

GAO finds key person 'unavailable' despite still being employed on date of award

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After a recent Court of Federal Claims (COFC) decision¹ limited the circumstances under which a departure of key personnel may doom an offeror's proposal, an even more recent GAO decision might have swung the pendulum right back.

Even though the key person was still employed on the date of award, GAO held that the agency's failure to consider his "prospective unavailability" for the follow-on contract undermined the contract award.

In *Sehlike Consulting, LLC*,² GAO sustained a protest because the agency failed to penalize the awardee when a proposed key person employed under the incumbent contract provided notice that he planned to resign. Even though the key person was still employed on the date of award, GAO held that the agency's failure to consider his "prospective unavailability" for the follow-on contract undermined the contract award.

The following dates were relevant:

- Performance of the follow-on contract was scheduled to begin February 1, 2022.
- On January 11, 2022, one of the awardee's proposed key personnel (who was then an employee of a subcontractor on the incumbent contract) announced that he planned to resign effective January 28, 2022. The awardee timely notified the Contracting Officer's Technical Representative (COTR) for the incumbent contract.
- On January 25, 2022, the agency completed its evaluations and awarded the contract.
- On January 28, 2022 — after award but before performance was to begin — the key person's resignation became effective.

The agency and awardee argued that the key person's departure did not affect the award decision given that the key person was still employed on the date of award. They also argued that the resignation only specifically related to the incumbent contract, and they directed GAO to the COFC's recent decision in *Golden IT*,³ holding that a contractor has no duty to notify an agency of a mid-procurement departure by key personnel (absent a specific solicitation requirement to do so). GAO rejected each of these arguments.

To begin, GAO held it was irrelevant that the key person was still employed on the date of award because the issue in this case turned on "whether there was definitive knowledge of the proposed key person's unavailability to perform the intended contract."

GAO noted that the key person "unambiguously resigned to take a position with a different firm, thereby making it clear that the individual would not be available to perform as part of the follow-on contract effort."

The decision signals GAO's continued willingness to sustain bid protests when key personnel become unavailable after proposal submission.

Next, because the key person was resigning to join another firm, GAO held there was "no basis to assume, without evidence to the contrary," that the individual might return to perform the follow-on contract. GAO also emphasized that the key person's resignation was definitive enough that the awardee saw fit to notify the COTR for the incumbent contract.

Finally, in a footnote, GAO emphasized that it is not bound by decisions of the COFC, and distinguished *Golden IT* on its facts. GAO asserted that *Golden IT* concerned an offeror's duty to notify an agency during a procurement of a key-personnel departure, whereas here the agency was aware of the key person's resignation through COTR notification under the incumbent contract.

Given these holdings, GAO sustained the protest and recommended that the agency either (1) reevaluate the awardee's proposal as submitted, without considering the now-unavailable key person; or (2) re-open the procurement and conduct discussions with all offerors.

GAO's decision is notable for at least two reasons. First, it signals GAO's continued willingness to sustain bid protests when key personnel become unavailable after proposal submission. In fact, it arguably extends the doctrine, as even prospective future unavailability can now be problematic.

GAO's decisional law affords offerors no relief and, instead, incentivizes them to avoid learning of key personnel changes.

For example, would GAO have reached the same conclusion if, instead of announcing his intention to switch employers in two weeks, the proposed key person had announced his definitive intention to retire in two months? The permutations under which key personnel can potentially become unavailable are countless and often wholly outside offerors' control.

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Yet GAO's decisional law affords offerors no relief and, instead, incentivizes them to avoid learning of key personnel changes and potentially to avoid notifying agencies when they do learn of actual or prospective unavailability.

Second, the decision highlights how incumbent contractors are particularly disadvantaged under GAO's key personnel case law because they, unlike non-incumbent offerors, cannot avoid learning about and notifying agencies of key personnel departures under the incumbent contract.

Indeed, the awardee here properly and timely notified the COTR for the incumbent contract of the key person's planned resignation, and that notification was what spelled its doom.⁴

Notes

¹ <https://bit.ly/3Ampb8Z>

² <https://bit.ly/3O0kpou>

³ <https://bit.ly/3lgCDeP>

⁴ Cf. *NCI Info. Sys., Inc.*, B-417805.5 *et al.*, 2020 CPD ¶ 104 (holding duty to notify did not attach because non-incumbent offeror lacked actual knowledge that proposed key person had accepted job with another company and relocated across the country).