



Judge Dismisses Flight Instruction In-sourcing Suit Against USAF

By Martin Bricketto

Law360, New York (October 13, 2010) -- A federal district judge has dismissed a suit brought by government contractors accusing the U.S. Air Force and the Department of Defense of violating their own procedures in a decision to "in-source" the instruction of certain fighter pilots, finding that the case belongs in the U.S. Court of Federal Claims.

In an order issued Tuesday, Judge Fred Biery of the U.S. District Court for the Western District of Texas disagreed with Harris Enterprises Inc. and Speed Aviation Inc. that the matter belonged in district court as a claim under the Administrative Procedure Act, rejecting the companies' request to stop the planned in-sourcing of the work they currently perform.

Siding with the government, Judge Biery said the case belonged in federal claims court under both the Administrative Disputes Resolution Act as a procurement matter and the Contract Disputes Act as a contractual matter.

The companies formed a joint venture, HESA, to provide instructors to train fighter pilots using T-1 aircraft at Pensacola Naval Air Station in Florida and have handled that work for the government since 2003, according to Tuesday's order.

But the government in May notified the companies that it intended to begin performing that instruction in-house once the HESA contract expired at the end of the year.

In July, the contractors filed suit against the Air Force and DOD, claiming they violated federal requirements governing the use of least costly personnel and civil employees.

Specifically, the companies argued that an erroneous classification marred a government cost analysis, resulting in the government coming out as the lowest cost provider of the instruction work.

Judge Biery noted in the order that the APA, under which the companies filed suit, grants district courts jurisdiction over non-monetary claims against the government but only if there is no other adequate remedy. To the extent that a case falls within the ADRA or the CDA, federal claims court has exclusive jurisdiction, Judge Biery said.

The companies contended that the suit doesn't fall within the ADRA because there was no procurement, but Judge Biery cited case law holding that an actual procurement isn't required.

"While in-sourcing in and of itself may not involve the procurement of goods and services, a decision whether or not to in-source involves the process for determining a need for acquisition of property or services and consequently involves a 'procurement' or a 'proposed procurement' regardless of whether property or services are actually procured," Judge Biery said.

Judge Biery also rejected the companies' contention that, as incumbent contractors, they wouldn't have standing under the ADRA as interested parties. The companies arguably conceded that they are prospective bidders and hold a direct economic interest in the government's decision to forgo a competitive procurement process, the judge said.

The companies argued that their suit was not founded on contractual provisions in disputing the government contention that the suit belonged in federal claims court under the CDA.

But Judge Biery said the case is “essentially one sounding in contract,” noting the government's decision not to extend the companies an option and that the alleged violated regulations pertain to the contract.

David Franklin Barton, an attorney for the companies, said Wednesday the next step could be appealing the decision in federal circuit court, adding that it seems the federal claims court is unwilling to hear such cases until there is exhaustion of appellate remedies.

Barton said there has been an increased pattern of government in-sourcing at the expense of contractors, part of what he said some in the contracting community view as an effort to swell the ranks of public workers and, in turn, union members and possible Democratic voters.

The companies are represented by The Gardner Law Firm PC.

The case is Harris Enterprises Inc. et al. v. United States Department of Defense et al., number 5:10-cv-00573, in the U.S. District Court for the Western District of Texas.