

# WICKWIRE ROUNDUP

## An Update on Government Contracts Issues

*For Clients and Friends of Wickwire Gavin, P.C.*

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***Request for Comment on Proposed Rule for T&M Contracts for Commercial Services***

If you perform services for Federal agencies, you should be interested in proposed rules allowing Federal agencies to use Time and Material (T&M) and Labor Hour (LH) type contracts to procure services under streamlined commercial item competitions. 69 Fed. Reg. 56315. Comments from the public and private sector are due on November 19. To view the proposed rules, go to <http://www.gpoaccess.gov/fr/index.html> and search for 56315.

On October 19, 2004, we attended the public meeting at GSA to discuss comments on the proposed rules. Summaries of the comments and suggestions from the public meeting will be posted by October 28, 2004 at <http://www.acq.osd.mil/dpap/dars>.

Currently, FAR Part 12 for commercial items allows agencies to procure services, but the commercial item regulations were drafted with supplies in mind. Congress authorized the use of T&M and LH contracts in the Services Acquisition Reform Act (SARA) provisions of the Defense Authorization Act for Fiscal Year 2004, and these proposed rules are intended to implement the statute. Issues addressed in the proposed rules include inspection of services, payment reductions for non-conforming services, surveillance to ensure proper charging of labor, and Government audit rights. If you would like a copy of the proposed rules, materials from the public meeting, or have comments that you would like submitted, please let us know.

***Ten Billion Dollar Nationwide ID/IQ Contract for Wireless Communications System – Comments Due November 1, 2004***

Communications and IT firms may be interested in a planned nation-wide wireless network for law enforcement now being procured. On October 13, the Departments of Homeland Security (DHS), Justice (DOJ), and Treasury requested comments on an Integrated Wireless Network (IWN) “Draft Phase 2 Request for Proposals”. Comments are due by email to [iwn@usdoj.gov](mailto:iwn@usdoj.gov) at 12:00 Noon, November 1. The Government is conducting a competitive, three-phase acquisition using a Statement of Objectives / Performance-Based contracting approach. Two or three contractors are to be selected for Indefinite Delivery Indefinite Quantity (ID/IQ) contracts not to exceed ten billion dollars. The draft RFP is available at <http://216.33.118.202/EPSTData/DOJ/Synopses/2261/Reference-Number-RFC-Draft-Phase-2-RFP-IWN/IWNPhase2DraftRFP.doc>.

***Protest Timeliness***

GAO’s protest rules can be tricky and contractors must strictly comply with them in order to have GAO consider a protest, as illustrated by a recent case. In Guam Shipyards, B-294287 (Sept. 17, 2004), the GAO dismissed a protest against the terms of a Request for Quotations (RFQ) because GAO received it AFTER quotes were opened. On the Web at <http://www.gao.gov/decisions/bidpro/294287.htm>. Quotes were due on July 6, 2004 at 4:30 pm Far East Time. The protest was faxed to GAO on July 5 prior to the opening of quotes, but GAO’s offices were closed for the July 4 holiday. By the time

GAO's offices opened July 6 at 8:30 am Eastern time, bids had been open for several hours earlier.

The GAO interpreted its Rule 21 as providing that protests can be filed only on days when its office is open. Furthermore, it noted that Rule 21.0(g) notifies parties that protests received after 5:30 pm will be docketed as received the next day. Accordingly, GAO concluded that since July 5 was not a business day for the GAO, then the protest could not be filed on that day and had to be docketed the next business day.

GAO said that its rule made sense for protests against solicitation improprieties because a clear rule gives the agency notice of the protest and the opportunity to take action before bids are submitted or "in case of public openings, avoid the release of other bidders' prices." Contractors must be mindful that GAO will strictly enforce its timelines rules and should err on the side of filing early.

### ***Contracting Authority***

Even the most complex disputes are sometimes resolved by application of very fundamental rules. For example, it is fundamental that, in order to enforce a Government contract, a contractor must prove that the contracting official either had actual authority to bind the United States or that the contract later was ratified by such an authorized official. In Home Federal Bank of Tenn. v. United States, -- Fed. Cl. -- (Sept. 8, 2004), Judge Yock denied the plaintiff's claim because the Principal Supervisory Agents of the Federal Home Loan Bank Board (FHLBB) did not have contractual authority to enter a binding agreement with the plaintiff that would allow it to recognize "supervisory goodwill" in its purchase of a failing S&L. Available on the Web at <http://www.cofc.uscourts.gov/Opinions/Yock/04/YOCK.HomeFederal2.pdf>.

In this case, Home Federal Bank applied to a FHLBB Supervisory Agent to purchase Second Federal Bank and the application was "approved." The suit here concerned whether Home Federal could recognize "supervisory goodwill" as part of the agreement approved by the FHLBB Supervisory Agent. An earlier decision held that the Supervisory Agent did not have authority to bind the Government on such agreements. In an attempt to overcome the lack of authority, the Bank argued that the agreement was ratified because the FHLBB (which had contractual authority) never objected to the proposed accounting treatment.

Judge Yock, however, found that the Board's silence was not enough to show ratification, especially where there was no showing that the FHLBB had actual or constructive knowledge that the PSA had "attempted to enter into a contract for the specialized accounting treatment of goodwill beyond any normal regulatory allowance or took any subsequent action to ratify such agreement." The Court relied on the fact that there was no evidence that the "agreement" had been reviewed or approved by anyone outside of the authority-less regional office.

Although the facts of this case are unusual, it underscores the rule that contractors must be wary when dealing with Government officials other than authorized "contracting officers." Contractors must verify an official's actual authority. Those who do not bear the risk that their agreement cannot be enforced against the United States.

***Termination for Default***

If a contractor fails to perform its contract because the incumbent contractor's employees conspire against the new contractor and refuse to work for the new contractor, does that prevent the Government from terminating for default? Is that a "strike" that is excusable under the Termination for Default clause? In The NTC Group, Inc., ASBCA Nos. 53270, *et al.* (Aug. 10, 2004), the Board overturned the default termination of a contractor that was awarded a contract for the operation of oil analysis laboratories where the Board found that the incumbent contractor employees conspired to sabotage the contractor's performance. On the Web at

[http://www.law.gwu.edu/asbca/decision/pdf2004/53720\\_53721\\_53722.pdf](http://www.law.gwu.edu/asbca/decision/pdf2004/53720_53721_53722.pdf).

NTC Group attempted to hire the incumbent contractor's employees, but email evidence showed that at least three of the existing lab chiefs used the Government email system to encourage other lab employees not to work for the awardee and copied the contracting officer. The contract's certification requirements provided for a limited pool of qualified candidates for hire. When the incumbent employees would not work for NTC, it requested a list of names from the Government of employees that would meet the requirements. The Government refused to provide the names of any individuals that it knew were qualified. While the Government had no obligation to share the names with the contractor, the Board found that in the unusual circumstances where the incumbent employees had conspired to keep all employees from working for NTC, and the Government was aware of the situation, the Government's refusal to share the names "sorely aggravated" the situation. In the end, the Board found that the employee conspiracy was tantamount to a labor strike which constituted an excuse for performance under the Termination for Default clause. Accordingly, the Board overturned the Termination for Default and converted it to a Termination for Convenience.

***A-76 Issues***

May an agency cancel a solicitation to contract-out services currently performed by Government employees even after contractors submit their offers? In SKJ & Associates, Inc., B-294219 (Aug. 13, 2004), the GAO denied the protest of a small business that had responded to an RFQ to provide analysis, grant, and audit services for the US Trade and Development Agency ("USTDA"). The USTDA issued the RFQ under FAR Part 12.6, and SKJ responded to the RFQ in a timely manner. After SKJ submitted its quote, the USTDA cancelled the solicitation based on a decision to divide the services among existing Government employees rather than using a contractor for the services. The GAO noted that an agency always has the discretion to cancel an RFQ, as long as there is a reasonable basis for doing so. The GAO also rejected the protestor's argument that the USTDA was required to contract out the services under OMB Circular A-76. The GAO noted that it does not review the decisions of the agency on whether to contract-out work. However, it noted that it will review A-76 procurements "when it is alleged that an agency did not adhere to the rules announced in a solicitation issued for the purpose of comparing the cost of contracting out work with the cost of performing the work in-house."

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