

CLIENT ALERT

COFC Rejects GAO's Duty to Notify of Key Personnel Departures

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Arguably the hottest bid protest topic of the past several years just reached its boiling point. On Friday, the Court of Federal Claims (COFC), in *Golden IT, LLC v. United States*, rejected the Government Accountability Office's (GAO) rule that an offeror must notify an agency if its proposed key personnel become unavailable after proposal submission but before award.

As we've [been tracking for years](#), GAO's key personnel rule has evolved from a general rule that offerors may not misrepresent their capabilities or otherwise pull a "bait and switch" (whereby the resources identified in the proposal are not those that the offeror actually intends to provide) into an affirmative, ongoing obligation to notify an agency—even after proposal submission and absent an opportunity for proposal revision—when a proposed "key personnel" becomes unavailable for any reason. Upon receiving such notification, GAO has held that an agency has two options: either (1) evaluate the proposal as having been submitted without a required key personnel position—regardless of the reason for that unavailability (be it illness, the poaching of the proposed person by a competitor, etc.), or the amount of time that has passed since the procurement commenced—meaning the proposal will likely be rejected as technically unacceptable; or (2) open discussions with all offerors to allow for proposal revisions. This framework has left offerors between a rock and a hard place: do they notify agencies of key personnel departures and risk summary elimination; or do they remain silent and risk sustained post-award protests? GAO's framework also arguably incentivizes offerors to **avoid** learning any information about the availability of their proposed key personnel following proposal submission.

In *Golden IT*, the COFC rejected GAO's notification requirement for post-proposal key personnel departures. In that case, shortly after the awardee submitted its proposal, one of its proposed key personnel left the company. The awardee never notified the agency of the departure. One of Golden's many protest arguments challenging the award was that the awardee had violated GAO's key personnel rule, and thus that the agency's award decision was arbitrary and capricious. The COFC rejected the argument, explaining that it "is unable to locate the basis for the GAO's rule," which "strikes the Court, candidly, as without legal basis and 'unfair'" (citation and quotation omitted). The COFC further held that it would "not conjure up a rule – and particularly not one untethered from a statute, regulation, or Federal Circuit decision – requiring offerors or quoters to routinely update the government when facts and circumstances change post-proposal or quote submission, during the course of the government's evaluation period."

The COFC noted that the situation might be different were there a solicitation provision expressly requiring such notification, or if the awardee had had an opportunity to address the issue and failed to do so in a subsequent proposal revision. But since neither of those facts were present, the COFC concluded that "all that is necessary here is that [the awardee] had a reasonable belief, at the time of its quote, that [it] would deploy [its proposed] key personnel upon contract award."

Golden IT is not binding on the GAO or even other COFC judges. However, it signals some potential relief for contractors attempting to traverse the key personnel quagmire. We'll have more detailed analysis of this potential watershed decision in the near future.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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