

CLAIMS COURT WILL NOT ENFORCE GAO RULE REQUIRING OFFERORS TO NOTIFY AGENCY OF A CHANGE IN KEY PERSONNEL

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In a recent decision, Judge Solomson of the Court of Federal Claims declined to follow the Government Accountability Office (“GAO”) rule that offerors are obligated to advise agencies of material changes in proposed key staffing, even after submission of proposals.” *Golden IT, LLC v. United States and Spatial Front, Inc.*, No. 21-1966C, Feb. 4, 2022. The Judge could find no basis for rule, and believed it to be unfair and not tethered to a statute, regulation or Federal Circuit decision.

The facts were simple. The solicitation (which was for information technology work on the U.S. Census), included a requirement for resumes of six key personnel as well as their employment status, recent experience, technical accomplishments and education. The solicitation did not require any document, such as letters of commitment, that assured continued availability of key personnel.

Spatial proposed Mr. “JH” to fill the key personnel role of Information Specialist/Knowledge Engineer. Mr. JH was an employee of Spatial on May 20, 2021, the day Spatial submitted its quote. But then Mr. JH departed later in May to begin work at another company. Nothing in the record indicated that Spatial had any indication prior to the time it submitted its proposal that Mr. JH intended to leave Spatial for another employer and would not be available for contract performance. Spatial did not notify the agency of JH’s departure.

The court first acknowledged that an offeror may not knowingly misrepresent a material fact in a proposal. But there was no evidence that Spatial knew about JH’s departure when it submitted its proposal. Protester Golden alleged that Spatial had an obligation to advise agencies of material changes in proposed staffing, even after submission of its proposal.

The Court disagreed, noting that there is a likely obligation of an offeror to ascertain the continuing availability of key personnel *at the time of submission of final proposal revisions*. However, the Court could not locate the basis for the GAO’s rule “that offerors or vendors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals.” The court felt that this rule was not based on a statute, regulation or Federal Circuit decision, was without legal basis and was unfair.

While denying Golden’s protest on this point, the court said “[i]n sum, all that is necessary here is that Spatial had a reasonable belief, at the time of its quote, that Spatial would deploy Mr. JH as key personnel upon contract award [fn omitted]. There is nothing in the administrative record...that Spatial lacked such a belief. The Court thus finds the government and Spatial and entitled to judgment on this issue.”

Takeaway: An offeror cannot make a misrepresentation (about personnel or anything else) in a proposal, including a final proposal revision. However, until this disagreement between the

Court of Federal Claims and the GAO is resolved, it may be wise to notify the agency of any material change in key personnel, where such personnel are a requirement in the solicitation.

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