

# WICKWIRE ROUNDUP

## An Update on Government Contracts Issues

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

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***Government Employees Get Protest Rights in A-76 Competitions***

Representatives of Government employees may file and intervene in GAO protests of contracting-out competitions under OMB Circular A-76, as provided in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-324, signed by the President on October 28, 2004. Section 326 of the Act makes the agency tender official, who submits an offer by the Government's Most Efficient Organization (MEO), an "interested party" who may file or intervene in bid protests at the GAO. It also provides that after a protest is filed "a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition may intervene in protest." Congress judged it fair to give the Government competitor the same protest rights as the private contractors against whom they are competing. These provisions might allow an agency tender official to file a protest and a different representative of a majority of the employees to intervene in the same protest. – *Dan Donohue*

***Government's Rights in Contractor's Inventions - Patent Rights Reports clause***

Whether for software, hardware, or other types of inventions, all government contractors are concerned about preserving their intellectual property. A recent decision by the Court of Appeals for the Federal Circuit shows how important it is to adhere strictly to contract requirements addressing these issues. In Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee, No. 03-1512 (Fed. Cir. Nov. 10, 2004) (<http://fedcir.gov/opinions/03-1512.pdf>), the contractor obtained a patent for an invention relating to the process of fabricating gas masks for the Army. The Government demanded title to the invention because of the contractor's failure to disclose the invention to the Government as required by the contract. The contractor argued that it should retain title to the invention because the material aspects of the invention had been disclosed during the contract. The Court rejected the argument. The contractor had failed to strictly comply with the requirements of the Patent Rights Reports clause, which requires all invention disclosures to be submitted on standard form DD 882, Report of Inventions and Subcontracts. Without strict adherence to the contract, the court held, "the government never would be sure of which piece of paper, or which oral statement, might be part of an overall invention disclosure . . . . Sound policy is promoted by the rule of strict compliance with the method of disclosure demanded by the contract." – *Brian Waagner*

***FOIA – Some CLIN Prices Exempt from Disclosure***

Are the prices of Contract Line Items ("CLINS") exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552? The D.C. Circuit recently held that CLIN

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prices for contract work are not exempt from disclosure. However, the Court held that the two types of CLIN prices were exempt from disclosure: Exempt are CLIN prices for options not yet exercised because their disclosure could harm the contractor by helping competitors persuade the Government not to exercise the option and to underbid the contractor in a recompetition. Also exempt are vendors' pricing to the prime contractor, which would allow competitors to derive the prime contractor's mark-ups. McDonnell Douglas Corp. v. U.S. Department of the Air Force, \_\_ F.3d \_\_ (D.C. Cir. 2004), On the Web at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200407/02-5342a.pdf>. The Air Force has moved for a rehearing en banc and the Court is expected to rule upon it soon. – *Claude Goddard*

### ***Federal Circuit Rejects McMullan Presumption as Inconsistent with the Contract Disputes Act***

Contractors can no longer rely on the rebuttable presumption of government responsibility based on a contracting officer's grant of extra time for contract completion. A 1976 ASBCA decision in Robert McMullan & Sons, Inc., ASBCA No. 19023, 76-1 BCA ¶11,728 held that a Contracting Officer's grant of a time extension to the contractor created a "rebuttable presumption" that the Government in fact was responsible for the delay, even if the Government later changed its position to deny liability for the delay. Recently, however, in Secretary of the Navy v. Sherman R. Smoot, Corp., the Court of Appeals for the Federal Circuit reversed an ASBCA decision sustaining the contractor's appeal by allowing the contractor the benefit of the McMullan rebuttable presumption. CAFC No. 03-1416 (November 3, 2004). The court reasoned that under § 605 (a) of the Contract Disputes Act of 1978 – passed after the McMullan case was decided - a Contracting Officer's findings are not binding on the Government in a subsequent proceeding. The court then extended this premise to include both interim and final decisions, holding that approved contract modifications extending the time for performance equated to decisions under the CDA and therefore were not binding in subsequent proceedings. The court concluded that the McMullan presumption is at odds with the legislative intent of the CDA and is no longer good law. Available on the Web at <http://fedcir.gov/opinions/03-1461.pdf>. – *M. K. Holohan*

### ***When It Absolutely Positively Has to Be There Overnight.... Make Sure You Use the Full Destination Address.***

The GAO recently reminded government contractors that they are responsible for ensuring that their proposals are delivered to the government agency on time in accordance with the contract or suffer the consequences.

In InfoGroup, Inc., B-294610 (Sept. 30, 2004), the protestor, InfoGroup, sent its proposal via FedEx for delivery to the DOT on the due date for proposals, but it

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neglected to include the room number specified in the RFP as the point of proposal acceptance. The FedEx delivery person arrived at the DOT Building, and the package was date-stamped by DOT security guards as arriving at the building almost 5 hours before the time for submission of proposals. However, the FedEx person could not locate the designated room for delivery, although he twice tried to call the CO. Since he only got voice mail and was never able to find the room for delivery, the FedEx courier gave up on the delivery. The next day, InfoGroup provided FedEx with the room number and the package was finally delivered to the designated location two days late.

InfoGroup protested the rejection of its proposal as late, but the GAO rejected its arguments that (1) the proposal was timely submitted because it had arrived at the DOT building before the time for the receipt of proposals; and (2) DOT was at fault for failing to provide an escort to the room and for failing to answer the phone calls of the FedEx courier. The GAO reminded that “an offer is late if it does not arrive at the office designated in the solicitation by the time specified in the solicitation.” See FAR 52.215-1. An offeror is responsible for the timely delivery of the offer and a late offer may only be considered for award if the “paramount reason for the late receipt was improper government action, and where consideration of the proposal would not compromise the integrity of the competitive procurement process.” Improper government action must be *affirmative government action* that makes the proposal late. Here, the GAO found that the reason for the late delivery was InfoGroup’s failure to properly address the package for FedEx. This case repeats the hard lesson that contractors are fully responsible for ensuring that proposals arrive at the designated locations in the RFP at the designated time. Available on the Web at <http://www.gao.gov/decisions/bidpro/294610.htm>. - Mike Littlejohn

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