

Key Personnel Departures: The Death Knell for Pending Federal Agency Proposals

IN SHORT

The Situation: Recent GAO decisions have made clear that departures of key personnel can be fatal to an offeror's chances of winning a contract award.

The Result: Realistically, there is little an offeror can do, after the fact, to save its proposal once a departure occurs.

Looking Ahead: Offerors should take certain steps to attempt to avoid these situations in the future.

In 2014, the U.S. Government Accountability Office ("GAO") sustained a protest by [Paradiqm Technologies, Inc.](#), challenging the award of a contract to an offeror, where its proposed contract program manager (a key personnel position) became unavailable after the submission of proposals but before the award. The agency evaluators were aware of the departure and assigned a weakness to the awardee's proposal, but they nevertheless rated the proposal as "satisfactory" under the key personnel subfactor, noting that the company had "the demonstrated ability to recruit and hire qualified personnel to fulfill the Key Personnel duties."

Paradiqm protested the award, and GAO sustained the protest, finding that the key personnel positions were material requirements of the solicitation and that the awardee's failure to satisfy one of the requirements, due to the departure of one of its proposed key personnel, rendered the proposal unacceptable (and therefore unawardable). GAO stated that in such a situation, the agency should have either rejected the awardee's proposal as technically unacceptable or reopened discussions to permit the firm to correct the deficiency. GAO also noted that it would not be permissible in such a situation to allow the company to submit a substitute contract program manager because this would have, in effect, resulted in discussions with only one offeror.

GAO's decision last year in [URS Federal Services, Inc.](#) highlighted this issue. In that case, an individual who was proposed to fulfill 0.5 FTE ("full-time equivalent") of a senior software engineer key personnel requirement departed the company after submission of proposals but before the award. When the agency was advised of this, it eliminated URS's proposal from the competition, finding that the company failed to meet the key personnel requirements. Despite acknowledging that the key person's departure was not the fault of URS, GAO nevertheless found the agency's elimination of URS to be reasonable. In doing so, GAO again noted that key personnel requirements are a material solicitation requirement and that in such situations, agencies must either evaluate the proposal as submitted (in which case the proposal would be rejected as technically unacceptable for failing to meet a material requirement) or reopen discussions to permit the offeror to correct this deficiency.

The Latest Development

GAO's decision in [A-T Solutions, Inc.](#) placed another nail in the coffin of offerors who have suffered the departure of a proposed key employee. The Navy had issued its solicitation in December 2015, and offerors submitted proposals in January 2016. After discussions had closed, one of A-T Solutions' proposed key personnel departed the company. A-T Solutions notified the agency of this, and in response, the agency eliminated the proposal from the competition. A-T Solutions protested, arguing that the agency should have reopened discussions to allow it to substitute another individual for the key position. GAO denied the protest, despite the fact that the elimination of the incumbent left only two offerors in the competition.

The Outcome

This outcome is unfortunate for several reasons. First, it results in decreased competition for contracts because it gives agencies an easy (and apparently unreviewable) method to eliminate otherwise competitive proposals from the competition.

Second, this is a situation over which offerors have very little control. A proposed key employee may decide to leave through no fault of the company, and as GAO's decisions demonstrate, an offeror is required to inform the agency of the departure but cannot substitute another employee or revise its proposal unless the agency decides to reopen discussions for all offerors—a decision that GAO will not second-guess.

Points for Consideration

Given the limited ability of companies to remedy this situation, offerors should take proactive steps to attempt to avoid this type of situation. First, offerors should review solicitations carefully and consider requesting that the agency amend the solicitation's personnel requirements to require offerors to demonstrate the ability to recruit and hire qualified personnel, rather than requiring a company to identify a specific person to fill a position. Second, when responding to a proposal that has key personnel requirements, offerors may want to consider providing retention incentives for employees proposed as key personnel to discourage departure prior to contract award.

Finally, agencies should consider the impact that these outcomes will have on the quality of the competition. While an agency may eliminate a proposal from the competition due to the departure of a key person, agency contracting officials should consider whether the elimination of a company on this basis really benefits the procurement. In such a context, reopening discussions could have benefits not just for the offeror but also for the agency that will receive more and better competition.

THREE KEY TAKEAWAYS

1. Recent GAO decisions illustrate the vulnerability of government contract offerors who lose key personnel after a proposal is submitted.
2. Certain proactive actions by offerors can minimize the consequences of key personnel departing.
3. Government agencies should take a closer look at the possible impact these outcomes will have on the proposals considered and, ultimately, the services or products procured.

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