



# The Key Personnel Conundrum

Bid protest risk and uncertainty over key personnel are rising just as the Great Resignation hits.



BY STEPHEN BACON

Federal agencies routinely require contractors to submit proposals identifying specific individuals who will hold “key personnel” positions on the contract. The agency’s evaluation often includes an assessment of key personnel resumes against certain technical qualifications, work experience requirements, and/or educational credentials set forth in the solicitation. Agencies expect that the individuals identified in the proposal will be available to perform the contract.

But that assumption frequently

conflicts with reality. Employees identified for key personnel roles may resign, retire, or otherwise become unavailable after a proposal is submitted. For years, the Government Accountability Office (GAO) has imposed an affirmative obligation on offerors in this situation to notify the agency if proposed key personnel become unavailable prior to contract award. A recent Court of Federal Claims decision, however, rejected GAO’s longstanding rule as “without legal basis” and “unfair.”<sup>1</sup>

The court’s decision in *Golden IT, LLC v. United States* introduces significant

uncertainty for both contractors and agencies. The decision comes at a time when broader economic trends, including the “Great Resignation,” make it increasingly likely that some proposed key personnel will depart during the pre-award period. By understanding the split that has emerged between GAO and the court on this important issue, contractors and procurement officials will be better equipped to mitigate risk. And they will be better able to navigate a shifting legal landscape that is fraught with risky choices and uncertain litigation outcomes.

### Impermissible “Bait and Switch”

In general, whether key personnel identified in a proposal will perform is an issue of “contract administration” that will not be reviewed in a bid protest.<sup>2</sup> GAO and the Claims Court will, however, entertain allegations that an offeror’s proposal contained a material misrepresentation concerning the availability of its key personnel.<sup>3</sup> This is commonly referred to as a “bait-and-switch” allegation.<sup>4</sup>

To prove an “impermissible bait and switch, a protester must show that:

1. The awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance
2. The misrepresentation was relied on by the agency
3. The agency’s reliance on the misrepresentation had a material effect on the evaluation results<sup>5</sup>

An awardee may be disqualified if it is found to have engaged in an illegal bait and switch because this practice undermines the integrity of the procurement system.<sup>6</sup>

A bait-and-switch allegation focuses on the awardee’s actions prior to proposal submission and whether it was reasonable for the offeror to indicate that the proposed individuals were committed to performing the contract. GAO has concluded, for example, that it is unreasonable for an offeror to represent the commitment of key personnel where the offeror did not contact the individuals regarding employment prior to proposal submission.<sup>7</sup>

### GAO’s Affirmative Notification Rule

Although bait-and-switch allegations concentrate on the offeror’s pre-proposal conduct, its obligations with respect to key personnel availability do not necessarily end with the submission of its proposal. That is because GAO has required offerors to affirmatively notify agencies if the key personnel identified in their proposal become unavailable prior to award.<sup>8</sup>

This obligation is not included in the *Federal Acquisition Regulation*, nor is it typically made an explicit requirement of solicitations that request key personnel resumes. Instead, GAO’s affirmative notification rule rests on the premise “that a firm may not properly receive award of a contract based on a knowing material misrepresentation in its proposal.”<sup>9</sup>

Once final proposals are submitted, the substitution of replacement resumes for originally proposed key personnel constitutes a proposal revision. As a result, agencies cannot accept and evaluate replacement resumes without engaging in discussions.

According to GAO, an agency has two options when it learns that an offeror’s proposed key personnel no longer are available to perform. The agency may evaluate the proposal as submitted in light of the change.<sup>10</sup> Alternatively, the agency can exercise its discretion to engage in discussions and allow the offeror to submit a new resume for substitute key personnel.<sup>11</sup>

In applying this rule, GAO has repeatedly affirmed that the agency is not obligated to conduct discussions when it learns that an offeror’s key

personnel are no longer available.<sup>12</sup> GAO’s rule puts offerors at the mercy of the agency. Indeed, an offeror may effectively disqualify its own proposal by disclosing to the agency that one of its key personnel is no longer available.

Procuring agencies also face a dilemma when they are notified an offeror’s key personnel have departed. The agency may be forced to reject a proposal that would otherwise have been selected for award under the solicitation’s evaluation criteria. If the agency does not want to disqualify an offeror’s proposal for missing key personnel, the agency must be willing to extend the duration of the procurement by opening (or reopening) discussions with all offerors.

### The Court Rejects GAO’s Rule

The *Golden IT* case involved a familiar fact pattern. The U.S. Census Bureau sought to establish a blanket purchase agreement for information technology support services under a solicitation that provided for an assessment of key personnel under one of the technical evaluation factors.

Quoters had to provide resumes and other information for their key personnel who would perform the first call order. The solicitation did not require “letters of commitment” from the quoters’ key personnel, but it 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.”<sup>13</sup>

The awardee, Spatial Front, Inc. (SFI), proposed one of its employees

to fill a key personnel role identified in the solicitation. This individual, referred to in the decision as “Mr. JH,” was employed by the awardee on the date it submitted its quote, but he left shortly after to work for another company.<sup>14</sup>

The agency assigned a significant strength to SFI for proposing Mr. JH as its Information Specialist / Knowledge Engineer.<sup>15</sup> SFI prevailed in the agency’s “best value” tradeoff analysis based on the technical superiority of its quote.<sup>16</sup>

The protester alleged that SFI engaged in a bait and switch, citing Mr. JH’s LinkedIn profile which showed his employment history. The court denied SFI’s bait-and-switch claim because there was no evidence in the record to establish that it knew Mr. JH was going to resign at the time the quote was submitted.<sup>17</sup>

The court proceeded to reject the protester’s alternative argument that SFI was required to notify the agency of Mr. JH’s unavailability prior to award. The court refused to apply “GAO’s freestanding rule requiring offerors to update an agency regarding key personnel” particularly given that the solicitation at issue did not include a “provision containing some such requirement or mandating a certification regarding the future availability or commitment of proposed personnel.”<sup>18</sup>

The court concurred with commentators who have criticized GAO’s rule because it is “unreasonable to expect that offerors will not experience changes in

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the status of their staffing over the course of. . . lengthy [procurement] periods.”<sup>19</sup> In the court’s view, GAO’s rule is “unfair” in light of “the common realities of business life (people retire, quit, or must be laid off or fired)” and the “simple facts of biology (illness, injury, incapacitation due to various causes, and death)” that cause key personnel to become unavailable.<sup>20</sup>

**Considerations for Contractors**

In recent years, a historic number of employees have resigned from their jobs in a phenomenon known as the Great Resignation. This broader economic trend makes it more likely that pending proposals will be impacted by ill-timed key personnel resignations.

Contractors in this situation face a difficult choice with no clear legal answer. An offeror’s proposal could be disqualified or substantially downgraded in technical merit if it notifies the agency that a person proposed for a key personnel role has resigned. But if the offeror chooses not to notify the agency, any future award to that offeror would be vulnerable to a bid protest under GAO’s longstanding rule.

The *Golden IT* decision further complicates the offeror’s decision.

That is because GAO makes “recommendations” to agencies and it is not necessarily the final arbiter of a bid protest. If GAO were to sustain a protest on the basis that the awardee failed to notify the agency of a key

personnel resignation, the awardee could potentially challenge the agency's implementation of GAO's recommendation in a separate bid protest at the court.

There is no guarantee, however, that a protest at the court would be successful. The *Golden IT* decision reflects the opinion of one judge on the court, which is not binding on the court's 25 other judges who could be assigned to resolve a protest.<sup>21</sup>

Moreover, even if a judge were generally inclined to agree with the holding in *Golden IT*, the specific facts in any future case could dictate a different outcome. The court's ruling in *Golden IT* was limited to a situation where the solicitation did not require offerors to submit letters of commitment, nor did it expressly require the offerors to update the agency regarding the availability of key personnel. A future case involving a solicitation that includes such requirements would likely have a different result.

Given the unsettled state of the law in this area, contractors should consider steps to mitigate the risk of key personnel resignations. This could include, for example, contractual incentives for proposed key personnel to remain employed while a proposal is pending.

### Considerations for Procuring Agencies

The differing legal standards applied by GAO and the court in *Golden IT* will have ramifications for procuring agencies as well. Agencies rely on consistent procurement law to make decisions regarding whether and how

to implement corrective action in response to a bid protest. As a result of the *Golden IT* decision, agencies no longer will have confidence in how one of the most frequently litigated bid protest issues will be resolved.

To mitigate that uncertainty, agencies might begin to consider including provisions in solicitations that clarify their expectations with respect to whether offerors are required to provide updates regarding key personnel availability. These provisions could ensure that all offerors have a consistent understanding of their disclosure obligations once proposals are submitted.

In the absence of clarity, offerors will inevitably differ in how they respond to a key personnel departure prior to award. The fairness and integrity of procurements will be undermined if offerors take inconsistent approaches to this issue because of a divergence in the law applied by GAO and the court. It is in the best interest of agencies and all offerors to know the rules of the competition before it begins.

### Final Thoughts

It is relatively rare that a split in the law emerges between GAO and the court. It is even more infrequent that the point of disagreement has the potential to affect many procurements due to the prevalence of the issue involved.

The departure of key personnel identified in a pending proposal is an issue that will continue to vex agencies and contractors unless and until clear legal rules are established.

Until then, procurement officials should clarify the applicable rules through solicitation provisions and offerors should take what steps they can to mitigate the risk of key personnel resignations. **CM**

*The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.*

**Stephen L. Bacon** is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

### ENDNOTES

- 1 Golden IT, LLC v. United States, 157 Fed. Cl. 680, 703 (2022).
- 2 Patricio Enterprises, Inc., B-412738 et al., May 26, 2016, 2016 CPD ¶ 145 at 4.
- 3 Id.
- 4 Id.
- 5 Id.
- 6 Id.; see also Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6.
- 7 Patricio, 2016 CPD ¶ 145 at 11-12.
- 8 M.C. Dean, Inc., B-418553 et al., June 15, 2020, 2020 CPD ¶ 206 at 4.
- 9 Id.
- 10 Id.
- 11 Id.
- 12 See, e.g., Chenega Healthcare Servs., LLC, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 5.
- 13 Golden IT, 157 Fed. Cl. at 690.
- 14 Id. at 692-93.
- 15 Id. at 692.
- 16 Id.
- 17 Id. at 702-03.
- 18 Id. at 704.
- 19 Id. at 703, n.38.
- 20 Id.
- 21 This includes fourteen active judges and eleven senior judges identified on the Court's website. See <https://www.uscfc.uscourts.gov/judicial-officers> (last visited July 1, 2022).