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Challenging a Federal Agency's Decision to 'Insource' Work: The Evolving Landscape

Can a government contractor challenge a federal agency decision to "insource" the contractor's work — decide to perform the work using government employees? Recent court decisions indicate the answer may be "yes," although the legal issues are far from being resolved.

Insourcing has been a concern for government contractors for several years. In January of 2006, Section 343 of the National Defense Authorization Act (NDAA) for FY 2006 required the Department of Defense (DOD) to give consideration to federal government employees for work performed under defense contracts. In March of 2009, the Omnibus Appropriations Act of 2009 (Pub. L. No. 111-8) required agencies to issue "guidelines and procedures to ensure that consideration is given to using, on a regular basis, federal employees to perform new functions and functions that are performed by contractors and could be performed by federal employees." Since that time, numerous agency regulations and memoranda have been issued dealing with the general practice of insourcing. And in August of 2009, Defense Secretary Robert Gates announced the Department's goal "to hire as many as 13,000 new civil servants in FY10 to replace contractors and up to 30,000 new civil servants in place of contractors over the next five years."

In recent months, the pace of insourcing has slowed. In August of 2010, Defense Secretary Robert Gates announced that DOD had reversed its plan to replace departing contractors with full-time government personnel, remarking that "we weren't seeing the savings we had hoped from insourcing." And in December of 2010, insourcing provisions proposed for both the Omnibus Appropriations Bill and National Defense Authorization Bill for FY 2011 were rejected. The provisions would have reserved to federal employees work identified as "closely associated with inherently governmental functions."

Nonetheless, many contractors continue to face serious challenges with respect to agency insourcing of previously-contracted activities. Before work is insourced, contractors should protect themselves against arbitrary insourcing actions on the part of their contracting agency; after work is insourced, contractors should respond to insourcing action in a way that best preserves their contracted work.

At the heart of an agency's decision to insource is its analysis of the respective costs and benefits of doing so. On July 29, 2009, the Office of Management and Budget (OMB) issued a memorandum "Managing the Multi-Sector Workforce," which emphasized that the determination of whether or not to insource should "generally include a cost analysis that addresses the full costs of performance and provides 'like comparisons' of relevant costs to determine the most cost effective source of support." DOD has also implemented regulations requiring that an analysis of the "full cost of manpower" be conducted in determining whether to insource and in

early 2010, pursuant to 10 U.S.C. § 2463, DOD issued guidance on insourcing procedures. With this in mind, contractors should carefully document and account for the costs of their work on government contracts. Timely and accurate recordkeeping will help enable a contractor to demonstrate the cost of its work if an agency takes insourcing action based on a cost-benefit comparison.

After an agency decides to insource, contractors may be able to challenge that action either in or out of court, as recent cases demonstrate.

First, in *Rohmann Services, Inc. v. Dep't of Defense* (Case No. 10-CV-0061, U. S. District Court for the Western District of Texas) a small business contractor challenged the Air Force's insourcing of its contract to provide for multimedia and audiovisual services at Edwards Air Force Base under the Administrative Procedures Act (APA). In February of 2010, while the case was pending, the Air Force reversed its decision to insource and stated that it had "determined the audiovisual work was not presently an appropriate candidate for insourcing."

More recently, in *K-MAR Industries, Inc. v. United States Department of Defense and United States Department of the Army* (U. S. District Court for the Western District of Oklahoma) plaintiffs alleged that the Army violated established guidelines for insourcing when it insourced work that was being performed by plaintiff without conducting an adequate cost analysis. On November 4, the court denied a motion to dismiss, and the case is still ongoing.

In each of these cases, the dispute centers on whether the agency's decision to insource was based on a cost-benefit analysis that was inadequate with respect to established DOD insourcing guidelines. Also, in each of these cases, the contractor challenging the agency's decision to insource filed a FOIA request designed to produce information in support of its claim. Government contractors faced with the prospect of their contract being insourced should consider filing FOIA claims designed to bring to light important cost and other information regarding the basis for the insourcing action.

Contractors should also be aware that the question of which court has jurisdiction over challenges to insourcing actions has not yet been settled. Contractors have sought to bring insourcing challenges in one of three venues — the Court of Federal Claims (CFC), a federal district court or the Government Accountability Office (GAO) — with mixed success.

Several federal district courts have dismissed insourcing claims based on the APA for lack of subject matter jurisdiction. In one such case, a court held in August of 2010 that challenges to insourcing decisions fall within the exclusive jurisdiction of the CFC. (*Vero Technical Support, Inc. v. United States Department of Defense*, U.S. District Court for the Southern District of Florida).

The CFC has expressed the opposite view. After the *Vero Tech* case noted above was transferred to the CFC, that court stated that "(w)ithout a contract or solicitation at issue, . . . , Tucker Act jurisdiction [in the CFC] to challenge the in-sourcing policy decisions is not immediately apparent." (*Vero Technical Support, Inc. v. United States*, U. S. Court of Federal Claims). Similarly, in the *K-MAR Industries* case noted above, the district court stated that "this action does not come within the exclusive jurisdiction of the CFC or the waiver of sovereign immunity provided by the ADRA."

Most recently, in October of 2010, another district court dismissed a challenge to an insourcing action, finding that the complaint fell instead within the jurisdiction of the Court of Federal Claims. (*Harris Enterprises, Inc., and Speed Aviation, Inc. v. United States Department of Defense and United States Department of the Air Force*, U. S. District Court for the Western District of Texas). Clearly the question of which court has jurisdiction is unsettled.

Finally, on November 24, 2010, the GAO dismissed a protest asserting that an agency's decision to insource certain work was based on an internal agency cost comparison that did not comply with 10 U.S.C. § 129a or internal department policy and guidance. (*Triad Logistics Services Corporation,* B-403726, Nov. 24, 2010) The GAO concluded that Triad lacked a valid basis of protest both because 10 U.S.C. § 129a is not a procurement statute and because compliance with internal agency guidance is a matter GAO will not consider.

In conclusion, if a contractor can show that an agency conducted an inadequate cost analysis or otherwise violated any applicable regulations governing insourcing, a judicial remedy may be available either in the CFC or in a federal district court under the APA. To date, no court has overturned an agency's insourcing decision, and the cases that have been brought have not progressed beyond preliminary questions like which court has jurisdiction to provide relief for improper insourcing decisions. Moreover, many agencies, particularly outside of DOD, have not yet issued formal regulations governing insourcing decisions, but are proceeding under policy memoranda and similar informal guidance that may not be enforceable in court. To the extent contractor work continues to be insourced by DOD and other agencies, however, further legal challenges are likely to be brought.

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