

Unavailable Key Personnel: CoFC Splits from GAO and Finds No Duty for an Offeror to Disclose

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Government contractors are often faced with the dilemma of their proposed key personnel becoming unavailable for contract performance, through no fault of their own, at a point *after* proposal submission but *prior* to contract award. In such cases, the Government Accountability Office (GAO) has espoused a rule that obligates offerors to advise contracting agencies of material changes in proposed staffing, even after proposal submission. *See, e.g., AttainX, Inc.*, B-419306, B-419306.2, Jan. 12, 2021, 2021 CPD ¶ 21. But a recent decision by the Court of Federal Claims (CoFC) challenges this rule, casting doubt on its basis in law or regulation.

In *Golden IT, LLC v. United States*, No. 21-1966C, __ Fed. Cl. __, 2022 WL 334369 (Feb. 4, 2022), the awardee Spatial Front, Inc. (SFI) had proposed an individual (identified in the decision as “Mr. JH”) as a key personnel. At the time of submission, Mr. JH was an SFI employee, but departed the company prior to contract award. Golden IT alleged that SFI’s proposal misrepresented his availability and thus the company’s proposal should have been assigned a weakness. The court, however, concluded otherwise.

In its decision, CoFC Judge Matthew Solomson acknowledged that an offeror is not permitted to knowingly misrepresent a material fact in a proposal for the purpose of winning a government contract. But here, he found that the protestor had not met its burden of proving that SFI had any knowledge *prior* to proposal submission that Mr. JH intended to leave the company. Thus, there was no evidence that this was a deliberate misrepresentation by SFI.

But what about after proposal submission, prior to award? Addressing the aforementioned GAO rule—requiring offerors to alert agencies of changes in proposed staffing *after* proposal submission—Judge Solomson declared it to be “without legal basis” and “unfair.” The court emphasized that a proposal is submitted at a certain point in time, and that it is evaluated over what can become a lengthy period. Without question, an offeror should have a reasonable basis for all facts and representations made in its proposal at the time of proposal submission. But circumstances may change after proposal submission, and the government has the discretion to engage in discussions to verify proposal details or extract more information.

Key to this decision, Judge Solomson asserted that no statute, regulation, or Federal Circuit decision requires offerors to routinely update the government of any changes during the government’s evaluation period. This position stands in stark contrast to GAO’s long-standing rule requiring an offeror to do just that. In reaching his conclusion, Judge Solomson also cited an article authored by a Jenner & Block team in 2018, which argued that “GAO has no jurisdiction to make recommendations to offerors – including a recommendation that an offeror disclose the unavailability of key personnel when the offeror first learns of this after proposal submission.” Instead, the court pointed to the solicitation itself as a guidepost for the extent to which key personnel must commit to an offeror, namely whether the solicitation contained any provisions that required commitment letters from proposed key personnel, constant verification of continued availability, or the requirement to update the Agency regarding departures of any employees proposed as key personnel.

In challenging head-on GAO’s expectation that an offeror notify the agency if a key person becomes unavailable after proposal submission, this decision highlights a conflict between the GAO and CoFC in this area. Could this decision turn the tide in favor of contractors currently stuck between a rock and a hard place when key personnel become unavailable during extended procurements? Until that happens, contractors should be reminded that CoFC decisions are not binding on other CoFC judges or GAO, and GAO has not signaled flexibility in its expectation that an offeror update the government whenever a key person’s status changes. In addition, for disappointed offerors raising key personnel non-availability issues in a protest, GAO may serve as the better forum for these arguments. Jenner & Block will continue to monitor any developments in this area of law.

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