

Bad Assumptions: GAO Refines Offerors' Due Diligence Obligation to Support Naming an Employee in a Proposal Staffing Plan

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In today's tight job market, with qualified, skilled, and experienced candidates in extreme demand in many fields, proposal writers face a daunting task to assemble the most competitive teams of technical, engineering, scientific, and business personnel for advisory or technical services contract proposal staffing plans. Building and maintaining over the many months or even years that a Government procurement might take requires a great deal of effort, networking, know-how and, in many cases, luck. For a non-incumbent offeror competing in a follow-on procurement, successful staffing plans may require projections about the availability of the existing workforce. It is often reasonable for offerors to assert that they plan to hire some or all of the incumbent workforce if awarded the new contract. But there is a limit to such assumptions. A new U.S. Government Accountability Office (GAO) decision provides a cautionary tale for offerors: If you are going to name a specific person in your proposal, you had better talk to that person first.

In a December 2019 decision, *T3I Solutions, LLC*, B-418034 (Dec. 13, 2019), GAO sustained a protest by the incumbent contractor alleging that the awardee had misrepresented the availability of a specific incumbent employee without having first spoken to the employee. This decision is significant because, in several respects, the challenger's assumptions seem reasonable, but GAO nevertheless found an impermissible "bait-and-switch." Competitors intending to capture incumbent employees for services contracts should understand the rule established in *T3I*, and perhaps consider prudent adjustments to business development practices.

Practice Areas

Government Contracts

The awardee, Darton Innovative Technologies, Inc. (Darton), won a total small business set-aside procurement to provide courseware development and training services to the Air Force. As part of the Air Force's evaluation of personnel qualifications, the solicitation required offerors to submit "a manning level and personnel mix plan for all workload ... to include all instructors, courseware developers and any other required positions." While offerors had to identify proposed personnel by name, there were no key personnel positions and the solicitation required neither the submission of resumes nor of letters of commitment from individuals named in personnel mix plans.

Darton and T3I Solutions, LLC (T3I) submitted proposals in response to the solicitation. Darton proposed a current incumbent instructor, and specifically advised the Air Force in its proposal that the person currently served in that role for T3I. In finding Darton's proposal to be technically acceptable, the Air Force specifically found that the named candidate met the qualifications requirements of the solicitation. T3I protested after a debriefing and demanded corrective action based on a Darton's alleged "material misrepresentation" in naming the T3I employee without a "reasonable expectation that [the] individual would be available for performance." The crux of T3I's protest ground was that Darton had not contacted the instructor before submitting his name, nor did it obtain permission to use his qualifications in Darton's proposal.

Darton insisted that its expectation of the instructor's availability was reasonable. It also noted that its proposal made no specific representation of the instructor's availability, and the solicitation did not require commitment letters for any proposed personnel. Notwithstanding these facts, in T3I's view, this indicated a lack of candor by Darton, and amounted to an improper "bait-and-switch."

GAO agreed that Darton's approach was a "bait and switch" because Darton had not contacted the individual in advance. GAO stated that, even if Darton did have a reasonable expectation of the incumbent instructor's availability, such an expectation would still amount to "speculation [which] cannot reasonably support Darton's inclusion of [the] individual in its proposal." Darton, in GAO's opinion, relied only on a "hope or belief" that it would be able to make good on its representation. It is difficult to see how GAO's apparent concession that Darton had a reasonable basis to believe the individual would be available can be reconciled with GAO's ultimate holding that faulted that reasonable basis as insupportable speculation.

But in any case, based on this finding, GAO ruled that the Air Force relied on Darton's misrepresentation, and that reliance was essential to finding Darton's proposal to be technically acceptable. GAO determined that established all the elements of a bait-and-switch and warranted corrective action. GAO found that the bait-and-switch here was less egregious than ones involved in other cases, so it did not recommend eliminating Darton from the competition. It did recommend however that the Air Force "reevaluate Darton's proposal, taking into consideration [Darton's] misrepresentations." Not only is Darton's reputation tarnished by the decision, but its award may be in jeopardy.

The *T3I* decision appears to overlook factors that would seem to bolster the reasonableness of Darton's expectation while mitigating any speculative aspect of this element of its staffing mix plan. The contract is

small (\$2 million–\$3.6 million) in a narrow, highly specialized niche (Air Force courseware) inhabited, so it seems, by just two small businesses. Thus, the named instructor would appear to have limited job mobility or incentive to depart the project simply because a new contractor took over from T3I. GAO obviously has a much deeper understanding of the facts, and it appears from the decision that Darton might have done a better job of explaining its conduct. But Darton's conduct might have been more charitably judged.

Nevertheless, this decision should cause contractors to exercise greater caution going forward. At a minimum, offerors should more closely analyze solicitation requirements and instructions to offerors—understanding with greater discernment and care what is required by way of submissions regarding personnel is more important than ever. This case does not concern key personnel, which has its own set of unique issues and risks based on GAO decisions in recent years. But at a minimum, so it would seem for the time being, if an offeror needs to name someone in its proposal, it had better at least talk to the person first, and document the conversation in some form. Such communications, especially when incumbent personnel are involved, are inherently risky and demand a delicate balance of considerations. But we now know that, in cases like T3I, any assumptions of availability without such contact are probably bad assumptions. At best they are improperly speculative and at worst they could be a possible basis for being called out by GAO for engaging in a bait-and-switch scheme.