



Companies Can Challenge ‘Insourcing’ Decisions, Judge Rules

By Leah Nylén

May 9 (Bloomberg) -- Government vendors can challenge a federal agency’s decision to have government employees perform work previously handled by contractors, a policy known as insourcing, a judge ruled.

Judge Nancy B. Firestone of the U.S. Court of Federal Claims in Washington rejected the Justice Department’s argument that decisions to insource jobs are matters of agency policy and not subject to court review.

“Where a protester stands to lose future work for which it likely would have competed because of” alleged errors in the review process, “the protester should have standing to challenge the decision to insource,” Firestone said in a ruling unsealed on May 4.

The case is one of at least 11 lawsuits challenging the Obama administration’s insourcing efforts and filed in federal courts in the last 18 months, according to the Justice Department. The Pentagon has hired about 3,000 people through insourcing, procurement director Shay Assad said in March.

President Barack Obama has said the government should take back more tasks that have been outsourced to private companies, a practice that had been increasing for 30 years.

“This is a very important decision,” Jacob Pankowski, chair of the government contracts practice group at Greenberg Traurig LLP in Washington, said in an interview. “The Court of Federal Claims has taken jurisdiction over insourcing decisions and has declared that interested parties have standing.”

That means “companies do have a venue to challenge government insourcing decisions,” he said.

Support Services

Santa Barbara Applied Research, based in Ventura, California, sued the Air Force in the Court of Federal Claims in February, arguing that a decision to insource a \$99 million contract for support services at eight bases was unfair.

Congress passed a law in 2008 requiring the Pentagon to implement guidelines on how to determine whether to use civilian employees or contractors. Defense Department officials issued guidance in May 2009 instructing agencies to consider converting existing contracts to jobs for civilian personnel in cases where a cost analysis showed such a move would save money.

The Air Force notified Santa Barbara Applied Research in June that it would be insourcing work under its contract. Lawyers for the company argued in court papers that the Air Force incorrectly calculated the cost savings from the switch.

While ruling that Santa Barbara Applied Research has the right to sue, Firestone rejected the company's arguments in the case, finding that the Air Force's analysis of the cost savings was reasonable because the agency followed the Defense Department's guidelines on insourcing.

Paul Khoury, a partner at Wiley Rein LLP in Washington who represented Santa Barbara Applied Research, declined to comment.

'True Cost'

In the decision, Firestone said it was reasonable for the agency to consider only costs to the Department of Defense rather than the federal government as a whole.

"If that stays the policy, none of the insourcing projects will accurately reflect the true cost to the government," said Edward Kinberg an attorney with Kinberg & Associates LLC in Melbourne, Florida, who is representing a company in another insourcing case.

"It overstates the amount of savings from insourcing and creates the impression that more money is being saved than is actually being saved or that there are savings where in fact there are none," he said in an interview.

Daniel I. Gordon, administrator for federal procurement policy at the White House Office of Management and Budget, is drafting regulations that may define the functions that only federal employees may perform. Final rules haven't been issued.

Small businesses are being hurt by insourcing, according to Robert A. Burton, a partner at the Washington law firm Venable LLP and a former federal procurement policy official.

"In my 30-year career, I have not really seen an initiative like this whereby the government is proactively hurting small business," Burton said in an interview. "I think it's very easy to argue there's a public policy problem."

The case is Santa Barbara Applied Research Inc. V. U.S., 11-cv-86, U.S. Court of Federal Claims (Washington).

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