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### FEATURE COMMENT: Court Of Federal Claims Pushes Back On GAO Waiver And Cost-Realism Analyses

In a prior Feature Comment, we highlighted a February 2021 Government Accountability Office decision holding that a protester and former awardee (VS2) had waived its right to challenge an Army corrective action rescinding its initial award and making a new award to its competitor (Vectrus). See 63 GC ¶ 107 (discussing *VS2, LLC*, Comp. Gen. Dec. B-418942.4, et al., 2021 CPD ¶ 108). In that decision, GAO concluded that VS2's failure to raise arguments when it *intervened* in Vectrus's earlier protest (against the Army's initial award to VS2), and failure to timely request reconsideration of GAO's decision sustaining Vectrus's protest, were fatal to VS2's ability to protest the corrective action award. In the latest twist in this ongoing protest saga, VS2 filed a "second bite at the apple" protest with the U.S. Court of Federal Claims, and received a far more favorable result. Not only did the Court find that VS2 had not waived its arguments, the Court rejected GAO's merits analysis and ordered the agency to reconsider its original award decision—and specifically to consider potential performance risk in Vectrus's proposal. See *VS2, LLC v. U.S.*, 2021 WL 4167380 (Fed. Cl. Sept. 1, 2021). The Court's timeliness and merits analyses each warrant discussion, as they highlight critical distinctions between GAO and Court bid protest litigation and offer important takeaways for agencies and offerors alike.

**Timeliness: The Court Refuses to Expand *Blue & Gold* Waiver Rule**—As a threshold matter, while the Court does not apply the same strict

timeliness rules that GAO applied in dismissing VS2's GAO protest, the Government and Vectrus nonetheless moved to dismiss VS2's Court protest as waived, invoking the Federal Circuit's decision in *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), and its progeny. In *Blue & Gold*, 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" in a subsequent Court bid protest. In recent years, the Federal Circuit has applied this rule to require pre-award protests in a wide variety of situations. 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; *Insero Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020) (holding small business waived OCI challenge by not filing pre-award protest regarding developments in parallel large business procurement); 62 GC ¶ 180.

The Government and Vectrus argued for a broad application of the *Blue & Gold* rule any time a company knows or even could know of a protest ground prior to award. On the specific facts of the case, the Government argued that VS2 had the opportunity to file a protest prior to the "corrective action" award to Vectrus—e.g., after GAO issued its initial decision sustaining Vectrus's protest and recommending that the Army award to Vectrus, but before the Army implemented that recommendation.

However, the Court rejected the Government's invitation to, in the Court's view, further extend the *Blue & Gold* waiver rule to dismiss a "corrective action challenge." The Court provided a thorough background on the *Blue & Gold* rule, its roots in 28 USCA § 1491(b)(3)—which calls for the "expeditious resolution" of protests—and its purpose to prevent a protester from lying in wait until after award to protest errors apparent on the face of a solicitation.

The Court concluded the *Blue & Gold* rule was limited to solicitation-based challenges, and subsequent decisions had expanded the rule only by invoking it under circumstances in which a solicitation-based challenge could not have been brought prior to proposal submission, but could have been raised pre-award. The Court was unwilling to extend the rule any further, and explained that even as cabined to solicitation challenges, the rule promoted the expediency called for by § 1491(b)(3).

As for VS2’s protest, the Court held that VS2 could not have challenged GAO’s decision immediately upon its issuance, because GAO’s recommendation that the Army award the contract to Vectrus did not guarantee that the Army would implement that recommendation. Once the Army did, however, Vectrus immediately pursued its protest rights, first at GAO, and then at the Court. Thus, the Court ruled, “VS2 cannot be said to have sat on its rights,” and the *Blue & Gold* waiver rule could not apply. In so holding, the Court noted our earlier Feature Comment, 63 GC ¶ 107, in which we highlighted that broad adoption of GAO’s earlier timeliness dismissal—which the Court eschewed here—could have unintended consequences and introduce difficult strategic considerations for protesters and *intervenors* going forward.

**Merits: The Court Requires the Army to Consider Performance Risk in Cost-Realism Evaluation**—On the merits, the procurement concerned a cost-plus fixed fee contract, and thus the Army was obligated to conduct a cost-realism analysis and determine each offeror’s most probable cost (MPC). In conducting its original analysis, the Army had upwardly adjusted certain of Vectrus’s proposed costs and identified associated performance risk in its proposal. Before GAO, Vectrus argued that because it had proposed to cap those costs—i.e., Vectrus would absorb and would not charge to the Government any costs that exceeded the cap—it was improper for the Army to upwardly adjust its MPC, or to assign performance risk as part of a cost-realism analysis. GAO agreed with Vectrus, holding that its MPC should not have been adjusted, and that any consideration of performance risk should have been limited to a responsibility determination. Additionally, because the solicitation required the Army to award to the offeror with the lowest total evaluated price that also was determined to be technically acceptable (with a substantial confidence rating in past performance and an acceptable rating in small business participation,

which ratings Vectrus had received), GAO recommended that the Army not only rescind the initial award to VS2, but also award the contract to Vectrus.

The Court reached a different conclusion. The Court agreed with GAO that, in light of Vectrus’s proposed cost caps, the Army should not have upwardly adjusted Vectrus’s MPC. However, the Court disagreed with GAO’s conclusion that any risk related to Vectrus’s 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 (the Court also noted that in a previous decision, GAO had *agreed* that performance risk was an appropriate consideration as part of a cost-realism analysis). Indeed, the Court ruled that because Vectrus had proposed to cap its costs—and therefore potentially perform the contract at a loss—the Army should have been *even more concerned* about Vectrus’s ability to perform at a technically acceptable level for its proposed capped cost. Thus, the Court 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’s evaluated cost.”

**Takeaways**—For protesters (and intervenors who may subsequently become protesters), the Court’s decision is a breath of fresh air, as it pushes back on the seemingly ever-expanding *Blue & Gold* waiver rule. The Court confirmed that (1) the *Blue & Gold* waiver rule, at least for now, remains tethered to solicitation-based challenges; and (2) so long as a protester has diligently pursued its rights at the earliest possible opportunity, it will not be deemed to have waived them. Note, however, that GAO is not bound by the Court’s decisions but by its own Bid Protest Regulations, and may continue to view its earlier decision—dismissing VS2’s protest—as relevant precedent. In litigation before GAO, *intervenors* must continue to consider in any given protest whether to preemptively challenge the protester’s standing so as to preserve such a challenge for later, should the award flip. This is an especially important consideration in circumstances where GAO may have sole bid protest jurisdiction, such as for task order procurements where the Federal Acquisition Streamlining Act bars Court jurisdiction.

Regarding cost realism and performance risk, it is unclear precisely what effect the Court’s decision

will have in this specific procurement. Given the solicitation's lowest-price, technically acceptable evaluation scheme, absent a finding of performance risk that would render Vectrus unacceptable—or a question of Vectrus's adequate financial resources (which the Army seemingly did not identify as part of the responsibility analysis it conducted following GAO's initial decision)—Vectrus will still have the lowest-proposed price, placing it in line for award.

But in future procurements where an offeror proposes to cap its costs, agencies will need to carefully consider *what* performance risks they are specifically evaluating, and *when*—e.g., a cost-realism assessment of potential underperformance risk resulting from contractor incentive to save costs, or a responsibility determination considering whether the contractor has the financial resources necessary to complete contract performance *at all*, given the shortfall between the MPC and proposed cap.

Moreover, offerors considering proposing cost caps should keep in mind that while their costs may not be upwardly adjusted as part of a realism analysis, potential performance risk associated with the costs *will be* assessed at some point. Thus, offerors should attempt to preemptively address any concerns about performance risk that might arise from such a pricing approach by documenting the anticipated total cost and explaining the management decisions and financial resources supporting those decisions, to assure agencies that their assumption of excess costs will not impact their performance.



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