

ALERT

COFC Decision Disagrees with GAO on Whether Contractors Must Notify Agencies of Changes to Key Personnel Availability During a Procurement

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WHAT: In a decision released on February 4, 2022, the Court of Federal Claims (COFC) declined to follow the Government Accountability Office's (GAO's) rule that offerors are obligated to inform agencies when proposed key personnel become unavailable after proposal submission but before contract award or else risk being found to have made a material misrepresentation about the personnel's availability. *Golden IT, LLC, v. United States*, No. 21-1966C, 2022 WL 334369 (Fed. Cl. Feb. 4, 2022) (Solomson, J.).

WHAT DOES IT MEAN FOR INDUSTRY: In declining to follow GAO's decisions, the *Golden IT* decision articulated many of the concerns voiced throughout the industry regarding key personnel unavailability. When contractors have followed GAO's rule and notified agencies that a key person has become unavailable, GAO has given agencies two options: either allow all offerors to revise proposals or find the notifying offeror's proposal unacceptable for failing to satisfy a material solicitation term.

Judge Solomson rejected GAO's approach, but it is unclear what the ultimate impact on the contracting community will be. Unlike at GAO, decisions of one COFC judge are not binding on the other judges, so this does not mean that awardees can necessarily count on a protest at the court to apply Judge Solomson's holding. Indeed, other COFC judges have previously issued decisions consistent with GAO's precedent. Likewise, of course, COFC holdings are not binding on GAO, and thus, GAO will likely continue to apply its own precedent.

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Furthermore, the COFC cannot hear protests challenging the award of task orders under indefinite-delivery, indefinite-quantity (IDIQ) contracts, as GAO has exclusive jurisdiction over task order protests (other than those that exceed the size, scope, or time period of the IDIQ contract). Thus, even if other COFC judges follow *Golden IT's* reasoning, it would not apply to task order procurements.

This uncertainty will likely persist unless the Federal Circuit has an opportunity to consider the issue. Although a Federal Circuit decision would only bind the COFC, its decisions have also historically resolved discrepancies between legal interpretations at GAO and the COFC.

In a post-award bid protest, Golden IT, LLC (Golden IT) alleged that the awardee's quote contained a material misrepresentation regarding the availability of one of its proposed key personnel, referred to as Mr. [JH]. Although Mr. [JH] was employed by the awardee when it submitted its quote on May 20, 2021, later that same month, Mr. [JH] left the awardee to work at another company, making him allegedly unavailable during contract performance. In support of its argument, Golden IT cited GAO's decisions holding that "offerors or vendors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals."¹ The court declined to follow these GAO decisions and rejected Golden IT's argument that the awardee was obligated to notify the agency of Mr. [JH]'s unavailability after submitting its proposal. In doing so, the court reasoned that GAO's requirement "strikes the Court [] as without legal basis and 'unfair':

- First, the court pointed out the lengthy evaluation process that often follows proposal submission, finding it unreasonable to expect that offerors would not experience changes in their proposed staffing over such long periods. Considering the high probability of staffing changes, the court disagreed with GAO's rule requiring offerors to tell agencies of changes in their staffing without also requiring agencies to provide a simple process for key personnel substitution that would not entail the delay and administrative burden of requesting and evaluating revised proposals.
- Second, the court reasoned that the extent to which key personnel must commit to contract performance depends on what the agency requires in each solicitation. Here, the solicitation did not require offerors to submit letters of commitment from key personnel, continuously verify key personnel availability, or update the agency regarding employee departures.
- Third, the court determined that it was "unable to locate the basis for the GAO's rule." Although the court acknowledged a COFC decision endorsing GAO's precedent,² it concluded that the rule was "untethered" from a statute, regulation, or Federal Circuit decision.

The court concluded that it should only assess an offeror's knowledge at the time the offeror submits its proposal, and here, there was no evidence showing that the awardee lacked a reasonable belief at that time that Mr. [JH] was available. Ultimately, the court refused to adopt GAO's rule that requires 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."

As noted above, there is not a uniformity of opinion at the COFC on this issue. Which view prevails may need to await a COFC appeal to the Federal Circuit. Wiley's Government Contracts practice will continue to monitor developments in this area and others related to bid protests at GAO and the COFC .

1 *E.g., AttainX, Inc.*, B-419306, 2021 CPD ¶ 21, 2021 WL 228876, at *4 n.4 (Jan. 12, 2021).

2 *Chenega Healthcare Servs., LLC v. United States*, 138 Fed. Cl. 644, 652 (2018) ("As the GAO stated, when an offeror is obliged to make a change in the key personnel included in its proposal, the agency has a choice between evaluating the original proposal as submitted, or opening discussions to allow for modified proposals.").