

ALERT

SAM (Registered) I Am, You Better Be or Else Risk Losing Your Award

August 26, 2021

WHAT: The U.S. Government Accountability Office (GAO) dismissed a protest challenging a U.S. Department of State (DOS) decision to exclude a proposal from competition because the offeror was not registered in the System for Award Management (SAM) prior to award, as required by the version of Federal Acquisition Regulation (FAR) 52.204-7 included in the solicitation. The protester asserted that DOS should have waived the SAM registration requirement as a minor informality or irregularity that did not affect its eligibility for award. GAO acknowledged that its prior decisions supported the protester's argument that registration, or lack of, is a matter of offeror responsibility rather than ability to perform. But GAO found that here, DOS had provided the protester with an opportunity to cure its lack of SAM registration, which satisfied DOS's obligations regarding responsibility issues. The protester's failure to cure justified the exclusion of its proposal. GAO also highlighted that under the current version of FAR 52.204-7, offerors must be registered in SAM at the time of proposal submission.

WHEN: On August 12, 2021, GAO published the public decision for *Continuity Global Solutions-Secure Me WLL Security, JV, B-419875*.

WHAT DOES IT MEAN FOR INDUSTRY: This case demonstrates the importance of contractors ensuring their SAM registration is active prior to any proposal submission. Contractors should also carefully review FAR clauses incorporated into the solicitations to ensure they are aware of the potential consequences if the agency incorporates an older version. If there is a patent ambiguity between an old regulation versus a more updated version, offerors should bring this to the contracting officer's attention to ensure they know what they are signing up for, and that all offerors are on equal footing.

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Practice Areas

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The protester in this case relied on GAO's decision late last year in *Master Pavement Line* to argue that its failure to be registered in SAM at the time of award was a minor informality or irregularity that did not affect the eligibility of its proposal. 2020 CPD ¶ 404. In *Master Pavement Line*, GAO found that, under FAR 14.405, an offeror's lack of SAM certification at the time of bid submission did not have a material impact on the offeror's performance. GAO stated that FAR 14.405 expressly defined a material defect as one that has a more than negligible effect on price, quantity, quality, or delivery. Accordingly, GAO found that offeror's failure to include a completed standard representations and certifications (in SAM or otherwise) with its bid did not render the bid nonresponsive.

GAO affirmed here in *Continuity Global Solutions* that "registration, or failure to register in SAM does not affect a firm's obligation to perform in accordance with the terms of the solicitation, compliance with the registration requirement is not a matter of responsiveness, but rather a matter of responsibility." However, GAO also noted that the current Solicitation was conducted under FAR Part 15, not FAR Part 14 as in *Master Pavement Line* and the other cases the protester relied on. It also noted that its prior decisions did not find that an agency should waive certification requirements. Instead, GAO's prior decisions concluded that the agency should have given the bidder—who would have been the awardee but for the SAM registration defect—an opportunity to cure. Here, DOS requested that the protester verify that it would be registered in SAM prior to award and repeatedly checked for the certification before issuing the award six weeks later.

GAO also addressed the conflict between the current FAR 52.204-7 versus the older version used in the solicitation. The October 2013 version of the clause, the version used in the solicitation, required SAM prospective awardees "be registered in the SAM database prior to award, during performance, and through final payment of any contract." The current FAR 52.204-7, which Wiley previously discussed, clarified that SAM registration is required at the time of proposal submission. DOS's inclusion of the older version of FAR 52.204-7 created a patent ambiguity, but would not have changed the outcome in this case (the protester argued that the agency had waived the requirement for SAM registration by not rejecting its proposal at time of submission, consistent with the current version of the FAR—GAO found this argument untimely based on the solicitation's inclusion of both versions of the FAR clause).