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Employee Turnover

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Use Sound Planning to Mitigate Risks of Unexpected Key Personnel Attrition

BY TARA L. WARD AND RICHARD B. O'KEEFFE JR.

Employee turnover is a harsh fact of corporate life — a challenge that requires the investment of substantial time and resources to manage. Any business — if it is to stay in business — must recruit new and replacement employees; identify internal candidates; capture, when necessary, the departing employees' institutional knowledge; and ultimately train and incorporate new employees, all while doing everything else needed to keep customers happy, the bills paid and the doors open.

But for a government contractor, the stakes are particularly high. The departure of key personnel at the wrong time in a procurement may cost the company a business opportunity even if it did everything just right.

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A hypothetical is instructive. A vendor submits a proposal in response to a solicitation requiring the submission (and evaluation) of resumes for proposed key personnel, including, among others, a program manager. Five weeks after proposal submission, the vendor's proposed program manager resigns due to a serious injury sustained in a traffic accident. The vendor reassigns another of its employees to the project — one who has greater qualifications and experience than the original program manager candidate. The vendor notifies the agency of the departure of its original proposed program manager and that it has identified a substitute. The agency does not respond or open discussions, and awards the contract to the vendor as the technically superior offeror. The vendor's celebration is cut short, however, when a competitor files a bid protest arguing that the evaluation and award decision were unreasonable because the vendor's named program manager had departed.

Under current Government Accountability Office (GAO) case law, the protest will likely be sustained. According to the GAO, when a key person, such as our unfortunate program manager (*i.e.*, an employee nominated to fill a specified position and for whom a resume must be submitted to and evaluated by the agency) departs after proposal submission, but before contract award, the offeror must disclose the departure to the contracting agency. The contracting activity, then, has two options: (1) deem the offeror's proposal unacceptable for failing to meet a material requirement, or (2) permit the offeror (and others) to rectify the departure by opening discussions. In our hypothetical, because the agency did not open discussions to accommodate the change in personnel, but rather charged ahead with its evaluation, its only option, according to the GAO, was to find the proposal unacceptable.

This is a terrible result. The realities of long lead-time procurements (for large-scale services contracts requiring the evaluation of key personnel, multiyear lead times are commonplace) mean that government contractors lose key personnel for reasons out of their control on a regular basis. When, as in our hypothetical, the contracting agency elects not to hold discussions, thereby causing the proposal to be deemed unacceptable (either by the agency before award or as corrective action based on a GAO protest ruling), all of the many thousands of dollars the vendor spent to assemble a competitive proposal are wasted. Not to mention the fact that, by categorically eliminating an otherwise superior proposal without investigating the merits of the vendor's proposed substitute, the agency misses out on what might be the true best value option. Everybody loses.

Faced with the reality of the GAO's clear guidance, contractors should be aware of several best practices for managing the departure of a key person. As an initial matter, upon learning of a key person's pending or recent departure, the company should identify a replacement that is at least as qualified as the originally proposed individual. The company should notify the contracting officer of the individual's departure (and the company's identification of an alternative) as quickly as possible, according to the GAO.

Every day counts. If discussions are ongoing — *i.e.*, final proposal revisions (FPR) have not been submitted yet — the company will want to make the substitution in its FPR. This is the best position. If discussions have closed — *i.e.*, FPRs are in — when notifying the agency of the departure, the company should also request the opportunity to revise its proposal further to remedy the departure. Even though the agency, according to GAO precedent, does not have to reopen discussions, the company should do its best to impress upon the agency the benefits of allowing such narrow revisions.

In light of the risks associated with not disclosing a key personnel loss (*e.g.*, the company might later be viewed as having misled the agency by remaining silent), and the reality that there are often long lead times between proposal submission and award dates, it is important to know who is proposed as key personnel, for what efforts, and what, if any, alternatives are available. To that end, it may be helpful to task a specific person or office with tracking people proposed as key personnel in various solicitations; and to institute a policy that job openings for key personnel be reviewed by someone in charge of acquisition before posting. The ability to react quickly to key personnel losses might be crucial.

This line of cases should not be confused with the long-standing precedent governing the alleged ''bait and switch'' of key personnel. Bait-and-switch cases prohibit an offeror from knowingly or negligently representing that it will rely on specific personnel that it does not expect to furnish during contract performance. This doctrine would apply if, in our hypothetical, the vendor did not advise the agency of the resignation of its proposed program manager, but rather continued to represent that the named individual would be performing. Tips for avoiding this situation mirror those already set forth above: A company that loses one or more key personnel after submitting a proposal but before award is required to notify the agency. In no circumstances should an offeror confirm its continued ability and intent to rely on the originally named individual.

Conclusion

Agencies will have to toe the line while the current GAO case law occupies the field. Nothing can prevent the truly unexpected from happening, but when mapping a strategy for a long-term procurement competition, offerors must expect the unexpected and react nimbly when the unexpected occurs. Contracting officers hate unexpected change — but they hate falling behind schedule even more. Every day an offeror dithers in responding to an unplanned personnel loss makes it less likely that the contracting officer will be inclined to accept a replacement, especially if that means having to explain to the customer that the award will be delayed. Know the rules, plan for the worst, and act quickly when bad things happen.

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