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Government Contracts Alert

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Key Points

- A potential offeror may have jurisdiction to protest a government insourcing decision at the Court of Federal Claims.
- This issue will likely need to be resolved by the Court of Appeals for the Federal Circuit.

New Court of Federal Claims Decision Is an Opportunity for Prospective Bidders

When the government decides to "insource" work, rather than contract it out, companies that would have competed for the work sometimes wish to protest that decision. The Court of Federal Claims (COFC) has held that a prospective bidder lacks standing to protest, unless it holds a current contract for the work being insourced. A recent decision calls that rule into question, holding that a company without a current contract may have standing to challenge the government's insourcing decision if the company would have submitted a proposal in response to a solicitation to outsource the work.

Prospective bidders disappointed by the government's decision to insource have had limited recourse. The COFC has held that prospective bidders seeking to challenge a government insourcing decision lacked the direct economic interest required for standing, unless they hold a current contract for the work the government intends to insource. *See, e.g., Triad Logistics Services Corp. v. United States*, No. 11-43C, 2012 WL 5187846, at * 20 (Fed. Cl. Feb. 29, 2012); *Elmendorf Support Services Joint Venture v. United States*, No. 12-346C, 2012 WL 3932774, at * 3 (Fed. Cl. Sept. 10, 2012).

Loomacres, Inc. v. United States, No. 17-824C, 2017 WL 4937752 (Fed. Cl. Oct. 31, 2017), however, found that a company had the requisite direct economic interest based only on its ability and readiness to submit a bid for the work. Loomacres had provided the United States Air Force with Bird Aircraft Strike Hazard program-related services at Cannon Air Force Base until 2016, when its contract with the Air Force expired. Instead of issuing a solicitation for the work, the Air Force entered into an Interagency Agreement with the United States Department of Agriculture for the same services. Loomacres attempted to protest the insourcing decision to the Government Accountability Office, but was dismissed on the grounds that the protest was untimely and failed to establish how the Air Force had violated procurement

requirements or procurement-related statutes or regulations. Loomacres, Inc., B-414019.1 (Comp. Gen. Jan. 18, 2017).

Loomacres then filed a protest at the COFC pursuant to the Tucker Act, 28 U.S.C. § 1491. The government moved to dismiss, arguing that Loomacres lacked standing and citing *Triad and Elmendorf*. The COFC denied the government's motion to dismiss because it determined that Loomacres was an interested party in the procurement decisions made by the Air Force. To have standing under the Tucker Act, the COFC has held that a party must demonstrate that it is an "actual or prospective bidder" with a "direct economic interest in the procurement." *See, e.g., Int'l Genomics Consortium v. United States*, 104 Fed. Cl. 669, 673 (2012). The court determined that Loomacres possessed a direct economic interest in the outcome of the case because it was qualified and prepared to submit a bid had a competition taken place. The court acknowledged *Triad and Elmendorf*, but held that the language of the Tucker Act did not require a protestor to have a current contract in order to have standing. Noting that the prior decisions cited the "difficulty of fashioning a remedy" for a prospective bidder lacking a current contract, the *Loomacres* court found that this difficulty should be "a pragmatic consideration to be weighed in determining the propriety of fashioning injunctive relief, not an issue of whether, as a threshold matter, a protestor is an interested party able to challenge that decision."

Thus, it seems that the judge in *Loomacres* would have found standing in *Triad and Elmendorf*, despite the difficulty in providing an appropriate remedy to the protestor. Given this apparent split within the COFC, we think that these decisions will need to be settled by the Federal Circuit. While the Federal Circuit has not directly addressed this issue, in *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340 (Fed. Cir. 2008), it held that contractors who submitted proposals in response to a government Request for Information before the decision to insource was made—but who nevertheless did not have a current contract with the government—had standing as interested parties with a direct economic interest. This precedent may support the *Loomacres* decision, but until the Federal Circuit squarely addresses the issue, a party seeking to protest a government insourcing decision will need to carefully craft its complaint to lay the groundwork to rebut an inevitable motion to dismiss from the Department of Justice.

This is the second interesting case involving standing from the COFC in the last two months. As we discuss here, the COFC recently discussed the issues of standing with regard to the government's decision to sole source an award.

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