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FEATURE COMMENT: COFC Rejects GAO's Key Personnel Notification Rule

In *Golden IT, LLC v. U.S.*, 2022 WL 334369 (Fed. Cl. Feb. 4, 2022), the U.S. Court of Federal Claims rejected the Government Accountability Office's much-maligned rule requiring contractors to notify procuring agencies when proposed key personnel become unavailable after proposal submission. Critics have highlighted that under GAO's rule, a contractor's proposal can be—and in certain circumstances must be—rejected as non-responsive through no fault of the contractor. See, e.g., Edwards, "Key Personnel Substitutions After Proposal Submission: An Unfair Rule," 31 Nash & Cibinic Rep. ¶ 59; Petkoff et al., Feature Comment, "Disclosure Dilemma For Government Contractors Learning Before Contract Award That Proposed Key Personnel Are Not Available To Perform The Contract," 60 GC ¶ 228; Sneckenberg, Lynch and Curran, "All Things Protest: Keeping Up with Key Personnel" (July 2019), available at *www.crowell.com/NewsEvents/AlertsNewsletters/all/All-Things-Protest-Keeping-Up-with-Key-Personnel-July-2019*\. For example, where a contractor's proposed key personnel unexpectedly seek other employment, become ill, or even die, if the agency does not wish to reopen discussions with all offerors, the contractor loses its opportunity to compete. This draconian outcome harms not just the contractor at issue, but the Government as well, as it can artificially reduce competition, especially in long-running procurements. Indeed, even high-performing incumbents have not been immune from exclusion under GAO's rule.

This Feature Comment addresses the evolution of GAO's rule, the limited prior court decisions addressing the rule, *Golden IT*, and contractors' and agencies' options going forward. *Golden IT*'s long-term ramifications remain to be seen—the decision is not binding on either GAO or other judges at the COFC—but at the very least, it provides the possibility of relief for contractors following an award upended by the GAO rule where none previously appeared available.

GAO's Notification Rule—GAO has long held that a contractor may not employ a "bait and switch," whereby it proposes to perform a contract with particular personnel or resources that it intends to substitute after award. See, e.g., *CBIS Fed. Inc.*, Comp. Gen. Dec. B-245844.2, 92-1 CPD ¶ 308; *Ann Riley & Assocs., Ltd.–Recon.*, Comp. Gen. Dec. B-271741.3, 97-1 CPD ¶ 122; see also Owen, "Bid Protest Pitfalls: Three Commonly Misused Arguments at GAO," The Procurement Lawyer, American Bar Ass'n (July 1, 2017), available at *www.americanbar.org/groups/public_contract_law/publications/procurement-lawyer/2017/52-3/bid-pitfall/* (summarizing requirements for bait and switch allegations). Similarly, GAO has held that offerors have an obligation to notify agencies of impending corporate transactions that will affect proposed performance—and that upon receiving such notification, agencies must consider it. See, e.g., *Dual, Inc.*, Comp. Gen. Dec. B-280719, 98-2 CPD ¶ 133 (holding agency award decision improper where days after completion of evaluation and two weeks prior to award, awardee sold division and transferred employees it had proposed to perform contract); 41 GC ¶ 154.

In *Greenleaf Construction Co.*, Comp. Gen. Dec. B-293105.18, B-293105.19, 2006 CPD ¶ 19; 48 GC ¶ 87, GAO essentially merged these doctrines to require that a contractor notify an agency when

proposed *key personnel* become unavailable after proposal submission. In *Greenleaf*, the awardee became aware after submitting its proposal that two of its proposed key personnel had become unavailable. The awardee did not notify the agency of this fact. Following a protest and hearing, GAO held that the awardee "was required to advise the agency of the material change in its proposed resources and technical approach, in order to ensure that the evaluation was based on consideration of the staffing ... that [the awardee] actually intended to use in performing the contract." Accordingly, GAO sustained Greenleaf's protest, holding that "[t]o allow such an award to stand would call into question the integrity of the competition."

The revolution in key personnel caselaw following *Greenleaf* was not immediate, but it was undeniable. First, in *Paradigm Techs., Inc.*, Comp. Gen. Dec. B-409221.2, B-409221.3, 2014 CPD ¶ 257; 56 GC ¶ 335, GAO instructed that where a required key personnel becomes unavailable, the agency must deem the proposal deficient. In *Paradigm*, the solicitation required offerors to identify and submit resumes for their proposed program managers. The ultimate awardee did so; however, between an initial award and a corrective action award, the awardee notified the agency that its proposed program manager—designated as key personnel—had left the company and was no longer available. The agency assigned a weakness to the company's proposal, but still awarded it the contract. GAO sustained the subsequent protest, holding that the key personnel requirement was "material," such that the unavailability of the awardee's proposed program manager had to result in a deficiency, not merely a weakness. And thus, upon the awardee's notice to the agency, the agency was required either to disqualify the company for failing to meet a material requirement or to open discussions with all offerors to allow for proposal revisions.

GAO applied this same framework in *Pioneering Evolution, LLC*, Comp. Gen. Dec. B-412016 et al., 2015 CPD ¶ 385. There, after a second round of discussions, Pioneering notified the agency that one of its three proposed key personnel had joined another company and would be unavailable. Pioneering proposed a qualified replacement employee and also offered to restructure its proposal to eliminate the need for the employee altogether. The agency refused to consider those alternatives, and instead assigned Pioneering's proposal a deficiency and eliminated Pioneering as unacceptable. When Pioneering protested that determination, GAO upheld the agency's decision. GAO held that any change to proposed key personnel constituted a material proposal change that could not occur without discussions, and if the agency chose not to open discussions (as agencies are entitled to do), the protester could not make the substitution.

These decisions form the bedrock of GAO's key personnel notification rule, and have been followed in a spate of other decisions that reinforce its applicability. See, e.g., *Gen. Revenue Corp.,* Comp. Gen. Dec. B-414220.2 et al., 2017 CPD ¶ 106 (holding it was "immaterial" whether unavailable key personnel were proposed to perform positions identified by the Government or by a contractor as "key"); *YWCA of Greater Los Angeles*, Comp. Gen. Dec. B-414596 et al., 2017 CPD ¶ 245 (holding offerors cannot use post-award personnel substitution clause to replace unavailable key personnel prior to award); *M.C. Dean, Inc.*, Comp. Gen. Dec. B-418553, B-418553.2, 2020 CPD ¶ 206 (sustaining protest because awardee failed to notify agency that key personnel was denied required security clearance prior to award); 62 GC ¶ 204.

GAO's notification framework creates problematic incentives for both contractors and agencies. For contractors, the rule encourages them to *avoid* learning the status of their proposed personnel. See, e.g., *NCI Info. Sys., Inc.*, Comp. Gen. Dec. B-417805.5 et al., 2020 CPD ¶ 104 (holding duty to notify did not attach because offeror lacked actual knowledge of key personnel unavailability); *MindPoint Grp., LLC*, Comp. Gen. Dec. B-418875.2, B-418875.4, 2020 CPD ¶ 309 (denying protest alleging failure to notify where awardee learned only seven days before award that its key personnel would likely—not definitively—be unavailable). Similarly, if a contractor does learn that its key personnel has become unavailable, it faces the untenable decision of notifying the agency (and risking immediate elimination) or biting its tongue (and risking a post-award protest and allegations of misrepresentation). Meanwhile, agencies confronted with notifications of key personnel unavailability must potentially choose between eliminating an offeror (and thus reducing competition, in contravention of the spirit of the Competition in Contracting Act) or prolonging a procurement and potentially delaying a much-needed acquisition by reopening discussions.

Some agencies have reduced the use of key personnel requirements by making them not mandatory,

and/or using solicitation language to address GAO's rule preemptively. For example, some agencies have used solicitation language indicating that the *qualifications* of the key personnel—not the individuals themselves—are the material aspect of the proposal. Such language appears to be crafted to avoid many of the pitfalls resulting from the GAO notification requirement. However, such proactive measures remain the exception, not the rule, and contractors have otherwise been left without guidance or direction.

In sum, there are no winners—except protest lawyers.

COFC Applications of GAO's Rule—Until *Golden IT*, recent COFC decisions had largely endorsed GAO's key personnel rule. Most notably, in *Chenega Healthcare Servs., LLC v. U.S.*, 141 Fed. Cl. 254 (2019), the Court was presented with perhaps the most sympathetic possible factual scenario for an offeror: the unavailability of a proposed key personnel due to illness. The Court nonetheless applied the GAO rule.

In that case, Chenega, the incumbent contractor, submitted a proposal for a follow-on contract to do the same work. The solicitation contained a key personnel requirement and instructed offerors to include with their proposals a letter of commitment for each individual proposed for an identified key position. For the key personnel position of general manager, Chenega proposed the same individual successfully performing that role on its incumbent contract. However, after proposal submission but prior to award, the general manager fell ill, and was unable to perform his role on either the incumbent or the to-be-awarded contract. Chenega replaced the general manager on the incumbent contract; the agency identified no concerns about that replacement. But when Chenega proposed to use the same individual as a replacement for the follow-on contract, the agency inquired as to whether the original general manager's letter of commitment was still valid. When Chenega explained it was not—due to his illness—the agency evaluated Chenega's proposal as "unsatisfactory" because it failed to meet the solicitation's key personnel requirements.

After an unsuccessful protest at GAO, Chenega brought a follow-on protest at the Court, which denied the protest after adopting GAO's notification framework. The Court ruled that upon the notification of a key personnel unavailability, an agency has only two options: evaluate the proposal as submitted (meaning nonresponsive to a material requirement); or open discussions. And in light of the broad discretion agencies are afforded as to whether to hold discussions, the Court held that the agency had not abused its discretion in refusing Chenega's request to make the substitution, regardless of the circumstances animating the need for that substitution.

Since *Chenega*, the Court repeatedly has upheld agency decisions deeming proposals technically unacceptable as a result of key personnel unavailability, or potential unavailability. For example, in *Conley & Assocs., Inc. v. U.S.*, 142 Fed. Cl. 177 (2019), for a position designated as "key," the awardee identified a former employee as a current one based upon only an assumption the individual would return upon contract award. Upon learning this, the agency rescinded the award and eliminated the awardee. In upholding the elimination, the Court held that "actual knowledge" of unavailability is not specifically required when potential unavailability is foreseeable. Similarly, in *NetCentrics Corp. v. U.S.*, 145 Fed. Cl. 158 (2019), an agency disqualified the original awardee after learning that its final proposal revision included a key personnel who had left the company without an express commitment to return if the company was awarded the contract. The original awardee argued that the employee had provided verbal commitment to return, but the Court upheld the disqualification and noted that the agency did not need to prove that the offeror had intended to mislead the agency. Finally, in *PAE Applied Techs., LLC v. U.S.*, 153 Fed. Cl. 573 (2021), the solicitation required letters of commitment for prospective hires proposed to fill key positions, but not for current employees. The incumbent contractor proposed a current employee to fill one "key" position, and thus did not need, and therefore did not provide, a commitment letter for that employee. However, the employee left the company prior to award, prompting the agency to disqualify the incumbent because its proposal was unacceptable without a commitment letter from the now-former employee. Moreover, even though the employee was potentially still available, the agency decided against opening discussions to allow the incumbent to provide such a commitment letter. The Court upheld the disqualification, holding that the employee's potential availability was irrelevant, and that the submission of a commitment letter would constitute a "change" to the proposal requiring discussions, which the agency was within its discretion in declining to reopen.

The *Golden* Rule—In *Golden IT*, the COFC took a fresh look at this issue. Following a September 2021

Census Bureau award to Spatial Front Inc. (SFI), Golden filed a bid protest alleging, in part, that SFI's quotation contained a "material misrepresentation" in proposing as key personnel an employee (Mr. JH) who left SFI for another company prior to award. Specifically, based on Mr. JH's public LinkedIn profile—which indicated that Mr. JH left SFI for another company the same month that SFI submitted its quotation—Golden alleged that SFI should have been disqualified or, at minimum, assigned a significant weakness because SFI "misrepresented the availability of Mr. [JH] either when it submitted its quote or because it failed to notify the Agency of the material change to its quote when it had knowledge of Mr. [JH]'s unavailability."

In response to this allegation, SFI moved to supplement the record with a declaration from an SFI vice president and "a letter of commitment from Mr. [JH] ... stating that he remains committed and available to serve" in the key personnel position identified in SFI's quotation. The Court allowed supplementation and, based on the additional materials, found that (1) Mr. JH was an SFI employee when SFI submitted its quote on May 20, 2021; and (2) Mr. JH departed SFI and began working for another company "at some point after that—albeit by May 31, 2021, at the latest." Critically, however, the Court also found that "there is no evidence in the administrative record—or proffered by any party—suggesting that SFI had any indication prior to the time it submitted its proposal that Mr. [JH] intended to leave SFI for another employer and would not be available for contract performance."

Regarding Golden's first allegation—that SFI "improperly proposed" Mr. JH as a key personnel despite his impending departure from SFI—the Court explained that SFI's knowledge of Mr. JH's pending unavailability was "fundamentally [a question] of fact," and held that Golden could not carry its burden of proof. The Court noted that the timing of Mr. JH's departure and the limited documentation SFI submitted to substantiate his continuing commitment to SFI "certainly raises questions regarding what SFI knew about Mr. [JH]'s likely availability to serve as a key personnel and when SFI knew it (i.e., prior to quote submission)." However, Golden did not seek discovery on this point, and could not prove on the existing record that SFI knowingly misrepresented Mr. JH's availability and commitment when SFI submitted its proposal. See id. ("In the absence of any RFQ requirement that SFI secure written commitments from proposed key personnel—and particularly given that Mr. [JH] was a current SFI employee at the time of proposal submission—Golden cannot prevail on its claim, at least not on this record.").

Turning to Golden's second allegation that SFI "failed to notify the Agency of the material change to its quote when it had knowledge of Mr. [JH]'s unavailability"—in other words, GAO's notification rule—the Court held SFI had no such duty. The Court began by acknowledging "the likely 'obligation [of an offeror] to ascertain the continuing availability of key personnel at the time of submission *of final proposal revisions*.' " Id. (quoting *OAO Corp. v. U.S.*, 49 Fed. Cl. 478, 482 (2001); 43 GC ¶ 250). However, the Court explained that it "is unable to locate the basis for the GAO's rule" requiring notification of key personnel departures even in the absence of subsequent proposal submissions—a rule that "strikes the Court, candidly, as without legal basis and 'unfair.' " Id. (quoting Edwards, 31 Nash & Cibinic Rep. ¶ 59). The Court went on to emphasize that "assessment of an offeror's knowledge of facts and representations ... is made with respect to the point in time at which the offeror submitted its proposal," and that although "[s]oftware versions may change, planned approaches to contract performance might be altered or improved by the time of contract award, and employees may come and go—none of those are problems *per se*."

Finally, the Court noted that "the Solicitation did *not* require quoters to: (1) obtain commitment letters from proposed key personnel; (2) constantly verify their continued availability and willingness to serve in such roles following the BPA award; or (3) update the Agency regarding the departure of employees proposed as key personnel." Thus, Golden failed to identify any express duty to notify alleged to have been violated, and the Court 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." Instead, "all that is necessary here is that SFI had a reasonable belief, at the time of its quote, that SFI would deploy Mr. [JH] as key personnel upon contract award."

Takeaways—*Golden IT* is not binding on GAO, or even on other COFC decisions. Thus, until the Federal Circuit takes up the issue—or the Federal

Acquisition Regulatory Council proactively addresses it—it is unlikely that GAO will eschew entirely its post-proposal submission notification requirement. However, the Court's cogent analysis provides hope that both GAO and other judges on the Court may take a more nuanced view of the notification requirement in light of the specific circumstances of the unavailability at issue. Moreover, in the event that an agency takes corrective action in response to a protest where the awardee failed to notify the agency of a key personnel unavailability that occurred after proposal submission, the original awardee could consider filing a "reverse protest" (a protest challenging the agency's corrective action) at the Court, challenging the agency's decision as irrational. See, e.g., *Superior Optical Labs, Inc. v. U.S.*, 152 Fed. Cl. 319 (2021) (enjoining agency decision to take corrective action in response to meritless GAO protest), aff'd, 852 Fed.App'x 545 (Fed. Cir. 2021).

Nonetheless, unless and until the *Golden IT* analysis becomes universally adopted, contractors should continue to approach these issues as they had before—e.g., encourage agencies to reduce or refine key personnel requirements in new solicitations; adhere to a solicitation's specific key personnel requirements; only propose as key personnel individuals intended to perform the contract; and, if given the opportunity to amend a proposal to replace a departed key personnel, amend the proposal. The traditional rules regarding knowing proposal misrepresentations still apply, even if the duty to notify post-proposal submission may not.

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