

The Price of Silence: GAO Dismisses Protest Because the Protester's Key Personnel Were Unavailable

Client Alerts

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On December 30, 2024, the Government Accountability Office (GAO) dismissed a protest by Orion Government Services, Inc. (Orion) after determining that Orion lacked standing to protest because one of its proposed key personnel had become unavailable prior to contract award.^[1] This decision highlights yet another risk to contractors that neglect to notify the government of changes in proposed key personnel during a procurement competition.

The US Army Corps of Engineers (Corps) issued a solicitation for construction services that identified five key personnel positions, including a site safety and health officer (SSHO). Last summer, the Corps selected McCarthy Building Companies, Inc., (McCarthy) for contract award, and Orion protested the loss at GAO.

McCarthy, as intervenor in the protest, filed a request for dismissal on the basis that one of two individuals who Orion proposed for the SSHO key position left Orion before the award; Orion knew about the departures; and Orion failed to inform the Corps. McCarthy and the Corps argued that the departure made Orion's proposal technically unacceptable and therefore unawardable. Thus, they maintained that Orion lacked standing as an interested party to protest.

This case has limited precedent. An allegation that an offeror's proposal was unacceptable because a proposed key person had become unavailable is typically one brought by a *protester* against the awardee, not the other way around.^[2] In fact, this was Orion's primary defense: that there had not been a previous case where GAO held that a protester lacked status as an interested party due to the unavailability of a proposed key person. But GAO rejected this argument, explaining that "[t]here is nothing in our decisions that suggest that the obligation with respect to material requirements such as key personnel applies to awardees only."

GAO then distinguished the prior limited precedent where an agency sought dismissal on the basis that the protester's proposed key personnel had become unavailable. In those cases, GAO explained, the protesters survived dismissal because they furnished evidence rebutting the

allegations. In one case, the protester submitted a declaration from the key person in question confirming continued availability.^[3] In another, the protester produced an affidavit from its president and chief executive officer attesting that the employees in question were available.^[4] In both instances, GAO found no basis to conclude that the protesters had “actual knowledge” that the proposed key employees were available before award.

In Orion, however, the protester did not contest that it knew the proposed key person became unavailable, nor did the protester argue that the key person in fact remained available. GAO therefore concluded that Orion’s proposal was unacceptable, and for that reason, Orion did not qualify as an interested party to protest the Corps’ award decision.

This case is notable for offerors and potential protesters. At least for protests filed at GAO, the risk of key personnel departure prior to award now clearly falls equally on protesters and awardees alike. Of course, the issue must come to light, though it often does through publicly available information and industry intelligence. Where the issue does come to the fore, a disappointed offeror considering a protest should confirm the availability of its proposed key personnel to assess dismissal risk in a GAO protest. But if the company lacked “actual knowledge” that the key person became unavailable, it can rebut the concerns with evidence such as declarations, as GAO explained in Orion.

Jenner & Block will continue to monitor developments in bid protest jurisprudence related to key personnel availability.

Footnotes

[1] *Orion Govt. Servs., Inc.*, B-422978, B-422978.2, Dec. 30, 2024, 2025 CPD <https://www.gao.gov/products/b-422978%2Cb-422978.2>

[2] *See, e.g., NCI Info. Sys., Inc.*, B-417805.5, B-417805.6, Mar. 12, 2020, 2020 CPD ¶ 104.

[3] *See Tiya Support Servs., LLC*, B-421538.3, May 24, 2024, 2024 CPD ¶ 134.

[4] *See DZSP 21, LLC*, B-410486.10, Jan. 10, 2018, 2018 CPD ¶ 155.

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