

# Key Takeaways from the GAO's Recent Bid Protest Decisions Regarding Corporate Transactions

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It is no secret that the M&A market exploded over the last few years, and U.S. government contractors have not been exempt from its effects. As a result of this boom, agencies have had the opportunity to consider how a corporate transaction might affect an offeror's pending proposal. Correspondingly, in the past few years, GAO has also had more than a few opportunities to consider whether agencies were reasonable in those evaluations, resulting

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in a proliferation of decisions since GAO's prominent decision addressing a corporate transaction, *Wyle Laboratories, Inc.*, in 2013. Although often turning on the highly fact-specific circumstances of each corporate transaction, these recent GAO decisions highlight principles that agencies follow and offer practical guidance that contractors should heed. This article addresses informing, and failing to inform, an agency of a potential corporate transaction; describes how an agency analyzes the impact of a corporate transaction on a pending proposal; and provides best practices for contractors to consider in light of a potential corporate transaction.

## Informing an Agency About a Potential Corporate Transaction

One of the most salient decisions a company must make when undertaking a corporate transaction is how and when to inform its customers of the transaction. This decision may take on additional weight when the company's customers include the U.S. government, in part because of the government's strict requirements when evaluating a proposal. A company's natural impetus may be to wait until the transaction is a done deal. However,

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## KEY TAKEAWAYS FROM GAO'S RECENT BID PROTEST

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how the government accounts for the impact of a corporate transaction on pending proposals requires a different calculation. An offeror who fails to inform government customers once a transaction is “imminent and essentially certain,” or already consummated, risks an agency discovering the pending transaction through an external source. The offeror’s omission then opens the door to the agency drawing its own conclusions regarding the impact of the transactions (possibly to the offeror’s detriment) or to a protest challenging the agency’s failure to do so. This section details the general parameters laid out in GAO decisions as to what an offeror should disclose and how an agency must consider regarding a pending corporate transaction’s impact on a pending proposal.

### ***If an Agency Is Not Aware of a Corporate Transaction, GAO Will Not Impose an Affirmative Obligation to Seek out and Consider Such Information***

An offeror’s failure to inform an agency of a looming transaction may not doom a pending proposal. When an agency is *not aware* of the transaction, GAO will not impose an affirmative obligation on the agency to discover and consider information regarding the transaction and its potential impact on an offeror’s proposal. For instance, in *VSE Corp.*, a protester challenged the agency’s failure to consider the awardee’s pending spinoff from a corporate parent, arguing that the agency should have evaluated technical and performance risks resulting from the corporate transaction.<sup>1</sup> GAO rejected protester’s contention for multiple reasons, one of which was that the agency had no knowledge of the corporate transaction ultimately undertaken. In reaching this conclusion, GAO noted that “[a]s a general matter, an agency’s lack of knowledge of a proposed corporate transaction is generally not unreasonable, and an agency generally has no affirmative obligation to discover and consider such information.”<sup>2</sup>

### ***If an Agency Discovers the Corporate Transaction Through Third-Party Sources Rather Than the Contractor, the Agency May Draw Its Own Conclusions as to the Potential Impact on Performance***

While it is permissible to withhold a pending transaction from an agency and for the agency without knowledge of the transaction to evaluate a proposal to consider the transaction’s impact, contractors who take this approach run the risk that an agency *will* find out about the pending transaction from other sources. Bid protests before GAO have identified a plethora of means by which an agency can become aware of a transaction. These include from other government agencies,<sup>3</sup> novation requests,<sup>4</sup> press releases about the transaction,<sup>5</sup> filings with

the Securities Exchange Commission, and statements to investors.<sup>6</sup> The agency is permitted to rely on that third-party information and draw its own conclusions as to the performance risks that the corporate transaction presents.

GAO’s decision in *Lockheed Martin Integrated Systems (LMIS)* illustrates the risk an offeror takes if an agency discovers a corporate transaction from third-party sources.<sup>7</sup> LMIS involved the same transaction discussed in *Enterprise Services*, *supra*, in which Lockheed Martin Integrated Systems spun off and sold its government IT business to Leidos. Unlike the procurement addressed in the *Enterprise Services* protest, in this procurement LMIS did *not* inform the agency of the pending transaction, either in its proposal or during discussions. The agency, however, discovered the transaction anyway as a result of a press release issued by LMIS after the submission of final proposal revisions. The press release stated that LMIS had entered into a definitive agreement to “separate and combine” its government IT business with Leidos. The press release also included a “Cautionary Statement Regarding Forward Looking Statements,” which detailed the uncertainties that could affect LMIS’s and Leidos’s operations, markets, products, services, prices, and other factors, and noted that these uncertainties were further detailed in publicly available SEC filings. The agency accounted for the press release, including the cautionary statement, when evaluating LMIS’s proposal. Given the indications of unpredictability of the spin-off, the agency concluded that the transaction “introduced significant cost uncertainty” into LMIS’s proposal and determined that LMIS should not be considered for award. LMIS subsequently protested its exclusion, arguing that nothing in the press release reasonably called into question LMIS’s ability to perform in accordance with its proposal, and moreover, that if the agency had reviewed the SEC filings, it would have found that LMIS’s assets were not being divided or diminished in any material way. In reaching its decision, GAO explained that “the agency, having read and evaluated the protester’s proposal, which contained no mention of a possible spin-off of the [government IT] business segment, and having received and reviewed the press release, was under no obligation to read the accompanying SEC filings.”<sup>8</sup> GAO then concluded that there was “nothing unreasonable about the agency’s determination that the [government IT] business would no longer be part of the offeror, but would be part of Leidos, creating a new corporate entity different from the firm that submitted the final proposal.”<sup>9</sup> As a result, GAO denied LMIS’s challenge and upheld the agency’s decision to exclude LMIS.

There *are* instances of agencies discovering corporate transactions from third-party sources and still concluding that the transaction would have no significant impact on the offeror;<sup>10</sup> however, contractors take the risk that without the contractor’s assurances in its proposal,

the agency, left to its own speculation, may not come to that same conclusion.

***If an Agency Becomes Aware of a Corporate Transaction, It Has an Affirmative Obligation to Consider That Transaction When It Is Imminent and Certain***

Contractors that elect not to communicate imminent corporate transactions in pending proposals not only face the risk that an agency could learn of the transaction and draw its own conclusions, they also face the risk that an agency could learn of the transaction and fail to draw any conclusions at all. Where the agency “fails to assess the impact on proposals” of the corporate transaction, GAO has said that the agency “runs the risk that its failure to do so will be deemed improper.”<sup>11</sup>

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transaction on a pending proposal can be successful protest grounds for unsuccessful offerors. For instance, in *Vertex Aerospace*, the Air Force solicited proposals for a task order under an IDIQ contract.<sup>12</sup> IDIQ holders included Vertex, Amentum Services, and DynCorp International. One month before the agency issued the task order RFP, Amentum and DynCorp underwent a series of corporate transactions and internal reorganizations in which DynCorp became a wholly owned subsidiary of Amentum. DynCorp then bid on the task order RFP without referencing its recent acquisition. During the course of the procurement, DynCorp submitted a novation request to DCMA requesting novation of its IDIQ to Amentum. DCMA subsequently notified the procurement’s contracting officer of the novation. Even though the agency received this information prior to completing its evaluation of DynCorp’s proposal, it declined to consider it in conjunction with its evaluation. Indeed, the record contained no pre-award documentation detailing what actions the contracting officer took in response to receiving information about the transaction or the

novation request. The agency subsequently awarded the task order to DynCorp.

Unsuccessful offeror Vertex challenged the award, arguing that the agency was obligated to consider the effect of the transaction on DynCorp’s proposal. GAO sustained the protest, finding that while the agency did not initially have an obligation to consider the transaction since DynCorp did not reference the transaction in its proposal, it was obligated to do so once DCMA made the agency aware of the transaction. Having established this obligation, GAO then concluded that the record “does not contain any contemporaneous documentation that the agency meaningfully and reasonably considered the effect this corporate transaction could have on DynCorp’s ability to perform.”<sup>13</sup> GAO’s decision in *Vertex* highlights how, even if an offeror does not bring a transaction to an agency’s attention, the agency’s knowledge of a transaction through outside sources, and failure to consider that knowledge during evaluation, can present a risk of a successful protest.

***Agencies Have Broad Discretion to Accept a Contractor’s Assurance That a Transaction Will Not Impact Performance***

Generally speaking, if an offeror has notified an agency of an imminent transaction and provided reassurance that the transaction will not impact the offeror’s performance, GAO will uphold the agency’s award to the impacted offeror. For instance, in *Enterprise Services, LLC*; *Accenture Federal Services, LLC*; *CSRA LLC*, protesters challenged an award to Lockheed Martin Corporation (Lockheed) on the basis that the agency failed to adequately assess the impact of an impending spinoff and acquisition of Lockheed’s government IT business by Leidos Innovations Corporation (Leidos). Lockheed had informed the agency of the impending transaction in its proposal, noted the expected closing time period, confirmed that the government IT business that submitted the proposal and that would perform any resulting contract was encompassed within the transaction, and assured the agency that the transaction would not have a material impact on performance of any resulting contract. While the protesters asserted that the agency did not “independently analyz[e] the risk of the transaction on Lockheed’s proposed prices and technical approach,” GAO found that the agency could reasonably rely on the assurances in Lockheed’s proposal and denied this ground of protest.<sup>14</sup>

GAO reached a similar conclusion in *ICI Services Corp.*<sup>15</sup> In that decision, a protester challenged the Navy’s award of a task order to Serco, Inc. (Serco) as the successor-in-interest to the entity that submitted a proposal, Alion. In its proposal, Alion informed the Navy that it had entered into a definitive agreement to sell relevant assets to Serco (which also held the underlying IDIQ contract), indicated when the transaction was expected to close, and stated that the resources identified and included in the proposal would remain the same.

GAO denied the protester's challenge, finding that any "corporate distinctions" that allegedly did not transfer to Serco would not have a significant cost or technical impact on the performance of the task order. In particular, GAO concluded that the protester failed to establish that the acquisition of the Alion business unit proposed to perform the task order "would have resulted in the task order being performed in a manner materially different from what was proposed by Alion."<sup>16</sup> As these decisions illustrate, GAO will grant broad discretion to an agency that (1) is aware of a corporate transaction and (2) accepts an offeror's assurances that the transaction will not impact performance.

#### **Agencies Are Not Under an Obligation to Consider a Transaction That Is Not Imminent or Certain**

Finally, agencies need only to consider transactions that are imminent or certain. Whether the timing of a corporate transaction is imminent or certain includes consideration of whether the timing and manner of the corporate transaction are within the control of the offeror and the anticipated time frame for closing of the transaction.<sup>17</sup> For example, in *LMIS*, Lockheed had issued a press release that indicated the company had "entered into a definitive agreement" and made "detailed transaction plans" that included "an expected quarter in which the transaction would close."<sup>18</sup> There, GAO agreed with the agency that the transaction was imminent and certain and should have been considered by the agency.

At the same time, GAO will not require an agency to consider a speculative transaction. For example, transactions that are purely a "possibility," such as where negotiations and an agreement had not been reached at the time of award, would not be considered imminent and certain.<sup>19</sup> Even clearer, cancelled transactions cannot be considered imminent or certain.<sup>20</sup> However, even where there is a signed agreement, under certain circumstances a potential transaction may not be considered certain or imminent. For example, in *UnitedHealth & Veterans Services, LLC*; *WellPoint Military Care Corp.*; *Health Net Federal Services, LLC*, Aetna and Humana had signed a definitive agreement for Aetna to acquire Humana.<sup>21</sup> Although the parties had a signed agreement, the Department of Justice had filed an antitrust lawsuit to block the transaction. Under the circumstances, the agency concluded, and GAO agreed, that the potential acquisition "did not rise to a level of sufficient certainty to affect the agency's award determination."<sup>22</sup> Accordingly, agencies can reasonably decline to consider the impact of such potential transactions on an offeror's pending proposal.

#### **What Elements of an Agency's Evaluation Might be Impacted by a Corporate Transaction?**

##### **Technical Evaluation**

An agency must consider a corporate transaction's impact on the resources proposed by an offeror as part of

its technical proposal. Ultimately, the successor-in-interest must have the same material rights and obligations arising out of the proposal.<sup>23</sup> If there is a material difference between the offeror's proposal and the offeror's actual intent subsequent to the corporate transaction, then the award of a contract cannot stand, as "both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement."<sup>24</sup>

#### **Where Resources Remain the Same, Agencies Can Conclude That A Corporate Transaction Will Not Impact a Pending Proposal**

Agencies begin their analysis of the impact of a corporate transaction on an offeror's technical proposal by understanding what entity and resources will be performing any resulting contract. For example, will the performing entity have the same CAGE Code? SAM registration? Internal corporate structure? Place of business? Employees and management? If the answers are yes, then the agency is more likely to conclude that the resources underlying proposed performance of a resulting contract are not impacted by the corporate transaction.<sup>26</sup>

Sometimes this assessment can be driven by the type of corporate transaction at issue. In a stock purchase, typically all shares of a particular company are purchased

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### **An agency must consider a corporate transaction's impact on the resources proposed by an offeror as part of its technical proposal.**

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and the same entity that submitted the proposal will perform any awarded contract with the same resources, but merely a new parent company.<sup>27</sup> This same concept also applies to acquisitions of assets where all of the assets that would be employed to perform the work outlined in the solicitation were acquired by a third party.<sup>28</sup> Under such circumstances, an agency's technical evaluation could conclude that the resources described in the offeror's proposal will not be impacted by the corporate transaction.<sup>29</sup>

#### **Agencies' Evaluations Employ Heightened Scrutiny Where the Performing Entities' Resources May Be Different Than Described in a Proposal**

Asset sales, mergers, and internal reorganizations can be more complex and require heightened scrutiny given



the increased likelihood of an impact to resources described in an offeror's proposal. For example, in *Vertex, supra*, DCMA notified the procuring agency that the seller, DynCorp, had requested novation of certain contracts to the buyer, Amentum. In that novation request, DynCorp described, without elaboration, "integration and consolidation of contract performance activities between the companies, and the intended use of intercompany procedures to ensure resources and employees were available."<sup>30</sup> GAO concluded that in light of the language in the novation documentation, the agency should have considered the offeror's reallocation of resources and its potential impact on performance.

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Because the record was "devoid of any specific details explaining how these efforts will be accomplished to ensure [the buyer] has the resources available to perform the task order at issue," GAO found the agency's analysis unreasonable.

But even an asset acquisition that includes all of the underlying assets is not without risk. For example, in *Wyle Laboratories, Inc.* and the subsequent *Wyle Laboratories, Inc.—Reconsideration*, the agency, Customs and Border Protection (CBP), determined that the seller's proposal represented a "strong approach to the technical and management performance of the resulting work."<sup>31</sup> Despite the promising proposal, CBP "identified risk with the potential consequences arising from [seller's] approach of entering into an agreement where it would pass 100 percent of the performance requirements through to [buyer] pending GSA's approval of the novation."<sup>32</sup> The risk CBP identified was its lack of privity with the buyer until *after* GSA approved the novation of the seller's contract. GAO concluded that even if there was minimal risk that GSA would *not* approve of the novation, it

was not a risk that CBP was required to bear. Accordingly, GAO did not disturb the agency's business judgment regarding risk of an asset sale, even when the transfer of all resources designated to perform the underlying contract are included.

#### ***An Offeror's Resources Include Intended Performance by Designated Subcontractors***

Furthermore, an agency's assessment of a corporate transaction's impact on its technical evaluation is not limited to the identified offeror; rather, agencies have also considered how a *subcontractor* undergoing a corporate transaction would impact an offeror's technical approach to the solicitation.<sup>33</sup> For example, in *Morgan Business Consulting*, the agency evaluated the protester's proposal and assigned it strengths that were reliant on the performance of the protester's subcontractor. Prior to award, however, the agency became aware of a press release that explained that the protester's subcontractor was undergoing a corporate transaction. The protester had not described the impact of the corporate transaction in its proposal or in any other communications to the agency. In assessing the impact of the corporate transaction on the protester's proposal, the agency considered the information contained in the press release and ultimately assigned the protester's proposal weaknesses because "it could not ignore the possibility that if [the protester] received award, the effort would not be executed as proposed" in light of the corporate transaction. Over the protester's objections, GAO concluded that the agency reasonably considered the facts in the press release in conjunction with the protester's proposal in assigning the weaknesses. Accordingly, contractors submitting proposals should request that their subcontractors keep them informed of any intended corporate transactions.

#### **Impact on Cost or Price**

An agency must assess the impact of a corporate transaction on not only the offeror's technical capability, but also the offeror's cost of performance.<sup>34</sup> *Wyle Laboratories* also emphasized this point, noting that the agency awarded a contract to SAIC based in part on its lower evaluated cost even though "the substitution of 'new' SAIC as the prime contractor may well have a material effect on both the costs incurred . . . during contract performance."<sup>35</sup> An important aspect to note in *Wyle Laboratories*, however, is that the agency gave no meaningful consideration to the corporate transaction's impact on costs. As more recent cases demonstrate, if an agency *does* consider the potential cost impact, GAO will grant that consideration significant deference. Nonetheless, parties should consider a transaction's impact on an offeror's cost rates and be prepared to defend a challenge to the agency's acceptance of an offeror's pre-transaction proposed cost/price. Parties should keep the following principles in mind when doing so.

### ***A Corporate Transaction Is Unlikely to Impact a Pending Fixed-Price Proposal***

While an agency must consider a corporate transaction's impact on a contractor's cost of performance, it is unlikely that the agency would find an impact to a fixed-price proposal, or that GAO would find the agency's determination of no impact to be unreasonable. Basic concepts of a fixed-price evaluation support this principle—because an offeror is bound to perform for the proposed price, any change to its costs will not impact the government. GAO decisions also bear this principle out.

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***... an agency may consider a corporate transaction during its evaluation of an offeror's past performance.***

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In *Enterprise Services, LLC, supra*, in which protesters challenged the award to a Lockheed business unit that was spun off and sold to Leidos prior to award, the protesters argued that the agency failed to independently analyze the risk of the transaction on Lockheed's proposed prices.<sup>36</sup> GAO rejected this challenge, noting that "the award here is for a fixed-price contract and the protesters have not shown that Leidos will not be bound by the fixed labor rates proposed by Lockheed."<sup>37</sup> Of course, while this decision may be reassuring for award-ees weighing the risk of a protest, the decision also serves as a reminder that if an offeror *does* anticipate increased costs following a corporate transaction or reorganization, it will still be held to the fixed prices in a proposal submitted prior to the transaction's close.

### ***A Corporate Transaction May Have More Impact on a Cost-Reimbursement Contract, but the Agency's Assessment of the Impact Will Receive Broad Discretion***

When a procurement requires a cost realism evaluation, the impact of a corporate transaction may require more scrutiny. When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs.<sup>38</sup> Consequently, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed.<sup>39</sup>

Given this additional scrutiny required for the procurement of a cost-type contract, a protester may have a

more credible argument that a corporate transaction or reorganization could impact an offeror's direct and indirect costs, though GAO will accord agencies broad discretion in this determination. For instance, in *Lockheed Martin Integrated Systems, supra*, GAO upheld the agency's determination that the corporate transaction, which was not addressed in LMIS's proposal, resulted in unquantifiable cost risks for LMIS.<sup>40</sup> On the other hand, GAO has also upheld an agency's determination that a corporate transaction would *not* impact the cost of performance. In *PAE Aviation and Technical Services*, the protester challenged the agency's cost realism analysis, asserting that a pending corporate transaction discovered by the agency after completion of the evaluation would necessarily obligate the agency to perform a new cost realism analysis.<sup>41</sup> GAO disagreed, finding that the record provided no support for the protester's contention that the transaction (the acquisition of DynCorp by Amentum) would lead to an increase in DynCorp's most probable cost on the contract.

Similarly, GAO granted discretion to the agency in *Booz Allen Hamilton, Inc.*<sup>42</sup> There, a protester challenged the adequacy of the agency's consideration of a pending internal corporate merger, specifically the merger's impact on the awardee's cost rates. GAO upheld the adequacy of the agency's determination, even though the contemporaneous record contained no discussion of the issue. Instead, GAO relied on the fact that at a protest hearing, the CO explained her conclusion that the merger would have no impact on the awardee's proposed indirect rates.<sup>43</sup> In upholding the agency's conclusions, GAO cited to the general principle that "agencies are given broad discretion to make cost realism evaluations and are not required to verify each and every item in assessing cost realism."<sup>44</sup>

These decisions demonstrate that, while an offeror should be aware of the impact a corporate transaction may have on its direct or indirect cost rates, an agency's conclusion that the transaction will have no significant impact will receive broad discretion from GAO. More particularly, when an offeror affirmatively provides assurances that a transaction will not impact its cost or price, GAO will further defer to the agency's decision to rely on those assurances.

### **Past Performance**

Aside from impacts on an agency's technical and cost evaluations, an agency may consider a corporate transaction during its evaluation of an offeror's past performance. In particular, an agency may consider whether, as a result of the corporate transaction, past performance is still relevant and a sufficient predictor of future performance.<sup>45</sup>

### ***Agencies May Reasonably Conclude That Past Performance Related to the Same Resources Is Still Relevant***

Where an offeror's past performance relies on the same resources that are the subject of the corporate transaction, an agency may conclude that the past performance

references outlined in the proposal are still relevant.<sup>46</sup> For example, in *ICI Services*, during discussions, the awardee explained that the assets described in the proposal will all be purchased by the buyer such that the buyer will own or solely perform the contracts and task orders included within the past performance section of the proposal. The protester argued that past performance was a “corporate distinction in the offeror’s proposal that did not transfer to” the buyer. GAO disagreed, concluding an agency may reasonably consider the past performance of predecessor companies.<sup>47</sup> Accordingly, even where corporate transactions involve the transfer of assets, if those assets are the same as the ones that are referenced in a proposal’s past performance, an agency may reasonably evaluate them.

#### ***Changes to Resources Could Result in a Need to Review Past Performance to Determine Whether It Still Reflects the Resources at Issue***

Contrary to *ICI Services*, agencies will take a harder look at offerors’ proposals that rely on past performance of other entities. For example, in *FCi Federal, Inc.*, PAE Shield Acquisition Company, Inc. (PAE) acquired USIS PSD, which had a pending proposal before the Department of Homeland Security (DHS).<sup>48</sup> However, USIS PSD had relied on its parent company’s and affiliate’s experiences for past performance. In light of the acquisition by PAE, GAO concluded that the agency’s evaluation of such past performance, where those former affiliates were no longer going to be involved in contract performance, was unreasonable. Accordingly, where a proposal proffers past performance that relies on entities or assets that the offeror will no longer be affiliated with after the corporate transaction, an agency is more likely to determine that such past performance is irrelevant.<sup>49</sup>

#### **Contractor Qualifications**

A corporate transaction may impact not only a contractor’s ability to meet an agency’s solicitation criteria in accordance with FAR Parts 8 and 12–15, but also its qualifications under FAR Part 9. Specifically, a corporate transaction may impact a company’s responsibility under FAR Subpart 9.1 or organizational conflicts of interest (OCIs) under FAR Subpart 9.5. While not all of the issues discussed in this section present viable protest grounds for an unsuccessful offeror, they still create post-transaction issues that could render an otherwise successful offeror ineligible for award.

#### ***A Corporate Transaction May Impact a Company’s Responsibility, Though the Agency’s Determination Is Likely Not Reviewable by GAO***

The FAR requires that agencies only award contracts to “responsible prospective contractors,” and further requires agencies to make an affirmative determination of responsibility prior to award of a contract.<sup>50</sup> In making an affirmative responsibility determination, an agency

will consider whether a contractor has obtained, or has the ability to obtain, (1) adequate financial resources; (2) the necessary organization, experience, accounting, and operational controls; and (3) the necessary equipment and facilities. An offeror undergoing a corporate transaction must be aware of these criteria and ensure that as a result of the corporate transaction, the offeror maintains the resources necessary to be determined a responsible contractor.

While an offeror must address similar concerns when ensuring that the transaction will not impact its technical or price proposal, the responsibility determination raises distinct issues. First, GAO’s regulations state that GAO will not review agency affirmative responsibility determinations unless a protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible.<sup>51</sup> GAO addressed this issue in the context of a corporate transaction in *VSE Corp.* In that case, while the protester tried to characterize its challenge as a price issue, GAO determined that the protester essentially challenged the awardee’s financial capabilities following the divestiture from its corporate parent, and that such arguments “raise quintessential matters of responsibility.”<sup>52</sup> GAO therefore did not consider the challenge, citing to the principle that GAO will only hear a responsibility challenge where the protester presents specific information that would have a strong bearing on responsibility, and noting further that “the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal.”<sup>53</sup>

Second, GAO has also rejected protester’s argument that the agency’s communications with the awardee to address post-transaction capabilities constituted unequal discussions, stating that “we have repeatedly recognized that an agency may request and receive information about an offeror’s responsibility without conducting discussions that trigger the obligation to conduct non-responsibility discussions with other offerors.”<sup>54</sup> The responsibility issue also arises in the context of affiliated offerors submitting offers for the same procurement, which may occur in the context of a corporate transaction. When doing so, offerors must ensure they comply with the Certificate of Independent Price Determination (CIPD) at FAR 52.203-2 to assure the government that the offerors arrived at their prices independently and did not disclose their prices to other competitors. However, to the extent an unsuccessful offeror wishes to challenge a potential violation of the CIPD, GAO has found that such determinations fall within an agency’s determination of responsibility and are not reviewable by GAO.<sup>55</sup>

In sum, an offeror impacted by a corporate transaction should be aware of the responsibility factors that an agency may consider; however, an agency’s determination that a corporate transaction did not impact the awardee’s responsibility is unlikely to be disturbed by GAO.

### ***GAO Will Consider a Pending Corporate Transaction's Impact on Organizational Conflicts of Interest (OCIs), Even if the Transaction Has Not Been Finalized***

OCI considerations should be at the forefront when a government contractor assesses a potential corporate transaction. OCIs may arise when (1) a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition;<sup>56</sup> (2) a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract;<sup>57</sup> or (3) a firm's work under one government contract could entail its evaluating itself under another government contract.<sup>58</sup> Every contractor must assess potential organizational conflicts of interest when bidding on a government contract. A contractor submitting an offer while also negotiating a corporate transaction, however, must make this assessment both for itself *and* any entities that may become affiliates as a result of the transaction.


GAO's decision in *McCarthy/Hunt, JV* demonstrates the importance of such a consideration.<sup>59</sup> In that decision, GAO addressed an OCI that resulted from the acquisition of an offeror's subcontractor. Specifically, the awardee for a design/build contract proposed a specific subcontractor for the design work. During the time of proposal evaluations, the subcontractor was in negotiations to be acquired by a third party that provided procurement development services to the procuring agency. GAO concluded that this acquisition created both an unequal access to information and biased ground rules OCIs. Notably, GAO concluded that there was no basis to distinguish between a firm and its affiliates for purposes of the biased ground rules OCI (thereby imputing the procurement services contractor's bias to the subcontractor with whom it was in negotiations to acquire). Also notable is GAO's determination that the fact that the transaction did not close until after source selection was irrelevant to the OCI analysis. According to GAO, it was sufficient that "negotiations occurred during the active phases of this procurement," notwithstanding that the negotiations between the firms may not have been continuous and may have stretched over a period of time.<sup>60</sup> Contractors should consider both of these principles when assessing and mitigating potential conflicts of interest as a result of a pending transaction.

#### **Best Practices**

In light of the GAO's recent decisions, there are a few best practices that contractors should consider when faced with a corporate transaction, for either itself or a subcontractor:

- Once a transaction is "imminent," consider notifying procuring agencies of the pending transaction and provide assurances that the transaction will not impact technical performance or contract cost. While a contractor cannot ensure what

a procuring agency will do with that information, disclosing to the agency provides the agency with a basis to conclude that the transaction will not impact the offeror's proposal, and also mitigates the risk of the agency discovering the transaction through external sources and drawing its own conclusions as to the impact.

- Identify any resources that support performance of the work outlined in the proposal and confirm with the agency that such resources will either still be available after the corporate transaction or otherwise are not material to performance of any resulting contract. The agency's primary consideration will be whether the same resources exist and are performing as described in the relevant proposal. Being upfront about the allocation of resources and their availability can reassure the agency that the corporate transaction will not have a material impact on the pending proposal and avoid having the agency draw its own conclusions about whether a particular resource is material to performance.
- Determine whether the proposal's references to past performance are still relevant, and explain the same to the agency. Similar to the technical approach, identify the resources subject to the corporate transaction and explain why those same resources encompass the past performance described in the proposal.
- Consider whether a transaction will impact direct or indirect costs, and ensure the agency is aware of any potential changes (or reassured that there will not be cost increases). While a fixed-price contract is less likely to be subject to a protest based on the transaction's impact on cost, be cognizant of the fact that the transaction will not provide an excuse to alter fixed rates once accepted by the government.
- Ensure that companies that may become affiliates during the course of a procurement do not share pricing. While violation of the CIPD does not provide a viable protest ground, it may cause the agency to disqualify the proposals. The same is true for other aspects of affirmative responsibility, such as possessing adequate financial resources to perform.
- Evaluate and mitigate potential OCIs early in the transaction process. Even before a transaction closes, GAO may impute a future affiliate's bias to an offeror if the offeror and future affiliates are in negotiations at the time of the procurement. 

#### **Endnotes**

1. B-417908, B-417908.2, 2019 CPD ¶ 413 at 4–5 (Comp. Gen. Nov. 27, 2019).
2. *Id.* at 8.
3. Morgan Bus. Consulting, LLC, B-418165.6, 2021 CPD ¶ 171 at 6–7 (Comp. Gen. Apr. 15, 2021).
4. Vertex Aerospace, LLC, B-420073, B-420073.2, 2022 CPD ¶ 5 at 3 (Comp. Gen. Nov. 23, 2021).



5. PAE Aviation & Tech. Servs., LLC, B-417704.7, B-417704.8, 2021 CPD ¶ 293 at 14 (Comp. Gen. Jun. 8, 2021) (“After the SSA concurred with the recommendation of award to DynCorp, and while the agency was performing a responsibility determination of the awardee, CBP learned through Defense News and Business Wire news articles that DynCorp had been acquired by Amentum.”); Morgan Bus. Consulting, B-418165.6 at 6.

6. VSE, B-417908.2 at 3; Lockheed Martin Integrated Sys., Inc., B410189.5, B-410189.6, 2016 CPD ¶ 273 at 4 (Comp. Gen. Sept. 27, 2016).

7. B-410189.5 at 8–9.

8. *Id.* at 9.

9. *Id.*

10. PAE Aviation, B-417704.7 at 14–15 (upholding agency termination that corporate transaction discovered through a news article would not significantly impact awardee’s performance).

11. Vertex Aerospace, B-420073 at 3.

12. *Id.* at 2.

13. *Id.* at 9.

14. Enterprise Services, LLC; Accenture Federal Services, LLC; CSRA LLC, B-415368.2 et al., 2018 CPD ¶ 44 at 18 (Comp. Gen. Jan. 4, 2018).

15. B-418255.5, B-418255.6, 2021 CPD ¶ 342 at 9–12 (Comp. Gen. Oct. 13, 2021).

16. *Id.* at 11.

17. LMIS, B-410189.5 at 8.

18. *Id.* at 9.

19. TrailBlazer Health Enters., LLC, B-406175, B-406175.2, 2012 CPD ¶ 78 at 18–19 (Comp. Gen. Mar. 1, 2012) (explaining that a corporate transaction was only one of several possibilities to resolving an OCI dispute).

20. VSE, B-417908.2 at 9.

21. B-411837.2 et al., 2016 CPD ¶ 329 at 16 n.26 (Comp. Gen. Nov. 9, 2016).

22. *Id.* at 16–17.

23. ICI Servs., B-418255.5 at 10.

24. Vertex Aerospace, B-420073 at 8.

25. See, e.g., Dell Servs. Fed. Gov’t, Inc., B-414461.6, 2018 CPD ¶ 374 at 13 (Comp. Gen. Oct. 12, 2018) (stating that the protester “has not shown, and there is no evidence in the record to show, that this transaction had any effect on the resources that were offered to perform the instant task order”); Vertex Aerospace, B-420073 at 8 (explaining that GAO considers “whether an offeror’s proposal relies on resources that may no longer be available after the corporate restructuring”).

26. UnitedHealth & Vets. Servs., B-411837.2 at 19–20 (explaining that where a corporate transaction “does not appear likely to have a significant . . . technical impact on contract performance, and the offering entity remains intact and retains the same resources reflected in its proposal, the subsequent acquisition of that offeror does not render the agency’s evaluation and award decision improper”).

27. VSE Corp., B-417908.2 at 9 (describing that a private equity firm is acquiring the awardee’s stock, which involves “only a change in the ownership of [the awardee’s] stock” and no change “between the offeror and the entity that will ultimately perform the requirements” as well as “no change in the underlying assets

that will be used to perform the work”); UnitedHealth & Vets. Servs., B-411837.2 at 19 (“We have held that where a corporate acquisition or restructuring does not appear likely to have a significant impact on cost or technical impact on contract performance, and the offering entity remains intact and remains the same resources reflected in its proposal, the subsequent acquisition of that offeror does not render the agency’s evaluation and award decision improper.”).

28. Keco Indus., Inc., B-207114, 82-2 CPD ¶ 165 at 5 (Comp. Gen. Aug. 23, 1982).

29. Dell Servs. Fed. Gov’t, B-414461.6 at 13.

30. Vertex Aerospace, B-420073 at 11.

31. Wyle Lab’sys—Reconsideration, B-416528.3, 2019 CPD ¶ 102 at 3 (Comp. Gen. Mar. 6, 2019); Wyle Lab’sys, Inc., B-416528.2, 2019 CPD ¶ 19 (Comp. Gen. Jan. 11, 2019).

32. Wyle’s Lab’sys—Reconsideration, B-416528.3 at 3.

33. Morgan Bus. Consulting, B-418165.6 at 6.

34. Enter. Servs., B-415368.2 at 19 (noting that GAO’s standard includes reviewing whether there is a “significant impact on cost or technical impact on contract performance”).

35. Wyle Lab’sys, Inc., B-408112.2, 2014 CPD ¶ 16 at 11 (Comp. Gen. Dec. 27, 2013).

36. *Id.* at 18.

37. *Id.*

38. FAR 15.305(a)(1); Tatitlek Techs., Inc., B-416711 et al., 2018 CPD ¶ 410 at 14 (Comp. Gen. Nov. 28, 2018).

39. FAR 15.404-1(d)(1); Solers Inc., B-409079, B-409079.2, 2014 CPD ¶ 74 at 4 (Comp. Gen. Jan. 27, 2014).

40. LMIS, B410189.5 at 10–11.

41. PAE Aviation & Tech. Servs., B-417704.7 at 13–15.

42. B-417418 et al., 2019 CPD ¶ 246 at 17 n.21 (Comp. Gen. July 3, 2019).

43. *Id.*

44. *Id.*

45. LMIS—Reconsideration, B-410189.7, 2017 CPD ¶ 258 at 3, 7 (Comp. Gen. Aug. 10, 2017).

46. ICI Servs., B-418255.5 at 11 n.14.

47. *Id.*

48. B-408558.7, B-408558.8, 2015 CPD ¶ 245 at 4–5 (Comp. Gen. Aug. 5, 2015).

49. LMIS, B-410189.5 at 12–13 (noting that “the agency questioned the accuracy of its prior past performance evaluation, given the possible impact the new Leidos corporate structure would have on contract performance”).

50. FAR 9.103(a), (b).

51. VSE, B-417908 at 6.

52. *Id.*

53. *Id.*

54. *Id.* at 5 n.5.

55. U-Liners Contracting Co., Inc., B-245179, B-245179.2, 91-2 CPD ¶ 370 (Comp. Gen. Oct. 24, 1991).

56. FAR 9.505-4.

57. FAR 9.505-1, 9.505-2.

58. FAR 9.505-3.

59. B-402229.2, 2010 CPD ¶ 68 at 6 (Comp. Gen. Feb. 16, 2010).

60. *Id.* at 6.