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Bid Protest Spotlight: Availability, Removal, Entity Confusion

By **James Tucker** (August 6, 2020, 3:55 PM EDT)

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This month's bid protest spotlight considers three protest decisions from the U.S. Government Accountability Office that provide important guidance for companies competing for government contracts.

M.C. Dean Inc. involves an unusual twist on an offeror's obligation to report pre-award changes in the availability of key personnel.[1] Eminent IT LLC is a successful challenge to an agency's decision to remove requirements from the 8(a) program.[2] DynCorp International LLC highlights the importance of determining what "the offeror" means in each solicitation and making sure that one's proposal clearly complies with the agency's intended meaning.[3]

M.C. Dean

Protests over unavailable key personnel are a dime a dozen these days. Such protests often involve proposed candidates who get tired of waiting on a drawn-out contract award and seek employment elsewhere, whose family situations require relocations that prevent the candidates from honoring their prior commitments, or who develop health problems that cause them to withdraw.

In M.C. Dean, however, the GAO sustained a protest on this basis with a twist: A key person was still available, but would no longer be able to meet the contract's requirements.

The GAO's general rule is, if an offeror gains actual knowledge prior to award that one of its proposed key personnel will be unavailable to perform, the offeror has an obligation to inform the agency of that fact.[4]

The procuring agency then has two options: (1) evaluate the proposal as submitted without considering the resume of the unavailable employee, which generally means the proposal will be found technically unacceptable; or (2) (re)open discussions with all offerors, which will allow the offeror to revise its proposal and change key personnel.[5]

Whether the unavailability is outside the control of the offeror and the candidate is legally irrelevant. Although it is the GAO that developed this rule, the U.S. Court of Federal Claims has followed the GAO's approach.[6]

In M.C. Dean, the solicitation identified seven labor categories as key personnel positions. Among these was the program manager, who was required to possess a top-secret/sensitive compartmented information, or TS/SCI, security clearance, with a full-scope polygraph at the time of award.

Following discussions, the agency evaluated the offerors' final proposal revisions and awarded the contract. M.C. Dean's protest followed.

Based upon post-award job opening announcements that appeared to match key personnel positions, the protester alleged that several of the awardee's key personnel were unavailable to perform and the awardee must have been aware of that fact before award.

During the course of the protest, it came to light that the awardee's proposed program manager learned after final proposal revisions were submitted, but before award, that the government had denied his TS/SCI security clearance application. The record reflected that the awardee itself was also of the clearance denial prior to the award.

Although the awardee argued that its program manager remained "currently available to be assigned to work on this contract," the GAO rejected the argument because the program manager's position required a valid TS/SCI security clearance, which the proposed program manager had been denied, and thus he was not available to perform as proposed.

The agency, for its part, argued that the awardee could not be charged with actual knowledge of the unavailability because the awardee had stated that it understood prior to award that the candidate would appeal the clearance denial.

The GAO rejected that argument as well, because there was "nothing in the record addressing whether or why [the awardee] believed an appeal would be successful, much less that an appeal would be successfully adjudicated prior to contract award." It turned out, moreover, that the proposed program manager never actually appealed the denial.

Under these facts, the GAO found the awardee had actual knowledge that its proposed candidate would not be available to serve as program manager.

Because the awardee failed to notify the agency prior to award that its proposed program manager had been denied the required clearance, the GAO sustained the protest and recommended that the agency either reevaluate the awardee's proposal, knowing that it lacked an acceptable program manager, or reopen discussions with all offerors and solicit proposal revisions.

Takeaway

Most offerors — to the extent they are aware of the rule governing unavailable key personnel — think the rule applies only to key personnel who become unwilling or unable to report to work.

In M.C. Dean, the GAO has clarified that offerors also have an affirmative obligation to report any material pre-award change, of which they have actual knowledge, that alters a proposed key person's ability to perform as required.

Here, it was a security clearance denial. In another case, it might be a key person's loss of required licenses or credentials that would render a material proposal representation no longer true.

Offerors have no obligation to monitor these things actively or to set out in search of material changes, but once an offeror learns a proposed key person has become unable to perform as proposed, it is time to determine a course of action.

Eminent IT

The Small Business Administration's 8(a) business development program is designed to assist small disadvantaged businesses. The program provides a number of administrative conveniences to procuring agencies as incentives to place their requirements with the program.

Once the SBA has accepted a requirement into the 8(a) program, follow-on requirements generally must remain in the 8(a) program, unless the SBA agrees to release the requirements for non-8(a) competition.[7]

In Eminent IT, the U.S. Department of State issued a request for quotations for IT services, to be competed among small-business holders of a U.S. General Services Administration Federal Supply Schedule contract. The request called for "the maintenance, operation, and management of PeopleSoft [version 9.x] or later in a production environment using Scaled Agile Framework" to support the agency's Global Employment Management System.

Prior to the date set for receipt of quotations, an 8(a) small business filed a pre-award protest. The protester pointed to an existing task order, which the agency had awarded to a different 8(a) firm. That task order similarly required the contractor to "provide, maintain, operate, and manage PeopleSoft" version 9.1 to support the development of the State Department's Global Employment Management System.

The protester argued that, unless the SBA agreed to release the requirements from the 8(a) program, which it had not done, the State Department was required to leave the requirements in the 8(a) program, pursuant to Federal Acquisition Regulation 19.815 and Title 13, Section 124.505(d) of the Code of Federal Regulations. Thus, according to the protester, the new request for quotations was illegal.

The protester supported its argument that the new requirements were materially the same as the old requirements with a so-called word comparison between Statements of Work in the old task order and the new request.

According to the protester's analysis, the trivial addition of a performance management plan was the only difference between the two Statements of Work.

The State Department responded that the new request for quotations included a Scaled Agile Framework methodology, with additional services and processes, whereas the prior task order required "standard waterfall systems development life cycle." The agency claimed this new requirement would assure it of a vendor with proven experience, which the pre-existing task order allegedly did not.

The GAO rejected the agency's arguments. First, it agreed with the protester and the SBA — whose views the GAO solicited — that the requirements in the old and new procurements were virtually identical.

Second, nothing in the record supported the State Department's claim that the prior task order required

only a standard waterfall methodology whereas the new request for quotations required a materially different Scaled Agile Framework methodology. The word "waterfall" appeared nowhere in the earlier task order.

More critically, the incumbent 8(a) contractor provided an affidavit stating that it was currently using the supposedly new Scaled Agile Framework methodology on the existing 8(a) task order.

Under these facts, the GAO found that the State Department failed to show that the new procurement involved substantially new requirements and thus failed to justify its solicitation of the follow-on requirements outside of the 8(a) program.

Takeaway

A variety of protest grounds may require the GAO to compare the requirements of separate procurements: challenges to the removal of requirements from the 8(a) program, as here; protests alleging that a task order exceeds the scope of an underlying indefinite delivery/indefinite quantity contract; arguments that a modification is outside the scope of a contract's changes clause; or disputes over whether an acquisition qualifies as a Small Business Innovation and Research Phase III procurement based upon the requirements of prior SBIR awards.

The GAO shows great deference to procuring agencies in the definition of their requirements, selection of acquisition methods and judgment of technical matters. With the right facts, however, a protester sometimes can overcome the deference, as the protester did here.

DynCorp International

Offerors should carefully scrutinize the terms of any solicitation that requires the offeror to demonstrate anything. Some solicitations allow offerors to meet such requirements with the qualifications of subcontractors, affiliates and other entities, whereas some solicitations do not.

In DynCorp, the solicitation required large business offerors to provide three individual subcontracting reports for recent contracts that included a subcontracting plan, and stated that the agency would "evaluate the Offeror's ... achievement on each goal stated within the subcontracting plan as reported on each" individual subcontracting report.

The protester submitted its proposal, which appropriately identified the offeror by its Commercial and Government Entity, or CAGE, code, and included three individual subcontracting reports for recent contracts.

Consistent with regulations and GAO case law, the agency used the CAGE code on the proposal to identify the precise legal entity that was the offeror. The agency evaluators then noted that none of the CAGE codes on the company's four submitted reports matched the CAGE code on the proposal.

The evaluators rated the protester's proposal as unacceptable under the small business participation evaluation factor, chose not to conduct discussions and made the award to another offeror.

In the protest that followed, the protester argued that the different CAGE codes were trivial differences that should not have prevented the agency from attributing the submitted individual subcontracting reports to the entity that submitted the proposal.

The GAO noted its extensive precedents for using CAGE codes "to dispositively establish the identity of a legal entity," including using CAGE codes to resolve any ambiguities in an offeror's references to itself, and noted that the protester correctly identified itself in its proposal using a CAGE code.

The GAO then observed that the protester's proposal failed to explain whether any of the different CAGE codes appearing on the individual subcontracting reports belonged to the offeror itself — perhaps the same legal entity at a different physical location — or to different legal entities — such as subsidiaries or affiliates.

In light of the mismatched CAGE codes and the lack of clarifications anywhere in the proposal, the GAO found that the agency reasonably rated the proposal unacceptable because the agency was unable to determine whether the reports demonstrated anything about the offeror itself. On this basis, the GAO denied the protest.

Takeaway

In addition to underscoring the importance of CAGE codes and the risk of unexplained discrepancies among them, the DynCorp decision also highlights the care an offeror must take when a solicitation refers to the offeror.

Numerous protests have arisen from disagreements between agencies and offerors over what those two words mean — with respect to past performance, facility clearances, licenses and certifications, and, as here, small business subcontracting history.

"The offeror" always means the legal entity submitting the proposal itself, but in some procurements the term may also encompass other entities for evaluation purposes.

If a solicitation is unclear as to the intended breadth of the term, and that may affect your proposal, it generally is a good idea to consider requesting clarification during the question-and-answer period prior to proposal submission.

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[1] M.C. Dean Inc., B-418553, B-418553.2.

[2] Eminent IT LLC, B-418570 et al.

[3] DynCorp International LLC, B-418594, B-418594.2.

[4] See, e.g., DZSP 21 LLC, B-410486.10, Jan. 10, 2018, 2018 CPD ¶ 155 at 10.

[5] See, e.g., Pioneering Evolution LLC, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 9.

[6] See Chenega Healthcare Servs. LLC v. U.S., 138 Fed. Cl. 644 (2018).

[7] See FAR 19.815; 13 C.F.R. § 124.504(d).