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Focus

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FEATURE COMMENT: COFC Provides Both Familiar And New Guidance On Bid Protest Challenges Of Agency Insourcing Decisions

Dellew Corp. v. U.S., 2012 WL 6690092 (Fed. Cl. Dec. 20, 2012)

The U.S. Court of Federal Claims has reached a decision in only six cases regarding a contractor's challenge of an agency's decision to insource work based on a cost comparison analysis under 10 USCA § 2463. Although the contractor was unsuccessful in each case, with each decision comes a new wrinkle in the COFC's analysis. As will be discussed below, the most recent decision in this area—*Dellew Corp. v. U.S.*, 2012 WL 6690092 (Fed. Cl. Dec. 20, 2012)—continues this trend. *Dellew* offers important guidance that must be considered prior to filing a protest of an agency's insourcing decision.

Relevant Insourcing Statutes—10 USCA §§ 129a and 2463 provide the statutory backdrop to the COFC insourcing protests. Understanding this statutory framework is important to understanding the COFC's decisions and the parties' arguments.

Enacted through the National Defense Authorization Act for Fiscal Year 1991, 10 USCA § 129a initially required the secretary of defense to "use the least costly form of personnel consistent with military requirements and other needs of the Department [of Defense]." Amended by the FY 2012 NDAA, 10 USCA § 129a(a) now requires the secretary of defense to "establish policies and procedures for determining the most appropriate and cost efficient mix of military, civilian, and contractor personnel to perform the mission of the Department of Defense." Also added was subsection (e), which notes that

> [i]f conversion of functions to performance by either Department of Defense civilian personnel or contractor personnel is considered, the Under Secretary of Defense for Personnel and Readiness shall ensure compliance with—(1) section 2463 of this title (relating to guidelines and procedures for use of civilian employees to perform Department of Defense functions); and (2) section 2461 of this title (relating to public-private competition required before conversion to contractor performance).

The other statute in play, 10 USCA § 2463, has been amended a variety of times since 2008. On Jan. 28, 2008, the FY 2008 NDAA amended 10 USCA § 2463, requiring the undersecretary of defense for personnel and readiness to "devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform new functions, and functions that are performed by contractors and could be performed by Department of Defense civilian employees." Following this requirement, two years later on Jan. 29, 2010, DOD issued Directive-Type Memorandum (DTM) 09-007, "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support." This DTM offers a framework for DOD to estimate and compare the costs associated with DOD manpower and contract support. The Air Force implemented the guidance in DTM 09-007—to perform cost analyses for its insourcing decisions—through a database tool known as DTM-COMPARE.

Effective Jan. 7, 2011, the FY 2011 NDAA amended 10 USCA § 2463, and provides that, "[i]n deciding which functions should be converted to performance by Department of Defense civilian employees ... the Secretary of Defense *shall* use the costing methodology outlined in [DTM 09-007] or any successor guidance for the determination of costs when costs are the sole basis for the deci-

sion." (Emphasis added.) Through this amendment, utilizing the DTM 09-007 cost comparison guidance essentially has become a requirement if costs are the sole basis for an insourcing decision.

Then, at the end of 2011, the FY 2012 NDAA further amended 10 USCA § 2463. In addition to utilizing the guidance in DTM 09-007 in certain instances, the new subsection (e) states, in part, that when

> determining whether a function should be converted [from performance by contractors] to performance by Department of Defense civilian employees, the Secretary of Defense shall ... ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—(i) 10 percent of the personnel-related costs for performance of that function; or (ii) $10,000,000.

These requirements do not apply to the conversion of inherently governmental functions, certain critical functions, acquisition workforce functions and a function closely associated with the performance of an inherently governmental function.

In other words, the projected savings must exceed a specified threshold before an agency can insource certain work. This provision is important because it now provides additional criteria that agencies must meet in order to insource certain work away from contractors.

The FY 2012 NDAA also added a new subsection (f) to 10 USCA § 2463, requiring that the "Secretary of Defense shall establish procedures for the *timely notification* of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to [10 USCA § 2463(a)]." (Emphasis added.) Most recently, on January 29, the Office of the Assistant Secretary of Defense issued a memo to implement 10 USCA § 2463(f). This memo, which is "effective upon issuance, and is not applicable retroactively," requires an agency to "determine and document *final* decisions to in-source." (Emphasis added.) It also requires a contracting officer to "provide a written notification" to affected incumbent contractors "[w]ithin 20 business days of the [CO's] receipt of such [insourcing] decision." However, the memo appears to provide the CO with discretion to decide what details to include in the written notification. The memo states that the CO "*may* summarize, in an appropriate format, the requiring official's final determination as to why the service is being in-sourced." (Emphasis added.)

Prior COFC Insourcing Bid Protest Decisions—Prior to the *Dellew* decision, the COFC had issued only six opinions (over five cases) relating to a contractor's protest of an agency's insourcing decision arising from the agency's cost analysis under 10 USCA § 2463. (By comparison, the Government Accountability Office had issued just two decisions in this area.) In each opinion, the COFC either dismissed or denied the contractor's protest, and in only two cases did the COFC find that the contractor had standing before the court:

- *Vero Technical Support, Inc. v. U.S.*, 94 Fed. Cl. 784 (2010); 52 GC ¶ 384—Judge Horn dismissed the contractor's complaint for lack of jurisdiction under 28 USCA § 1500 because the contractor had previously challenged the agency's insourcing decision before the district court, and its claim was still deemed to be "pending."
- *Santa Barbara Applied Research, Inc. v. U.S.*, 98 Fed. Cl. 536 (2011); 53 GC ¶ 237—Judge Firestone found that the contractor had standing to pursue its bid protest, but ultimately granted the Government's motion for judgment on the administrative record.
- *Hallmark-Phoenix 3, LLC v. U.S.*, 99 Fed. Cl. 65 (2011)—Judge Allegra dismissed the bid protest based on prudential standing concerns.
- *Triad Logistics Servs. Corp. v. U.S.*, slip op., 2012 WL 5187846 (Fed. Cl. 2012)—Judge Horn held that the contractor did not have standing before the court because it filed its second complaint after its underlying contract ended.
- *Elmendorf Support Servs. JV v. U.S.*, 105 Fed. Cl. 203 (June 22, 2012) ("*Elmendorf I*"); 54 GC ¶ 255—Judge Bruggink initially found that the contractor had standing to pursue its motion for preliminary injunction.
- *Elmendorf Support Servs. JV v. U.S.*, 2012 WL 3932774 (Fed. Cl. Sept. 10, 2012) (unpublished) ("*Elmendorf II*")—Subsequent to issuing *Elmendorf I*, Judge Bruggink determined that the contractor no longer had standing because the contractor's underlying contract expired before it filed its second amended complaint.

All of the protests at the COFC involved insourcing decisions made by the Air Force.

Air Force Insources Dellew's Contract, Terminates the Contract for Convenience—On July

18, 2008, the Air Force awarded a contract to Dellew Corp. to provide certain support services to nine bases in the Pacific Air Forces Major Command. The contract included an initial term and five option periods. After Dellew performed under the initial term, the Air Force exercised consecutively the first three option periods in full. The fourth one-year option period was exercised, but it was only incrementally funded for six months, April 1, 2012–Sept. 30, 2012. The option period would expire on March 31, 2013.

Meanwhile, in early 2010, the Air Force began to gather information from its major commands to implement its insourcing initiatives. In May 2010, the Air Force performed a cost comparison analysis of Dellew's contract with the Air Force's DTM-COMPARE software. Although its initial analysis included certain errors, its final analysis ultimately yielded a projected cost savings of 7.9 percent. In June 2010, the Air Force issued a memo indicating that Dellew's contract was a "viable candidate for insourcing," and that the cost comparison analysis justified the insourcing of the contracts. In July 2010, the Air Force "approved" the contract for insourcing.

Dellew learned of the insourcing decision on Feb. 29, 2012, over a year and a half after the Air Force performed its cost comparison analysis and approved the contract for insourcing. On April 2, 2012, the Air Force notified Dellew that its contract would terminate for convenience effective Oct. 1, 2012. A few days before receiving the Air Force's notice of termination, Dellew filed a Freedom of Information Act request to the Air Force asking for documents related to the Air Force's insourcing decision. After receiving a handful of heavily redacted documents, Dellew appealed the Air Force's partial denial of the FOIA request in August 2012.

After terminating Dellew's contract for convenience on Oct. 1, 2012, the Air Force immediately began to perform the requisite work with civilian and military personnel. The Air Force later indicated that it intended to hire full-time civilian employees to perform the work, and as of November 2012, the Air Force had hired seven civilian employees. The Air Force hoped the other positions would be filled by December 2012.

Dellew Protests at the COFC—Dellew filed its protest at the COFC on Sept. 24, 2012, seven days before the termination of its contract became effective. Alleging in its complaint that the "Air Force's decision to insource the Contract lacked a rational basis, was arbitrary and capricious, an abuse of discretion, and not in accordance with law," Dellew sought to enjoin the Air Force's insourcing decision. Dellew made two principal arguments:

- The Air Force's insourcing decision violated 10 USCA § 2463(e), as amended by the FY 2012 NDAA, because its cost comparison analysis did not determine that the "difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—(i) 10 percent of the personnel-related costs for performance of that function; or (ii) $10,000,000."
- The Air Force's decision to insource was "not supported by a proper cost analysis and therefore was irrational and contrary to the pre-2012 statutes and regulations." The Air Force should have performed a new cost comparison analysis because the prior analysis performed in 2010 was "stale" and contained a variety of errors. Also, the Air Force's use of military personnel to perform certain work ran counter to the May 28, 2009 In-Sourcing Implementation Guidance, which states that "[c]ontracted services can only be converted to military performance in very limited circumstances—i.e., when the work is determined to be military essential or justified as a legitimate military exemption consistent with DoD Instruction 1100.22."

Although Dellew initially sought a temporary restraining order and preliminary injunction to "enjoin the Air Force from terminating the Contract and insourcing the work performed by plaintiff under the Contract," after oral argument, Dellew agreed to withdraw its request for the temporary restraining order and the Government agreed to produce an administrative record without delay.

COFC Finds Jurisdiction over Dellew's Protest—Before reviewing the merits of Dellew's request for injunctive relief, the COFC had to rule on the Government's motion to dismiss Dellew's complaint for lack of jurisdiction. The Government made three arguments: (a) Dellew lacked statutory standing to pursue its protest because it was not an interested party under 28 USCA § 1491(b)(1); (b) Dellew did not have prudential standing to raise its protest grounds because its alleged injury was "not within the zone of interests protected" by the pertinent statutes under review; and (c) Dellew's

complaint was moot because the COFC could not redress Dellew's alleged injuries. As will be discussed below, Judge Miller rejected all of the Government's arguments.

Subject Matter Jurisdiction: Before addressing the three arguments made by the Government, the COFC first addressed the issue of subject matter jurisdiction and found that the COFC had subject matter jurisdiction over Dellew's complaint based on 28 USCA § 1491(b)(1). Under that statute, the COFC has jurisdiction "to render judgment on an action by an interested party objecting to ... any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

Relying upon *Distrib. Solutions, Inc. v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008); 50 GC ¶ 332, Judge Miller found that the phrase "in connection with a procurement or a proposed procurement" relates to "any stage of the federal acquisition contracting process, including 'the process for determining a need for property or services.' " Additionally, in *RAMCOR Servs. Group, Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999); 41 GC ¶ 361, the Court of Appeals for the Federal Circuit stated that the phrase, " 'in connection with' is very sweeping in scope," such that 28 USCA § 1491(b)(1) "does not require an objection to the actual contract procurement .... As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."

Under this framework, Judge Miller concluded that the COFC had jurisdiction over Dellew's claim because the Air Force's insourcing decision "involved a 'process for determining a need for property or services' and was made 'in connection with a procurement or proposed procurement.' " Judge Miller's determination was consistent with prior COFC insourcing bid protest decisions.

Statutory Standing: Next Judge Miller analyzed whether Dellew had statutory standing as an interested party under 28 USCA § 1491(b). In *Distributed Solutions*, the Federal Circuit determined that a plaintiff is an interested party "if it establishes that '(1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement.' "

Taking guidance from Judge Firestone's *Santa Barbara* decision (and Judge Bruggink's *Elmendorf I* decision), Judge Miller easily determined that Dellew was an interested party because it "held a government contract [at the time it filed its complaint] and claimed that it 'would expect to compete for future government contracts but for the errors made by the Air Force in its in-sourcing decision.' "

Prudential Standing: Judge Miller disagreed with the Government's contention that Dellew's complaint must be dismissed due to prudential standing concerns. As defined by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997), prudential standing is a " 'judicially self-imposed limit[] on the exercise of federal jurisdiction[,]' requiring that a 'plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.' "

In arriving at her determination, Judge Miller stated that "[t]his court cannot heed the clarion call of *Hallmark-Phoenix*," in which Judge Allegra "held that an incumbent contractor lacked prudential standing under the pre-2011 versions of §§ 129a and 2463(e) to challenge the Air Force's decision to in-source." Judge Allegra based his decision on the fact that the relevant statutes and DOD guidance must be viewed in a "limited budgetary context," which should be enforced through legislative oversight and not through private actions. Judge Allegra did not view the contractor's alleged injury as being within the zone of interests that the statute was protecting.

Although Judge Miller acknowledged that those statutes were "enacted in a 'budgetary context,' the context of the legislation alone is not a conclusive determinant of prudential standing. The fact that Congress included a legislative reporting requirement also is not controlling." Judge Miller explained that DOD

> procedures required by the statutory provisions at issue in this case place limits on the ability of [DOD] to convert from contractor to civilian performance. An incumbent contractor arguably comes within the zone of interests protected and therefore has prudential standing to challenge an in-sourcing decision under these statutes and regulations.

Mootness: Finally, at the Government's urging, Judge Miller reviewed whether Dellew's complaint should be dismissed as moot. As stated by the Supreme Court in *Powell v. McCormack*, 395 U.S. 486 (1969), "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." In addition, a court must dismiss a case as moot if an event occurs during the proceedings that makes it impossible for the court to grant any relief.

The Government argued that the complaint must be dismissed as moot because the COFC could not require the Air Force to award a new contract to Dellew after the contract was terminated. The Government explained that, in order to award a new contract to Dellew, the Government would need to conduct a public-private competition to outsource the work under 10 USCA § 2461, which is prohibited by the Omnibus Appropriations Act of 2009.

Rejecting the Government's argument, Judge Miller concluded that the COFC could fashion a remedy for Dellew if the contractor was successful on the merits. Unlike the scenario in *Elmendorf II* in which the contractor amended its complaint after its contract had expired, the Air Force terminated Dellew's contract during an option period well before the option expired. As a result, but for the early termination due to the insourcing decision, Dellew would have performed the work until the option period ended. On that basis, the COFC concluded that "[u]ntil the fourth option period expires by its terms, on March 31, 2013, this court could order a return to the pre-termination status quo for the remaining months of the fourth option year." Accordingly, the relief requested in the complaint was not moot.

Notably, in a departure from the COFC's prior decisions in *Triad Logistics* and *Elmendorf II*, which "framed the issue in terms of standing," Judge Miller reasoned that the "mootness doctrine provides the proper context for considering the effect of the Contract termination on the court's ability to fashion a remedy for plaintiff." (Although the Government argued that the mootness doctrine applied in *Elmendorf II*, Judge Bruggink's analysis was presented in terms of standing.) *Dellew* was the first COFC insourcing bid protest case dealing substantively with the doctrine of mootness.

COFC Denies Dellew's Request for Injunctive Relief—Next, Judge Miller reviewed Dellew's request for injunctive relief. To award injunctive relief, the plaintiff must demonstrate (a) success on the merits, (b) that it will suffer irreparable harm if the relief is not granted, (c) that the harm to plaintiff if the relief is not granted outweighs the harm to the Government if the relief is granted, and (d) that the relief is not against the public interest. As will be discussed below, Judge Miller ultimately denied Dellew's request, holding in favor of the Government.

Success on the Merits: First, Judge Miller found that the Air Force's cost comparison analysis did not violate 10 USCA § 2463(e), as amended by the FY 2012 NDAA. Although the Air Force's cost comparison analysis yielded projected cost savings less than the 10 percent required by that statute, Judge Miller agreed with the Government that the version of the statute in effect when the agency made its insourcing decision did not include the 10-percent threshold, and so the agency was not required to meet it in this case. Judge Miller determined that the Air Force's insourcing decision was made in July 2010—when the Air Force approved the cost comparison analysis. She rejected Dellew's argument that the insourcing decision was made when the Air Force decided to terminate the contract and notify Dellew of the termination because she found these actions were "mere steps in the implementation of the insourcing decision." Further, she found that the 10-percent threshold in the current version of the statute does not apply retroactively.

Second, Judge Miller concluded that the relevant statutes and regulations did not require the Air Force to perform a new cost comparison analysis, and the errors in the analysis would not result in a prejudicial violation of any applicable statutes or regulations. Further, Judge Miller determined that the Air Force's decision to use military personnel on a temporary basis after termination, and until it can hire civilians, was not contrary to law.

Irreparable Harm: Judge Miller noted that if Dellew could succeed on the merits, it would have been irreparably harmed because "regardless of whether the Air Force would have decided to exercise the fifth option period of the Contract, [Dellew] has been denied an opportunity to compete for the contract that lawfully was not subject to in-sourcing."

Balance of Hardships: Although the Government claimed that it would suffer a hardship if the injunctive relief were granted—because it could not service the bases due to its inability to award a new contract—Judge Miller was not persuaded. Judge Miller noted that she could have "enjoined the Air Force from proceeding with the in-sourcing during the balance of the option period. Were the Air Force to reinstate plaintiff, the limited relief available on the duration of the option period would not constitute a new contract award."

The Public Interest: Dellew argued that awarding an injunction would "serve the strong public interest in preserving the integrity of the procurement process and protecting taxpayer dollars." Without going into much detail, Judge Miller merely determined that

the public interest would not be served if injunctive relief were granted because the Air Force's insourcing decision was proper.

Key Takeaways from *Dellew*—Judge Miller's *Dellew* decision, and the other COFC decisions in this area, offer important guidance about protesting an agency's insourcing decision arising from the agency's cost comparison analysis under 10 USCA § 2463.

The decisions highlight the importance of filing a complaint as soon as possible, and obtaining either a preliminary injunction or an agreement by the Government to maintain the status quo. Considering the majority of the decisions, it appears that the expiration of a contract will likely end a protest, regardless of whether it is analyzed through statutory standing or the doctrine of mootness. This dynamic may provide an incentive for an agency to announce its insourcing decision as close as possible to the expiration of the contract.

The longer the agency waits to announce its decision to the contractor, the less time the contractor has to raise its protest, and the more likely the contract will expire while the protest is pending before the COFC. It is therefore imperative that a contractor not only file a protest as quickly as possible after receiving notice of an insourcing decision, but that it also obtain a preliminary injunction or an agreement to maintain the status quo.

Dellew also highlights a major impediment to a contractor's ability to take such prompt action: It can be difficult to obtain key information regarding the insourcing decision necessary to build support for a protest. In a typical protest situation, involving a challenge to a procurement conducted on the basis of competitive proposals, a disappointed offeror is entitled to a debriefing, which provides a well-established and timely process for obtaining information that may support a protest.

Although 10 USCA § 2463 provides for "timely notification" of the agency's insourcing decision to the contractor, the January 29 guidance memo issued by the Office of the Assistant Secretary of Defense does not guarantee that the contractor will receive *meaningful* information about the insourcing decision from the CO. The memo states that the CO's notification "*may summarize*, in an appropriate format, the requiring official's final determination as to why the service is being in-sourced." (Emphasis added.) It appears that the CO has discretion to determine what details are included in the written notification. Thus, it is possible that the contractor may receive an insourcing notification that provides little information about the cost comparison analysis performed.

The lack of a formal mechanism to obtain meaningful information about the insourcing decision places a potential protester at an inherent disadvantage. The protester in *Dellew* sought to solve this problem by filing a FOIA request, but, as is often the case, obtaining responsive information proved to be a lengthy process. If an agency does not promptly provide meaningful information to the contractor—whether in response to a FOIA request, in response to a more informal request, or through the CO's notice of the final insourcing decision—the contractor is faced with an unappetizing choice.

If the contractor acts promptly to file a protest, it must do so without the benefit of much information. A lack of information will weaken the protest, impair the protester's ability to demonstrate a likelihood of success on the merits, and therefore also impair the protester's ability to obtain a preliminary injunction. It will also create a risk that the protest could be dismissed. If, on the other hand, the protester waits to obtain additional information about the insourcing decision, then it runs the risk of having its contract expire, leading to dismissal for mootness or lack of standing.

Although each choice has its perils, filing early is the better choice whenever the contractor has enough information to avoid outright dismissal of the protest. Even if the contractor fails to obtain a preliminary injunction, filing early enough may allow it time to obtain the administrative record and litigate the protest to an ultimate decision on the merits prior to the expiration of its contract. Such a solution is far from ideal for either the agency or the protester, however. The protester will incur substantial costs to litigate the protest, and the agency will likely be subject to protests that could have been avoided had the protester been able to obtain more information prior to filing its protest. A mechanism for providing such information would therefore be in the interests of both contractors and the Government.

Dellew does provide some comfort to potential protesters because it suggests that once a contractor has its foot in the door, an agency's subsequent termination of the contract for convenience should not trigger a change in the contractor's status as an interested party, or result in a finding that the case

is moot. Judge Miller distinguished the situations in *Elmendorf II* and *Triad Logistics*, in which the contractor lost its standing to pursue its protest at the COFC because it filed an amended complaint after its underlying contract had *expired*.

In *Dellew*, by contrast, Dellew's contract was terminated by the Air Force six months *prior* to the current option period expiring. Judge Miller explained that the COFC can enjoin an agency "from proceeding with the in-sourcing during the balance of the option period." She further explained that such an action would not require the award of a new contract by conducting a public-private competition to outsource the work under 10 USCA § 2461, a process that is currently prohibited by the Omnibus Appropriations Act of 2009. Thus, a contractor that is able to file its protest many months in advance of the expiration of its contract is not likely to lose its ability to obtain relief if the agency terminates its contract while the protest is pending.

Conclusion—Although *Dellew* offers this limited comfort to protesters, it—like the other COFC insourcing bid protest decisions—highlights the many challenges contractors face when protesting insourcing decisions. In addition to the procedural hurdles applicable to protests involving competitive procurements, insourcing protests also face additional risks associated with (1) the expiration of the contract and (2) the contractor's ability to obtain meaningful information regarding the insourcing decision before filing its protest. And a protester who successfully navigates these shoals must then identify a prejudicial error in a cost comparison analysis under DTM 09-007 and 10 USCA § 2463. It is a daunting set of challenges, as demonstrated by the fact that no insourcing protest has yet succeeded before the COFC.

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