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Contra Dicta-ry: Your Agency Challenge May Be Waived, Even If Cases Say You "Likely" Preserved It

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The Court of Federal Claims' decision in *Harmonia Holdings Group, LLC v. United States* serves as a stark reminder to be wary when relying on dicta supporting your position. In 2018, U.S. Customs and Border Protection solicited bids for application development and support services. After receiving some proposals, but before deciding who would win the award, the agency made significant amendments to its solicitation. Harmonia — which had submitted a bid before the solicitation was amended — filed a pre-award protest with the agency before the deadline for submission of all bids, contending that it should be allowed to modify its proposal in light of the amendments to the solicitation made after Harmonia's submission. The agency denied Harmonia's pre-award protest and, five months later, granted the award to another bidder. One month after the agency announced the winner, Harmonia filed a complaint in the Court of Federal Claims, raising both pre-award and post-award challenges against the agency. Just as it had argued in its agency-level, pre-award protest, Harmonia asserted that it should have been allowed to amend its proposal after the agency amended the solicitation. In addition, Harmonia challenged the agency's ultimate award decision. With respect to the pre-award challenge, the court ultimately concluded that ***all*** of Harmonia's pre-award protest grounds had been waived. In so concluding, the court acknowledged that various decisions suggested that Harmonia had preserved its pre-award protest arguments by filing them before the bidding closed. In particular, in *Blue & Gold Fleet, L.P. v. United States*, the Federal Circuit held: [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. Further, the Federal Circuit had previously stated in another case that filing a formal, agency-level protest before the award would "likely" preserve a protestor's post-award challenge to a solicitation, as might a pre-award protest filed with the Government Accountability Office. However, the Court of Federal Claims also cited other Federal Circuit authority providing that a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity before the award of the contract, with exceptions only for impracticability and inadequate time in which to do so. Ultimately, the court concluded that this latter rationale applied. Although the agency-level protest was timely, Harmonia "nevertheless waived its pre-award protest grounds by waiting five months to re-raise its pre-award arguments with its post-award protest grounds." The court reasoned that nothing in the record or in Harmonia's briefing meaningfully explained the five-month delay in filing the pre-award protest with the court, and so "allowing Harmonia to re-raise its pre-award claims months after the Agency's adverse protest decision and subsequent award decision would … functionally give Harmonia a second bite at the apple." Thus, despite acknowledging that "Harmonia facially met the requirements under *Blue & Gold*," the court ultimately concluded that Harmonia "nevertheless waived its right to bring those claims before this Court by failing to timely and diligently pursue its objections" after the agency-level protest was denied, but before the agency issued its award decision. Although Harmonia was still permitted to raise its post-award challenges, it lost the opportunity for relief on its pre-award challenges. Unfortunately for Harmonia, the court denied its post-award challenges on the merits, such that the pre-award challenges, if preserved, might have made all the difference.

Tips:

- In determining when and how to challenge agency action, do not stop your analysis upon simply finding authority that supports your position; as this case shows, there may be conflicting authority on the issue that the court may conclude applies to produce a waiver.
- When contesting agency action, raise your challenge as soon as practicable, and in all events before the agency's final decision. Waiting to do so until afterward risks waiving your pre-decision grounds.

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