

ALERT

GAO Reaffirms Ignorance Can Be Bliss When It Comes to Key Personnel

April 20, 2020

WHAT: U.S. Government Accountability Office (GAO) denied a protest alleging that an awardee was unacceptable where it failed to notify the agency of the unavailability of a key person because the record lacked evidence that the awardee had “actual knowledge” of the unavailability.

Under GAO caselaw, offerors must inform the agency of changes to key personnel that occur after proposal submission but before contract award. *Greenleaf Constr. Co.*, B-293105.18, Jan. 17, 2006, 2006 CPD ¶ 19. If the agency learns that proposed key personnel are no longer available, it can either find the offeror’s proposal unacceptable for failing to meet a material solicitation requirement, or it can open discussions to allow the offeror (and others) to propose new key personnel. *Paradigm Techs., Inc.*, B-409221.2, Aug. 1, 2014, 2014 CPD ¶ 257. Further, an offeror who knowingly fails to inform the agency of a key person’s departure may not properly receive award of a contract. *DZSP 21, LLC*, B-410486.10, Jan. 10, 2018, 2018 CPD ¶ 155. However, GAO has held that an offeror’s obligation to inform the agency does not apply if the offeror lacks actual knowledge of the key person’s unavailability. *Id.*

In *NCI Information Systems, Inc.*, B-417805.5, Mar. 12, 2020, 2020 WL 1285436, the protester challenged the Army’s issuance of a task order to DCS Corporation (DCS), arguing (among other things) that it should have found DCS’s proposal unacceptable because DCS had failed to inform the Army of a key person’s departure prior to contract award. According to the protester, “publicly available information” confirmed that DCS’s proposed materials engineer III, a subcontractor, had relocated and accepted a new position with another company in October 2019, a month before the Army awarded the contract to

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DCS.

GAO denied this protest ground, holding that the protester had not shown that DCS was aware of the key person's unavailability. As part of its proposal, DCS had submitted to the Army the key person's resume, which indicated that he had never been employed by DCS, as well as a signed commitment letter. Moreover, DCS stated in a declaration submitted to GAO that none of its proposed key personnel had rescinded their commitment letters or otherwise informed DCS that they were unavailable to perform the contract. GAO concluded that, under these circumstances, "DCS had no obligation to inform the agency that any of its key personnel were unavailable."

WHEN: GAO issued its public decision on March 18, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: When proposed key personnel depart before award, contractors face a tough choice under GAO precedent: inform the agency of the key person's departure and risk disqualification from the competition, or stay silent and hope that in the event of an award a potential protester does not raise this issue. This decision reiterates an important principle: the awardee must actually know about the key person's unavailability in order for GAO to sustain the protest. This whole line of cases has created real problems for contractors in trying to ensure they retain key personnel even when procurements drag on longer than anticipated. This latest case offers some limits on its application.