



In-Sourcing: A Positive Recent Development at DoD, But Concerns Remain

William A. Roberts, III, Philip J. Davis and Thomas J. Warren

Fall 2010 | *Government Contracts Issue Update*

Recent months have seen important developments concerning the government's effort to transition work currently performed by contractors back into the federal sphere. This broad initiative, known as "in-sourcing," has been undermined by a recent Department of Defense (DoD) policy announcement, but a number of in-sourcing efforts are continuing, and the threat to contractor jobs is real.

The DoD's in-sourcing efforts arose out of the National Defense Authorization Act for FY 2008, and gathered steam following President Obama's March 4, 2009, Memorandum on Government Contracting (Memorandum). Announcing the new policies articulated by the Memorandum, the president explained that in-sourcing would be part of "reforms in how government does business, which will save the American people up to \$40 billion each year." With these supposed cost-saving goals in mind, DoD began to implement this in-sourcing policy.

However, on August 9, 2010, Secretary Gates abruptly announced that DoD intends to abandon its in-sourcing effort in favor of other cost-cutting methods. In his August speech, Gates announced that DoD no longer intends to continue in-sourcing work currently performed by contractor personnel, explaining that, "As we were reducing contractors, we weren't seeing the savings we had hoped from in-sourcing."

While DoD may be reversing course on its in-sourcing policy, we are aware of a number of DoD programs where in-sourcing is proceeding apace. In addition, there is no indication that civilian agencies are following Secretary Gates' lead. As we noted previously, the Office of Procurement Policy (OFPP) issued a proposed policy letter on March 31, 2010, entitled "Work Reserved for Performance by Federal Government Employees." This proposed policy letter addressed categories of work that OFPP believes should be reserved for government employees, but it raised concerns that

agencies may extend in-sourcing efforts well beyond support functions considered "inherently governmental." It is uncertain what impact, if any, DoD's retreat from in-sourcing will have on the general OFPP policy or OFPP's plans to promulgate the final policy by the end of 2010. As of the date of publication of this newsletter, the final OFPP policy is still due to be released by the end of this year. If issued, the new policy may cause civilian agencies to step up their in-sourcing efforts.

As we explained in a previous article, challenges to an agency's decision to in-source work can be fraught with complex cost analysis issues and difficult jurisdictional questions. Recently, a Federal District Court dismissed a contractor's in-sourcing challenge for lack of jurisdiction, holding that, pursuant to the Tucker Act, challenges to decisions to in-source work fall within the exclusive jurisdiction of the COFC. *See Vero Technical Support, Inc. v. U.S. Dep't. of Def.*, No. 10-14162-CIV (S.D.Fla. Aug. 18, 2010). When the contractor then filed its action in the COFC, the court dismissed the protest for lack of jurisdiction—although it did so because the case was still "pending" in the Federal District Court. In *dicta*, however, the Court of Federal Claims (COFC) opined that "plaintiff's deliberate choice of forum in the District Court . . . resonates with this court. Without a contract or solicitation at issue, even as amended by the ADRA, Tucker Act jurisdiction to challenge the in-sourcing policy decisions is not immediately apparent." *See Vero Technical Support, Inc. v. United States*, No. 10-575C, (Fed.Cl. Sep. 29, 2010). Both decisions in *Vero Technical Support, Inc.* make it clear that, when seeking to contest an agency's in-sourcing move, contractors must make informed strategic choices with respect to forum and approach.

The results of the midterm elections, with Republicans regaining the majority of the House of Representatives, also may have the effect of reversing in-sourcing initiatives. For example, below is an excerpt from an interview with Rep. Darrell Issa (R-CA), the likely next Chairman of the House Reform Committee, identifying in-sourcing as a key area of concern:

In-sourcing for example is right on my committee. We have every day in the defense and non-defense community, executives of the government tapping people on their shoulders saying your contract is not going to be renewed, we are going to in-source that. You should take the job now. We have example after example. Yes, we plan on investigating it. I want the American people to get products and services at the lowest possible price. I don't want to determine if it should be in house or out of house.

Obama is playing faster and looser with the rules with very little justification. He says we are going to in-source things and all of your government begins in-sourcing without legitimate justifications.

Since the government began pursuing in-sourcing policies, Wiley Rein attorneys have successfully challenged agencies' in-sourcing decisions in a number of programs. While there may be open questions about the manner in which agencies will pursue future in-sourcing initiatives or whether DoD will maintain its about-face on in—sourcing policy, Wiley Rein attorneys have been—and will continue to be-attentive to these issues.

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