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Insourcing

To Each His Own: An Analysis of the U.S. Court of Federal Claims' Jurisdiction Over Challenges to the Federal Government's Cost Analyses and Insourcing Decisions Under 10 U.S.C. § 2463

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With budget cuts on the rise over the last few years and in the face of President Obama's March 4, 2009 memorandum regarding government contracting[2], federal government insourcing has become a hot topic. Contractors are starting to pay closer attention to insourcing statutes and directives because of the likelihood that the level of work available for contractor employees will decrease.[3] As a result,

[2] In his Memorandum, President Obama directed the Office of Management and Budget (OMB) to develop and issue ''governmentwide guidance to assist agencies in reviewing, and creating processes for ongoing review of, existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner. Such corrective action may include *modifying or canceling* such contracts in a manner and to the extent consistent with applicable laws, regulations, and policy.'' Mem. of Mar. 4, 2009 on Government Contracting, 74 Fed. Reg. 9755 (Mar. 6, 2009) (emphasis added).

[3] For example, Section 808(c)(4) of the National Defense Authorization Act (''NDAA'') for Fiscal Year 2012 requires the Secretary of Defense to issue guidance to military departments and defense agencies during fiscal years 2012 and 2013 to ''require the Secretaries of the military departments and the heads of the Defense Agencies to *reduce by 10 percent* per fiscal year in each of fiscal years 2012 and 2013 the funding of the military department or Defense Agency concerned for— (A) staff augmentation contracts; and (B) contracts for the performance of functions closely associated with inherently governmental functions.'' NDAA for FY 2012, Pub. L. No. 112–81, § 808(c)(4), 125 Stat. 1298, 1489 (2011) (emphasis added). *See also* Office of the Under Sec'y of Def. Mem., Guidance for Limitation on Aggregate Annual Amount Available for Contracted Servs. (June 3, 2012) (implementing Section 808 of the NDAA for the Fiscal Year 2012); U.S. Air Force Materiel Command, Resource Management Decision No. 802, insourcing Implementation Guidance (Apr. 8, 2008), available at http://www.peer.org/docs/dod/4_13_10_USAF_Materiel_Command_

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over the last few years contractors have begun to challenge agency decisions to insource work that has been performed by contractors, albeit with little success.[4]

Much of this litigation has focused on the application of 10 U.S.C. § 2463 (along with 10 U.S.C. § 129a), which requires the Under Secretary 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.''[5] And in most cases, the litigation has begun and ended with the question of whether a court or the Government Accountability Office (''GAO'') has jurisdiction to entertain the contractor's claim or protest.

Unfortunately, courts have not even been uniform in their interpretation of this jurisdictional issue. To demonstrate this point, one need look no further than four recent decisions by the United States Court of Federal Claims (the ''COFC''): *Santa Barbara Applied Research, Inc. v. United States*[6]; *Hallmark-Phoenix 3, LLC v. United States*[7]; *Triad Logistics Services Corp. v. United States*[8]; and *Elmendorf Support Services Joint Venture v. United States*[9].

In this article, we analyze the jurisdictional jungle that has arisen from contactor challenges to agency decisions to insource work under 10 U.S.C. § 2463. We conclude that, although the prospect is looking brighter that COFC judges will recognize jurisdiction in these matters, jurisdiction is not assured with each presiding judge rendering his or her own view.[10]

I. Brief Background of Insourcing Costs Analyses Under 10 U.S.C. § 2463. In January 2008, Congress added Section 2463 to Title 10 of the United States Code, requiring that:

> [t]he Under Secretary of Defense for Personnel and Readiness shall 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. The Secretary of a military department may prescribe supplemental regulations, if the Secretary determines such regulations are necessary for implementing such guidelines within that military department.[11]

This statute did not require a cost analysis, comparing agency and contractor costs, to be performed as part of an insourcing decision.

On May 28, 2009, the Office of the Under Secretary of Defense issued its guidance memorandum entitled ''In-sourcing Contracted Services – Implementation Guidance.''[12] Noting that ''[i]nsourcing is a high priority of the Secretary of Defense,''[13] this guidance document reinforced that ''10 U.S.C. § 2463 requires the Department of Defense to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform functions that are performed by contractors but could be performed by Department of Defense civilian employees.''[14] It also stated, in pertinent part, that certain services ''may be in-sourced if a cost analysis shows that Department of Defense civilian employees would perform the work more cost effectively than the private sector contractor.''[15] The Office of the Secretary of Defense also published Directive-Type Memorandum (''DTM'') 09-007 regarding ''Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support'' to establish the ''business rules . . . for use in estimating and comparing the full costs of military and DOD civilian manpower and contract support.''[16]

In-Sourcing_Implementation_Guidance.pdf (realigning resources for fiscal years 2010 through 2013 to decrease funding for contract support and increase funding for government civilian support). Although requiring a quota in this instance does not necessarily mean that there will be a 10 percent reduction in available contractor jobs (*e.g.*, hypothetically, all contractor jobs could be retained if the rates for their positions were lowered to fit within the funding reduction), it is representative of the federal government's push to move more work in-house.

[4] Of the four COFC cases discussed herein, only two found that COFC had jurisdiction to entertain the protest and that the contractor was an interested party. *SeeSanta Barbara Applied Research, Inc. v. United States*, 98 Fed. Cl. 536 (2011); *Elmendorf Support Servs. Joint Venture v. United States*, No. 12-346C, 2012 WL 236075 (Fed. Cl. June 22, 2012). And in those two decisions, the court ultimately denied the contractors' protests. *Santa Barbara Applied Research*, 98 Fed. Cl. at 545-53 (granting the government's motion for judgment on the administrative record); *Elmendorf Support Servs.*, 2012 WL 236075, at *6-9 (denying the contractor's motion for preliminary injunction).

[5] 10 U.S.C. § 2463(a), (e) (as amended by NDAA for FY 2012, § 938, 125 Stat. at 1547). *See also* 10 U.S.C. § 129a(e)(1) (as amended by NDAA for FY 2012, § 931(a), 125 Stat. at 1541) (''If conversion of functions to performance by . . . Department of Defense civilian 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'').

[6] 98 Fed. Cl. 536 (2011) (finding jurisdiction to hear the contractor's bid protest challenging the government's transfer of services in-house under 10 U.S.C. § 2463).

[7] 99 Fed. Cl. 65 (2011) (determining that the court could not entertain a challenge to an insourcing decision under 10 U.S.C. § 2463 due to prudential standing concerns).

[8] No. 11-43C, slip op. (Fed. Cl. Feb. 29, 2012) (finding that the contractor did not have standing to challenge the agency's insourcing decision under 10 U.S.C. § 2463 because the contractor's contract had expired prior to its filing its complaint).

[9] No. 12-346C, 2012 WL 236075 (Fed. Cl. June 22, 2012) (agreeing with the analysis in *Santa Barbara Applied Research, Inc.*, and finding jurisdiction to hear the contractor's bid protest challenging the government's transfer of services in-house under 10 U.S.C. § 2463).

[10] *See, e.g., Adams v. United States*, 42 Fed. Cl. 463, 472-73 (1998) (noting that a COFC judge is not bound by decisions of other COFC judges); *Tamerlane, Ltd. v. United States*, 81 Fed. Cl. 752, 759 (2008) (''[D]ecisions of one judge . . . on the Court of Federal Claims do not serve to bind another judge of the court'').

[11] NDAA for FY 2008, Pub. L. No. 110-181, § 324(a)(1), 122 Stat. 3, 60-61 (Jan. 28, 2008) (codified as amended at 10 U.S.C. § 2463(a)(1)).

[12] Office of the Under Sec'y of Def. Mem.,In-sourcing Contracted Servs. – Implementation Guidance (May 28, 2009), available at http://www.peer.org/docs/dod/4_13_10_DepSecDef_Memo_In-sourcing.pdf [hereinafter the ''May 28, 2009 Memorandum''].

[13] *Id.*

[14] May 28, 2009 Memorandum, Attach. 1, § 4.1.

[15] *Id.* at § 4.2.6.

[16] Office of the Sec'y of Def., DTM No. 09-007, Estimating & Comparing the Full Costs of Civilian & Military Manpower

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Unlike the NDAA for Fiscal Year 2008, which contained no requirement for a cost analysis under 10 U.S.C. § 2463, the NDAA for Fiscal Year 2011 included language making the DTM 09-007 cost analysis mandatory in certain instances.[17] Section 323(b) stated, in part:

In deciding which functions should be converted to performance by Department of Defense civilian employees pursuant to section 2463 of title 10, United States Code, the Secretary of Defense *shall use the costing methodology outlined in the Directive-Type Memorandum 09-007* (Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support) or any successor guidance for the determination of costs *when costs are the sole basis for the decision*. The Secretary of a military department may issue supplemental guidance to assist in such decisions affecting functions of that military department.[18]

Section 323(d)(2) noted, however, that the Secretary of Defense was not required to ''conduct a cost comparison before making a decision to convert any acquisition function or other critical function to performance by Department of Defense civilian employees, where factors *other than cost* serve as a basis for the Secretary's decision.''[19] Finally, this section required specific reporting requirements to Congress about the ''conversion of functions to performance by Department of Defense civilian employees made during fiscal year 2010.''[20]

Congress made further changes to 10 U.S.C. § 2463 in the NDAA for Fiscal Year 2012. In addition to the mandatory requirement in the prior year's NDAA – that a cost analysis under DTM 09-007 be performed before work can be insourced where the costs are the sole basis for the determination – Congress added a minimum differential in cost standard when analyzing contractor versus insourcing decisions:

> Except as provided in paragraph (2) [discussing inherently governmental functions], in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense *shall—*
>
> (A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09-007 entitled 'Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support' or any successor guidance for the determination of costs *when costs are the sole basisfor the determination*;
>
> (B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department; and
>
> (C) *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 employeeswould 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.[21]

The NDAA for Fiscal Year 2012 also modified 10 U.S.C. § 2463 to include a new reporting requirement, requiring the secretary of defense to notify any contractor who performs a function that DOD plans to convert to performance by DOD civilian employees pursuant to 10 U.S.C. § 2463(a), and to provide a copy of such notifications to congressional defense committees.[22]

II. Recent COFC Decisions Regarding Challenges Under 10 U.S.C. § 2463. Although all COFC judges are bound by decisions of the United States Court of Appeals for the Federal Circuit, a COFC judge's decision is not binding on any other COFC judge.[23] As a result, although the COFC as a court has jurisdiction over procurement protests,[24] each individual judge interprets and applies his or her own notion of COFC jurisdiction. The ability to have a protest of a government insourcing decision heard at the COFC may well rest entirely on the judge who is drawn for the protest. If the judge has decided jurisdiction before, litigants will likely know whether the COFC will hear the case on the merits. If the judge has not decided the issue before, the litigants are in for briefing and argument of that issue, with the outcome unknown.

Four recent COFC bid protests related to agency decision to insource work under 10 U.S.C. § 2463 highlight the situation: *Santa Barbara Applied Research, Inc.;Hallmark-Phoenix 3, LLC;Triad Logistics Services Corp.;* and *Elmendorf Support Services Joint Venture*. All of these cases focus on the issues of subject matter jurisdiction to review insourcing decisions and standing.[25] 28 U.S.C. § 1491(b)(1) provides the COFC with subject matter jurisdiction to ''render judgment on an

& Contract Support (Jan. 29, 2010), available at http://www.govexec.com/pdfs/050410rb1a.pdf. The guidance in DTM 09-007 is effective through October 1, 2012. *See* Office of the Sec'y of Def., DTM No. 09-007, Estimating & Comparing the Full Costs of Civilian & Military Manpower & Contract Support, Change 3 (Sept. 2, 2011), available at http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-007.pdf.

[17] NDAA for FY 2011, Pub. L. No. 111–383, § 323, 124 Stat. 4127, 4184.

[18] *Id.* at § 323(b) (emphasis added). *See also id.* at § 323(a) (''The Secretary of Defense may not establish, apply, or enforce any numerical goal, target, or quota for the conversion of Department of Defense functions to performance by Department of Defense civilian employees, unless such goal, target, or quota is based on considered research and analysis, as required by section 235, 2330a, or 2463 of title 10, United States Code.'')

[19] *Id.* at § 323(d)(2) (emphasis added).

[20] *Id.* at § 323(c) (emphasis added).

[21] *See* NDAA for FY 2012, § 938(e), 125 Stat. at 1547 (emphasis added). *See alsoid.* at § 931(e)(1), 125 Stat. at 1542-43; 10 U.S.C. § 129a(e)(1) (''If conversion of functions to performance by . . . Department of Defense civilian 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)'').

[22] NDAA for FY 2012, § 938(f), 125 Stat. at 1547; 10 U.S.C. § 2463(f).

[23] *See, e.g., Adams*, 42 Fed. Cl. at 472-73; *Tamerlane*, 81 Fed. Cl. at 759.

[24] 28 U.S.C. § 1491(b)(1).

[25] *E,g., Triad Logistics Services Corp.*, No. 11-43C, slip op. at 1 (''The court, however, favors the approach adopted in *Santa Barbara*, that the court first should determine whether there is subject matter jurisdiction generally, including subject matter jurisdiction to review insourcing decisions under 28 U.S.C. § 1491(b)(1) and standing as an interested party, before addressing questions related to prudential standing.'') (citing *Santa Barbara Applied Research, Inc.*, 98 Fed. Cl. at 542; *Wendland v. Guitierrez*, 580 F. Supp. 2d 151, 153 n.2 (D.D.C. 2008)). *But see generallyHallmark-Phoenix 3, LLC*, 99 Fed. Cl. at 68.

action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.''[26] In *Distributed Solutions, Inc. v. United States,* the Federal Circuit explained:

the phrase, ''in connection with a procurement or proposed procurement,'' by definition involves a connection with any stage of the federal contracting acquisition process, including ''the process for determining a need for property or services.'' To establish jurisdiction pursuant to this definition, the contractors must demonstrate that the government at least initiated a procurement, or initiated ''the process for determining a need'' for acquisition . . . .[27]

The *Distributed Solutions, Inc.* court also stated that, to have standing, a contractor must be an ''interested party'' – 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.''[28] Additionally, these four COFC cases discuss the issue of prudential standing – ''whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.''[29]

Although three of the four decisions demonstrate a positive trend for contractors attempting to challenge agency insourcing decisions, one of the four decisions provides a strong view against jurisdiction. As the Federal Circuit has not ruled on this particular issue and Congress has not added any legislation to resolve the same, a contractor's success against the government is dependent upon the judge assigned to the case. And because there are currently 24 judges on the COFC bench, there is a very good chance that a contractor will need to persuade a judge in the first instance that jurisdiction and standing exists. One thing is certain: for the foreseeable future the Department of Justice will continue to press its case that there can be no jurisdiction and standing in COFC protests of insourcing decisions under 10 U.S.C. § 2463.[30]

A. ***Two COFC Decisions Issued in 2011 With Similar Fact Patterns Reach Completely Opposite Conclusions.***

1. Santa Barbara Applied Research, Inc.

Santa Barbara Applied Research, Inc. was the first published decision discussing the issue of whether the COFC had jurisdiction over a contractor's bid protest challenging the government's transfer of services in-house under 10 U.S.C. § 2463, and whether the contractor had standing.[31] In this case, the contractor protested the agency's determination to insource work that was currently being performed by the contractor pursuant to an option to the underlying contract.[32] The contractor claimed that the agency did not perform a proper cost analysis under 10 U.S.C. § 2463.[33] Ruling on the government's motion to dismiss, Judge Firestone found that the COFC had jurisdiction under 28 U.S.C. § 1491(b)(1) to hear the contractor's claim and that the contractor had standing.[34]

Judge Firestone determined that the court had jurisdiction to entertain the contractor's challenge of the agency's insourcing decision because the agency's ''decision to in-source the work [the contractor] had been performing at four Air Force bases and continues to perform at five other locations . . . was made 'in connection with a procurement' as that term has been interpreted by the Federal Circuit [in *Distributed Solutions,*

[26] Although the language in the current version of 28 U.S.C. § 1491(b)(1) states that the COFC *and* U.S. district courts possess jurisdiction, the Administrative Dispute Resolution Act (ADRA) included a sunset provision which removed the U.S. district courts' jurisdiction over bid protests as of January 2, 2001. ADRA, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875.

[27] 539 F.3d 1340, 1346 (Fed. Cir. 2008).

[28] *Id.* at 1344 (citation omitted).

[29] *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[30] Interestingly, the court in *Triad Logistics Services Corp.* commented:

> The United States has taken evolving positions on jurisdiction and standing as related to insourcing challenges. In the current litigation, the government states, ''in certain district court litigation, the government previously asserted that an incumbent contractor could satisfy the interested party requirement. We now believe that our prior position was incorrect, and that the position we presented in our motion to dismiss in this case – that Triad is not an interested party – is the correct one and we have taken the same position in other insourcing protests before this court.''

No. 11-43C, slip op. at 23 n.17 (citations omitted).

[31] There have been two published GAO decisions related to protests about an agency's decision to insource work under 10 U.S.C. § 2463 and 10 U.S.C. § 129a. In *Aleut Facilities Support Services, LLC*, B-401925, 2009 CPD ¶ 202 (Comp. Gen. Oct. 13, 2009), the contractor argued that the agency improperly canceled a solicitation, in part, because it did not conduct a proper cost analysis under 10 U.S.C. § 2463. In dismissing the protest, the GAO explained, ''Although we review agency decisions to cancel solicitations to determine whether those decisions are reasonably based, we generally do not review them when the work in question is to be performed in-house because such decisions are generally a matter of executive branch policy.'' *Id.* at 3 (citation omitted). Although the GAO recognized that there were limited exceptions to this rule – *e.g.*, ''where a solicitation requires a cost comparison . . . , where a statute or regulation requires a cost comparison before retaining the work in-house'' – it determined that no exceptions applied here, in part, because 10 U.S.C. § 2463 did ''not require . . . a cost comparison between the agency and outside contractors.'' *Id.* (citations removed). In *Triad Logistics Services. Corp.*, B-403726, 2010 CPD ¶ 279 at 3(Comp. Gen. Nov. 24, 2010), the precursor to *Triad Logistics Services Corp. v. United States* discussed herein, the GAO quickly dismissed the contractor's argument that the GAO had jurisdiction to review the agency's cost analysis under 10 U.S.C. § 129a because this statute was not a procurement statute and it did ''not require a cost comparison between agency and contractor performance . . . .'' It remains unclear, however, if GAO would find jurisdiction following the amendments to 10 U.S.C. § 2463 in the NDAA for Fiscal Years 2011 and 2012, which make the DTM 09-007 cost analysis mandatory in certain instances. There have also been a few cases before U.S. district courts and the U.S. Circuit Courts of Appeals challenging agency's decisions to insource under these statutes. The majority of these decisions hold that U.S. district courts do not possess jurisdiction over such a claim. *E.g.*, *Fisher-Cal Indus., Inc. v. United States*, No. 11-791 (BAH), 2012 WL 914674 (D.D.C. Mar. 19, 2012) (finding no jurisdiction); *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 666 F.3d 336, 338 (5th Cir. 2011) (finding jurisdiction); *Vero Tech. Support v.U.S. Dep't of Def.*, 437 F. App'x 766 (11th Cir. 2011) (unpublished decision) (finding no jurisdiction); *K-Mar Indus., Inc. v. U.S. Dep't of Def.*, 752 F. Supp. 2d 1027 (W.D. Okla. 2010) (finding no jurisdiction).

[32] *Santa Barbara Applied Research, Inc.*, 98 Fed. Cl. at 537-38, 539-41.

[33] *Id.* at 540-41.

[34] *Id.* at 542-44.

  FCR ISSN 0014-9063

Inc.].''[35] Further, Judge Firestone determined that the contractor had standing because the contractor

> has a government contract and claims that it would expect to compete for future government contracts but for the errors made by the [agency] in its insourcing decision, which prevents [the contractor] or any other contractor from performing the functions at issue. Where, as here, [the contractor] has a track record of winning contracts for the work that the [agency] is now insourcing, the economic impact to [the contractor] cannot be denied.[36]

Finally, the court rejected the government's argument that the court should dismiss this claim based on ''prudential standing'' grounds.[37] A determination of prudential standing is based upon ''whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief,''[38] *e.g.*, ''whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.''[39] Judge Firestone found that the doctrine of prudential standing did not apply to bid protests under 28 U.S.C. § 1491(b)(1), and even if it did, it would not relinquish the court's jurisdiction over this protest.[40] She determined that 10 U.S.C. § 2463 ''was enacted, at least in part, for the benefit of the contracting community.''[41] She arrived at this conclusion based upon Section 323 in the NDAA for FY 2012 which ''prevent[ed] the DOD from imposing any specific quotas or goals on insourcing without a considered cost analysis and mandated that the DOD conduct a specific cost comparison [under 10 U.S.C. § 2463] that takes into account the 'full costs of civilian and military manpower' before making any insourcing decision, where . . . cost alone is the deciding criteria,''[42] although Section 323 was enacted after the events underlying the contractor's protest.

2. Hallmark-Phoenix 3, LLC.

The next case to tackle these issues was *Hallmark-Phoenix 3, LLC.* Like the contractor in *Santa Barbara Applied Research, Inc.* here the contractor protested the agency's decision under 10 U.S.C. § 2463 to insource work currently being performed by the contractor.[43] Although this case had a similar fact pattern to *Santa Barbara Applied Research, Inc.*, Judge Allegra took issue with the majority of Judge Firestone's analysis, and arrived at a much different conclusion.

In a spirited decision, Judge Allegra dismissed the contractor's claim because it failed to meet prudential standing requirements.[44] After determining that the concept of prudential standing applied to bid protests under 28 U.S.C. § 1491(b)(1),[45] Judge Allegra indicated that ''the critical question becomes whether the statutes at issue [10 U.S.C. §§ 129a and 2463] can be understood as granting a contractor standing to challenge an agency's decision to fulfill its needs using its own employees.''[46] ''[T]he injury of which plaintiff complains does not arguably fall within the zone of interests sought to be protected by these statutes.''[47] Because sections of these statutes required certain reporting to Congress, Judge Allegra relegated these statutes to ''internal internal agency procedures subject to legislative oversight,''[48] and compared the issues now before him to *American Telephone & Telegraph Co. v. United States*.[49] In doing so, he explained:

> What is controlling here—and what demands, in the final analysis, that plaintiff's case be dismissed—is the language of the statutes in question. That language indicates that Congress intended to reserve for itself, and not any court, the twin job of deciding whether the Defense Department has properly in-sourced various tasks and of requiring the agency to changes its policies as proved necessary. Both tasks were to be accomplished by application of the considerable pressures of the legislative process—what Madison, in Federalist No. 48, referred to as Congress' ''complicated and indirect measures.'' [50]

Interestingly, Judge Allegra's lengthy analysis appears to boil down to policy concerns.[51] Judge Allegra was very apprehensive that a decision finding jurisdiction over the contractor's protest would ''risk[] triggering a wave of cases brought by hopeful contractors each believing that they have the likely prospect of receiving a contract if a particular function is outsourced. The disruption inherent in such cases likely would hinder the ability of the Department of Defense to establish, on a timely basis, its personnel needs in formulating its authorization requests to Congress, thereby impeding the

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[35] *Santa Barbara Applied Research, Inc.*, 98 Fed. Cl. at 542-43 (citing *Distributed Solutions, Inc.*, 539 F.3d at 1346 (''[T]he phrase, 'in connection with a procurement or proposed procurement,' by definition involves a connection with any stage of the federal contracting acquisition process, including 'the process for determining a need for property or services.' '')). *See alsoSanta Barbara Applied Research, Inc.*, 98 Fed. Cl. at 543 (''The substance of the [agency's] decision has been to stop procuring services from [the contractor] and to instead use [agency] civilian employees to do the same work. Thus, the insourcing decision in this case was made for the purpose of determining the need for contract services and thus was made 'in connection with a procurement decision.' '').

[36] *Santa Barbara Applied Research, Inc.*, 98 Fed. Cl. at 543.

[37] *Id.* at 544.

[38] *Warth*, 422 U.S. at 500.

[39] *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53 (1970).

[40] *Santa Barbara Applied Research, Inc.*, 98 Fed. Cl. at 544.

[41] *Id.*

[42] *Id.*

[43] *Hallmark-Phoenix 3, LLC*, 99 Fed. Cl. at 66-67.

[44] *Id.* at 68-80.

[45] *Id.* at 68-72.

[46] *Id.* at 72.

[47] *Id.*

[48] *Id.* at 75.

[49] 307 F.3d 1374, 1379 (Fed. Cir. 2002) (finding that Section 8118 of the NDAA for Fiscal Year 1988 did ''not create a cause of action inviting private parties to enforce the provision in courts'').

[50] *Hallmark-Phoenix 3, LLC*, 99 Fed. Cl. at 77 (citation omitted). Judge Allegra even commented that the language added to the NDAA for Fiscal Year 2011 regarding 10 U.S.C. § 2463 would not have changed his analysis. *Id.* at 74 n.15 (''While the amended statute makes specific reference to the existing Defense Department guidelines, that feature does not, in this court's view, make insourcing decisions under the amended statute reviewable. This is because the amendment does not fundamentally change the nature of section 2463 as focusing on legislative oversight, rather than judicial review, as the means of enforcement. Indeed, as mentioned above, the same Congress that passed the requirements highlighted in Santa Barbara also imposed new reporting and review requirements to bolster its legislative oversight of this issue.'').

[51] That being said, Judge Allegra indicated that the ''court does not come to this decision lightly, fully recognizing the potential impact on plaintiff.'' *Id.* at 80.

legislative oversight process that Congress intended to establish.''[52]

Also, by agreeing with the government's prudential standing argument, Judge Allegra did not have to decide if the contactor possessed standing as an interested party. However, he commented that the contractor's argument that it was an interested party was based on a ''pile of assumptions.''[53] Judge Allegra stated that it was '' debatable whether [the contractor] qualifies as a prospective bidder within the meaning of the Federal Circuit's definition of interested party.''[54]

B. ***Two COFC Decisions Issued in 2012 Favor the Analysis in Santa Barbara Applied Research, Inc.***

After Judge Allegra issued his decision in *Hallmark-Phoenix 3, LLC* in late 2011, two other COFC judges issued decisions on the same topic, and preferred Judge Firestone's analysis in *Santa Barbara Applied Research, Inc.* over Judge Allegra's analysis in *Hallmark Phoenix 3. LLC*.

1. Triad Logistics Services Corp.

In *Triad Logistics Services Corp.*, the contractor protested the agency's decision to insource work previously performed by the contractor based, in part, upon the cost analysis performed under 10 U.S.C. § 2463.[55] Unlike the situation in *Santa Barbara Applied Research, Inc.* and *Hallmark-Phoenix 3, LLC*, the contractor in *Triad Logistics Services Corp.*, protested the agency's decision to insource the work *after* the contractor's contract had ended on its own terms.[56] The agency also made its final determination to insource the work after the contract had ended.[57]

As an initial matter, Judge Horn stated that she ''favors the approach adopted in *SantaBarbara [Applied Research, Inc.]*,'' noting that ''the court first should determine whether there is subject matter jurisdiction generally, including subject matter jurisdiction to review insourcing decisions under 28 U.S.C. § 1491(b)(1) and standing as an interested party, before addressing questions related to prudential standing.''[58] After undertaking a robust critical analysis of the court's subject matter jurisdiction to review government insourcing decisions, she found that the alleged violations under 10 U.S.C. §§ 129a and 2463 were generally ''within the subject matter jurisdiction of this court.''[59]

However, persuaded by the government's arguments, Judge Horn ultimately concluded that the contractor did not possess standing as an interested party, mostly because the contractor's contract had ended and the government insourced the work *prior* to the contractor filing its current complaint.[60] Judge Horn also appeared to be influenced by the government's argument that the court could not ''fashion[] a workable remedy'' in this specific scenario because the agency personnel were already performing the insourced work.[61] That being said, she offered hope for future contractor challenges in her conclusion:

> This court concludes that Triad is not an interested party, and therefore, does not possess standing to sue. The court, however, does not conclude that an incumbent contractor challenging an insourcing decision could never satisfy the interested party requirements. In the case currently before the court, Triad's contract had been completed before the second complaint was filed in this court. Triad was in the unfortunate position that it no longer possessed a direct, economic interest in an Air Force contract when it filed suit. Moreover, if a contractor's ongoing contract is insourced after the enactment of the [NDAA for Fiscal Year 2011], that incumbent contractor could be in a different position than the plaintiff in this case.[62]

Also, because Judge Horn ultimately found that the contractor had no standing, she did not rule on the government's prudential standing arguments.[63]

2. Elmendorf Support Services Joint Venture

The most recent COFC case dealing with these jurisdictional issues is *Elmendorf Support Services Joint Venture*. Like the scenarios in *Santa Barbara Applied Research, Inc.* and *Hallmark–Phoenix 3, LLC*, here the agency decided to insource work currently being performed by the contractor after performing a cost analysis under 10 U.S.C. § 2463.[64] Prior to its contract end-

[52] *Id.* at 78. *See also id.* at 80 (''In the court's view, internal agency decisions of the sort at issue do not suddenly become reviewable because they are predicated on an insourcing decision. A contrary ruling would fling open the doors of this court to any contractor who can reasonably claim that an agency's insourcing decision denied it a contracting opportunity.'').

[53] *Id.* at 68 (''[T]here is no existing solicitation here. Nor is there any assurance that there ever will be one. If this court were to set aside the Air Force's insourcing decision, it is conceivable, if not likely, that the Air Force would simply make a second 'corrected' decision to in-source, the effect of which would be to deny plaintiff a contracting opportunity. Even if this court's rejection of the Air Force's insourcing decision resulted in a new procurement, there is no assurance that plaintiff could or would bid on that procurement. After all, the contract that plaintiff previously won was a small-business set aside. And there is no guarantee that the Air Force would once again reserve the requirements at issue for such a set aside, nor any statute or regulation of which the court is aware that would dictate that result.'') (citation and footnote omitted).

[54] *Id.* at 68.

[55] No. 11-43C, slip op. at 1-2 (Fed. Cl. Feb. 29, 2012).

[56] *Id.* at 5-8.

[57] *Id.* at 8. This situation arose because the agency performed a new set of cost analyses after the contractor's initial protest at COFC was dismissed without prejudice to allow the new analysis to occur. *Id.* at 7-8. The Contractor's first protest was filed at COFC on the date its contract ended. *Id.* at 7.

[58] *Id.* at 13.

[59] *Id.* at 11-19.

[60] *Id.* at 24-25.

[61] *Id.* at 26 (''The Air Force cannot easily reverse the insourcing decision which, according to defendant, has resulted in agency personnel performing the tasks that previously had been performed by Triad, following the end of Triad's contract, even if the court were to order another cost study analysis and the cost study analysis were to demonstrate that performance by Air Force personnel was more costly than contractor performance. Defendant points out the difficulties in fashioning a workable remedy, and, therefore of providing redress to this plaintiff, which no longer has an economic interest in the contract work since plaintiff's contract ended by its own terms, is further reason why plaintiff does not have standing to challenge the DOD insourcing decision.'').

[62] *Id.* at 33. Judge Horn commented, ''Because this court has concluded plaintiff is not an interested party and lacks standing, however, it is not for this court to determine if the [NDAA for Fiscal Year 2011] was enacted for the benefit of contractors or provides sufficient judicially manageable guidelines, to assist in providing standing for future plaintiffs wishing to challenge future insourcing decisions by the DOD.'' *Id.* (footnote removed).

[63] *Id.* at 26-33. Nonetheless Judge Horn did spend a considerable amount of time in her decision discussing Judge Firestone's and Judge Allegra's prudential standing analysis. *Id.*

[64] 2012 WL 236075, at *1-2.

  FCR ISSN 0014-9063

ing, the contractor protested the agency's decision to insource.[65]

Issued in June 2012, Judge Bruggink's opinion acknowledged that ''there exists a split among the judges of this court regarding whether the decision to insource contract services is reviewable.''[66] In concluding that the court possessed subject matter jurisdiction and that the contractor was an interested party, Judge Bruggink considered the approaches in *Santa Barbara Applied Research, Inc.* and *Hallmark–Phoenix 3, LLC*.[67] He agreed with Judge Firestone's decision in *Santa Barbara Applied Research, Inc.*

Like Judge Firestone, Judge Bruggink determined that the COFC had subject matter jurisdiction over the contractor's bid protest under 28 U.S.C. § 1491(b)(1) because:

> The substance of the [the agency's] decision here was to stop procuring services from plaintiff and instead to use government employees. Because that decision necessarily included the process for 'determining the need for . . . services' that plaintiff currently provides, the insourcing decision-making process was 'in connection with a procurement or proposed procurement' within the rather generous definition adopted by the Federal Circuit [in *Distributed Solutions, Inc.*[68]].'' [69]

The court also determined that the contractor was an interested party, and was not barred by the doctrine of prudential standing. Finding that the *Santa Barbara Applied Research, Inc.* was ''instructive,''[70] Judge Bruggink stated succinctly:

> Having concluded that there was a proposed procurement, we have no difficulty finding that plaintiff clearly has a financial interest in maintaining its incumbency. It has demonstrated its desire for the work and, but for the insourcing, we have every reason to assume it would still be on the job ... Here, in its most recent contractor performance assessment report, plaintiff was rated as excellent, and for the duration of the contract, there is no dispute that plaintiff has performed well. Thus, there is a substantial chance that, given the opportunity, plaintiff would perform the services in the future.[71]

The court summarily dismissed the government's argument that the court did not have jurisdiction over this bid protest due to prudential standing concerns, preferring Judge Firestone's approach over Judge Allegra's approach.[72] Apparently disagreeing with Judge Allegra's concern that finding jurisdiction over these types of protest would open the floodgates of litigation, Judge Bruggink explained:

> While we recognize that Congress no doubt was motivated by fiscal concerns in requiring periodic assessment of the relative costs of having services performed by outside contractors, and that this makes such protests very different in some regards from ones in which the concerns of the Competition in Contracting Act, 31 U.S.C. §§ 3551–56 (2006), are invoked, nevertheless, the procedures and standards required by these statutes circumscribe the government's ability to bring services in-house. At a minimum, incumbent contractors have an interest in ensuring that the calculus is done properly. This competitive impulse creates an incentive to expose ways in which the government may have acted improperly. *Refereeing such debates is routine work for the court.*[73]

The court was also persuaded by the analysis in *Match–E–Be–NashShe–Wish Band of Pottawatomi Indians v. Patchak*[74], a Supreme Court decision issued after oral arguments were held.[75] Judge Bruggink noted that the Supreme Court ''made it clear that the prudential standing test 'is not meant to be especially demanding.' . . . Moreover, the test 'forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' ''[76] It is unclear whether this Supreme Court decision would have affected Judge Allegra's analysis in *Hallmark–Phoenix 3, LLC*.

III. Conclusion. These decisions demonstrate how COFC judges can arrive at completely different conclusions when analyzing similar fact patterns. The stark contrast between Judge Firestone's and Judge Allegra's decisions is striking, and presents a hurdle for contractors attempting to protest an agency's decision to insource under 10 U.S.C. § 2463. Jurisdiction before the COFC is not guaranteed in any way until the Federal Circuit addresses the issue for all the judges of the COFC.

Although Judge Bruggink (and for the most part Judge Horn[77]) was persuaded by Judge Firestone's analysis in *Santa Barbara Applied Research, Inc.* finding jurisdiction, contractors cannot assume that other COFC judges will follow suit. Other judges may agree with Judge Allegra's analysis of prudential standing in *Hallmark–Phoenix 3, LLC* or be guided by the same policy concerns that underpinned his decision.

Until the Federal Circuit rules on this issue or congress adds legislation clarifying that the COFC has jurisdiction over this type of protest, contractors must remain vigilant and careful when arguing for jurisdiction. Due to budget constraints and general government policies, insourcing and the related cost analyses under 10 U.S.C. § 2463 are not going away.

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[65] *Id.* at *1-2.
[66] *Id.* at *3.
[67] *Id.* at *3. Judge Bruggink likely did not rely upon *Triad Logistics Services Corp.* because the facts before Judge Bruggink more closely resembled the facts in *Santa Barbara Applied Research, Inc.* and *Hallmark–Phoenix 3, LLC*.
[68] 539 F.3d 1340 (Fed. Cir. 2008).
[69] 2012 WL 236075, at *3-4 (citations omitted).
[70] *Id.* at *4.
[71] *Id.* at *4.
[72] *Id.* at *4-5.
[73] *Id.* at *5.
[74] Nos. 11–246, 11–247, 2012 WL 2202936 (U.S. June 18, 2012).
[75] 2012 WL 236075, at *5.
[76] *Id.* at *5 (quoting *Match–E–Be–NashShe–Wish Band of Pottawatomi Indians v. Patchak*, Nos. 11-246, 11-247, 2012 WL 2202936, at *9 U.S., June 18, 2012)).
[77] One lesson learned from Judge Horn is that a contractor should file its protest related to an agency's decision to insource under 10 U.S.C. § 2463 prior to the expiration of its contract.