

Conflicting GAO and CoFC holdings muddy the waters surrounding key personnel and the duty (or lack thereof) to notify

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The Court of Federal Claims (CoFC) recently held that an offeror was not obligated to inform the agency of staffing changes, affecting its key personnel, that occurred following its proposal submission. This new CoFC decision conflicts with longstanding GAO precedent.

Key personnel are often a significant part of proposals and can greatly increase or diminish an offeror's chance of award. However, as individuals, key personnel themselves can give rise to protests when they become unavailable.

GAO has long taken an expansive view of material misrepresentation regarding key personnel and has routinely held that offerors are obligated to inform agencies of changes in key personnel following the submission of proposals.¹

In a sound rejection of GAO's rule, the Court of Federal Claims recently held that an offeror has no obligation to update the agency regarding availability of key personnel after the submission of proposals, absent an express RFP requirement to do so.²

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In *Golden IT*, the protester challenged the Agency's award decision, in part based on material misrepresentation regarding key personnel. The Technical Factor of the RFP identified six key personnel. While it did not require letters of commitment, the RFP did state that the "availability and commitment of Key Personnel is important to the Government and will be evaluated through information contained in the written quote[.]"³

The Agency awarded the contract to Spatial Front, Inc. (SFI) under a best value principle and assigned SFI a significant strength within the Key Personnel category for its Information Specialist / Knowledge Engineer, Mr. [JH].

At some point following the submission of proposals, Mr. [JH] left the employment of SFI and Golden IT brought a protest alleging that 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."⁴

The court determined that SFI did not have an obligation to notify the agency of Mr. [JH]'s departure and denied Golden IT's challenge.

The Court found that there was no evidence to indicate that SFI was aware of Mr. [JH]'s impending departure ahead of the submission of its proposal and therefore could not have knowingly misrepresented his availability. As far as a duty to notify is concerned, the Court held that absent an RFP requirement to do so it, it would be unfair to require offerors to "routinely update the government when facts and circumstances change post-proposal or quote submission, during the course of the government's evaluation period []" especially given the length of evaluation periods.⁵

In sum, the Court determined that SFI did not have an obligation to notify the agency of Mr. [JH]'s departure and denied Golden IT's challenge.

While *Golden IT*, may appear to alleviate some of the burden on offerors to notify the agency of material changes throughout the evaluation period, contractors should be aware that CoFC decisions are not binding on GAO and so far, GAO has not indicated that it plans to move away from the duty to notify.

Nonetheless, this divide may indicate change is on the horizon. Until the CoFC and GAO agree on an approach to this issue, protesters may want to carefully evaluate in which forum they choose to file protests concerning key personnel issues.

Notes

¹ See, e.g., *Matter of: Ashlin Mgmt. Grp.*, B-419472.3 (Nov. 4, 2021) (sustaining a protest where the offeror failed to meet its “ongoing obligation to notify the agency in the event they obtained actual knowledge that a quoted key person had become unavailable”); *Matter of: M.C. Dean, Inc.*, B-418553 (June 15, 2020).

² *Golden IT, LLC v. United States*, No. 21-1966C, (Fed. Cl. Feb. 4, 2022) (“[T]he Court will 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.”). <https://bit.ly/3lgCDeP>

³ *Id.*, at *7.

⁴ *Id.*, at *16.

⁵ *Id.*, at *21.

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