

# Roundup

An Update on Government Contracts Issues for Clients & Friends

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## **FOIA Amendments Signed Into Law: A Shot In the Arm for Requesters?**

*By Brian P. Waagner*

On December 31, 2007, President Bush signed into law the OPEN Government Act of 2007. The new statute amends the Freedom of Information Act, which requires federal agencies to make documents available to the public upon request. In addition to making several administrative changes intended to enhance compliance with FOIA, the OPEN Government Act strengthens the rights of FOIA requesters.

First, the Act clarifies the 20-day deadline applicable to the initial response to a FOIA request. It limits the ability of agencies to extend the response deadline and bars the assessment of search and duplication costs when they fail to meet the deadline.

Second, the Act eliminates an ambiguity in the application of the FOIA statute to records held by government contractors. It provides that information maintained for an agency by a government contractor for the purpose of records management is a record subject to public release under FOIA.

Third, the Act expands the ability of FOIA requesters to recover attorneys' fees. Prior to the Act, requesters could recover attorney's fees from agencies that wrongfully withheld documents only if a

court order addressed the merits of the case. Under the new law, a FOIA requester may recover attorneys' fees without a court order simply upon execution of a settlement agreement or an agency's voluntary change in position.

Finally, the Act creates an Office of Government Information Services within the National Archives to oversee FOIA compliance and to offer mediation services between FOIA requesters and agencies. If mediation is unsuccessful, the new Office would have the power to issue an advisory opinion on the dispute. Mediation of FOIA disputes would not be required, however, and litigation remains an option for FOIA requesters seeking to force agencies to

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release public documents.

## **COFC Defers to CO's Judgment on OCI**

*By Steven J. Koprince*

When an offeror alleges that a competitor had unequal access to information important to obtaining the contract, the contracting officer's decision to award the contract will be upheld so long as the contracting officer conducts a sufficient investigation into the potential organizational conflict of interest ("OCI") and does not arrive at an arbitrary conclusion. A recent case, Masai Technologies Corp. v. United States, No. 07-714 C (Fed. Cl., Nov. 29, 2007), demonstrates this.

The Masai Technologies case arose from a Request for Quotation ("RFQ") issued by the United States Army Medical Research Acquisition Activity to procure computer and other technical support for the Army's medical logistics system. The RFQ was designated as a HubZone Small Business set-aside and contemplated the award of a firm, fixed price contract for a one-year base period with two one-year option periods. Award was to be made on a "best value" basis.

Quotes were received from three offerors, and the contract was awarded to Denysys Corporation ("Denysys"). One of the other offerors, Masai Technologies Corp ("Masai") filed a bid protest. Masai's bid protest alleged that Denysys had an impermissible OCI due to the participation of BearingPoint as a subcontractor to Denysys on the bid. In response to the protest, the Army required contractors to complete an OCI certification. Based on Denysys' certification and an independent

investigation, the Army determined that no OCI existed, and again awarded the contract to Denysys.

Masai filed another protest again alleging (among other bases of protest) that Denysys had an impermissible OCI and was ineligible for award. Masai alleged that BearingPoint and another of Denysys's subcontractors, CompQSoft, had unequal access to proprietary information and documentation as a result of their work on other government contracts. Under the FAR, a contractor's unequal access to information can lead to an unfair competitive advantage (and an impermissible OCI) when the contractor has access to source selection information that is relevant to the contract, but not available to all competitors, and that would assist the contractor in obtaining the contract. FAR 9.505.

The court began its review of Masai's claim by noting that longstanding government contract law gives the contracting officer the responsibility for reviewing a possible "unequal access" situation and implementing corrective action, if necessary. The contracting officer's decision will be upheld so long as the contracting officer conducts a sufficient investigation and takes any necessary action. Here, the court determined that the contracting officer had thoroughly reviewed the potential OCI, and that his conclusion that no impermissible OCI existed was reasonable. Accordingly, the Court denied Masai's claim.

## **When COFC Says Timely, It Means It! – Court Enforces New Pre-Award Timeliness Rule**

By Sarah M. Graves

In Benchmade Knife Co. v. United States, No. 07-593C, 2007 WL 4335442 (Fed. Cl. Dec. 10, 2007), the Court of Federal Claims granted the government's motion for judgment on the administrative record based, in substantial part, on the protestor's failure to timely protest defects in the solicitation before the closing date for proposals in accordance with the Federal Circuit's recent decision in Blue & Gold Fleet.

The protest arose from the Defense Supply Center Columbus's ("DSCC") procurement of two types of combat knives. Prior to its issuance of the initial solicitation, DSCC determined that the FAR "Rule of Two" was satisfied, in that at least two small business manufacturers were expected to submit proposals. Based on that finding, the solicitation was issued as a total small business set-aside. Soon after it issued the solicitation, DSCC learned that one of the anticipated small business manufacturers had discontinued the procured product and was no longer a small business. DSCC then cancelled and reissued the solicitation on an unrestricted basis. Ultimately, the solicitation contemplated award of an IDIQ contract with a one year base and four one-year options. The solicitation noted the possibility of a split award for each of the two types of knives. It also permitted offerors to submit alternate products along with a technical package covering the "design, materials, performance, function, interchangeability, inspection, and/or testing criteria, and other characteristics of the offered product." DSCC received four proposals, including the protestor's. Ultimately, it awarded the contract to Gerber Legendary Blades Division, Fiskar Brands, Inc. ("Gerber") based on its alternate product, which DSCC's mechanical engineer found "technically acceptable."

Following two unsuccessful protests before the GAO, Benchmade brought its case to the Court of Federal Claims.

In its protest, Benchmade claimed that DSCC's determination not to set aside the solicitation for small business concerns was arbitrary and capricious. As an initial matter, the court denied this aspect of the protest as untimely—reasserting the Federal Circuit's decision in Blue & Gold Fleet which adopted a timeliness rule similar to GAO's. In reliance upon the Federal Circuit's holding, the court found that Benchmade's failure to protest the agency's decision not to set aside the solicitation prior to the closing date for submission of proposals was fatal, and that it could not succeed on that aspect of its protest. Perhaps for academic measure, however, the court addressed one of Benchmade's arguments in support of its claim—that DSCC's decision was unreasonable because the "Rule of Two" does not require two small business manufacturers, but rather only two small business "entites," even if both are offering the same product. The court rejected this argument, concluding that the FAR required DSCC to identify "at least two *different* small business knife manufacturers."

Benchmade also failed on its claim that DSCC improperly bundled the procurement without adhering to the FAR requirements for doing so. Again, the court denied this aspect of the protest based on Benchmade's delay in raising the issue. Despite its denial on timeliness, the court went on to dispose of Benchmade's assertion on the merits. Specifically, the court noted that the potential for a "split award" indicated that it was not a bundled procurement.

Finally, Benchmade alleged that the agency's interchangeability determination

was arbitrary and capricious. On this claim, Benchmade failed on the merits. Specifically, the court deferred to the agency's discretion and found that the engineer's decision that Gerber's alternate product was "technically acceptable" was adequate despite its failure to include the exact "physically, mechanically, electrically, and functionally interchangeable" language contained in the solicitation.

By its decision in Benchmade Knife, the court reminds contractors to be diligent in raising protests based on defects in the solicitation. The court's denial of 2/3 of the protestor's allegations based on timeliness makes clear that mistakes and oversights will not be forgiven!

## **FCPA Settlement Shows Need for Good Compliance Programs For Contractors**

*By Jonathan Goodman*

The Securities and Exchange Commission ("SEC") recently settled a lawsuit against Lucent Technologies, Inc. concerning alleged violations of the books and records and internal control provisions of the Foreign Corrupt Practices Act ("FCPA"). The settlement requires Lucent to pay \$1.5 million in civil penalties and to be subject to a permanent injunction. In a related development, Lucent entered into a non-prosecution agreement with the United States Department of Justice, agreeing to pay a \$1 million fine.

The SEC's lawsuit against Lucent, a Delaware corporation which provides communications systems and services, alleges that Lucent spent more than \$10 million from 2000 to 2003 on approximately 1,000 Chinese government officials working for Chinese government enterprises which were prospective or existing Lucent customers. Specifically, the settled lawsuit alleges that the money was supposedly used to allow the Chinese officials to travel to the United States and elsewhere for inspection of Lucent factories and for training the Chinese officials to use Lucent equipment. But according to the SEC's lawsuit, the officials frequently traveled to tourist destinations, such as Las Vegas, Disney World and Niagara Falls, and did not inspect any Lucent facilities or receive any training.

The SEC contends that these Chinese officials, who traveled at Lucent's expense, were often identified in Lucent internal documents as "decision makers" for awarding new business.

Lucent, which agreed to the sanctions without admitting or denying the allegations in the lawsuit, allegedly recorded many trips with improper entries, such as booking more than 160 trips to its "factory inspection account" even though the Chinese officials did not visit a Lucent factory at any time during the trip. In addition to alleging that Lucent made incorrect entries, the SEC also contends that Lucent failed to properly train its officers and employees to appreciate the nature and status of its Chinese government customers in the context of the FCPA.

Enacted in 1977 after a series of domestic and foreign bribery scandals, the FCPA prohibits improper payments to foreign officials (to assist in obtaining or retaining business) and imposes record-keeping and internal controls requirements on all entities subject to SEC jurisdiction. The FCPA's accounting provisions are generally enforced by the SEC. The record-keeping provisions are designed to prevent entities from disguising bribes paid overseas by

inaccurately describing the payments on their books.

Concerning the SEC's allegation that Lucent did not adequately train its officers and employees, the FCPA internal controls require issuers to devise and maintain a system of internal accounting controls. They do not require a particular or specific

type of control system – but it must be sufficient to reasonably meet the statute's specified objectives.

*(Jonathan Goodman is a shareholder in our Miami Office and a member of the firm's White Collar and Parallel Proceedings practice group. Jonathan is a former Assistant United States Attorney.)*

## **New FAR Rule Would Mandate Contractor Disclosure of Violations of Federal Criminal Law --- And Penalties For Failure to Do So**

*By Daniel J. Donohue*

The FAR Councils recently proposed new regulations that would require contractors not only to "prevent" criminal violations on their Federal contracts and subcontracts, but also would mandate that contractors promptly disclose to contracting officers any violations of Federal criminal law of which they become aware. 72 Fed. Reg. 64019 (Nov. 14, 2007). The proposal has drawn fire from a number of contractor and industry trade groups that the mandatory disclosure requirements are vague, require contractors to determine when specific actions may constitute a violation of federal criminal law, and may require breach of the attorney-client and attorney work product privileges when the information is acquired through the work of counsel.

The process began early last year, when the FAR Councils proposed additions the FAR to require contractors with federal contracts or subcontracts over \$5 million to have effective compliance programs. 72 Fed. Reg. 7588 (Feb. 16, 2007). That notice proposed the creation of a new FAR Subpart 3.10 to address the requirements for a contractor code of ethics and business conduct, and an associated clause at FAR 52.203-XX requiring contractors to have such a code of ethics and business conduct.

The Department of Justice asked the FAR Councils to supplement that proposal to add FAR provisions so as:

- "require contractors to have a code of ethics and business conduct,
- to establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts, and
- to notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to Government contracts or subcontracts."

In response to DOJ's request, the FAR Councils proposed a rule that would require contractors to prevent and disclose violations of federal criminal law concerning federal contracts and subcontracts. As requested by DoJ, the proposed rule includes the following amendments to the FAR:

- add "the contractor's record of integrity and business ethics" as relevant information to be included in past performance information to be evaluated in making contract awards;
- make the FAR-required compliance program more closely match the guidance in the U.S. Sentencing Commission Manual guidelines, section 8B2.1;
- require internal controls and appointment of a contractor official

at a high level to ensure effectiveness of the contractor's internal controls and ethics and business conduct compliance programs;

- provide for disciplinary action for violations and for failures to take reasonable steps to prevent or detect improper conduct by others;
- provide that contractors may be suspended or debarred for failure to timely disclose a violation of Federal

criminal law in connection with the award or performance of a Federal contract or subcontract;

- mandate disclosure of any violations of Federal criminal law of which the contractor becomes aware.

Several contractor associations have submitted comments on the proposed rule. We will continue to follow developments on this issue.

## About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt Wickwire Gavin assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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