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Appeals Court Decision Limits Insourcing Challenges to the Court of Federal Claims

The United States Court of Appeals for the Fifth Circuit (the "Court of Appeals") recently held that exclusive jurisdiction over "insourcing" challenges lies with the Court of Federal Claims. According to this ruling, parties wishing to challenge an agency's decision to insource work may not invoke the jurisdiction of a federal district court, but must, instead, bring those challenges at the U.S. Court of Federal Claims. The problem, of course, is that it is not clear whether the Court of Federal Claims recognizes that it has jurisdiction over such actions. Thus, it is quite possible that the *Rothe* decision, coupled with at least one decision of the Court of Federal Claims, may leave contractors without any avenue to obtain judicial review of an agency's decision to insource work.

In *Rothe Dev., Inc. v. U.S. Dep't of Def.*, --- F.3d ---, WL6821377 (5th Cir. 2011), the plaintiff, Rothe Development, Inc., an information technology (IT) services contractor, had been providing IT services to the Department of Defense (DoD) for over 20 years. In 2010, as part of the federal government's ongoing push to fulfill more requirements using government employees rather than outside contractors (the government's insourcing initiative was examined in Greenberg Traurig's January 2011 *Alert*, *Challenging a Federal Agency's Decision to 'Insource' Work: The Evolving Landscape*), the DoD informed Rothe that it intended to insource the IT services that Rothe had been providing. After unsuccessful attempts to dissuade DoD of its insourcing decision, Rothe brought suit in the United States District Court for the Western District of Texas (the "District Court") alleging that the DoD's decision to insource Rothe's IT services violated certain procurement laws and procedures. The District Court dismissed the suit, finding that it did not have jurisdiction over the matter. Rothe appealed the dismissal.

The Court of Appeals affirmed the District Court's decision, finding that the Tucker Act — which vests the Court of Federal Claims with exclusive jurisdiction over "'actions by an interested party' 'objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement,'" — applied to challenges of an agency's decision to insource. The Court of Appeals decision that the Tucker Act applied was grounded in three key findings: 1) that a contractor adversely affected by an insourcing decision is an "interested party;" 2) that challenging an insourcing decision necessarily involves an alleged violation of statutes and regulations; and 3) that the decision to insource is not outside of the scope of the definition of "procurement."

The third finding, that insourcing decisions are within the scope of the term "procurement" was the most critical to the court's decision. Rothe attempted to argue that the decision to insource was not within the scope of the term "procurement" because the decision to insource, by definition, involves a function outside of the standard procurement process. The court disagreed, concluding that "'procurement' includes all stages of the process of acquiring property or services, beginning with *the process for determining the need for property or services* and ending with contract completion and closeout." (emphasis added). Therefore, since

the decision to insource is "in connection with a procurement" the Tucker Act applies and exclusive jurisdiction lies with the Court of Federal Claims.

The Court of Appeals is not, however, the first court to consider this question. In *K-Mar Indust., Inc. v. U.S. Dep't of Def.* 752 F. Supp. 2d 1207 (W.D. Okla. 2010), the United States District Court for the Western District of Oklahoma was faced with the same issue and reached the exact opposite conclusion. In that case, the court found that the decision to insource was outside the scope of the "process for determining the *need* for property or services" because once a function has been insourced the government no longer has a "need" that must be fulfilled. Thus, the District Court held that challenges of insourcing decisions were not within the scope of the Tucker Act and for that reason could be heard by any federal district court in the country. In essence, the court in *K-Mar* agreed with the argument that Rothe later made but the Court of Appeals rejected in *Rothe*--that the decision to insource was not part of the procurement process. Furthermore, as *Rothe* noted, the Court of Appeals for the Eleventh Circuit, in an unpublished and thus nonbinding decision, came done on the same side as *Rothe* and found that only the Court of Federal Claims could hear a challenge of an agency's decision to insource. *See Vero Technical Support v. U.S. Dep't of Def.*, 437 F. App'x 766 (11th Cir. 2011) (unpublished decision).

Interestingly, the Court of Federal Claims, the object of the Tucker Act's jurisdictional grant, has issued contradictory decisions on whether it has jurisdiction over challenges of insourcing decisions. In *Santa Barbara Applied Research v. U.S.*, 98 Fed. Cl. 536 (2011), the Court of Federal Claims examined the question of "whether the government's insourcing decision was made 'in connection with a procurement'" and was thus within the purview of the Tucker Act. The Court concluded that "the substance of [the Government's] decision has been to stop procuring services from [the contractor] . . . Thus, the insourcing decision in this case was made for the purpose of determining the need for contract services and thus was made 'in connection with a procurement decision.'" As a result, the Court concluded that it had jurisdiction over the matter. A few weeks later, in *Hallmark-Phoenix 3, LLC v. U.S.*, 99 Fed. Cl. 65 (2011), a different judge on the Court of Federal Claims found that the plaintiff did not have standing to challenge an agency's insourcing decision because it was not within the "zone of interest to be protected or regulated" by the statute under which it brought its suit. Though this finding was the basis of the Court's decision to dismiss the case, the Court also opined at great length that insourcing challenges do not fall under the Tucker Act because once a requirement has been insourced, "there is no existing solicitation." Similarly, in *Vero Tech. Support v. U.S.*, 94 Fed.Cl. 784 (2010), though not essential to its holding, the Court of Federal Claims mentioned in dicta that it did not believe the Tucker Act gave the Court jurisdiction over insourcing decisions because there was no "contract or solicitation" at issue.

In summary, there is a clear diversity of views among various federal courts as to whether the Tucker Act limits jurisdiction over insourcing challenges to the Court of Federal Claims. The Court of Appeals decision in *Rothe* is technically only binding in the Fifth Circuit states of Texas, Louisiana and Mississippi. Because at least one other federal district court has maintained jurisdiction over an insourcing challenge, it is unclear, at this time, how other district courts will view the issue. Similarly, different judges on the Court of Federal Claims have issued contradictory rulings on whether the Court has jurisdiction over such actions. Only time will tell whether future court decisions will provide greater clarity on this matter. However, given the distinct possibility of a circuit split on the question, the U.S. Supreme Court may very well be required to settle the matter in the near future.

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