LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# GAO Ruling Instructs On Proposal Planning During Gov Con M&A

By **Scott Freling, Alexander Hastings and Brenna Ferris**
(November 15, 2021, 3:12 PM EST)

Scott Freling

Alexander Hastings

Brenna Ferris

Amid the whirlwind of mergers and acquisitions activity in the government contracts industry, a recent bid protest decision from the U.S. Government Accountability Office highlights the importance of proper planning to protect prime contract proposals during M&A and other corporate transactions.

Last month, the GAO denied a protest from ICI Services Corporation that challenged the U.S. Navy's decision to award a task order to Serco Inc. under the SeaPort Next Generation vehicle.[1]

Although ICI raised a multitude of challenges, the GAO focused on what it considered the gravamen of ICI's protest — that Serco was ineligible for award because it allegedly was not a complete successor-in-interest to the Naval Systems Business Unit, or NSBU, of Alion Science and Technology Corporation.[2]

Serco had acquired the NSBU from Alion in July 2019, and has been operating the NSBU in the several months since then.

For years, contractors have faced an amalgamation of protest decisions assessing the impact of transactions on proposals for new prime contracts.

The recent ICI decision provides some additional guidance and, more importantly, underscores the GAO's stated intent that its decisions not frustrate pending proposals merely because a corporate transaction has taken place or is expected to take place, but instead ensure that the procuring agency has reasonably considered the impact of the transaction and concluded that the resulting contract will be performed in materially the same way as described in the proposal.[3]

In the absence clear guidance in the Federal Acquisition Regulation on the treatment of bids in connection with a corporate transaction, the GAO's decision in ICI offers some clarity for contractors and a framework for agencies when assessing the impact of a transaction.

Although every transaction and proposal is unique, the ICI decision highlights some key considerations for contractors.

**Positioning a Proposal to Weather a Transaction**

A government contractor preparing to undergo a significant corporate transaction, particularly one that will involve a carveout of a business from a broader organization, is well advised to engage in early planning to, among other things, mitigate the impact that the transaction could have on the contractor's pipeline of current and future proposals.[4]

This planning should start with a careful assessment of each key pipeline opportunity, including the extent to which any may involve resources, including systems, facilities, and other assets and personnel, that are not expected to transfer with the business.

The GAO explained in its ICI decision that an agency's analysis of the impact of a transaction should focus on the resources discussed in the proposal.

Indeed, the GAO recognized that unlike a FAR Subpart 42.12 novation request in which the government will consider whether the "entire portion of the assets involved in performing the contract" have transferred, the relevant question with respect to a proposal is more narrow — the focus should be on whether the "portion of the business embraced by the proposal" has transferred.[5]

In denying ICI's protest, the GAO recognized that, with one exception, "all assets and personnel initially proposed by Alion had been acquired by Serco and would continue to be used by Serco to perform."[6] This group of "all assets and personnel" included the personnel, facilities, leases, licenses and other federal contracts held by the NSBU business.

The GAO's decision suggests that although it is preferable that all the resources needed to perform a proposal be transferred with the sold business, this need not be the case.

For instance, in the procurement at issue in the ICI protest, Serco did not purchase one of the facilities that Alion had noted would be used during the performance of the task order; however, Serco found a suitable replacement facility and included the other facility in its final proposal revisions.

The GAO did not take issue with the substitution, noting that the Navy was aware of the change through the final proposal revisions.

Similarly, the GAO rejected ICI's argument that Serco was not a complete successor-in-interest because it did not acquire Alion's SeaPort Next Generation vehicle — Serco had its own SeaPort Next Generation vehicle — or because there were certain corporate distinctions, such as accounting practices for uncompensated overtime and the relevant Defense Contract Management Agency representative, that did not transfer to Serco.[7]

The GAO emphasized — for the first time in its decisions in this area — that the resources that matter for purposes of the agency's analysis are those that are "likely to have a significant cost or technical impact on performance of the task order."[8]

Therefore, contractors should identify those assets and other resources that could have a significant impact on cost or performance of a particular contract, if awarded, and ensure that they are included in the transaction. If, for some reason, including a particular resource in a transaction is not possible, the focus should turn to ensuring that appropriate arrangements are made to provide continuity for the

proposal.

Presumably securing the proper resources may include finding a suitable replacement — as Serco did with the facility swap — or getting an agreement from the seller to make particular resources available to the buyer following the transaction.

**Positioning the Agency to Make a Reasoned Assessment**

The ICI decision also makes clear that the GAO will defer to an agency's reasonable assessment of the impact of a transaction and its determination of whether the buyer is an appropriate successor-in-interest for purposes of the proposal.

In the procurement at issue in the ICI protest, Alion and Serco took several steps to ensure the Navy understood the transaction.

For instance, when submitting the initial proposal, Alion informed the Navy that Alion had entered a definitive purchase agreement to sell the NSBU to Serco, noting that Alion had taken the transaction into account when preparing the proposal and that the change in ownership of the NSBU would not impact the technical, staffing or pricing approaches in the proposal.

Further, after the transaction closed, Serco engaged in discussions with the Navy during which Serco provided the Navy "detailed information regarding the Serco-Alion transaction in order to determine whether Serco was a complete successor-in-interest to Alion for purposes of the submitted proposal."[9]

Additionally, Serco submitted final proposal revisions after the transaction closed, thereby effectively submitting the proposal in its own name. Based on this information, the GAO concluded that the Navy reasonably determined that Serco was the successor-in-interest to the underlying proposal and thus could be substituted for Alion under the RFP.

The ICI decision underscores the importance of proactive communication with key customers and stakeholders during a transaction. Ideally, transaction parties will provide the procuring agency with sufficient information regarding a transaction to allow it to make a reasonable determination concerning the transaction's impact, if any, on the proposal.

Of course, providing such information can be challenging in many circumstances.

For instance, in the ICI decision, Alion and Serco had the benefit of a publicly announced sale agreement that they could describe in the initial proposal. Contractors often do not have this leeway and must stay silent until a transaction is announced publicly.

In those circumstances, the parties should still take care to ensure that the proposal is appropriately calibrated to a possible transaction, for example by minimizing references to resources that are expected to remain with the seller if and when a transaction happens.

Further, the Alion and Serco transaction closed prior to the agency's award decision, thus streamlining the agency's determination that the transaction was imminent and certain.

In circumstances where it is unclear whether a contract award or closed transaction will occur first, a contractor should generally continue corresponding with the agency, making the agency aware of the

likelihood of a transaction after a definitive agreement is signed and providing assurance that if the transaction closes, the buyer will be in a position to perform as described in the proposal.

Finally, the procurement at issue in the ICI protest allowed for discussions with the agency, allowing Serco to describe the transaction to the agency and submit final proposal revisions in its name.

In some circumstances, particularly when discussions are not anticipated, parties will need to consider creative ways to inform the agency of the transaction without running afoul of procurement restrictions. For instance, a contractor may consider providing the agency information concerning the transaction through a FAR Part 9 responsibility update.

Although every transaction and proposal is unique, the GAO's decision in the ICI protest provides contractors with key considerations for active pursuits when approaching M&A or other corporate transactions. Contractors are well advised to ensure alignment to the extent practical between the transaction and procurements under pursuit and to keep the procuring agency informed throughout the process, arming the agency with sufficient information to make a reasonable determination concerning the transaction's impact, if any, on the proposal.

---

*Scott A. Freling is a partner, Alexander B. Hastings is special counsel and Brenna Ferris is an associate at Covington & Burling LLP.*

***Disclosure: The authors previously represented Alion in the sale of its NSBU business to Serco.***

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See ICI Servs. Corp., B-418255.5 et al., 2021 WL 5038953 (Comp. Gen. Oct. 13, 2021).

[2] Id. at 5–6.

[3] See id. at 11.

[4] See generally Scott Freling & Alexander Hastings, 4 Considerations For Gov't Contractor Carveout Deals, Law360 (May 21, 2018), https://www.law360.com/articles/1045619/4-considerations-for-gov-t-contractor-carveout-deals.

[5] ICI Servs. Corp., B-418255.5 et al. at 10 (emphasis supplied).

[6] Id. at 7.

[7] Id. at 10.

[8] Id. at 11 (emphasis added.)

[9] Id. at 7.