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A few months ago, we suggested that technology firms seeking government contracts in the wake of September 11 should be aware of problems involving intellectual property rights. We stressed the importance of putting restrictive legends on proprietary data and software sent to the Government.

A recent bid protest decision, *Snell Enterprises, Inc.*, 2002 WL 1492090 (Comp. Gen.) (June 10, 2002) ("Snell") proves the point. Snell claimed that a potential competitor, Impact Innovations Group ("Impact"), had obtained an unfair competitive advantage because it got to see some of Snell's proprietary data and software. Snell had submitted the data to the government while performing a contract, and Impact was given the data while performing a related government contract. Snell contended that Impact should be excluded from an upcoming procurement competition as a remedy for its unfair competitive advantage.

In principle, Snell had a good case. The General Accounting Office ("GAO") has recognized that unauthorized access to a competitor's proprietary information can result in an unfair competitive advantage (as well as violating the procurement integrity provisions of the Office of Federal Procurement Policy Act and its implementing regulations) and has upheld agency decisions to exclude competitors on that basis. See, e.g., *Computer Tech. Assoc., Inc.*, B 288622, 2001 C.P.D. 187 (Nov. 7, 2001).

But in the end, the GAO rejected Snell's claim that Impact has obtained an unfair competitive advantage. It reached this result because Snell had not marked the information as proprietary prior to its submission and had not otherwise submitted it to the Government (or Impact) with limitations on its use. In short, Snell's claim that the information was proprietary came too late. GAO refused to exclude Impact from the competition.