

CLIENT ALERT

COFC Refuses to Expand Blue & Gold and Requires Army to Consider Performance Risk in Cost Realism Evaluation

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In *VS2 v. U.S.*, the U.S. Court of Federal Claims (“COFC”) rejected a Government Accountability Office (“GAO”) decision that effectively flipped an Army contract award. After an initial award to VS2, Vectrus filed a GAO protest alleging that the Army erred by upwardly adjusting Vectrus’ most probable cost (“MPC”) and assessing performance risk where Vectrus had proposed to cap those costs. GAO agreed, holding that Vectrus’ price should not have been adjusted and that any consideration of performance risk should have been limited to a responsibility determination. GAO recommended the Army award the contract to Vectrus and, after the Army did so, VS2 filed its own protest. GAO summarily dismissed VS2’s post-award protest as an untimely request for reconsideration and a belated challenge to GAO-recommended corrective action. VS2 then filed a protest at the COFC, which took a decidedly different tack.

As a threshold matter, the COFC rejected the government’s invitation to extend the *Blue & Gold* waiver rule to dismiss VS2’s “corrective action challenge” as untimely because it was not filed prior to the award to Vectrus. The COFC explained that the *Blue & Gold* rule—which requires solicitation challenges to be presented prior to proposal submission deadlines—was intended to prevent a protester from lying in wait until after award to protest errors apparent on the face of a solicitation. Here, VS2 had raised its arguments both while intervening in Vectrus’ original GAO protest and immediately after the changed award decision, and the government was unable to point to any deadline prior to award by which VS2 should have filed its challenge. Thus, the COFC held that “VS2 cannot be said to have sat on its rights.” (On this point, the COFC also cited a [C&M article](#) noting that the GAO’s earlier timeliness dismissal introduced difficult strategic considerations for protesters *and intervenors* going forward.)

On the merits, the COFC agreed with GAO that, in light of Vectrus’ proposed cost caps, the Army should not have upwardly adjusted Vectrus’ MPC. However, the COFC disagreed with GAO’s conclusion that any risk related to Vectrus’ performance was simply a matter of responsibility, holding that a risk to contract performance was a necessary and appropriate piece of a cost-realism analysis. Thus, the COFC enjoined the Army to reconsider its award decision, and specifically instructed the Army to “consider the magnitude of the quantitative MPC adjustment as a measure of performance risk, even though the sum itself cannot be added to Vectrus’ evaluated cost.”

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