

# Risks For Contractor With New Info After Proposal Submission

By **Aron Beezley** and **Emily Unnasch**

Law360, New York (May 26, 2017, 12:16 PM EDT) -- Government contractors frequently find themselves in a sticky situation where, after submitting a “best and final offer” (BAFO), but before award, they learn that material information provided in their proposal has become stale. This type of situation often arises when the contractor learns that proposed key personnel are no longer available, or otherwise will not be able to participate in the contract if awarded. The contractor facing such a situation must quickly decide whether, prior to contract award but after submission of its BAFO, it should notify the contracting officer of the newly discovered potential unavailability of such proposed key personnel. As discussed below, this is a gray area in the law, with Government Accountability Office decisions supporting either notification or remaining silent depending on the specific facts at issue.



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## Analysis

First, some GAO decisions lend support to a contractor’s decision to refrain from providing additional information to the agency under such circumstances. In AdapTech Gen. Sci. LLC, B-293867, 2004 CPD ¶ 126 (Comp. Gen. June 4, 2004), for example, the GAO found that there was no misrepresentation (and therefore no improper bait-and-switch) where the awardee planned to substitute some of its key personnel after contract award. Denying the protest, the GAO found that one of the proposed key personnel left the awardee’s employ just one week before the agency awarded the contract. The GAO noted that “[t]here is no evidence that [the awardee] anticipated this employee’s leaving prior to termination of his employment, and substitution of such key personnel is specifically provided for in the request for proposals. Thus, the need to replace this employee does not establish that [the awardee] misrepresented his availability.”



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Although the awardee did not notify the agency of the key personnel’s unavailability prior to award — despite having actual knowledge of the same — the GAO found that there was no misrepresentation. (“[S]ince award was made on the basis of initial proposals, eliminating an opportunity to advise the agency of this change in a revised proposal, and award was made shortly after the employee’s departure, we do not believe [the awardee’s] failure to notify the agency implies an intent to misrepresent the availability of its proposed personnel.”). The GAO thus denied the “bait-and-switch” protest allegation and upheld the contract award.

Similarly, in Unisys Corp., B-242897, 91-1 CPD ¶ 577 (Comp. Gen. June 18, 1991), cited in AdapTech, the GAO denied a “bait-and-switch” protest allegation where the awardee was

unable to secure several of its proposed key personnel after award. (“[W]here the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals (that is, the offeror has not proposed personnel it has no intention of providing), the fact that the offeror, after award, provides substitute personnel does not make the award improper.”). In Unisys, however, the awardee did informally notify the government of the likely change. (“Although [the awardee] did not have the opportunity to withdraw some of the proposed individuals and to propose substitutes in a BAFO because award was made on the basis of initial proposals, the record shows that [the awardee], during the pre-award survey conducted by [the government], informed the survey personnel that four of the people whom it had initially proposed were no longer available.”). Although the awardee provided informal notice, such notice was never passed along to the contracting officer prior to award. The GAO nonetheless denied the protest, finding no misrepresentation occurred.

It is important for a contractor facing this type of situation to be aware that there are inherent risks in informing the agency of a likely change in its proposed key personnel at this stage of the evaluative process, after submission of a BAFO and while awaiting contract award. Among other things, a competitor could argue that the contractor has impermissibly engaged in unilateral discussions with the agency, and the agency might misinterpret a contractor’s good-faith notification of the newly discovered information to mean that the contractor’s proposal is noncompliant or unacceptable.

The GAO’s decision in *The Sandi Group Inc.*, B-401218, 2009 CPD ¶ 123 (Comp. Gen. June 5, 2009) demonstrates such risk to contractors who decide to notify the agency of a late change in its proposed key personnel. In that case, the GAO denied a protest where the agency rejected the offeror’s proposal after it informed the agency of a change in its proposed key personnel. There, the contractor both notified the agency of the change and proposed to substitute key personnel in place of those who were no longer available. The contracting officer determined that the contractor’s requested substitution “would constitute negotiations which would unduly delay the procurement, and prejudice other offerors.” The contractor’s attempt to substitute key personnel thus was deemed an impermissible “late proposal modification.”

Despite these risks, contractors also should be aware that numerous GAO opinions could be interpreted to require pre-award notification of any “material change” in the offeror’s proposal. In *Greenleaf Constr. Co, Inc.*, B-293105.18, 2006 CPD ¶ 19 (Comp. Gen. Jan. 17, 2006), for example, the GAO sustained a protest where, after submission of the awardee’s proposal but prior to award, both the offeror’s key personnel and the proposed technical approach had materially changed. The GAO reasoned that because of the material changes, “the agency never evaluated the awardee’s actual resources and technical approach as they existed at the time of award.” Similarly, in *Paradigm Tech. Inc.*, B-409221.2, 2014 CPD ¶ 257 (Comp. Gen. Aug. 1, 2014), the GAO sustained a protest where the procuring agency was aware that the awardee’s proposal failed to satisfy a material solicitation requirement concerning key personnel. Citing *Greenleaf*, the GAO admonished the offeror that it “should not have allowed almost three months to pass before notifying the agency that one of its two key people was no longer available,” noting that identification of key personnel was a material term of the solicitation and any changes must be reported to the contracting officer.

A number of recent GAO cases cite *Greenleaf* as mandating that “offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals.” See, e.g., *Brandes Assoc. Inc.*, B-412548.5, 2016 CPD ¶ 245 (Comp. Gen. Aug. 24, 2016) (citing *Greenleaf* as holding: “The failure of an offeror to inform the agency of a

change in proposed staffing and resources may render the evaluation and subsequent award decision unreasonable where it results in the agency being unable to evaluate the actual employees as they existed at the time of award.”). Additionally, relevant commentary suggests that an offeror likely should notify the government of the change. See, e.g., Steven W. Feldman, *Government Contract Awards: Negotiation and Sealed Bidding* §10.26 (Oct. 2016) (suggesting that “if in the interval between submission of revisions and the award the offeror learns that the key personnel representations are no longer accurate,” the offeror should “volunteer the information to the agency so as to avoid tainting the award with a possible misrepresentation”).

## **Conclusion**

In sum, this is a gray area of the law, and there is no risk-free path forward for a contractor facing a newly discovered material change in its proposal after it has submitted a BAFO. While some contractors may decide, in light of *Greenleaf* and its progeny, that the best course of action is to notify the agency of the anticipated change, contractors should be aware that in doing so, they potentially open themselves up to claims of unauthorized unilateral discussions, or a finding that the contractor impermissibly attempted to submit a late proposal modification. One thing that is “black and white,” however, is that contractors who find themselves in a “bait-and-switch” situation should consult with experienced legal counsel, as determining which path forward likely carries the least amount of risk in a given situation can ultimately mean the difference between winning and losing a contract.

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