

BAIT AND SWITCH: MANY PROTESTS, FEW SUSTAINS

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In a recent Government Accountability Office (“GAO”) case, the protester alleged “bait and switch” tactics, but the GAO denied the protest. *Allied Technology Group, Inc.*, B-412434, Feb. 10, 2016. This denial continues a general trend at the GAO of denying protests alleging bait and switch. In fact, a search at the GAO showed that there were 123 reported cases that included an allegation of bait and switch, but the GAO sustained only two of the protests on that ground. This blog examines bait and switch, demonstrating the elements that must be present in order to get a protest sustained, and then considers the *Allied Technology* case.

Definitions of “bait and switch.” Most people have a general understanding of bait and switch, because they have observed it in commercial transactions:

- Webster: A sales tactic in which a customer is attracted by the advertisement of a low-priced product but then is encouraged to buy a higher-priced one. *Merriam-Webster’s Collegiate Dictionary*, 11th Ed. (2003).
- Black’s: A sales practice whereby a merchant advertises a low-priced product to lure customers into the store only to induce them to buy a higher priced product. Most states prohibit the bait and switch when the original product is not actually available as advertised. *Blacks Law Dict. 10th Ed.* (2014)
- Bankruptcy Court: Debt relief agency misrepresented the services that it would provide to prospective clients, in violation of Code provision regulating conduct of debt relief agencies, by engaging in classic bait-and-switch whereby agency led prospective clients to believe that, in exchange for payment of agency's \$1,495 fee, a bankruptcy petition would be filed for client by one of the agency's attorneys, only to disclose, after clients had paid fee and completed bankruptcy workbook, that workbook had been forward to outside counsel, who required payment of additional fee. *In re Spence*, 411 B.R. 230 (Bankr. D. Md. 2009)

GAO: The GAO has brought the concept of bait and switch into negotiated government contracts. Frequently, a solicitation for services, especially specialized or high technology services, will require that resumes, along with signed commitments, be included in an offeror’s proposal for various key personnel. GAO identifies the following elements of bait and switch that render a contract award improper:

- (1) The offeror knowingly or negligently represented in its proposal that it would rely on specific personnel that it did not expect to furnish during contract;
- (2) it was foreseeable that the individuals named in the proposal would not be available to perform the contract work; and
- (3) the agency relied on this representation in evaluating the proposal, and it had a material effect on the evaluation results.

Ann Riley & Assocs., Ltd.--Recon., B-271741.3, Mar. 10, 1997, 97-1 CPD ¶ 122; see also

Advanced Tech. Sys., Inc., B-298854 (Dec. 29, 2006) 2007 CPD ¶ 22.

The author can find only two bait and switch protests that have been sustained by the GAO. The first is *Aerospace Design & Fabrication*, B-278896, May 4, 1998, 98-1 CPD ¶ 139, where an offeror received evaluation credit from the agency for *nonexistent* commitments from key employees, and in one case, for naming a key employee who had expressly *denied* the offeror permission to use his name in the proposal. The protester had accurately represented in its proposal that it had the required signed commitments from its proposed key employees.

The second is *Mantech Adv. Sys. Int'l, Inc.*, B-255719, May 11, 1994, 94-1 CPD ¶ 326, where offerors were required to provide resumes for all personnel they intended to use in contract performance. One non-incumbent offeror stated that it had hired or attempted to hire certain incumbent personnel it included in its proposal, but these statements were *untrue* at the time they were made. The misrepresentation of employment commitments materially influenced the agency's evaluation of the non-incumbent's proposal, and caused the agency to select it for award.

Turning to *Allied Technology*, the GAO summarized the elements of bait and switch as follows: to establish an improper bait and switch scheme, a protester must show that a firm either knowingly or negligently represented that it would rely on specific personnel that it did not reasonably expect to furnish during contract performance, and that the misrepresentation was relied on by the agency and had a material effect on evaluation results. Although the protester in *Allied Tech.* alleged that the awardee's proposed key personnel were unavailable, unwilling or unlikely to perform, the GAO stated it there was "nothing in the record" that contradicted the fact that the awardee was fully prepared to provide and intended to staff the contract with individuals it had proposed as key personnel.

Potential protesters should beware of alleging bait and switch. Protesters have a heavy burden not only of demonstrating that there was a misrepresentation in the protested offeror's proposal, but that the agency relied on it to their detriment in the evaluation of offers.