



COFC In-Sourcing Cases: Standing Issues Remain

Law360, New York (August 06, 2012, 1:05 PM ET) -- Whether incumbent contractors have standing to challenge a government decision to convert the work to performance by government personnel remains an open question. The recent in-sourcing initiative stems from the fiscal year 2008 National Defense Authorization Act, which required the U.S. Department of Defense to implement guidelines and procedures to ensure that functions and services performed by contractors are not more appropriately served by using civilian employees.

As the DOD began implementing the regulations, moving to bring work “in-house,” a series of cases were filed by disappointed contractors challenging DOD in-sourcing decisions. Although the jurisdictional issues have largely been resolved by the district courts, the Court of Federal Claims is still grappling with standing questions.

The first issue facing contractors was identifying the appropriate protest venue. Many of the initial challenges to in-sourcing decisions were brought in the district courts under the Administrative Procedures Act. With near-uniformity, every district and circuit court to address the issue of subject matter jurisdiction for in-sourcing claims has dismissed the case finding in-sourcing falls within the broad definition of “procurement” as that term has been defined by the Federal Circuit, and therefore within the exclusive jurisdiction of the Court of Federal Claims. *Vero Technical Support, Inc. v. U.S. Dept. of Def.*, 733 F. Supp. 2d 1336, 1338 (S.D. Fla. 2010) *aff’d*, 437 F. App’x 766 (11th Cir. 2011); *Rothe Dev. Inc. v. U.S. Dept. of Def.*, SA-10-CV-743-XR (W.D. Tex. Nov. 3, 2010) *aff’d*, 666 F.3d 336 (5th Cir. 2011); *Fisher-Cal Indus. Inc. v. United States*, 839 F. Supp. 2d 218, 220 (D.D.C. 2012). But see *K-Mar Indus. Inc. v. U.S. Dept. of Def.*, 752 F. Supp. 2d 1207 (W.D. Okla. 2010).

In *Distributed Solutions*, the Federal Circuit held that “the phrase, ‘in connection with a procurement or proposed procurement,’ [in the Tucker Act], by definition involves a connection with any stage of the federal contracting acquisition process, including ‘the process for determining a need for property or services.’” *Distributed Solutions Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008). Generally, the courts have held that the process for determining a need necessarily includes the choice to refrain from obtaining outside services.

With the case law seemingly coalescing around the notion that subject matter jurisdiction lay with the Court of Federal Claims, it seemed as if the procedural roadmap for challenging an in-sourcing decision was settled. However, standing issues emerged as another difficult hurdle for disappointed contractors at the Court of Federal Claims. The first two in-sourcing cases at the Court of Federal Claims were sharply divided on this issue.

In *Hallmark-Phoenix 3 LLC*, Judge Francis Allegra dismissed the in-sourcing case finding that plaintiff lacked prudential standing because the statutes at issue envision enforcement by legislative oversight through reports and requests to Congress — not judicial review. *Hallmark-Phoenix 3 LLC v. United States*, 99 Fed. Cl. 65 (2011).

In contrast, Judge Nancy Firestone concluded that prudential standing did not apply to bid protests, because the Tucker Act provided its own standing requirements and, in any event, certain in-sourcing provisions were enacted, at least in part, for the benefit of the contracting community. *Santa Barbara Applied Research Inc. v. United States*, 98 Fed. Cl. 536 (2011). Instead of adding clarity to the issues, the next case to come out of the Court of Federal Claims added yet a new twist.

That case was *Triad Logistics Servs. Corp. v. United States*, No. 11-43C (Crt. Fed. Cl. Apr. 16, 2011). Triad initially protested at the U.S. Government Accountability Office, but its protest was dismissed for failure to set forth a valid basis of protest because in-sourcing, according to the GAO, was based on internal guidance and other nonprocurement statutes. Triad then filed its first protest at the Court of Federal Claims on Nov. 29, 2010, the same day its contract ended.

At the initial hearing on Triad's first protest, the Air Force admitted there were errors in the cost calculation comparing the cost of contracting for the services versus performing the services internally. The court therefore dismissed that complaint to allow the Air Force to perform a recalculation and make a final in-sourcing decision. On Dec. 16, 2010, the Air Force again concluded that it would be less expensive to in-source the services, and Triad filed its second protest at the Court of Federal Claims, on Jan. 14, 2011.

The court, Judge Marian Horn, dismissed the case, holding that Triad was not an interested party because its contract had ended and government employees had begun performing the contract functions prior to when the second complaint was filed. Therefore, the court found that Triad no longer possessed the required direct economic interest in a contract to qualify as an interested party.

The court seemed to suggest that Triad's claim may be more akin to an out-sourcing claim, which the Appropriations Acts strongly discourage. While the Triad decision added to the growing consensus that the Court of Federal Claims is the court with subject matter jurisdiction over in-sourcing claims, the decision ultimately left observers with more questions than answers, such as what exactly is an interested party and what would happen if a contract ends by its own terms during the litigation.

We may not have to wait long to get some answers as an interesting development has begun to unfold at the Court of Federal Claims, courtesy of *Elmendorf Support Services v. United States*, No. 12-346C (Crt. Fed. Cl. Jun. 22, 2012). On Feb. 2, 2011, the Air Force notified the plaintiff that it would not be exercising any further option year periods on its contract and would instead be in-sourcing the services provided. The last option year period executed by the parties ended on June 29, 2012. Plaintiff filed a bid protest at the Court of Federal Claims on June 1, 2012. As is common with bid protests at the Court of Federal Claims, plaintiff also filed a motion for preliminary injunction seeking to enjoin the Air Force from in-sourcing the activities during the pendency of the litigation. The United States filed a motion to dismiss for lack of subject matter jurisdiction and lack of standing.

On June 22, 2012, the Court of Federal Claims, Judge Erin Bruggink, denied the government's motion to dismiss. Judge Bruggink found that because the decision to in-source "necessarily included the process for 'determining the need for ... services' that plaintiff currently provides, the in-sourcing decision-making process was 'in connection with a procurement or proposed procurement' within the rather generous definition adopted by the Federal Circuit" in *Distributed Solutions*.

As to standing, Judge Bruggink found that plaintiff's case was not barred by prudential standing concerns and, in this regard, found instructive the court's holding in *Santa Barbara Applied Research Inc.* In a direct rebuke to Judge Allegra, Judge Bruggink also cited a recent U.S. Supreme Court decision to conclude that prudential standing was not meant to be especially demanding.

However, Judge Bruggink denied plaintiff's request for a preliminary injunction. Although the court acknowledged that the plaintiff could suffer harm, the court noted that the injury is triggered by the government failing to exercise an option, something which was never required of it, and as well, in this case, plaintiff waited until the contract was nearly over to file its protest. The court also found that it was "not persuaded that plaintiff's argument is a likely winner" and that significant harm to the government could result if an injunction were to issue. While the court found that the public interest is obviously served by the government following the law, on balance, the factors did not favor injunction. Accordingly, plaintiff's motion for a preliminary injunction was denied.

Here is where things really get interesting. Because Judge Bruggink denied the preliminary injunction, the plaintiff's contract ended by its own terms on June 29, 2012. The Air Force has since in-sourced the services previously provided by the plaintiff, and on July 2, 2012, the United States filed a motion to dismiss the case as moot. The government argues that without a contract, plaintiff no longer has a legally cognizable interest in the outcome of the litigation, and, in accordance with *Triad*, requests the court to dismiss the case.

This could present a new twist in the seemingly unending line of obstacles facing contractors bringing in-sourcing claims. In denying plaintiff's motion for preliminary injunction it is possible that the court could have allowed to expire the very thing that gave it jurisdiction. Judge Bruggink will need to reconcile the *Triad* decision, which essentially held that without an active contract, a plaintiff lacks standing as an interested party. If Judge Bruggink follows *Triad* and dismisses the case, this would add new meaning to the term irreparable harm because the denial of the preliminary injunction would equate to a denial of plaintiff's right to pursue its case altogether. Of course, Judge Bruggink could instead opt to distinguish or disagree with the *Triad* decision. Only time will tell how this case will end, but no matter what, the opinion is sure to be an interesting one.

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