

Tell It to the Judge: Contractors are Turning to Courts to Challenge Insourcing

By Robert Brodsky November 1, 2010

Federal contractors are employing a powerful new weapon in their fight against the Obama administration's initiative to bring more jobs in-house: lawsuits.

During the past year, companies that could lose government contracts through insourcing have filed at least eight complaints in federal court. While the jury still is out on whether the strategy will prove successful, it's clear the lawsuits could undercut, or at least delay, one of the administration's signature procurement reform strategies.

"President Obama clearly wants to bring work in-house," says Kenneth B. Weckstein, a partner in the Washington law firm Brown Rudnick LLP. "But if we start to see more lawsuits, [agencies] may not be able to do this as quickly as they want."

In April 2009, Defense Secretary Robert Gates announced a plan to rebuild the Pentagon's critical workforce skills by adding 35,000 employees. Roughly half the increase would be achieved through insourcing; the rest from new hires. Civilian agencies have employed a somewhat less aggressive insourcing approach, generally targeting inherently governmental or mission-critical services.

Agencies can bring inherently governmental jobs in-house with no questions asked. But in other cases where the goal is to save money, officials must compare the costs of using a contractor to those of using federal employees. In each of the eight lawsuits, which all challenge insourcing efforts at the military services, contractors claim the government either failed to conduct a cost comparison, or botched the assessment by using suspect methodology.

"The government is not following its own rules," says David F. Barton, an attorney with the Gardner Law Firm in San Antonio, which represents contractors.

For example, after prevailing in three consecutive bid protests, Vero Technical Support Inc. of Vero Beach, Fla., in March won a small business set-aside contract for weather observation services. Almost immediately following this, the Air Force began an insourcing conversion, although documents indicate plans for the transition date back to September 2009.

The Air Force told Vero owner George Sigler it could save \$186,000 over five years by using in-house staff. But Sigler's suit contends the Air Force grossly miscalculated the price tag of performing the work by misclassifying required personnel and failing to factor in the cost of using government vehicles. Sigler - who describes himself as an "angry American" - says insourcing will triple the government's costs.

"I am as aggravated with the lies the government is telling as I have ever been," says Sigler, a former naval aviator and survival expert. "They are destroying the ability of small businesses [to win government work]." He has filed a second insourcing lawsuit against the Air Force regarding an aerial services contract.

The Defense Department did not respond to requests to discuss the suits. In September, Thomas Hessel, a senior analyst in the Office of the Undersecretary of Defense for Personnel and Readiness, told Government Executive Pentagon officials were approaching insourcing carefully with an eye toward cost. "On a case-by-case basis at the organizational level, DoD components are finding that they can generate savings or efficiencies through insourcing certain types of services or functions," he said.

As of June 30, Defense had created more than 16,500 civilian positions as a result of insourcing, according to Hessel. More than half involve work determined to be inherently governmental, closely associated with inherently governmental, or otherwise barred from outsourcing, he says. The remaining jobs have been targeted for potential cost savings.

Gates has since announced he was scaling back the insourcing initiative because it didn't produce the anticipated savings, but the Pentagon is allowing transitions to continue at the services.

"It will take political pressure for the cases to have an impact on the larger picture," Barton concedes.

The U.S. Court of Federal Claims in Washington will hear the complaints. The Vero case is the closest to a decision, Barton says, although that could still be months away. In the meantime, the court has issued a temporary injunction to stop the conversion. But with hefty monthly legal fees, Sigler admits his strategy is risky. "I wish every company would go after the government like this," he says. "But a lot of companies just can't do this."

Barton's efforts already have reaped some benefits. Earlier this year, he filed suit against the Air Force on behalf of Rohmann Services Inc., a small San Antonio firm with a contract for multimedia and audiovisual work at Edwards Air Force Base in California. The complaint claimed the Air Force's cost analysis was faulty. Before the case could be heard, however, the service withdrew its insourcing request and extended Rohmann's contract.

Barton is not asking for damages in any of his cases - just to give his clients the ability to continue with the contract. "Most times, the government can't beat the price of the contractor," he says. "I think they are going to end up with a lot more lawsuits. Or they will be making some moral decisions that will really hurt small businesses."