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The COFC Rejects the Government's Doublespeak on Standing to Challenge In-Sourcing Decisions

By Daniel R. Forman May 6, 2011

In *Santa Barbara Applied Research, Inc. ("SBAR") v. United States, No. 11-86C (May 4, 2011),* Judge Firestone of the United States Court of Federal Claims ("COFC") ultimately upheld the Air Force's in-sourcing decision on facts that are largely *sui generis.* However, before ruling in the Air Force's favor on the merits of the cost comparison, Judge Firestone first unequivocally held that the COFC has subject matter jurisdiction to hear a challenge to a DoD in-sourcing decision, and the Plaintiff, the incumbent provider of the in-sourced services, had standing to bring such a challenge.

As a threshold matter, the government did not dispute that the COFC had jurisdiction to hear SBAR's in-sourcing challenge under the Tucker Act, 28 U.S.C. § 1491(b)(1), because the matter involved the "alleged violation of statute or regulation in connection with a procurement or proposed procurement." The government's position on the COFC's exclusive jurisdiction to hear in-sourcing challenges was consistent with the position that it has taken in a number of recently filed in-sourcing challenges in the district courts.

However, in moving to dismiss SBAR's challenge for a lack of standing, the government staked out a position that was directly inconsistent with the arguments that it had advanced in moving to dismiss the district court in-sourcing cases. In this regard, the government moved to dismiss the SBAR challenge at the COFC on the grounds that, *inter alia*, SBAR was not an "interested party" because the matter did not involve a formal public-private competition, and, therefore, SBAR purportedly did not suffer the competitive injury necessary for standing under section 1491(b)(1). In advancing this argument, the government relied on the Federal Circuit's prior decisions in *American Federation of Government Employees, AFL-CIO ("AFGE") v. United States*, 258 F.3d 1294 (Fed. Cir. 2001) and *Weeks Marine, Inc. v. United States*, 575 F.3d 1352 (Fed. Cir. 2009).

Remarkably, in the district court actions where the government moved to dismiss on the grounds that the COFC had exclusive jurisdiction, the plaintiffs in those cases argued that dismissal was not proper because, *inter alia*, the in-sourcing challenges were not "bid protests" and the plaintiffs were not interested parties to pursue such actions at the COFC. In response, the government asserted that the plaintiffs were in fact interested parties and could demonstrate prejudice because an in-sourcing decision necessarily involves consideration of whether it is in the best interests of the government to contract for its requirements, and contractors interested in bidding on such contracts are affected and suffer injury when the decision is made not to contract. Despite taking a directly contrary position before the COFC, the government further

argued in the district court matters that *AFGE* and *Weeks Marine* did not support the argument that the plaintiffs lacked interested party status. *See, e.g.*, Government's Replies to Plaintiffs' Motions to Dismiss in *Rothe Development, Inc.* (5:10-CV-00743-XR (Western Dist. Of Tex.)); *K-MAR Industries, Inc.* (CIV-10-984-F (Western Dist. Of Okla.)); *Vero Technical Support, Inc.*, (10-14162-CIV-GRAHAM/LYNCH (Southern Dist. of Fla)).

In an apparent attempt to reconcile its inconsistent positions on standing to challenge in-sourcing decisions, in an April 2011 filing in *Triad Logistics Svs., Corp*., which is another in-sourcing challenge pending before the COFC, the government acknowledged to Judge Horn that "the United States' position with respect to these issues has developed over time." That seems to be quite the euphemism.

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