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FEATURE COMMENT: Speak Now Or Forever Hold Your Protest: Intervenor's Silence Waives Future Protest Grounds

When is the deadline to file a bid protest, and what actions or inactions can cause potential future protest arguments to be waived? These seemingly simple questions can cause significant anxiety to companies and counsel seeking to challenge a solicitation, a contract award, or even an agency's corrective action following an earlier protest. In recent years, most controversies surrounding bid protest deadlines have focused on the U.S. Court of Appeals for the Federal Circuit's *Blue & Gold* waiver rule, which originally required solicitation challenges to be filed prior to the deadline for proposal submission, but now arguably requires a company to file a pre-award protest any time it knows—or could potentially know—a protest ground prior to award. See, e.g., *COMINT Sys. Corp. v. U.S.*, 700 F.3d 1377, 1382 (Fed. Cir. 2012) ("[T]he 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."); 55 GC ¶ 39; *Inserso Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020) (holding small business waived argument by not filing pre-award protest following developments in parallel large business procurement); 62 GC ¶ 180.

In a wrinkle not unlike the expansion of *Blue & Gold* waiver, the Government Accountability Office recently held that waiver traps can also apply to contract *awardees* that fail to raise arguments when intervening in a protest filed against their award. Specifically, in *VS2, LLC*, Comp. Gen. Dec. B-418942.4, B-418942.5, 2021 CPD ¶ 108, GAO held that VS2 had waived its challenges to an agency's corrective action award to another company, because VS2 had not raised its arguments when it *intervened* in the original protest filed by the competitor against the initial award to VS2 (or timely requested reconsideration of GAO's decision in that prior protest). This Feature Comment summarizes the procurement and initial protest that preceded the *VS2* decision, GAO's analysis dismissing VS2's protest, and key takeaways for companies seeking to avoid waiving future protest grounds—when *intervening* in a protest.

The Initial Award to VS2 and Vectrus's Post-Award Protest—At issue was a procurement issued by the Department of the Army for logistics support services at Fort Benning, Ga., conducted under the Enhanced Army Global Logistics Enterprise multiple-award, indefinite-delivery, indefinite-quantity contracting program. The solicitation contemplated the award of a predominantly cost-plus-fixed-fee type requirements task order for a base year and four one-year options.

Relevant here, the solicitation established essentially a low-cost/price, technically acceptable basis for award, under which the Army would make the award to the responsible offeror that received a "substantial confidence" rating under the past performance factor, submitted the lowest-evaluated cost/price proposal, and was determined to be acceptable under the technical and small business evaluation factors.

The Army initially evaluated both VS2 and another firm—Vectrus—as acceptable under the technical and small business evaluation factors, with "substantial confidence" past performance ratings. Although Vectrus had proposed the lower cost/price, the Army made an upward realism adjustment to Vectrus's cost proposal, resulting in award of the contract to VS2. Vectrus and another disappointed offeror protested the award. See *Vectrus Mission Solutions Corp., Vanquish Worldwide, LLC*, Comp. Gen. Dec. B-418942 et al., 2021 CPD ¶ 87.

As discussed in The Government Contractor, 63 GC ¶ 89, GAO sustained Vectrus's protest, holding that the Army's upward adjustment to Vectrus's most probable cost was unreasonable where Vectrus had expressly and unequivocally agreed to absorb the adjusted costs, and the Army had not identified any concern with Vectrus's threshold responsibility to perform the contract. Additionally, GAO found that but for the upward adjustment, Vectrus would have been the low-cost/price offeror with a technically acceptable proposal and "substantial confidence" past performance rating. Thus, rather than recommending the Army reevaluate proposals, GAO instead recommended that the Army issue the task order directly to Vectrus, if otherwise proper.

VS2's Protest of the Corrective Action Award to Vectrus—Consistent with GAO's decision and recommendation, the Army terminated the award to VS2 and instead awarded the contract to Vectrus. VS2 then filed a new protest of the Army's corrective action award.

In that protest, VS2 primarily challenged issues that had been raised in the initial Vectrus protest or discussed in GAO's decision (e.g., GAO's unique recommendation), but also alleged new issues regarding Vectrus's past performance—specifically, that the Army misevaluated Vectrus's proposal during the competition and should not have assigned Vectrus a "substantial confidence" past performance rating. GAO, however, dismissed each of VS2's protest grounds.

Regarding VS2's repetition of arguments made in the prior protest (identified by GAO as "a word-for-word restatement of its earlier comments") and challenges to GAO's prior analysis and recommendation, GAO held that those issues were untimely requests for reconsideration that were required to be raised within 10 days of GAO's earlier decision—not after the eventual award to Vectrus—and otherwise not a valid basis for reconsideration. See 4 CFR § 21.14(b) ("A request for reconsideration of a bid protest decision shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier."); 4 CFR § 21.14(c) ("GAO will not consider a request for reconsideration based on repetition of arguments previously raised."). GAO further explained that its recommendation of a direct award was appropriate in light of the solicitation's low-cost/price, technically acceptable evaluation scheme, which eliminated the need for new proposals or a reevaluation as is typically recommended in sustained protests.

With respect to VS2's new allegations concerning the Army's evaluation of Vectrus's past performance, GAO held that VS2 waived those arguments because it could have raised them when VS2 intervened in Vectrus's original protest. VS2 argued that it had no reason to do so, and would not have been an "interested party" to raise the arguments in the prior protest because they would essentially have been protest grounds challenging a non-awardee, when VS2 itself was already the awardee. However, GAO held that because VS2's past performance challenges went to Vectrus's eligibility and standing to bring the initial protest (recall, the solicitation's award criteria *required* a "substantial confidence" past performance rating for award), they constituted a "procedural challenge to the sufficiency of the earlier protest (a challenge to Vectrus's interested party status, a challenge to the timeliness of the protest, or a challenge to our jurisdiction to consider a protest) ... that should have been advanced by VS2 during [GAO's] original consideration of the Vectrus protest." GAO also held that even if VS2 were not required to make these additional arguments at the time of the original protest, they also remained an untimely request for reconsideration because they were filed more than 10 days after GAO issued its earlier decision.

Analysis and Takeaways—At first glance, the outcome in *VS2* seems harsh. In the original Vectrus protest, VS2 was already the awardee and intervened only in order to defend its award—not to attack the evaluation of a losing offeror. Indeed, VS2 would not have been an interested party (nor had a reason) to independently file a protest against the non-awardee Vectrus. Moreover, whether for cost or strategy reasons, awardees intervening in bid protests frequently focus only on the primary challenges raised by the protester against the award. After all (the thinking goes), the agency will be defending the award decision.

However, as GAO noted in its decision, prior cases such as *Good Food Servs., Inc.*, Comp. Gen. Dec. B-244528, B-244528.3, 92-2 CPD ¶ 448, and *Techniarts Eng'g*, Comp. Gen. Dec. B-238520, B-238520.5, 92-1 CPD ¶ 20, had warned that affirmative challenges an intervenor could have but failed to make against a protester's interested party status are waived in a subsequent protest following a change in the award decision. In *Good Food Services*, for example, the orig-

inal awardee did not intervene in the original protest, yet GAO held that it was precluded from later protesting that the original protester's proposal did not meet solicitation requirements, because such a challenge *could have been raised* in the original protest in the context of the protester's interested party status. Meanwhile, in *Techniarts Engineering*, the original awardee had submitted a less expensive *alternate proposal* that the agency had found unacceptable in a lowest-price, technically acceptable procurement. Of course, the company had little if any reason to challenge the unacceptable rating assigned to its alternate proposal while it was already the awardee. But GAO held that the company *could have raised* the allegedly improper evaluation of its alternate proposal when another company—which submitted a proposal priced between Techniarts's two proposals—protested the original award. Having failed to raise a challenge to the agency's evaluation of its alternate proposal in that protest, which, if successful, could have entitled Techniarts's alternate proposal to award and deprived the protester of interested party status, GAO held the argument was waived when Techniarts later (i) sought reconsideration of GAO's decision sustaining the other protest and (ii) filed its own protest challenging the subsequent corrective action award to the competitor.

The Court of Federal Claims also has held that a company can waive protest arguments that could have been learned or presented through an earlier intervention. For example, in *Sonoran Tech. & Prof'l Servs., LLC v. U.S.*, 135 Fed. Cl. 28, 34–35 (2017), the original awardee did not intervene in multiple protests challenging its award, but later sought to protest when the agency, on corrective action, awarded to the original protester. The Court rejected that protest as an untimely challenge to the scope of the corrective action, and faulted the company for not participating earlier: "Why Sonoran chose not to intervene in either of these protests is beyond the Court's comprehension, as Sonoran should have known that its award was at risk of being rescinded and granted to [the protester] instead as a result of potential corrective action." Id. at 35.

In light of these prior decisions—as well as the recent expansion of the Federal Circuit's *Blue & Gold* waiver rule—the result in *VS2*, though still harsh, is perhaps not surprising. Similar to solicitation challenges that must be protested prior to proposal submission, or protest grounds that must be diligently pursued, a company may not assume simply because it is the original awardee that it may preserve, and will be able to raise, any protest grounds should the award decision later change. Especially in the case of potential arguments that an intervenor may raise against a protester's interested party status—such as allegations that the agency misevaluated the protester's proposal as acceptable, or that would show the protester would not be in line for award were its protest sustained—arguments should be advanced in the initial protest "since such challenges bear directly on whether [GAO or the Court] should dismiss the matter, or consider the underlying merits of the protest."

Does this mean an awardee must, while defending its award, preemptively challenge *every* negative finding about its own proposal—e.g., every weakness, every negative comment about its past performance, every arguably too-low adjectival rating—as well as assert every possible additional weakness or negative comment that the protester's proposal may have warranted? One would hope not, as doing so could needlessly complicate protests and result in a significant waste of resources on protective challenges never intended to be litigated. (From a practical standpoint, given that the intervenor files its comments after the agency, would GAO begin requiring agencies to submit supplemental agency reports responding to challenges raised by the intervenor against the agency's evaluation of the intervenor's own proposal or of the protester's?) *VS2* does not seem to go so far, as it emphasized the unique evaluation scheme and the threshold standing and jurisdictional issues that could have been raised. Going forward, however, these waiver issues are considerations that counsel for *intervenors* will have to make—to the extent they did not already—as they defend their clients' awards.

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