

# Fifth Circuit Weighs In on Where to Find Jurisdiction for In-Sourcing Claims

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On December 29, 2011, the Fifth Circuit issued its opinion in *Rothe Development, Inc. v. United States Department of Defense*, No. 11-50101 (5th Cir. Dec. 29, 2011), affirming the district court's dismissal of an in-sourcing claim for lack of subject-matter jurisdiction. Under the Tucker Act, the Court of Federal Claims is vested with exclusive jurisdiction over actions by interested parties "objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The jurisdictional issue raised in in-sourcing cases such as *Rothe* is whether an agency's decision to in-source is a decision "in connection with a procurement or a proposed procurement." The Fifth Circuit concluded that "it clearly is."

In an attempt to avoid falling under the purview of the Tucker Act, *Rothe* argued that it was not an interested party as required by that statute. The Fifth Circuit rejected this argument because *Rothe*'s complaint specifically stated that it was seeking to keep its scope of work as the low cost provider, demonstrating that it has an economic interest as a prospective bidder. The court also held that in-sourcing falls within the broad definition of "procurement" as that term has been defined by the Federal Circuit. In *Distributed Solutions, Inc. v. United States*, the Federal Circuit held that "the term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 539 F.3d 1340, 1345 (Fed. Cir. 2008). Accordingly, the Fifth Circuit held that the process for determining a need necessarily includes "the choice to refrain from obtaining outside services." Therefore a complaint challenging an in-sourcing decision is an action alleging a violation of statute or regulation in connection with a procurement, for which jurisdiction is exclusively vested in the Court of Federal Claims.

With the Fifth Circuit decision in *Rothe*, the body of case law continues to develop regarding the proper jurisdiction for in-sourcing claims. The Eleventh Circuit, the only other circuit court to address the issue, also has held that the district courts lack subject-matter jurisdiction over in-sourcing claims. *See Vero Technical Support v. U.S. Dep't of Def.*, 437 F. App'x 766, 770 (11th Cir. 2011) (unpublished decision). Importantly, both circuit opinions opined on the proper jurisdiction for in-sourcing claims, holding that the claims fall within the scope of the Tucker Act and the exclusive jurisdiction of the Court of Federal Claims. However, the jurisdictional question still lingers, as the Court of Federal Claims is currently divided on the issue, with one case holding that the Court has jurisdiction, *see Santa Barbara Applied Research, Inc. v. United States*, 98 Fed. Cl. 536 (2011), and one case holding that the Court does not have jurisdiction

over such claims because a disappointed contractor lacks prudential standing, *see Hallmark-Phoenix 3, LLC v. United States*, 99 Fed. Cl. 65 (2011). As well, one district court in the Western District of Oklahoma found that it had jurisdiction over an in-sourcing claim, *see K-Mar Indus., Inc. v. U.S. Dep't of Def.*, 752 F. Supp. 2d 1207 (W.D. Okla. 2010). We will continue to monitor developments in this area as new cases provide guidance on this jurisdictional enigma.

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