Inserso Corp. v. United States*,[37] the Federal Circuit issued a decision that, according to one commentator, "ushered in a significant expansion of the *Blue & Gold* waiver rule beyond the once settled and narrow confines of patent solicitation defects."[38]

The procurement at issue in *Inserso* had two competitions: a full-and-open competition and a small business competition.[39] Small business offerors "could compete in both competitions."[40] The agency notified offerors of its award decision in the full-and-open competition on November 2, 2017.[41] The agency did not make its award decision in the small business competition until September 7, 2018.[42] The protestor, Inserso Corp., only competed in the small business competition.[43]

As part of Inserso's debriefing after the small business competition, the agency provided Inserso with each awardee's total evaluated price and "previously undisclosed information on how [the agency] had evaluated the cost element of the proposals."[44] Inserso inquired whether, and the agency acknowledged that, participants in the full-and-open competition, which included companies that also participated in the small business competition, had been given "similarly detailed debriefings" following the earlier award decision in 2017.[45]

Inserso filed a protest at the Court of Federal Claims asserting that the disclosure of competitively sensitive information to some, but not all offerors in the small business competition created an organizational conflict of interest (OCI) and violated the requirement in the Federal Acquisition Regulation (FAR) that offerors receive fair and equal treatment.[46] The Court of Federal Claims found that, while the pricing information "provided a useful comparison tool that [small-business-competition] offerors could utilize as a

36. *Id.* at 1382–83.
37. Inserso Corp. v. United States, 961 F.3d 1343, 1343 (Fed. Cir. 2020).
38. Jerald S. Howe et al., *An Analysis Of GAO's 2020 Bid Protest Statistics—Fewer Protests, More Success—Together With Last Year's Top Protest Decisions And Developments*, 63 No. 6 Gov't Contractor ¶ 40 (Feb. 10, 2021); *see also* Matthew J. Michaels, *Protesting Too Much or Not Enough? Setting Boundaries in the Court of Federal Claims for the Recent Expansions of the Blue & Gold Waiver Rule*, The Procurement Law., Spring 2021, at 11 (noting that "recent cases," including *Inserso*, "have shifted the boundaries for waiver of preaward challenges").
39. *Inserso Corp.*, 961 F.3d at 1346.
40. *Id.*
41. *Id.*
42. *Id.* at 1347.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1348.

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benchmark in revising their price proposals," it concluded that the government's actions did not prejudice Inserso.[47]

Although the Court of Federal Claims did not address whether Inserso's protest was barred under *Blue & Gold*, on appeal, the Federal Circuit majority concluded that Inserso had waived its challenge regarding the release of competitively sensitive information to some, but not all, offerors.[48] The Federal Circuit vacated the lower court's decision regarding a lack of prejudice, and the majority determined that "Inserso should have challenged the solicitation before the competition concluded because it knew, or should have known, that [the agency] would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards."[49]

Regarding the non-public pricing information that was provided during the full-and-open debriefings, the Federal Circuit majority stated that Inserso knew that the full-and-open competition concluded in November 2017 and that the "FAR indicates that the winning total evaluated prices would have been provided to all unsuccessful offerors in the competitive range within three days of the award."[50] The Federal Circuit majority asserted that "[t]he law and facts made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices that Inserso now challenges."[51] Regarding the non-public evaluation information that was provided during the full-and-open debriefings, the Federal Circuit majority stated that, "[a]lthough the FAR does not require disclosing such information in the award notice, Inserso should have known that disclosure of this information was likely to be a part of the competitively valuable information required by the FAR to be included in the post-award debriefing."[52]

Thus, the Federal Circuit majority concluded that, "[a]lthough it may have been impossible to know the precise contents of the full-and-open competition's debriefings, Inserso should have known that those debriefings were bound to contain information that would provide a competitive advantage in the small-business competition" and that it should have filed its protest prior to award.[53] The Federal Circuit majority asserted that applying *Blue & Gold* to Inserso's claims "implements Congress's directive that courts 'shall give due regard to . . . the need for expeditious resolution' of protest claims."[54]

Judge Reyna issued a dissenting opinion in which he stated:

47. *Id.* at 1347 (quoting Inserso Corp. v. United States, 142 Fed. Cl. 678, 684 (2019), *vacated*, 961 F.3d at 1347 (Fed. Cir. 2020)).

48. *Id.* at 1349–50 ("Inserso, however, did not object to the disparity in provision of competitively advantageous information until after the awards were made in the small-business competition. We conclude that, by waiting until the awards were made, Inserso forfeited the objection.").

49. *Id.* at 1350.

50. *Id.* (citing FAR 15.503(b)(1)(iv)).

51. *Inserso Corp.*, 961 F.3d at 1350.

52. *Id.*

53. *Id.* at 1350–51.

54. *Id.* at 1352 (omission in original) (quoting 28 U.S.C. § 1491(b)(3)).

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> The majority decides that appellant's claims are barred under the *Blue & Gold* "waiver rule." This decision rests on shaky, legal ground and cannot stand. First, the validity of the *Blue & Gold* "waiver rule" is undermined by the reasoning in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, —— U.S. ——, 137 S. Ct. 954, 197 L.Ed.2d 292 (2017). Second, the undermined *Blue & Gold* "waiver rule" does not apply to appellant's claims, which arise from latent errors not apparent from the solicitation. Third, the majority decides to bar appellant's claims under the *Blue & Gold* "waiver rule" in the first instance. We should not engage in such overreach given that the parties did not brief, and the Claims Court did not discuss, the interplay between *Blue & Gold* and *SCA Hygiene*.[55]

Regarding the validity of *Blue & Gold*, Judge Reyna stated that, contrary to the majority's reference to the *Blue & Gold* rule as a "waiver rule," the rule actually is a "judicially-created time bar."[56] Judge Reyna stated that "[w]aiver is an equitable defense, the application of which is left to the trial court's discretion" and that turns '"upon the particular facts and circumstances"' of "'whether there has been an intelligent waiver of right."'[57] The *Blue & Gold* rule, on the other hand, is a "hard and fast" rule that "is triggered solely by the timing of a protestor's challenge," without exception.[58]

Judge Reyna also stated that, in *SCA Hygiene*, the U.S. Supreme Court explained that a statute of limitations addresses the issue of timeliness, and that "'courts are not at liberty to jettison Congress' judgment on the *timeliness of suit*,' even if the statute of limitations gives rise to 'undesirable' 'policy outcomes.'"[59] Judge Reyna stated that, "[r]elying on this principle, the Supreme Court held that a court cannot rely on the doctrine of laches, an equitable doctrine primarily focused on the timelines[s] of a claim, to preclude a claim for damages incurred within the Patent Act's statute of limitations."[60]

As for bid protests, Judge Reyna stated that "Congress has spoken to the timeliness of challenges to patent errors in the solicitation" in the Court of Federal Claims by enacting 28 U.S.C. § 2501,[61] which states that "[e]very 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."[62] Judge Reyna also asserted that, "[g]iven this clear congressional directive, we cannot curtail the six-year limitations period for challenges to patently defective solicitations," and that "the *Blue & Gold* time bar directly conflicts with the reasoning in *SCA Hygiene*."[63] Judge Reyna further stated that "our interest in reducing costly after-the-fact litigation and procurement delays does not save the *Blue & Gold* time bar from *SCA Hygiene*'s

55. *Id.* at 1352–53 (Reyna, J., dissenting).
56. *Id.* at 1353.
57. *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
58. *Id.*
59. *Id.* at 1354 (quoting SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960–61 n.4 (2017)).
60. *Id.* (citing *SCA* Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960, 961 n.4 (2017); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667 (2014)).
61. *Inserso Corp.*, 961 F.3d at 1354.
62. 28 U.S.C. § 2501.
63. *Inserso Corp.*, 961 F.3d at 1354–55.

reach" because the Federal Circuit "cannot override the Claims Court's six-year statute of limitations based on our own policy concerns."[64]

Instead of applying a time bar, Judge Reyna stated that the court should "consider the prejudicial effects of delay at the remedy phase."[65] Judge Reyna also asserted that "it is in the public interest that government-made errors in a solicitation do not go unreviewed, even if the only feasible remedy given a protestor's delay is a declaratory judgment that the government erred."[66]

Regarding the application of the *Blue & Gold* time bar to Inserso's claims, Judge Reyna stated that *Blue & Gold* would not bar Inserso's claims because Inserso did not raise a challenge to a patent error in the solicitation.[67] Judge Reyna stated that the Federal Circuit has "never previously extended *Blue & Gold* beyond challenges to the solicitation" and that the Federal Circuit "should not do so today."[68] Instead of applying *Blue & Gold* to Inserso's claims, Judge Reyna asserted that the Federal Circuit "should [have] instead reach[ed] the merits of Inserso's claims."[69]

D. Decisions After Inserso

Following *Inserso*, the U.S. Court of Federal Claims has continued to address the application and scope of *Blue & Gold*.[70] For example, one Court of Federal Claims judge declined to extend *Inserso*, holding that it did not support the proposition that a protestor must "challenge a biased award decision—based on allegations not directly related to the terms or structure of the solicitation itself—before that decision is rendered by the agency."[71] Conversely, another judge of the Court of Federal Circuit appears to have extended *Inserso* to find that by not raising its grounds for a protest prior to award, a protestor waived its right to protest the agency's failure to consider whether an awardee gained access to non–public information by hiring a former government employee.[72] In the latter case, the Court of Federal Claims determined that the protest should have been filed prior to an award because the former government employee at issue attended an "engineering day" as a representative of the awardee and because there was an article that identified the former government employee as an employee of the awardee.[73] Neither decision analyzed

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64. *Id.* at 1355.
65. *Id.* (citing Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 685, 687 (2014)).
66. *Id.* (citing Ian, Evan & Alexander Corp. v. United States, 136 Fed. Cl. 390, 429 (2018)).
67. *See id.* at 1356.
68. *Id.* at 1358.
69. *Id.*
70. *See generally* Blue Origin Fed'n, LLC v. United States, 157 Fed. Cl. 74, 95 (2021); SEKRI, Inc. v. United States, 152 Fed. Cl. 742 (2021), *rev'd*, 34 F.4th 1063 (Fed. Cir. 2022).
71. Amazon Web Servs., Inc. v. United States, No. 19-1796C, 2021 WL 1686406 (Fed. Cl. Apr. 29, 2021).
72. Perspecta Enter. Sols. LLC v. United States, 151 Fed. Cl. 772, 780 (2020).
73. *Id.*

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the viability of *Blue & Gold* in light of the Supreme Court precedent cited in Judge Reyna's dissent.[74]

Additionally, roughly one-and-a-half years after issuing his dissenting opinion in *Inserso*, Judge Reyna wrote a separate decision in *Harmonia Holdings Group, LLC v. United States*,[75] which involved a *Blue & Gold* argument. Although *Harmonia* did not address the viability of the *Blue & Gold* doctrine in light of recent Supreme Court precedent, it did provide helpful clarification regarding the preservation of a pre-award protest.[76] Specifically, the Court of Federal Claims found that, even though the protestor had filed a timely pre-award protest challenging the terms of solicitation amendments with the agency, the protestor waived its ability to reassert the pre-award protest in the Court of Federal Claims "by waiting five months to re-raise its pre-award arguments."[77] The Federal Circuit reversed, stating that the protestor's "undisputedly timely, formal challenge of the solicitation before [the agency] remove[d] th[e] case from the ambit of *Blue & Gold* and its progeny."[78] Thus, although many commentators had anticipated that *Harmonia* would further explore the tension between *Blue & Gold* and Supreme Court precedent, the decision avoided the issue, as the protest was outside "the ambit of *Blue & Gold* and its progeny."[79]

In May 2022, Judge Reyna wrote the decision in SEKRI, Inc. v. United States,[80] which found that a protest ground was not waived when a protestor submitted a question to an agency regarding the issue in the protest ground prior to the close of the solicitation.[81] According to Judge Reyna, the question that the protestor asked constituted a "timely, formal challenge" under *Harmonia*.[82]

III. ANALYSIS

For the reasons set forth below, *Blue & Gold* should no longer be applied to bar post-award bid protests that are timely under the Court of Federal Claims' statute of limitations. With that being said, important policy considerations underpin the *Blue & Gold* doctrine, and those considerations need not be discarded simply because the doctrine is no longer viable.

74. *See* Amazon Web Servs., Inc. v. United States, 153 Fed. Cl. 602, 605 (2021); *see also Perspecta Enter. Sols. LLC*, 151 Fed. Cl. at 772.

75. Harmonia Holdings Grp., LLC v. United States, 20 F.4th 759 (Fed. Cir. 2021).

76. *See id.* at 811–13.

77. Harmonia Holdings Grp., LLC v. United States, 146 Fed. Cl. 799, 813 (2020), *rev'd in part*, 20 F.4th at 759 (Fed. Cir. 2021).

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

79. *Id.*

80. SEKRI, Inc. v. United States, 34 F.4th 1063 (Fed. Cir. 2022).

81. *Id.* at 1065.

82. *Id.*

A. Blue & Gold *Should No Longer Be Applied in Bid Protests.*

The *Blue & Gold* doctrine is no longer good law for two reasons: first, the doctrine conflicts with recent U.S. Supreme Court precedent; and second, the rationale underlying the doctrine is no longer valid.

1. *Blue & Gold* Conflicts with Supreme Court Precedent Because It Applies a Judicially Created Time Bar to Claims That Are Timely Under the Applicable Statute of Limitations.

The Supreme Court's decisions in *SCA Hygiene* and *Petrella v. Metro-Goldwyn-Mayer, Inc.* provide that judicially created timeliness rules, such as the *Blue & Gold* rule, may not be applied to preclude claims that are otherwise timely under the applicable statute of limitations.[83] These decisions conflict with the *Blue & Gold* timeliness rule as understood and applied by the Court of Federal Claims and the Federal Circuit.

i. The Rule Established in *Blue & Gold* Is a Judicially Created Timeliness Rule, Not a Waiver Rule.

The Federal Circuit and the Court of Federal Claims have referred to the *Blue & Gold* rule as a "waiver rule."[84] Indeed, in *Blue & Gold*, the court stated that it was "recognizing a waiver 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 afterwards in a § 1491(b) action in the Court of Federal Claims.[85]

As noted by Judge Reyna in his dissenting opinion in *Inserso*, the *Blue & Gold* rule is not actually a "waiver rule."[86] The Federal Circuit in *Massie v. United States* described "[a] waiver [a]s 'an intentional relinquishment or abandonment of a known right or privilege.'"[87] Whether a claim is waived depends on the facts and circumstances of the case.[88] Because waiver is a fact-intensive defense, application of a waiver is left to the discretion of the trial court.[89] In short, a waiver requires that the trial court make a factual determination as to

83. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 961 (2017); Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1974 (2014).

84. Harmonia Holdings Grp., LLC v. United States, 146 Fed. Cl. 799, 813 (2020), *rev'd in part*, 20 F.4th 759 (Fed. Cir. 2021).

85. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314–13 (Fed. Cir. 2007).

86. Inserso Corp. v. United States, 961 F.3d 1343, 1353 (Fed. Cir. 2020) (Reyna, J., dissenting) ("Although we called [*Blue & Gold*] a 'waiver rule,' this is a misnomer.").

87. Massie v. United States, 166 F.3d 1184, 1190 n.** (Fed. Cir. 1999) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

88. *Johnson*, 304 U.S. at 464 ("The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case . . . ."); Hooe & Herbert v. United States, 41 Ct. Cl. 378, 382–83 (1906) ("Waiver is always a question of fact, determinable from all the facts and circumstances surrounding the transaction in hand. To estop the assertion of one's rights it must distinctly appear that the same were waived with full knowledge of what they were and with intent to waive the same.").

89. *See* Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1019 (Fed. Cir. 2008).

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whether a plaintiff knowingly relinquished its right to bring a claim.[90] If the *Blue & Gold* rule was actually treated as a "waiver rule," application of *Blue & Gold* would depend on whether a plaintiff intentionally relinquished its right to bring a protest, a determination that would be in the Court of Federal Claims' discretion and that would be based on the facts of the case being brought.[91]

Unlike a traditional waiver rule, the *Blue & Gold* rule does not permit analysis of the facts and circumstances surrounding a plaintiff's failure to bring a claim prior to the deadline for proposals or the award decision.[92] In fact, the majority opinion in *Inserso* clearly stated that it was *not* conducting a fact-intensive inquiry into whether Inserso intentionally relinquished or abandoned its right to bring its protest as would be required in a waiver analysis.[93] Instead it stated that whether Inserso's claims were barred under *Blue & Gold* was "an issue of law."[94] Additionally, unlike waiver, the Court of Federal Claims does not have discretion when deciding whether to dismiss a protest ground that is untimely under *Blue & Gold*.[95] Thus, the *Blue & Gold* rule has not been applied as a waiver, but rather as a judicially created time bar, as it reflects a "judicially created limitation[] on [a] right[] of action" that "denies a plaintiff relief if sufficient time has elapsed" from when the claim is known.[96]

ii. A Court May Not Impose a Timeliness Rule That Is More Stringent Than the Applicable Statute of Limitations.

As discussed below, in *Petrella* and *SCA Hygiene*, the U.S. Supreme Court established that judicially created timeliness rules, such as laches, may not be

90. BGT Holdings, LLC v. United States, 142 Fed. Cl. 474, 481 (2019) ("In order to effectively waive a right to which a party would otherwise be entitled, it must do so 'knowingly and voluntarily.'" (quoting Minesen Co. v. McHugh, 671 F.3d 1332, 1340 (Fed. Cir. 2012))), *vacated in part*, 984 F.3d 1003, 1015–16 (Fed. Cir. 2020).

91. *Johnson*, 304 U.S. at 464. Although the majority in *Inserso* occasionally referred to the *Blue & Gold* "waiver rule" as a "forfeiture rule," *see* Inserso Corp. v. United States, 961 F.3d 1343, 1352 (Fed. Cir. 2020), neither *Blue & Gold*, nor any Federal Circuit opinion prior to *Inserso*, appears to have referred to *Blue & Gold* as a "forfeiture rule."

92. *See* Per Aarsleff A/S v. United States, 829 F.3d 1303, 1316–17 (Fed. Cir. 2016) (Reyna, J., concurring) ("When a prospective offeror knows about problems in a solicitation before proposals are due, any protest of those solicitation provisions must be dismissed as untimely, unless it is filed before the close of the bidding process . . . . Dismissal is mandatory, not discretionary." (citation omitted)).

93. *BGT Holdings, LLC*, 142 Fed. Cl. at 481.

94. Inserso Corp. v. United States, 961 F.3d 1343, 1349 n.1 (Fed. Cir. 2020).

95. *See* SEKRI, Inc. v. United States, 152 Fed. Cl. 742, 752 (2021), *rev'd*, 34 F.4th 1063 (Fed. Cir. 2022) ("Courts have held that when *Blue & Gold Fleet*'s waiver rule applies, a court must dismiss the action; it has no discretion to allow the plaintiff to maintain the action." (citations omitted)); *see also Per Aarsleff A/S*, 829 F.3d at 1317 (Reyna, J., concurring) (stating that, under *Blue & Gold*, "[d]ismissal is mandatory, not discretionary").

96. *See* Mitchell A. Lowenthal et al., *Time Bars in Specialized Federal Common Law*, 65 Cornell L. Rev. 1011, n.12, 1015 (1980); *see also Per Aarsleff A/S*, 829 F.3d at 1316–17 (Reyna, J., concurring) (discussing "the *Blue & Gold* timeliness bar").

applied to bar claims that are otherwise timely under the applicable statute of limitations.[97]

In *Petrella*, the Supreme Court addressed whether the equitable defense of laches could be used to bar a claim that was brought within the three-year statute of limitations applicable to the Copyright Act, 17 U.S.C. § 507(b).[98] The Supreme Court defined laches as "unreasonable, prejudicial delay in commencing suit"[99] and stated that, when Congress fails to enact an applicable statute of limitations, courts may use laches to fill the "legislative hole."[100]

The Supreme Court concluded that, "in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[101] The Supreme Court stated that "we have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period" and that "[i]nviting individual judges to set a time limit other than the one Congress prescribed . . . would tug against the uniformity Congress sought to achieve when it enacted" the statute of limitations.[102] The Supreme Court also stated that "a plaintiff's delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing" the damages owed to the plaintiff.[103]

In *SCA Hygiene*, the Supreme Court addressed whether "laches can be asserted to defeat a claim for damages incurred within the [six-]year period set out in the Patent Act."[104] The Supreme Court stated that *Petrella*'s reasoning applied in *SCA Hygiene* and that the statute of limitations provision in the Patent Act "represents a judgment by Congress that a patentee may recover damages for any infringement committed within six years of the filing of the claim."[105] Thus, "[l]aches cannot be interposed as a defense against damages where the infringement occurred within the period prescribed by" the Patent Act.[106] The Supreme Court reiterated that "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power."[107] Thus, under *SCA Hygiene* and *Petrella*, a court is therefore not permitted to apply a timeliness rule that is more stringent than the applicable statute of limitations because the statute

97. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667 (2014); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960 (2017).

98. *Petrella*, 572 U.S. at 667.

99. *Id.*

100. *Id.* at 670 (internal quotation marks and citation omitted); *see also id.* at 678 ("[L]aches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation." (citation omitted)).

101. *Id.* at 679.

102. *Id.* at 680-81.

103. *Id.* at 668.

104. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 959 (2017).

105. *Id.* at 961.

106. *Id.* at 967.

107. *Id.* at 960 (quoting *Petrella*, 572 U.S. at 680).

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of limitations provides the time limit that Congress deemed appropriate for bringing a claim.[108]

iii. *Blue & Gold* Conflicts with Supreme Court Precedent Because It Applies a Time Bar to Claims That Are Timely Under the Applicable Statute of Limitations.

The Tucker Act states that the Court of Federal Claims "shall have jurisdiction to entertain [a bid protest] action without regard to whether suit is instituted before *or after the contract is awarded*."[109] The applicable statute of limitations for bid protests at the Court of Federal Claims is set forth at 28 U.S.C. § 2501, which states: "*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."[110] Thus, by enacting 28 U.S.C. § 2501, Congress limited the amount of time within which a protest must be brought in the Court of Federal Claims to six years from when the claim accrues.[111]

Because Congress has established the period within which a protest may be asserted in the Court of Federal Claims, the Federal Circuit may not create a timeliness rule shortening that period.[112] The statute of limitations at 28 U.S.C. § 2501 "speaks directly to the issue of timeliness" for filing protests at the Court of Federal Claims, and the Federal Circuit is "'not at liberty to jettison Congress' judgment on the timeliness of suit'" by creating and applying a more stringent timeliness requirement.[113] By applying a judicially created time bar to a discrete set of bid protests that may otherwise be timely under the applicable statute of limitations, the *Blue & Gold* doctrine conflicts with *SCA Hygiene* and *Petrella*. In fact, in *Harmonia Holding Groups LLC v. United States*, the Federal Circuit acknowledged that *Blue & Gold* "restricted the time for bringing a bid protest in the Court of Federal Claims to a shorter period" than the applicable statute of limitations.[114]

In *Inserso*, the majority attempted to distinguish *Blue & Gold* from *SCA Hygiene* by asserting that *SCA Hygiene* involves "the general non-statutory equitable timeliness doctrine of laches," while *Blue & Gold* "establishes a 'waiver rule' under a specific statutory authorization," that is, 28 U.S.C. § 1491(b)(3), "with support from longstanding substantive contract law and from regulations under a related statutory regime specific to bid protests."[115] The majority's distinction overlooks that, in *SCA Hygiene* and *Petrella*, the

108. *See Petrella*, 134 S. Ct. at 1967; *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 960.
109. 28 U.S.C. § 1491(b)(1) (emphasis added).
110. 28 U.S.C. § 2501 (emphasis added).
111. 28 U.S.C. § 2501; *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").
112. *See SCA Hygiene Prods. Aktiebolag, LLC*, 137 S. Ct. at 960.
113. *Id.* (quoting *Petrella*, 572 U.S. at 667).
114. Harmonia Holdings Grp., LLC v. United States, 20 F.4th 759, 756 (Fed. Cir. 2021).
115. Inserso Corp. v. United States, 961 F.3d 1343, 1349 n.1 (Fed. Cir. 2020). The "support from longstanding substantive contract law and from regulations under a related statutory regime specific to bid protests," or, lack thereof, is discussed below in Part III.B. *Id.*

Supreme Court "spoke in broad terms," based "on both separation-of-powers principles and the traditional role of laches in equity," both of which are relevant in the bid protest context.[116]

Regarding the separation of powers principles, the Supreme Court explained that "[a] statute of limitations reflects a congressional decision that timeliness is better judged by a hard and fast rule instead of a case-specific judicial determination."[117] A court cannot impose a more stringent timeliness rule than the applicable statute of limitations, even if the timeliness rule is designed to avoid undesirable "policy outcomes."[118] If individual judges are allowed to create time limits other than the ones prescribed by Congress—the applicable statute of limitations—this "would tug against the uniformity Congress sought to achieve when it enacted" the statute of limitations.[119] The *Blue & Gold* doctrine contravenes separation of power principles, as the doctrine creates a timeliness rule that bars certain protest grounds that might otherwise be timely under the applicable statute of limitations in 28 U.S.C. § 2501.[120]

The "role" of the *Blue & Gold* doctrine also is similar to "the traditional role of laches," which further indicates that *Blue & Gold* conflicts with the reasoning in *SCA Hygiene* and *Petrella*.[121] The Supreme Court has explained that "[l]aches is 'a defense developed by courts of equity' to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'"[122] The *Blue & Gold* rule is a judicially-created timeliness rule that seeks to protect offerors and the government against potentially unreasonable and prejudicial delay in filing a protest.[123] Indeed, in *Blue & Gold*, the Federal Circuit cited to the use of laches in patent cases as support for the creation of the *Blue & Gold* doctrine.[124]

Laches and the *Blue & Gold* doctrine also share many of the same desired policy goals.[125] The Federal Circuit has stated that laches "will not assist one who has slept upon his rights," and assures "that those against whom claims are presented will not be unduly prejudiced by delay in asserting them."[126]

116. *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 960.

117. *Id.* at 957.

118. *Id.* at 961 n.4.

119. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 680–81 (2014); *see also id.* at 680 (stating that application of laches within an applicable statute of limitations would be "legislation-overriding").

120. *See* 28 U.S.C. § 2501.

121. *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 960.

122. *Id.* (quoting *Petrella*, 572 U.S. at 667, 678).

123. Bannum, Inc. v. United States, 779 F.3d 1376, 1380 (Fed. Cir. 2015) (stating that the *Blue & Gold* doctrine "reduc[es] the need for the 'inefficient and costly' process of agency rebidding 'after offerors and the agency ha[ve] expended considerable time and effort submitting or evaluating proposals in response to a defective solicitation'" (second alteration in original) (quoting Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007))).

124. *See Blue & Gold Fleet, L.P.*, 492 F.3d at 1314. The Federal Circuit's reliance on laches to support the creation of a time bar makes sense, as "[l]aches is a[n] equitable time bar defense penalizing those who sleep on their rights." Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 Cornell L. Rev. 1151, 1182 n.215 (1990).

125. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1314.

126. A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1029 (Fed. Cir. 1992) (en banc), *abrogated by SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 954.

In *Blue & Gold*, the Federal Circuit similarly stated that "[v]endors cannot sit on their rights," and that "[a] waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation."[127] Additionally, both laches and the *Blue & Gold* doctrine attempt to fill a "gap" as to when claims must be brought.[128]

There is, however, no gap to fill in the bid protest context, as Congress provided the statute of limitations applicable to protests by enacting 28 U.S.C. § 2501.[129] Indeed, the Court of Federal Claims has recognized that, in light of the statute of limitations at 28 U.S.C. § 2501, "laches cannot be applied to bid protests."[130] Additionally, the Supreme Court has determined that policy goals like those at issue in *Blue & Gold* are insufficient to support the creation of a timeliness rule that is more stringent than the applicable statute of limitations, as a court "cannot overrule Congress's judgment based on [its] own policy views."[131]

In sum, the timeliness rule established in *Blue & Gold* conflicts with the Supreme Court's decisions in *SCA Hygiene* and *Petrella* and should no longer be applied in bid protests.

2. The Rationale Underlying *Blue & Gold* Is No Longer Valid.

In addition to conflicting with *SCA Hygiene* and *Petrella*, the justifications cited by the Federal Circuit when creating the *Blue & Gold* rule do not support its continued use in bid protests.

The Federal Circuit identified four bases supporting its creation of the *Blue & Gold* rule: (1) the language at 28 U.S.C. § 1491(b)(3); (2) the doctrine of patent ambiguity; (3) the GAO's timeliness regulation at 4 C.F.R. § 21.2(a)(1); and (4) the "analogous doctrines of laches and equitable estoppel" in patent cases.[132] Each of these bases are discussed, in turn, below.

i. 28 U.S.C. § 1491(b)(3) Does Not Support the Continued Use of the *Blue & Gold* Time Bar.

In *Blue & Gold*, the U.S. Court of Appeals for the Federal Circuit heavily relied on the language at 28 U.S.C. § 1491(b)(3) to justify the creation of the

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

128. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 961 (2017) ("Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill."); *Blue & Gold Fleet, L.P.*, 492 F.3d at 1315 (stating that the *Blue & Gold* time bar furthers "the statutory mandate of § 1491(b)(3)" even though "the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding").

129. *See* 28 U.S.C. § 2501.

130. ATSC Aviation, LLC v. United States, 141 Fed. Cl. 670, 696 (2019). Similarly, the Armed Services Board of Contract Appeals, following the Supreme Court's rulings in *SCA Hygiene* and *Petrella*, no longer applies laches to claims brought under the Contract Disputes Act. *See* Lockheed Martin Aeronautics Co., ASBCA No. 62209, 21-1 BCA ¶ 37,886.

131. *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 967.

132. *See* Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313–14 (Fed. Cir. 2007).

Blue & Gold time bar.[133] In *Inserso*, the Federal Circuit similarly relied on the language at 28 U.S.C. § 1491(b)(3) to support its continued use of the *Blue & Gold* time bar.[134] In fact, the Court of Federal Claims stated that "the majority in *Inserso* firmly grounded *Blue & Gold Fleet*'s waiver rule in the statutory text of 28 U.S.C. § 1491(b)(3)."[135]

A statutory provision should not be read in isolation, but rather in the context of other relevant provisions.[136] Title 28 U.S.C. § 1491(b)(1) states that the Court of Federal Claims has jurisdiction over pre–award and post–award bid protests.[137] The statutory provisions at 28 U.S.C. § 1491(b)(2)–(3) further state:

> (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.
>
> (3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.[138]

As Judge Reyna noted in his dissent in *Inserso*, when read in the context of the preceding sections, § 1491(b)(3) addresses the importance of expeditious resolution of bid protests when deciding whether relief is proper.[139] In other words, § 1491(b)(3) requires the Court of Federal Claims to "'give due regard . . . for expeditious resolution'" of the action when considering the type of relief to grant under § 1491(b)(2).[140]

Moreover, 28 U.S.C. § 1491(b)(3) states that the Court of Federal Claims must "give due regard to" two things: "the interests of national defense and national security <u>and</u> the need for expeditious resolution of the action."[141] The statute does not differentiate between the type of "due regard" the Court of

133. *See id.* at 1315 ("[W]hile it is true that the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of § 1491(b)(3) for courts to 'give due regard to . . . the need for expeditious resolution of the action' and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule." (omission in original) (quoting 28 U.S.C. § 1491(b)(3))).

134. Inserso Corp. v. United States, 961 F.3d 1343, 1352 (Fed. Cir. 2020) ("Enforcing our forfeiture rule implements Congress's directive that courts 'shall give due regard to . . . the need for expeditious resolution' of protest claims" (quoting 28 U.S.C. § 1491(b)(3))).

135. SEKRI, Inc. v. United States, 152 Fed. Cl. 742, 753 (2021), *rev'd*, 34 F.4th 1063 (Fed. Cir. 2022).

136. *See* King v. Lynch, 21 F.3d 1084, 1088 (Fed. Cir. 1994) ("The statutory language at issue in Sec. 7703(d) cannot be read in isolation but must be read in the context of other applicable provisions of the CSRA."); *see also* Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350, 1356 (Fed. Cir. 2015) ("Statutory interpretation is 'not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law.'" (alteration in original) (quoting Hawkins v. United States, 469 F.3d 993, 1001 (Fed. Cir. 2006))).

137. 28 U.S.C. § 1491(b)(1).

138. 28 U.S.C. § 1491(b)(2)–(3).

139. *Inserso Corp.*, 961 F.3d at 1355.

140. *Id.* at 1352 (quoting 28 U.S.C. § 1491(b)(3)).

141. 28 U.S.C. § 1491(b)(3) (emphasis added).

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Federal Claims is to provide in the interests of "national defense and national security" and "the need for expeditious resolution of the action."[142] Instead, the plain language of § 1491(b)(3) indicates that the same type of "due regard" is to be given to both considerations.[143]

Yet, the Federal Circuit has widely divergent interpretations of the type of due regard owed to national security and the expeditious resolution of protests.[144] Regarding national security, the Federal Circuit has stated that "section 1491(b)(3) merely instructs courts to give due regard to the issue of national defense and national security *in shaping relief*."[145] The Court of Federal Claims has similarly stated that § 1491(b)(3) "states in as plain English as Congress ever proffers that the interests of national defense and national security must be accorded due regard in determining *whether to award injunctive relief*."[146] Neither the Federal Circuit nor the Court of Federal Claims has suggested that 28 U.S.C. § 1491(b)(3) mandates dismissal of all protests involving national security or the national defense.[147] Conversely, the Federal Circuit and the Court of Federal Claims have interpreted "the need for expeditious resolution of the action" prong of § 1491(b)(3) as mandating dismissal of certain pre–award protests that are deemed untimely under *Blue & Gold*.[148]

It would be incongruous to give "due regard" to "the interests of national defense and national security" when addressing the appropriate remedy, while giving "due regard" to "the need for expeditious resolution" when determining whether the claim was timely filed.[149] Two clauses in the same sentence, separated only by the word "and" should be interpreted in the same manner. The Court of Federal Claims, therefore, should "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action" when considering the relief to be awarded.[150] The interpretation of § 1491(b)(3) offered in *Blue & Gold* "misreads [s]ection 1491(b)(3),"[151] as that statutory provision does not provide a basis for creating a time bar precluding the filing of certain pre–award protests that are statutorily authorized under 28 U.S.C. § 1491(b)(1) and timely under 28 U.S.C. § 2501.

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142. *Id.*

143. *Id.*

144. *See, e.g.*, PGBA, LLC v. United States, 389 F.3d 1219, 1226 (Fed. Cir. 2004).

145. *Id.* (emphasis added); *see also* Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1381 (Fed. Cir. 2000) (stating that the government raised "national security concerns . . . in the remedy phase of the case").

146. GTA Containers, Inc. v. United States, 103 Fed. Cl. 471, 493 (2012) (emphasis added).

147. *See, e.g.*, *id.*

148. 28 U.S.C. § 1491(b)(3); *see also* Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005).

149. 28 U.S.C. § 1491(b)(3).

150. *Id.*; *see also* Inserso Corp. v. United States, 961 F.3d 1343, 1355 (Fed. Cir. 2020) (Reyna, J. dissenting) ("When both provisions are read in harmony, the 'due regard' provision refers to the Claims Court's need to consider expeditious resolution of bid protests when deciding the proper relief.").

151. *See Inserso Corp.*, 961 F.3d at 1355 (Reyna, J. dissenting).

ii. Contract Interpretation Doctrines Do Not Support the Creation of a Time Bar.

When it created the *Blue & Gold* doctrine, the Federal Circuit also relied on the "doctrine of patent ambiguity."[152] The Federal Circuit has stated that, when there is a patent ambiguity in a solicitation, a contractor has "a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation."[153] The patent ambiguity doctrine "is the counterpart of the canon in government procurement that an ambiguous contract, where the ambiguity is not open or glaring, is read against the [g]overnment (if it is the author)."[154]

The patent ambiguity doctrine, however, is *not* a timeliness rule; rather, the doctrine "is a court-made rule that is designed to ensure, to the greatest extent possible, that all parties bidding on a contract share a common understanding of the scope of the project."[155] Indeed, the Federal Circuit has stated that "it has not given the [patent ambiguity] doctrine broad application."[156] The Court of Federal Claims has further stated that the patent ambiguity rule "is applied narrowly, because to do otherwise, effectively would relieve the government, as drafter, from bearing the consequences of its poorly stated contracts."[157]

Although *SCA Hygiene* and *Petrella* did not undermine the use of the patent ambiguity doctrine when resolving contract interpretation disputes,[158] a narrow contract interpretation doctrine should not be used to justify the creation of a timeliness rule. The doctrine does not address the timeliness of claims, nor does it provide any basis for shortening the applicable statute of limitations.[159] Moreover, relying on the patent ambiguity doctrine to create a timeliness rule expands the patent ambiguity doctrine beyond its original purpose as a contract interpretation tool and overlooks that the Court of Federal Claims is statutorily authorized to "entertain [bid protests] without regard to whether suit is instituted before or after the contract is awarded."[160]

iii. The GAO's Bid Protest Regulations Do Not Provide a Basis for Creating a Timeliness Rule in the Court of Federal Claims.

The U.S. Court of Appeals for the Federal Circuit stated that it found "support" for the *Blue & Gold* time bar in the GAO's bid protest regulations,[161]

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

153. Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996).

154. S.O.G. of Ark. v. United States, 546 F.2d 367, 371 (Ct. Cl. 1976).

155. Triax Pac., Inc. v. West, 130 F.3d 1469, 1475 (Fed. Cir. 1997). The Federal Circuit also has stated that the duty of inquiry created by the patent ambiguity doctrine "prevents contractors from taking advantage of ambiguities in government contracts by adopting narrow interpretations in preparing their bids and then, after the award, seeking equitable adjustments to perform the additional work the government actually wanted." *Id.* (citations omitted).

156. *Id.*

157. P.R. Burke Corp. v. United States, 47 Fed. Cl. 340, 351–52 (2000), *aff'd*, 277 F.3d 1346 (Fed. Cir. 2002).

158. *See generally* CGS-SPP Sec. Joint Venture v. United States, 158 Fed. Cl. 120 (2022).

159. *See generally Triax Pac., Inc.*, 130 F.3d at 1474–75.

160. *See* 28 U.S.C. § 1491(b)(1).

161. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007).

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which state that "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."[162]

As an initial matter, "there is no callus bridge between the scion of [the Court of Federal Claims'] bid protest regime and the stock of the limitations the GAO has imposed upon itself."[163] The GAO's bid protest regulations plainly do not apply to protests filed in the Court of Federal Claims.[164] For example, there is no basis for asserting that a protest filed in the Court of Federal Claims must comply with the GAO's requirements for filing bid protests, such as providing a copy of the protest to certain agency personnel.[165] Yet, the *Blue & Gold* doctrine relies, in part, on the GAO's timeliness rule for certain pre–award protests based on policy goals that a panel of Federal Circuit judges deemed to be desirable.[166]

Moreover, the GAO protest process establishes a streamlined, administrative process as an alternative to the judicial remedies available in the Court of Federal Claims.[167] It is unusual for a court to look to regulations governing a streamlined administrative process when interpreting a statute relating to the court's authority to hear certain claims.[168]

Inserso's apparent expansion of *Blue & Gold* to OCI allegations also misapplies the GAO timeliness regulation (*i.e.*, 4 C.F.R. § 21.2(a)(1)) that the Federal Circuit relied upon in *Blue & Gold* as "support" for its creation of the time bar.[169] The regulation at 4 C.F.R. § 21.2(a)(1) generally is limited to "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals."[170] As Judge Reyna noted in his dissent in *Inserso*, "Inserso's claims, which do not challenge any patent errors in the solicitation, are not subject to this rule."[171] In fact, the GAO has stated that a protest alleging an OCI, such as the protest grounds at issue in *Inserso*, generally may not be filed until after award.[172] The GAO applies that rule because, "[u]nless the firm with the alleged conflict of interest is actually selected for award, the protestor has not suffered any competitive

162. 4 C.F.R. § 21.2.

163. Wit Assocs., Inc. v. United States, 62 Fed. Cl. 657, 661 (2004).

164. *Id.*

165. *See* 4 C.F.R. § 21.1(e).

166. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1314.

167. *See* Advance Constr. Servs., Inc. v. United States, 51 Fed. Cl. 362, 365 (2002). The GAO is statutorily charged with the "inexpensive and expeditious resolution of protests." 31 U.S.C. § 3554(a)(1).

168. *See, e.g.*, *Advance Constr. Servs., Inc.*, 51 Fed. Cl. at 365.

169. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007).

170. 4 C.F.R. § 21.2(a)(1).

171. Inserso Crop. v. United States, 961 F.3d 1343, 1356 (Fed. Cir. 2020) (Reyna, J. dissenting).

172. *See* Deque Sys., Inc., B-415965.4, 2018 CPD ¶ 226, at *3 (Comp. Gen. June 13, 2018); *see also* Manus Med. LLC, B-412331, 2016 CPD ¶ 49, at *5 (Comp. Gen. Jan. 21, 2016) ("A protester's allegation that another firm has a conflict of interest is generally premature when filed before an award has been made.").

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prejudice."[173] Thus, in addition to not supporting the creation of the *Blue & Gold* time bar, the GAO's rules also do not provide a basis for extending *Blue & Gold* to protest grounds asserting an OCI claim.[174]

iv. Laches May No Longer Be Used as a Defense in Patent Cases. The final basis that the Federal Circuit relied upon in *Blue & Gold* to justify its creation of the *Blue & Gold* time bar is the affirmative defense of laches in patent cases.[175] In *Blue & Gold*, the Federal Circuit cited to the use of laches in *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*,[176] which was abrogated by the Supreme Court in *SCA Hygiene*.[177] The use of laches in patent cases, therefore, no longer supports use of the *Blue & Gold* time bar in bid protests.[178]

B. The Policy Goals Identified in Blue & Gold *Can Be Considered in Bid Protests in a Manner That Does Not Conflict with U.S. Supreme Court Precedent.*

Although insufficient for purposes of creating a time bar that is more stringent than the applicable statute of limitations, the policy goals underlying the *Blue & Gold* doctrine are significant enough to warrant consideration in bid protests. As stated in *Blue & Gold*, there is a need in appropriate cases to "prevent contractors from taking advantage of the government" and other bidders, and to "avoid[] costly after-the-fact litigation."[179]

At the same time, refining the *Blue & Gold* time bar so that it does not conflict with Supreme Court precedent is not only necessary, but may also reduce the number of "defensive" protests that are filed to avoid application of the *Blue & Gold* time bar.[180] Further, "it is in the public interest that government-made errors in a solicitation do not go unreviewed, even if the only feasible remedy given a protestor's delay is a declaratory judgment that the government erred," or bid and proposal costs.[181] Correcting government errors in the procurement process "improves the overall value delivered to the government in the long term,"[182] and the award of bid and proposal costs in appropriate cases would provide an offeror compensation for participating in a flawed procurement.

Rather than barring a claim that is untimely under *Blue & Gold*, but is timely under the applicable statute of limitations, the Court of Federal Claims could consider the protestor's delay when determining the appropriate relief. As discussed below, the delay could be raised as a threshold matter, before

173. *Deque Sys., Inc.*, 2018 CPD ¶ 226, at *4.

174. *See id.*

175. *See* Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007).

176. A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992) (en banc), *abrogated by* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017).

177. *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 959.

178. *See id.* at 957.

179. *See Blue & Gold Fleet, L.P.*, 492 F.3d at 1313–14.

180. *See* Ralph C. Nash, *Preaward Protests: When Are They Mandatory?* 34 Nash & Cibinic Rep. NL ¶ 40 ("The downside of [the *Blue & Gold*] rule is that it forces an offeror to file an early protest that might not be necessary or relevant to the outcome of the procurement.").

181. Inserso Corp. v. United States, 961 F.3d 1343, 1355 (Fed. Cir. 2020) (Reyna, J., dissenting).

182. Ian, Evan & Alexander Corp. v. United States, 136 Fed. Cl. 390, 429 (2018).

proceeding to the merits of the protest. Alternatively, the *Blue & Gold* doctrine could be reworked into a waiver rule that reflects the traditional principles and considerations of waiver.

1. The Court of Federal Claims Could Consider a Protestor's Delay in Bringing Its Claim When Considering Whether to Grant the Requested Relief.

Instead of barring certain claims in their entirety, the Court of Federal Claims could "consider a protestor's prejudicial delay when fashioning relief."[183] This approach is supported by the language at 28 U.S.C. § 1491(b)(3), which indicates that the Court of Federal Claims should give "due regard" to the "need for expeditious resolution" of the protest when granting relief.[184]

i. Injunctive Relief

Under 28 U.S.C. § 1491(b)(2), the Court of Federal Claims may award injunctive relief in bid protests.[185] When deciding whether to award injunctive relief, the Court of Federal Claims considers:

> (1) whether, as it must, the plaintiff has succeeded on the merits of the case; (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) whether it is in the public interest to grant injunctive relief.[186]

Although "success upon the merits is necessary, it is not sufficient alone for a plaintiff to establish an entitlement to injunctive relief."[187]

The Supreme Court has explained that "a plaintiff's delay can always be brought to bear at the remedial stage" and when "determining appropriate injunctive relief."[188] The Court of Federal Claims, therefore, could consider the protestor's delay in bringing a protest when considering irreparable harm, the balance of the hardships, and the public interest. Indeed, the Court of Federal Claims has done so in the past.[189]

For instance, when discussing irreparable harm, the Court of Federal Claims has explained 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."[190] In other words, the Court of Federal Claims is "ill-inclined" to issue injunctive relief to prevent harm attributable to the protestor's "own ill-fated tactical decisions."[191] Waiting to challenge a patent

183. *Inserso Corp.*, 961 F.3d at 1355 (Reyna, J., dissenting).
184. 28 U.S.C. § 1491(b)(3).
185. 28 U.S.C. § 1491(b)(2).
186. PGBA, LLC v. United States, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).
187. MVM, Inc. v. United States, 149 Fed. Cl. 478, 492 (2020) (citing Contracting, Consulting, Eng'g LLC v. United States, 104 Fed. Cl. 334, 353 (2012)).
188. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 668 (2014).
189. *See generally* CGS-SPP Sec. Joint Venture v. United States, 158 Fed. Cl. 120, 133 (2022).
190. Aircraft Charter Sols., Inc. v. United States, 109 Fed. Cl. 398, 416 (2013).
191. GEO Grp., Inc. v. United States, 100 Fed. Cl. 223, 229 (2011).

error in a solicitation until after proposal submission or the award decision might fairly qualify as an "ill-fated tactical decision" that would preclude the protestor from establishing irreparable harm based on the award of a contract to another offeror.[192]

Regarding the balance of the hardships factor, the Court of Federal Claims "has repeatedly held that a protestor's delay in bringing a protest must be accounted for in the balance of hardships inquiry."[193] Specifically, "[u]ndue delay is relevant in determining the extent to which it has magnified the harm to defendant."[194] Again, by failing to challenge a patent error in a solicitation prior to award, the protestor may significantly magnify the harm to the government because if it is enjoined from proceeding with its initial award decision, the government may need to amend the solicitation and restart the bidding process.[195] This can be expensive and time-consuming, and the harm might be reduced or avoided in an appropriate case if the protest had been filed earlier in the procurement process.[196]

As for the public interest factor, the Court of Federal Claims has stated that, "[e]xcept in the most extraordinary circumstances," it is not in the public interest to issue injunctive relief when the protestor "waits an inordinate period of time . . . before pressing its claim."[197] This consideration is "particularly heavy" when the issue "was plain from the face of the [request for proposal] and easily could have been raised prior to the time for submitting offers."[198]

Thus, a protestor who brings a post–award protest challenging a patent solicitation defect may be unable to make the required showings under the irreparable harm, the balance of the hardships, and the public interest factors to justify the issuance of injunctive relief.[199] In light of the established caselaw cited above, the court's analysis of the impact of a protestor's delay under the injunctive relief factors would be prudent and, in an appropriate case, might even be undertaken as a threshold matter prior to addressing the merits of the protest grounds. Protestors who know that the Court of Federal Claims will not grant the desired injunctive relief where the protestor cannot make the required showings under factors two, three, and three would be more likely to voluntarily dismiss the protest.

ii. Bid and Proposal Costs

In addition to injunctive relief, the Court of Federal Claims may award "bid preparation and proposal costs" as a remedy in bid protests.[200] Bid and proposal costs:

192. *Id.*
193. *Aircraft Charter Sols., Inc.*, 109 Fed. Cl. at 417 (citations omitted).
194. Elmendorf Support Servs. Joint Venture v. United States, 105 Fed. Cl. 203, 212 (2012).
195. *See Aircraft Charter Sols., Inc.*, 109 Fed. Cl. at 417.
196. *See id.*
197. Software Testing Sols., Inc. v. United States, 58 Fed. Cl. 533, 538 (2003).
198. *Id.*
199. *See, e.g.*, *Aircraft Charter Sols., Inc.*, 109 Fed. Cl. at 417; *Software Testing Sols., Inc.*, 58 Fed. Cl. at 538.
200. 28 U.S.C. § 1491(b)(2).

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> are recoverable only if three conditions are satisfied: (i) the agency has committed a prejudicial error in conducting the procurement; (ii) that error caused the protester to incur unnecessar[y] bid preparation and proposal costs; and (iii) the costs to be recovered are both reasonable and allocable, *i.e.*, incurred specifically for the contract in question.[201]

A protestor's delay in bringing a protest challenging a patent defect in the terms of a solicitation could be addressed when considering whether the government error "caused the protester to incur [unnecessary] bid preparation and proposal costs."[202] If the protestor's bid and proposal costs "were 'not rendered a needless expense by defendant's erroneous conduct, but rather were lost due to' some other reason, the bid preparation and proposal costs are not recoverable."[203] A typical patent defect would not have '"*caused*"' the protestor '"to incur [unnecessary] bid preparation and proposal costs."'[204] Rather, it would be the protestor's failure to timely raise the patent defect,[205] not the government's conduct, that caused the protestor to incur bid and proposal costs.

In addition, awarding bid and proposal costs to a protestor who fails to protest a patent error in a solicitation may be inconsistent with the purpose of awarding bid and proposal costs. "[B]id preparation and proposal costs are a type of reliance damages."[206] "Reliance damages are damages designed to compensate a plaintiff for foreseeable loss caused by reliance on the contract" or, in the bid protest context, the solicitation.[207] A protestor who fails to raise a patent error in the solicitation until after the close of bidding or award arguably did not "rely" on the solicitation; the protestor, instead, may have decided to "roll the dice" by waiting to see if it received the award before raising the issue.[208] In such a situation, it may be inequitable and inconsistent with the purpose of reliance damages to award bid and proposal costs.

iii. Declaratory Judgments

The Court of Federal Claims is also authorized to award declaratory relief in bid protests.[209] "A declaratory judgment states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future

201. Q Integrated Cos., LLC v. United States, 133 Fed. Cl. 479, 485 (2017) (quoting Reema Consulting Servs. v. United States, 107 Fed. Cl. 519, 532 (2012)).

202. *Id.*

203. A Squared Joint Venture v. United States, 149 Fed. Cl. 228, 232 (2020) (quoting *Reema Consulting Servs.*, 107 Fed. Cl. at 533).

204. *Id.* (emphasis added); *see also* IAP Worldwide Servs., Inc. v. United States, No. 21-1570C, 2022 WL 1671697, at *26 (Fed. Cl. May 25, 2022) (stating that a protest is unable to recover bid and proposal costs unless the protestor "is able to demonstrate that its initial proposal was somehow unnecessary or wasted").

205. *See, e.g.*, Moore's Cafeteria Servs. v. United States, 314 F. App'x 277, 279 (Fed. Cir. 2008).

206. Gentex Corp. v. United States, 61 Fed. Cl. 49, 54 (2004) (citing La Strada Inn, Inc. v. United States, 12 Cl. Ct. 110, 115 (1987)).

207. S. Cal. Fed. Sav. & Loan Ass'n. v. United States, 422 F.3d 1319, 1334 (Fed. Cir. 2005).

208. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007) (internal quotation marks and citation omitted).

209. 28 U.S.C. § 1491(b)(1).

action."[210] A declaratory judgment "is a milder remedy" than an injunction and "is frequently available in situations where an injunction is unavailable or inappropriate."[211] The Court of Federal Claims has explained that "[t]here is a dearth of authority with respect to the showing required for declaratory relief."[212]

If *Blue & Gold* in its current formulation was no longer applied in bid protests, a protestor who delays bringing a protest that should have been brought pre–award potentially could obtain a declaratory judgment providing that the government erred. Although allowing the protestor to pursue the declaratory judgment would require the government to engage in litigation, and would require the Court of Federal Claims to decide the case, a declaratory judgment would not restart the bidding process or otherwise prolong the procurement process.[213] The concerns in *Blue & Gold* of (1) an offeror "with knowledge of a solicitation defect. . .[choosing]. . .to stay silent when submitting its first proposal," and (2) an offeror who was not awarded the contract "[coming] forward with the defect to restart the bidding process" would not be implicated because declaratory judgments do not force parties to take certain actions or enjoin parties from taking certain actions.[214] Thus, allowing a protestor to pursue a declaratory judgment after an award would not adversely affect or delay the procurement process or otherwise transgress the directive that the Court of Federal Claims give "due regard" to "the need for expeditious resolution of the" bid protest.[215]

iv. Considering a Protestor's Delay in Filing When Deciding the Remedy Is Unlikely to Require the Court of Federal Claims to Address the Merits of Claims That Should Have Been Brought Prior to Proposal Submission or Award.

The delay in filing a protest at the remedy stage of the proceedings will likely ameliorate the concern that, but for the *Blue & Gold* doctrine, the Court of Federal Claims would need to address the merits of claims that should have been brought prior to proposal submission or award. As discussed above, post–award protests challenging a patent solicitation defect are unlikely to obtain injunctive relief or bid and proposal costs.[216] As for declaratory judgments, protestors generally will be unwilling to incur the costs associated with litigating a bid protest only to obtain a declaratory judgment that provides no benefit or compensation to the protestor. As the protestor will be unable to restart the procurement process with a declaratory judgment, it may decide

210. Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1055 (1st Cir. 1987).

211. Sierra Nevada Corp. v. United States, 107 Fed. Cl. 735, 761 (2012) (quoting *Ulstein Mar., Ltd.*, 833 F.2d at 1055).

212. *Id.*

213. *See* Inserso Corp. v. United States, 961 F.3d 1343, 1356 (Fed. Cir. 2020) (Reyna, J., dissenting).

214. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007).

215. 28 U.S.C. § 1491(b)(3).

216. *See, e.g.*, Software Testing Sols., Inc. v. United States, 58 Fed. Cl. 533, 538 (2003); A Squared Joint Venture v. United States, 149 Fed. Cl. 228, 232 (2020).

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to simply forgo the protest and save the expense of litigating unless the issue is significant. The Court of Federal Claims and the government, therefore, would likely not see a substantial increase in the number of post–award protests that seek a declaratory judgment in connection with a patent error in a solicitation if *Blue & Gold* was no longer applied.

Furthermore, "it is in the public interest that government-made errors in a solicitation do not go unreviewed,"[217] and Congress empowered the Court of Federal Claims with authority to hear post-award bid protests by providing the Court with the ability to issue declaratory judgments.[218] The Court of Federal Claims, therefore, must hear those actions and may not decline to exercise its jurisdiction simply because of the work required to litigate a bid protest.[219]

2. Alternatively, the *Blue & Gold* Doctrine Could Be Reworked to Follow a Traditional Waiver Analysis.

As currently applied, when the conditions of *Blue & Gold* are met, "[d]ismissal is mandatory, not discretionary."[220] Thus, there is no consideration of whether the protestor knowingly or voluntarily waived its right to bring the claim.[221]

If *Blue & Gold* were reshaped into a waiver rule, the Court of Federal Claims would look to whether the plaintiff intentionally relinquished its protest ground,[222] a consideration that would depend on the facts and circumstances of the case.[223] As the Court of Federal Claims explained:

> Waiver is always a question of fact, determinable from all the facts and circumstances surrounding the transaction in hand. To estop the assertion of one's rights it must distinctly appear that the same were waived with full knowledge of what they were and with intent to waive the same.[224]

The Court of Federal Claims would have discretion when making the fact-intensive determination as to whether the protestor knowingly and voluntarily waived its claim by failing to raise it prior to proposal submission or award.[225] Reshaping the *Blue & Gold* doctrine into a waiver rule would

217. *Inserso Corp.*, 961 F.3d at 1355 (Reyna, J., dissenting).

218. 28 U.S.C. § 1491(b)(2).

219. *See* 28 U.S.C. § 1491(b)(3).

220. Per Aarsleff A/S v. United States, 829 F.3d 1303, 1317 (Fed. Cir. 2016) (Reyna, J., concurring).

221. *See id.*

222. *See* Massie v. United States, 166 F.3d 1184, 1190 n.** (Fed. Cir. 1999) ("A waiver is 'an intentional relinquishment or abandonment of a known right or privilege'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))); *see also* BGT Holdings, LLC v. United States, 142 Fed. Cl. 474, 481 (2019) ("In order to effectively waive a right to which a party would otherwise be entitled, it must do so 'knowingly and voluntarily.'" (quoting Minesen Co. v. McHugh, 671 F.3d 1332, 1340 (Fed. Cir. 2012))), *vacated in part*, 984 F.3d 1003, 1016 (Fed. Cir. 2020).

223. *Johnson*, 304 U.S. at 464 ("The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case . . . .").

224. Hooe & Herbert v. United States, 41 Ct. Cl. 378, 382–83 (1906).

225. *See* Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1019 (Fed. Cir. 2008) ("We review a district court's judgment on the equitable defense of waiver for an abuse of discretion").

take the doctrine out of conflict with the U.S. Supreme Court's decisions in *SCA Hygiene* and *Petrella* as the Court of Federal Claims would no longer be applying a timeliness rule that is more stringent than the applicable statute of limitations.

Reworking the *Blue & Gold* doctrine into a waiver rule would likely only have a minor practical effect on application of the rule. The Court of Federal Claims may find that protestors voluntarily waived a claim challenging a patent ambiguity in a solicitation by failing to raise the claim prior to proposal submission. Because a patent ambiguity is an ambiguity that "is 'obvious, gross, [or] glaring,'"[226] there would be a viable argument that the protestor knowingly or intentionally relinquished its protest ground by failing to challenge a truly patent ambiguity in the solicitation until after the receipt of proposals or award.

With that being said, as the Federal Circuit expands the scope of the *Blue & Gold* doctrine "to other procurement errors beyond patent solicitation defects,"[227] the analysis of whether a protestor intentionally relinquished a protest ground would become more fact-dependent and nuanced. For instance, in *Inserso*, the Court of Federal Claims may have had difficulty identifying facts to support a conclusion that the protestor knowingly waived its OCI claim by not bringing it prior to award. Indeed, in order to reach that conclusion, the Federal Circuit stated that Inserso should have assumed that small businesses would compete in both the full-and-open and small business competitions and should have assumed that the agency would provide total evaluated prices and other competitively valuable information to those small businesses as part of the debriefings for the full-and-open competition (notwithstanding that the Federal Circuit acknowledged that "it may have been impossible to know the precise contents of the full-and-open competition's debriefings").[228]

Similarly, in *Perspecta Enter. Sols. LLC v. United States*, under a traditional waiver analysis, the Court of Federal Claims may not have found that the protestor intentionally waived its claim by failing to file a bid protest asserting an OCI claim until after award, given that application of *Blue & Gold* in that case was based on a former government employee's attendance of an "engineering day" as a representative of the awardee and an article that identified the former government employee as an employee of the awardee.[229]

In short, reshaping the *Blue & Gold* doctrine to reflect a traditional waiver analysis would give the Court of Federal Claims more discretion as to whether the protestor intentionally waived its protest ground and, more importantly,

226. CliniComp Int'l, Inc. v. United States, 117 Fed. Cl. 722, 738 (2014) (quoting NVT Techs., Inc. v. United States, 370 F.3d 1153, 1162 (Fed. Cir. 2004)).

227. Jerald S. Howe et al., *An Analysis of GAO's 2020 Bid Protest Statistics—Fewer Protests, More Success—Together with Last Year's Top Protest Decisions and Developments*, 63 No. 6 Gov't Contractor ¶ 40 (Feb. 10, 2021).

228. Inserso Corp. v. United States, 961 F.3d 1343, 1350 (Fed. Cir. 2020).

229. Perspecta Enter. Sols. LLC v. United States, 151 Fed. Cl. 772, 780 (2020).

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would help remove the tension between *Blue & Gold*, as currently formulated, and the U.S. Supreme Court's decisions in *SCA Hygiene* and *Petrella*.

IV. CONCLUSION

The future of *Blue & Gold* is uncertain. Although Judge Reyna's dissent in *Inserso* identified legitimate concerns regarding the validity of the *Blue & Gold* doctrine, the Federal Circuit nevertheless denied Inserso's petition for a rehearing en banc,[230] which would have provided the Federal Circuit with the opportunity to address the concerns raised in Judge Reyna's dissent. As *SCA Hygiene* and *Petrella* continue to be interpreted and expanded outside of the patent and copyright context,[231] perhaps the Federal Circuit will revisit the issue and address the tension between the cases. Until then, *Blue & Gold* will remain in effect, and practitioners, the government, and the Court of Federal Claims should all be prepared to address how *Blue & Gold* should be interpreted and applied in light of *Inserso*.

With that being said, the issues discussed in Part III.A of this article cannot remain unresolved indefinitely. The *Blue & Gold* doctrine, as it currently stands, conflicts with the principles the U.S. Supreme Court articulated in *SCA Hygiene* and *Petrella*, and policy considerations, reliance on the GAO's regulations, and the doctrine of patent ambiguity are all insufficient bases for overcoming that conflict.

The policy considerations, however, are legitimate and can be accounted for at the relief stage of the proceedings or by reworking the *Blue & Gold* rule to conform to a traditional waiver analysis. How to salvage the policy considerations identified in *Blue & Gold* ultimately is a question for the Federal Circuit or Congress, but there are methods of doing so aside from continuing to rely on a doctrine that conflicts with Supreme Court precedent.

230. Order, Inserso Corp. v. United States, Case No. 19-1933 (Fed. Cir. Sept. 16, 2020), ECF No. 59.

231. *See*, *e.g.*, Grant v. Swarthout, 862 F.3d 914, 919–20 (9th Cir. 2017) (considering *SCA Hygiene* in the context of equitable tolling and habeas corpus petitions).

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