In the United States Court of Federal Claims

No. 11-43C
Filed: February 29, 2012
Issued for Publication: April 16, 2012[1]

TRIAD LOGISTICS SERVICES CORPORATION,		
Plaintiff,	*	**Government Contracts; Subject Matter Jurisdiction; In-Sourcing; Standing; Interested Party; Prudential Standing.**
v.	*	
UNITED STATES,	*	
Defendant.	*	

Edward J. Kinberg, Kinberg & Associates, LLC, Melbourne, FL, for the plaintiff. With him was **R. Brent Blackburn**, Kinberg & Associates, LLC, of counsel.

Elizabeth A. Speck, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for the defendant. With her were **Jeanne E. Davidson**, Director, Commercial Litigation Branch, and **Tony West**, Assistant Attorney General, Civil Division.

O P I N I O N

HORN, J.

FINDINGS OF FACT

Plaintiff, Triad Logistics Services Corporation (Triad), a Florida based corporation, was awarded Contract No. FA3022-07-C-0001-P00024 (the contract) for vehicle operations and maintenance services at Columbus Air Force Base in Columbus, Mississippi by the United States Air Force. The contract was a one year contract with four option years. Plaintiff provided the required services during the first year, after

[1] The parties were given the opportunity to propose redactions to the court. Neither party proposed any redactions. The opinion, therefore, is unsealed and issued for publication.

which the Air Force exercised the first three option years.[2] On September 30, 2010, at the end of the third option year, pursuant to 48 C.F.R. § 52.217-8 (Nov. 1999), the Air Force did not exercise the full fourth option year, but modified the contract and extended the period of performance until November 29, 2010, on which date the contract between plaintiff and the Air Force ended by its own terms. The Air Force subsequently made a decision to in-source the work Triad had previously performed.

On January 28, 2008, Congress amended 10 U.S.C. § 2463[3] and instructed consideration of using Department of Defense (DoD) civilian employees to perform DoD functions on a more regular basis. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, 60-61 (Jan. 28, 2008). Section 2643 of Title 10 of the United States Code directed 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." 10 U.S.C. § 2463(a). Additionally, 10 U.S.C. § 2463(b) instructed that the guidelines and procedures developed under 10 U.S.C. § 2463(a) shall provide:

> special consideration to be given using Department of Defense civilian employees to perform any function that--
>
> (1) is performed by a contractor and--
>
> (A) has been performed by Department of Defense civilian employees at any time during the previous 10 years;
>
> (B) is a function closely associated with the performance of an inherently governmental function;
>
> (C) has been performed pursuant to a contract awarded on a non-competitive basis; or
>
> (D) has been performed poorly, as determined by a contracting officer during the 5-year period preceding the date of such determination,

[2] Triad alleges, however, that, "[d]uring the course of the base year and the first two option years, the scope of work was reduced, resulting in Triad reducing its labor force…."

[3] As discussed below, 10 U.S.C. § 2463 was subsequently modified in January 2011 by the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111–383, § 323(b), 124 Stat. 4127, 4184 (Jan. 7, 2011).

> because of excessive costs or inferior quality; or
>
> (2) is a new requirement, with particular emphasis given to a new requirement that is similar to a function previously performed by Department of Defense civilian employees or is a function closely associated with the performance of an inherently governmental function.[4]

10 U.S.C. § 2463(b). Furthermore, 10 U.S.C. § 2643(c) prohibits the Secretary of Defense from conducting:

> a public-private competition under this chapter, Office of Management and Budget Circular A-76,[5] or any other provision of law or regulation before--
>
> (1) in the case of a new Department of Defense function, assigning the performance of the function to Department of Defense civilian employees;
>
> (2) in the case of any Department of Defense function described in subsection (b), converting the function to performance by Department of Defense civilian employees; or
>
> (3) in the case of a Department of Defense function performed by Department of Defense civilian employees, expanding the scope of the function.

10 U.S.C. § 2463(c).

On April 4, 2008, the DoD issued guidelines and procedures to implement 10 U.S.C. § 2463. The guidelines noted that 10 U.S.C. § 2463 required the "Under Secretary of Defense for Personnel and Readiness to develop guidelines and procedures to ensure that the Department considers using DoD civilian employees to perform new functions or functions that are performed by contractors." (internal citation omitted). On March 4, 2009, the President directed the Office of Management and Budget (OMB), in collaboration with heads of various agencies, including the Secretary of Defense, to issue guidance to assist agencies in identifying "contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate

[4] Neither party has alleged that any of special considerations identified in 10 U.S.C. § 2463(b) are applicable in the above-captioned case or to Triad's contract.

[5] Defendant notes that "A-76 was a circular created by OMB to establish Federal policy for determining whether a particular Government need should be fulfilled by Government employees or by private-sector contractors."

appropriate corrective action," including modification or cancellation of contracts when appropriate.

On April 8, 2009, the DoD issued Resource Management Decision 802 (RMD 802), which realigned resources for the DoD for fiscal years 2010 through 2014, by decreasing funding for contract support and increasing funding for civilian manpower authorizations, including the Defense acquisition workforce. On May 28, 2009, the Deputy Secretary of Defense released a guidance document titled "In-sourcing Contracted Services – Implementation Guidance." The guidelines explained that "[i]n-sourcing is a high priority of the Secretary of Defense," and that "10 U.S.C. § 2463 requires the Department to ensure that consideration is given to using, on a regular basis, DoD civilian employees to perform functions that are performed by contractors but could be performed by DoD civilian employees."

The guidelines suggested that when considering conversions from contractor to DoD, the following considerations would support in-sourcing: the function is inherently governmental or is exempt from private sector performance, the contract is for personal services, the contract has contract administration problems, or a cost analysis shows that DoD civilian performance is more cost effective than contractor performance. The guidelines also indicated that:

> If possible, contracted services that have option-years that will be exercised during FY [fiscal year] 2010 should be identified for in-sourcing in FY 2010. However, contracted services that require re-competition during FY 2010 should be given priority over contracted services that have option years remaining since in-sourcing services that require re-competition would save the Department the time, effort, and costs of re-competing the contract.

For an in-sourcing decision based on cost, the guidelines also noted that "services may be in-sourced if a cost analysis shows that DoD civilian employees would perform the work more cost effectively than the private sector contractor."

Following the issuance of the May 28, 2009, guidelines, each Air Force major command was instructed to identify candidates for in-sourcing. Once each major command had identified candidates for in-sourcing, they were instructed to ascertain whether the identified contracts were viable candidates for in-sourcing by using the COMPARE cost calculating tool.[6] On January 29, 2010, the DoD published Directive-Type Memorandum [DTM] 09-007, titled "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support" (DTM 09-007). DTM 09-007 established rules "for use in estimating and comparing the full costs of military and DoD

[6] Defendant indicates that "COMPARE is a DoD costing software program that was designed to assist analysts in developing, documenting, and comparing the relative costs of operating commercial activities by in-house, other Government agency, or commercial entities for purposes of OMB Circular A-76."

civilian manpower and contract support." The DoD reissued DTM 09-007 on October 21, 2010 to establish that DTM 09-007 would expire on September 1, 2011.[7] The Air Force subsequently updated the COMPARE database with costing procedures outlined in DTM 09-007.

In accordance with the May 28, 2009, guidelines, the Air Force began to identify candidates suitable for in-sourcing. On August 19, 2009, the Air Education and Training Command was instructed to identify candidates suitable for in-sourcing for fiscal year 2010, as well as consider candidates for fiscal years 2011-2015. Subsequently, on October 24, 2009, the Air Education and Training Command requested its Bases to identify candidates for in-sourcing and attached a preliminary list of contracts which were potential in-sourcing candidates for fiscal years 2010-2015, including Triad's contract.[8]

On June 22, 2010, the Air Force held a meeting with Triad employees and informed Triad of the Air Force's intent to in-source the work Triad was performing for the Air Force. That same day, June 22, 2010, the Air Force sent Triad written notice of its intent to in-source the work then being performed under Contract No. FA3022-07-C-0001-P00024. The notice stated, in part:

> The purpose of this letter is to notify Triad Logistics that contract number FA3002-07-C-0001 [sic] for vehicle operations and maintenance on Columbus Air Force Base, Mississippi was indentified and approved as a candidate for the RMD 802 initiative (in accordance with Secretary of Defense Letter dated 28 May 09). The Government will initiate the process of in-sourcing this effort in the upcoming days…. The Government retains the right to unilaterally exercise the option on this contract or extend the service of this contract in conjunction with the current terms of the contract.

Subsequently, on September 30, 2010, the Air Force declined to exercise the fourth option year in Triad's contract, and instead modified the contract to extend the period of performance to November 29, 2010, on which date plaintiff's contract with the Air Force ended.

On July 21, 2010, the Air Education and Training Command, using DTM-COMPARE,[9] issued a cost study for the contract work Triad was performing, titled

[7] The reason for the reissue was DTM 09-007 was effective January 29, 2010 and was to be converted "to a new DoD Instruction within 180 days," but was not so converted.

[8] The potential candidates for in-sourcing were identified as "Pre-Decisional FY10-15 RMD 802 Candidates."

[9] The database was renamed DTM-COMPARE. In a March 1, 2010 memorandum, the Air Force Directorate of Manpower, Organization, and Services directed the use of

"Memorandum of Intent to In-source a Contracted Activity [Vehicle Operations (Columbus) and FA3022-07-C-0001]." (brackets in original). The memorandum stated: "Contracted services may be in-sourced if a cost analysis shows that the DoD civilian employees would perform the work more cost effectively than the private sector contractor." The cost analysis determined that the total cost of contractor performance under the contract was $8,576,987.00 and that the total cost of agency performance would be $7,707,538.00, for a cost difference of $869,449.00, or a 10.14% reduction in cost to in-source the required services.

On August 30, 2010, Triad filed a protest with the General Accountability Office (GAO), challenging the reasonableness of the Air Force's decision to in-source air field logistics support services based upon its cost analysis. See Matter of Triad Logistics Servs. Corp., B-403726, 2010 WL 4808381 (Comp. Gen. Nov. 24, 2010). At the GAO, Triad alleged that under 10 U.S.C. § 2463, the cost of in-sourcing would be more expensive. The GAO concluded that "Triad's protest fails to state a valid basis of protest." Matter of Triad Logistics Servs. Corp., B-403726, 2010 WL 4808381, at *2. The GAO stated:

> In Aleut Facilities Support Servs., LLC, B–401925, Oct. 13, 2009, 2009 CPD para. 202, we considered a similar protest challenging the agency's decision to cancel a solicitation to perform work in-house on the basis that the cost comparison performed by the agency violated DOD's in-sourcing guidance (as well as that the requirement was not one given priority under section 2463). We held that the protest failed to state a valid basis of protest, finding that section 2463 does not require a cost comparison and that, since the cited guidance issued pursuant to section 2463 was only internal DOD policy, the assertion that the agency did not adhere to that policy guidance is not a basis for challenging the agency's actions.

Matter of Triad Logistics Servs. Corp., B-403726, 2010 WL 4808381, at *2. In response to Triad's argument that GAO review was authorized by 10 U.S.C. § 129a (2006), the GAO determined

> the statue on which the protester's argument is founded - 10 U.S.C. sect. 129a - is not a procurement statute. Nor does it bear directly on federal agency procurements; rather, it sets forth the general personnel policy of DOD. Moreover, the provision does not require a cost comparison between agency and contractor performance; it requires only that agencies use the "least costly form of personnel consistent with military requirements and other needs of the Department."

Matter of Triad Logistics Servs. Corp., B-403726, 2010 WL 4808381, at *3 (quoting 10 U.S.C. § 129a). Therefore, on November 24, 2010, the GAO dismissed Triad's protest.

DTM-COMPARE to determine if in-sourcing the contractor's work would be appropriate after potential candidates were identified.

After the GAO denied Triad's protest, Triad filed its first complaint in this court on November 29, 2010, the day Triad's contract ended. As in its second protest, which is now before the court, plaintiff alleged in its first complaint that the Air Force had improperly decided to in-source the work Triad had previously performed under its contract with the Air Force, and had failed to make a like comparison between Triad's costs and the government's costs in order to support the in-sourcing decision. In its first complaint in this court, plaintiff requested that the court enjoin the Air Force from in-sourcing its work "until such time as the Air Force completes a proper cost study to determine if in-sourcing will be cost effective and makes a proper decision as to whether the work should be performed under a competitively awarded contract or performed by the Air Force."

An initial hearing was held on Triad's first complaint. Subsequently, the defendant acknowledged that both minor errors and one material error had been made in the original cost study analysis conducted by the Air Force to support the agency decision to in-source. The defendant acknowledged that the minor errors were: the Air Force had not included the custodial services provided by Triad, the Air Force had not adjusted the contract cost for income tax, and the required fax machine had been included in the costs to the government. The material error was that the government incorrectly had listed the automobile parts costs as minor items costs, instead of material and supply costs, the result of which was a "net increase of $546,203.00 to the Government proposal." Corrections of all the acknowledged errors in the recalculated cost study "resulted in an increase of $592,103.00 to the government's estimate." On December 9, 2010, plaintiff's first complaint was dismissed by the court, in order to allow the agency to perform recalculations of the cost analysis and to make a final in-sourcing decision after consideration of the recalculated cost analysis. On December 10, 2010, judgment was entered and the plaintiff's first complaint was dismissed, without prejudice.

After the court's dismissal, without prejudice, of plaintiff's first complaint, the Air Education and Training Command, using DTM-COMPARE, issued a revised cost study for the work covered in Triad's contract, titled "Memorandum of Intent to In-source a Contracted Activity [Vehicle Operations (Columbus) and FA3022-07-C-0001]." (brackets in original). The justification memorandum in support of the in-sourcing decision stated: "Contracted services may be in-sourced if a cost analysis shows that DoD civilian employees would perform the work more cost effectively than the private sector contractor." The cost analysis determined that the total cost of the contractor performance under the contract was $8,578,569.00,[10] and the total cost of agency performance would be $8,299,641.00, for a cost difference of $278,928.00, or a 3.25% reduction in cost to in-source the required services. The higher cost of agency

[10] The defendant explained that the increase for the total cost of contractor performance from $8,576,987.00 to $8,578,569.00 was because the "contract cost projections calculated based upon the updated guidance differ slightly from the projections calculated in the original cost analysis. The impact of the correction is an overall increase of $1,582.00 to the contract cost estimate."

performance from the earlier cost analysis was the result of the agency re-calculating the acknowledged errors, as well as the Air Force "using the most current Air Force guidance available at the time of the re-calculations."

The Air Force concluded, again, on December 16, 2010, at a time when Triad no longer had a contract with the Air Force, that the decision to in-source the work formerly performed by Triad would be cheaper than contractor performance. On January 14, 2011, Triad filed a second protest in this court. In Triad's second protest, currently before the court, plaintiff asserts that the Air Force's "in-sourcing decision, and whatever findings and conclusions are alleged to support it, are agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' to include being an unconstitutional application of the Air Force's in-sourcing procedures that denies Triad due process of law." Triad requests "this court to direct the Air Force to set aside the Air Forces' [sic] second decision to in-source and conduct a new study in accordance with law, regulation and applicable guidance." Triad further requests if the new cost study concludes in-sourcing would be more expensive than contractor performance, the court direct the Air Force to "issue a competitive solicitation." Triad alleges that both cost studies failed to account for the proper number of personnel required to perform the work, and, therefore, "[n]either study included the cost to the Federal Government in determining the total cost of performance."

DISCUSSION

The defendant argues that this court does not have jurisdiction over plaintiff's claims because Triad "is not an 'interested party' for purposes of the Tucker Act." Defendant also argues that Triad lacks "prudential standing," which "requires the plaintiff to demonstrate, at a minimum, that its interest is 'arguably within the zone of interests to be protected or regulated' by the statute at issue." (quoting Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. 630, 632 (2002), aff'd, 369 F.3d 1298 (Fed. Cir. 2004)). According to the defendant, "[t]he plaintiff must be a 'direct beneficiar[y]' of the statute at issue, rather than benefit 'incidentally' from the statute." (quoting Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. at 634) Furthermore, defendant asserts: "[t]he Court should dismiss this case because the decision not to procure is committed to agency discretion by law." In contrast, plaintiff argues that its protest is properly before the court because the court has protest jurisdiction and Triad alleges "a violation of statute, regulation or procedure in connection with a procurement or proposed procurement…and as such, this Court has jurisdiction pursuant to 28 U.S.C. § 1491(b)."

It is well established that "'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011); see also Hertz Corp. v.

Friend, 130 S. Ct. 1181, 1193 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." (citing Arbaugh v. Y & H Corp., 546 U.S. at 514)); Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340, 1342 (Fed. Cir. 2001) ("[A] court has a duty to inquire into its jurisdiction to hear and decide a case." (citing Johannsen v. Pay Less Drug Stores N.W., Inc., 918 F.2d 160, 161 (Fed. Cir. 1990))); View Eng'g, Inc. v. Robotic Vision Sys., Inc., 115 F.3d 962, 963 (Fed. Cir. 1997) ("[C]ourts must always look to their jurisdiction, whether the parties raise the issue or not."). "The objection that a federal court lacks subject-matter jurisdiction…may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." Arbaugh v. Y & H Corp., 546 U.S. at 506; see also Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1346 (Fed. Cir. 2008) ("[A]ny party may challenge, or the court may raise sua sponte, subject matter jurisdiction at any time." (citing Arbaugh v. Y & H Corp., 546 U.S. at 506; Folden v. United States, 379 F.3d 1344, 1354 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005); and Fanning, Phillips & Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998))); Pikulin v. United States, 97 Fed. Cl. 71, 76, appeal dismissed, 425 F. App'x 902 (Fed. Cir. 2011). In fact, "[s]ubject matter jurisdiction is an inquiry that this court must raise *sua sponte*, even where, as here, neither party has raised this issue." Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings, 370 F.3d 1354, 1369 (Fed. Cir.) (citing Textile Prods., Inc., v. Mead Corp., 134 F.3d 1481, 1485 (Fed. Cir.), reh'g and en banc suggestion denied (Fed. Cir.), cert. denied, 525 U.S. 826 (1998)), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. dismissed as improvidently granted, 548 U.S. 124 (2006).

Pursuant to the Rules of the United States Court of Federal Claims (RCFC) and Rule 8(a) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds for the court's jurisdiction," and "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(1), (2) (2011); Fed. R. Civ. P. 8(a)(1), (2) (2011); see also Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57, 570 (2007)). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir.) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)), reh'g denied (Fed. Cir. 1997); see also Klamath Tribe Claims Comm. v. United States, 97 Fed. Cl. 203, 208 (2011); Gonzalez-McCaulley Inv. Grp., Inc. v. United States, 93 Fed. Cl. 710, 713 (2010). "Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998); see also McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1363 n.9 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part) (quoting C. Wright and A. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004)). As stated in Ashcroft v. Iqbal, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' [Bell Atlantic Corp. v. Twombly,] 550 U.S. at 555, 127 S. Ct. 1955. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual

enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. at 557).

When deciding a case based on a lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. at 555-56 (citing Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002))); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); United Pac. Ins. Co. v. United States, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003).

The Tucker Act grants jurisdiction to this court as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2006). As interpreted by the United States Supreme Court, the Tucker Act waives sovereign immunity to allow jurisdiction over claims against the United States (1) founded on an express or implied contract with the United States, (2) seeking a refund from a prior payment made to the government, or (3) based on Federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained. See United States v. Navajo Nation, 556 U.S. 287, 289-90 (2009); United States v. Testan, 424 U.S. 392, 400 (1976); see also Greenlee Cnty., Ariz. v. United States, 487 F.3d 871, 875 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2007), cert. denied, 552 U.S. 1142 (2008); Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999). In Ontario Power Generation, Inc. v. United States, 369 F.3d 1298 (Fed. Cir. 2004), the court stated, "[t]he underlying monetary claims are of three types…. First, claims alleging the existence of a contract between the plaintiff and the government fall within the Tucker Act's waiver." Ontario Power Generation, Inc. v. United States, 369 F.3d at 1301 (citations omitted).

The Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, §§ 12(a), 12(b), 110 Stat. 3870, 3874 (1996) (codified at 28 U.S.C. § 1491(b)(1)-(4) (2006)), amended the Tucker Act, providing the United States Court of Federal Claims with a statutory basis for protests. See Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1330-32 (Fed. Cir. 2001). The statute provides that protests of agency procurement decisions are to be reviewed under Administrative Procedure Act (APA) standards, making applicable the standards outlined in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) and the line of cases following that decision. See Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324,

1329 (Fed. Cir.) (citing Scanwell for its reasoning that "suits challenging the award process are in the public interest and disappointed bidders are the parties with an incentive to enforce the law."), reh'g denied (Fed. Cir. 2004); Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004) ("Under the APA standard as applied in the Scanwell line of cases, and now in ADRA cases, 'a bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" (quoting Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332)); see also PAI Corp. v. United States, 614 F.3d 1347, 1351 (Fed. Cir. 2010); Axiom Resource Mmgt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009); Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2003).

Subject Matter Jurisdiction to Review In-Sourcing Decisions

The United States Court of Appeals for the Federal Circuit has stated: "[u]nder 28 U.S.C. § 1491(b)(1), the Court of Federal Claims is authorized 'to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract...or [to] any alleged violation of statute or regulation in connection with a Federal procurement or proposed procurement.'" Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1358 (Fed. Cir. 2009) (quoting 28 U.S.C. § 1491(b)(1)) (bracket and omission in original); see also Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1388 (Fed. Cir.), reh'g en banc denied (Fed. Cir. 2011); Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1243 (Fed. Cir. 2010); Centech Grp., Inc. v. United States, 554 F.3d 1029, 1036 (Fed. Cir. 2009); Distrib. Solutions, Inc. v. United States, 539 F.3d 1340, 1344 (Fed. Cir.), reh'g denied (Fed. Cir. 2008); see also Akal Sec., Inc. v. United States, No. 11-562C, 2011 WL 6937386, at *10 (Fed. Cl. Dec. 29, 2011) (quoting Distrib. Solutions, Inc. v. United States, 539 F.3d at 1344) ("A two-part test is applied to determine whether a protester is an 'interested party.' A protestor must establish 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.'").

As explained by the Federal Circuit, "Congress sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims. Therefore, as part of the ADRA [Administrative Dispute Resolution Act], Congress enacted a sunset provision, which terminated federal district court jurisdiction over bid protests on January 1, 2001. Pub. L. No. 104-320, § 12(d), 110 Stat. at 3875.[11]

[11] Despite the enactment of the ADRA provisions by which the jurisdiction of the United States District Courts over bid protests expired on January 1, 2001, by virtue of the sunset provision, the text of 28 U.S.C. § 1491(b)(1) still states, "[b]oth the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an 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

It is clear that Congress's intent in enacting the ADRA with the sunset provision was to vest a single judicial tribunal with exclusive jurisdiction to review government contract protest actions." Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079 (Fed. Cir.) reh'g and reh'g en banc denied (Fed. Cir. 2001) (footnote omitted); see also Res. Conservation Grp., LLC v. United States, 597 F.3d at 1243 (quoting H.R. Rep. No. 104-841, at 10 (1996) (Conf. Rep.)) ("The ADRA expanded the jurisdiction of the Court of Federal Claims to hear bid protest cases, ultimately giving the court exclusive jurisdiction to review 'the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims.'"). Notably, "[t]he Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, provides the Court of Federal Claims jurisdiction to render judgment on 'an 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.'" Turner Constr. Co., Inc. v. United States, 645 F.3d at 1388; see also Distrib. Solutions, Inc. v. United States, 539 F.3d at 1344 ("§ 1491(b) confers exclusive jurisdiction upon the Court of Federal Claims over bid protests against the government."); Fire-Trol Holdings, LLC v. United States, 65 Fed. Cl. 32, 34 (2005) (quoting 28 U.S.C. § 1491(b)(1)) ("Under the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b), this Court has exclusive jurisdiction over 'any 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 [sic] proposed procurement.'").

The first issue presented in Triad's second complaint is whether, pursuant to its Tucker Act protest jurisdiction, the United States Court of Federal Claims has jurisdiction to consider the protest brought by Triad to contest an in-sourcing decision by the DoD. Plaintiff alleges that the Tucker Act "does not include a limitation on the type of statute or the statutes located in the United States Code, it simply states 'any alleged violation of a [sic] Statute or Regulation [sic].'" Plaintiff's statement, however, is overly broad. In the Tucker Act, the operative phrase, "alleged violation of statute or regulation" is modified by "in connection with a procurement or a proposed procurement." At a minimum, in a protest, brought pursuant to 28 U.S.C. § 1491(b)(1), the statute or regulation identified by plaintiff must relate in some way to a procurement or a proposed procurement.

Plaintiff also argues that as part of the in-sourcing decision process, 10 U.S.C. § 129a and 10 U.S.C. § 2463 were violated. The statute at 10 U.S.C. § 129a, titled "General personnel policy," instructs the Secretary of Defense to "use the least costly form of personnel consistent with military requirements and other needs of the Department," and "consider particularly the advantages of converting from one form of personnel (military, civilian, or private contract) to another for the performance of a specified job." 10 U.S.C. § 129a. Plaintiff also cites to 10 U.S.C. § 2463, titled

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regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

"Guidelines and procedures for use of civilian employees to perform Department of Defense functions," which states in part: "The 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." 10 U.S.C. § 2463(a)(1). Triad claims that these "statutes, regulations and policies related to a procurement decision were violated and that as a result of those violations the Government's determination of the 'least costly' method of obtaining the services was arbitrary and capricious and that allowing the decision to stand without review impairs the integrity of the federal procurement system."

Notably, there is no binding, precedential authority regarding this court's jurisdiction to review DoD in-sourcing decisions. Two decisions in United States Court of Federal Claims have addressed in-sourcing jurisdiction, each emphasizing a different basis for determining threshold jurisdictional issues before proceeding to the merits of a plaintiff's claims. See Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65, further injunction and expedited appeal denied, 429 F. App'x 983 (Fed. Cir.), appeal voluntarily dismissed, 431 F. App'x 923 (Fed. Cir. 2011); see also Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. 536 (2011). In Santa Barbara, the court framed the issue as follows:

> Whether this court has jurisdiction to hear SBAR's challenge to the government's in-sourcing decision—and whether SBAR has standing to bring that challenge—is a threshold question that turns on whether the government's in-sourcing decision was made "in connection with a procurement" within the meaning of section 1491(b)(1) and whether SBAR is an "interested party" within the meaning of section 1491(b)(1).

Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542. The Judge in Hallmark-Phoenix, after acknowledging the decision in Santa Barbara, addressed his case first from the perspective of prudential standing, and concluded that, "[t]he court need not decide, however, whether plaintiff is an interested party for purposes of section 1491(b)(1) because it finds, in any event, that Hallmark fails to meet prudential standing requirements." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 68.

Using either approach, standing to sue must be addressed as a "threshold jurisdictional issue." Myers Investigative & Sec. Servs. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002). 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 in-sourcing decisions under 28 U.S.C. § 1491(b)(1) and standing as an interested party, before addressing questions related to prudential standing. See Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542; see also Wendland v. Guitierrez, 580 F. Supp. 2d 151, 153 n.2 (D.D.C. 2008) (finding an absence of subject matter jurisdiction, stating it improper to "conflate[] separate and distinct concepts: standing and subject matter jurisdiction….

Teamsters for a Democratic Union v. Sec'y of Labor, 629 F. Supp. 665, 668 (D.D.C. 1986) (citing Block v. Cmty. Nutrition Inst., 467 U.S. 340, 353, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984) (holding that a court first should determine if it has subject matter jurisdiction before addressing whether the plaintiff has standing)).") (footnotes omitted); but see Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65.

As discussed above, the Tucker Act provides the United States Court of Federal Claims with jurisdiction to review "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1); see also Turner Constr. Co., Inc. v. United States, 645 F.3d at 1288; Weeks Marine, Inc. v. United States, 575 F.3d at 1358. Following the end of Triad's contract, the Air Force did not issue a solicitation for further work, and no bids or proposals were solicited because the Air Force had decided to in-source the work Triad has been performing for the services required at Columbus Air Force Base. Moreover, the record does not reflect that a solicitation or request for proposals (RFP) was drafted by the Air Force. Therefore, unless the DoD decision to in-source, and not to procure the work Triad had previously been performing on its completed contract from outside contractors, can be considered part of a "proposed procurement," this court would not have subject matter jurisdiction to review the DoD's in-sourcing decision.

In Distributed Solutions, Inc. v. United States, 539 F.3d 1340, the Federal Circuit considered whether the government's decision to delegate to the prime contractor the task of awarding subcontracts for the purchase of software, instead of procuring the software directly through a competitive process, violated procurement statutes. See id. at 1343. Initially, the Federal Circuit determined that the protestors, who had submitted qualifying proposals in response to RFPs and who were prepared to submit bids to the anticipated additional RFP had established themselves as prospective bidders to a challenged procurement as interested parties, having "alleged a number of statutory and regulatory violations by the government in choosing to forego the direct competitive procurement process." Id. at 1344-45. The Federal Circuit noted that "[t]he only issue is whether the contractors' protest is 'in connection with a procurement or a proposed procurement' under the scope of § 1491(b)." Distributed Solutions, Inc. v. United States, 539 F.3d. In Distributed Solutions, the Federal Circuit noted that in RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999), "we held that 'the operative phrase "in connection with" is very sweeping in scope.'" Distrib. Solutions, Inc. v. United States, 539 F.3d at 1344-45 (quoting RAMCOR Servs. Grp., Inc. v. United States, 185 F.3d at 1289. As indicated in Magnum Opus Technologies, Inc. v. United States:

> The phrase "in connection with a procurement or a proposed procurement" is "very sweeping in scope." Distrib. Solutions, Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (quoting RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999)). The court may hear any claim "involv[ing] a connection with any stage of the federal contracting acquisition process, including 'the process for

> determining a need for property or services.'" [Distrib. Solutions, Inc. v. United States, 539 F.3d] at 1346 (quoting 41 U.S.C. § 403(2)).

Magnum Opus Tech., Inc. v. United States, 94 Fed. Cl. 512, 525, motion to amend denied, 94 Fed. Cl. 523 (2010).

After noting that the Tucker Act does not define the terms "procurement" or "proposed procurement," the Federal Circuit in Distributed Solutions looked to other statutes for a workable definition for the term "procurement" in the protest context, and determined:

> Congress did, however, expressly define "procurement" in 41 U.S.C. § 403(2), a subsection of the statutory provisions related to the establishment of the Office of Federal Procurement Policy in the Office of Management and Budget. These provisions give overall direction for federal procurement policies, regulations, procedures, and forms. Specifically, § 403(2) states "'procurement' includes all stages of the process of acquiring property or services, *beginning with the process for determining a need* for property or services and ending with contract completion and closeout." 41 U.S.C. § 403(2)[12] (emphasis added). We conclude that it is appropriate to adopt this definition to determine whether a "procurement" has occurred pursuant to § 1491(b). We note that § 1491(b)(1) includes both actual procurements and proposed procurements.

Distrib. Solutions, Inc. v. United States, 539 F.3d at 1345 (citations and footnote omitted). The Federal Circuit concluded: "Therefore, 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.'" Id. at 1346. In order to have protest jurisdiction in the Court of Federal Claims, a protestor, thus, must "demonstrate that the government at least initiated a procurement, or initiated 'the process for determining a need' for acquisition…." Id.; see also Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542-43.

A Judge of the United States Court of Federal Claims more recently explained:

> The United States Court of Appeals for the Federal Circuit considered the phrase "in connection with a proposed procurement," as used in 28 U.S.C. § 1491(b)(1), in Distributed Solutions, Inc. v. United States, 539 F.3d

[12] As of January 4, 2011, this definition of procurement has been recodified at 41 U.S.C.A. § 111 (2011). See Pub. L. 111-350, § 3, 124 Stat. 3681 (Jan. 4, 2011). The entirety of 41 U.S.C.A. § 111 states: "In this subtitle, the term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C.A. § 111.

> 1340, 1345–46 (Fed. Cir. 2008). Therein, our appellate court held that the phrase "procurement or proposed procurement" is defined to include "*all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.*" Id. at 1345 (quoting 41 U.S.C. § 403(2) (emphasis added)). Specifically, "in connection with a 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." Id. at 1346 (internal quotation marks and citations omitted).

Google, Inc. v. United States, 95 Fed. Cl. 661, 672 (2011).

In Resource Conservation Group, LLC v. United States, 597 F.3d 1238, the Federal Circuit again examined the definition of the term "procurement," when a protestor alleged a violation of the Administrative Procedure Act and a breach of an implied contract of fair and honest consideration, id. at 1241, after its bid for a lease of real property was not accepted by the Navy. Id. at 1240-41. In Resource Conservation Group, the court also looked to 41 U.S.C. § 403, noting that,

> although Congress did not define "procurement" in the Tucker Act, it did define "procurement" in 41 U.S.C. § 403(2), related to the establishment of the Office of Federal Procurement Policy, an office within the Office of Management and Budget that plays a central role in shaping the policies and practices federal agencies use to acquire goods and services. Section 403(2) states that procurement "includes all stages of the process of *acquiring property or services*, beginning with the process for determining a need for property or services and ending with contract completion and closeout."

Res. Conservation Grp., LLC v. United States, 597 F.3d at 1244 (quoting 41 U.S.C. § 403(2)) (emphasis in original). Referring to its earlier analysis, the Federal Circuit wrote, "[i]n Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), we concluded that the definition of 'procurement' in 41 U.S.C. § 403(2) should be utilized in determining the scope of section 1491(b)(1), as the statutory provisions related to the establishment of the Office of Federal Procurement Policy 'give overall direction for federal procurement policies, regulations, procedures, and forms.'" Res. Conservation Grp., LLC v. United States, 597 F.3d at 1244 (quoting Distrib. Solutions, Inc. v. United States, 539 F.3d at 1345).[13]

[13] In concluding that a bid for lease of real property was not a procurement, the Federal Circuit stated, although without offering a definition for their use of the term nonprocurement, "there is no indication in the legislative history that the ADRA was intended to deal with nonprocurement protests," and "[t]he issue of nonprocurement bid protests is mentioned nowhere in the legislative history." Res. Conservation Grp., LLC v. United States, 597 F.3d at 1244 (footnote omitted).

In Rothe Development, Inc. v. Department of Defense, 666 F.3d 336 (5th Cir. 2011), the United States Court of Appeals for the Fifth Circuit, found that exclusive jurisdiction for procurement protests rests with the United States Court of Federal Claims, and noted that the Federal Circuit's definition of procurement "'includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.'" Id. at 339 (quoting Distrib. Solutions, Inc. v. United States, 539 F.3d at 1345). The Fifth Circuit further stated, "this definition specifically includes the process for *determining a need for services*, which by necessity includes the choice to *refrain* from obtaining outside services. The very processes Rothe challenges reflect the DoD's attempt to economically determine whether and from whom to contract for goods and services." Rothe Develop., Inc. v. Dep't of Def., 666 F.3d at 339 (citing Vero Tech. Support, Inc. v. U.S. Dep't of Def., 437 F. App'x 766, 769-70 (11th Cir. 2011) (unpublished)) (emphasis in original).

Although the Federal Circuit in Resource Conservation Group and Distributed Solutions examined the definition of procurement, neither case examined, or offered, a definition for the phrase "proposed procurement." Nor does the legislative history for the ADRA provide guidance as to what actions a "proposed procurement" would or would not encompass. Therefore, as was indicated by the Federal Circuit:

> In construing statutory language, we look to dictionary definitions published at the time that the statute was enacted. At the time that the ADRA was enacted in 1996, the definition of "procurement contract" was "[a] government contract with a manufacturer or supplier of goods or machinery or services under the terms of which a sale or service is made to the government." Black's Law Dictionary 1208 (6th ed. 1990). "Procure" was defined as "to get possession of; obtain, acquire." Webster's Third New International Dictionary 1809 (1993). These definitions of "procurement" and of "procure" signify the act of obtaining or acquiring something, in the context of acquiring goods or services.

Res. Conservation Grp., LLC v. United States, 597 F.3d at 1243-44 (footnote omitted).

The definitions for "propose" in the New Oxford American Dictionary include: "put forth (an idea or plan) for consideration or discussion by others." New Oxford American Dictionary 1401 (3d ed. 2010). Therefore, applying the New Oxford American Dictionary's definition, a proposed procurement would seem to include the consideration to form a procurement, or the discussion about whether to procure goods or services. Consistent with these definitions, the Federal Circuit defined "procurement" to include "all stages of the process of *acquiring property or services*, beginning with the process for determining a need for property or services." Res. Conservation Grp., LLC v. United States, 597 F.3d at 1244 (emphasis in original). An agency's decision to determine "a need for property or services," necessarily, is part of and precedes the issuance of a request for proposal, request for quotation, or a request for information under the Circuit's definition. Therefore, for the purposes of establishing subject matter

jurisdiction, this court considers a proposed procurement to include "all stages of the process of *acquiring property or services*, beginning with the process for determining a need for property or services and ending with contract completion and closeout." Id.; see also Distrib. Solutions, Inc. v. United States, 539 F.3d at 1345; Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542-43; 41 U.S.C. § 403(2), recodified in 41 U.S.C.A. § 111.

In Santa Barbara, the court determined that challenges to in-sourcing decisions were within this court's jurisdiction and noted that:

> There appears to be no dispute that the Air Force's decision to in-source the work SBAR had been performing at four Air Force bases and continues to perform at five other locations is a decision that was made "in connection with a procurement" as that term has been interpreted by the Federal Circuit. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008) ("[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.'").

Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542. The Santa Barbara court concluded: "The substance of the Air Force's decision has been to stop procuring services from SBAR and to instead use Air Force civilian employees to do the same work. Thus, the in-sourcing decision in this case was made for purposes of determining the need for contract services and thus was made 'in connection with a procurement decision.' For this reason, the court agrees with both the government and SBAR that SBAR has properly invoked the court's 1491(b)(1) jurisdiction." Id. at 543.

On October 24, 2009, the Air Force identified plaintiff's contract as a potential in-sourcing candidate. On June 22, 2010, having "identified and approved" Triad's contract for vehicle operations and maintenance on the Columbus Air Force Base as a candidate for in-sourcing, Triad was notified of the Air Force's decision. The DoD concluded that the Air Force still required the vehicle maintenance at Columbus Air Force Base and that government personnel could perform the vehicle operations and maintenance covered by Triad's earlier contract more cheaply. During the course of this litigation, the government also has indicated that "newly-hired employees are performing the vehicle maintenance services previously performed by Triad."

As discussed above, after a complaint is filed, the first step is for this court to examine whether it has subject matter jurisdiction pursuant to its Congressional authority to review the matters raised by the complaint. As indicated in Lockheed Martin Corp. v. United States:

> The U.S. Court of Federal Claims is a court of "special and, therefore, limited jurisdiction." Blazavich v. United States, 29 Fed. Cl. 371, 373 (1993). Because the court was established pursuant to Article I of the

> United States Constitution, 28 U.S.C. § 171(a), its powers are limited to that granted by Congress and by its own rules, which were adopted under Congressional authority. In re United States, 877 F.2d 1568, 1571 (Fed. Cir. 1989). It is well established that this Court possesses jurisdiction over a matter only to the extent that the United States has waived its sovereign immunity, and that waivers should be strictly construed in favor of the Government. United States v. Testan, 424 U.S. 392, 399 (1976).

Lockheed Martin Corp. v. United States, 50 Fed. Cl. 550, 553-54 (2001), aff'd, 48 F. App'x 752 (Fed. Cir. 2002). In this regard, the court concludes that the Air Force's determination to in-source services it continues to require, rather than issue a solicitation to contractors for the necessary work, comes within the meaning of 28 U.S.C. § 1491(b)(1), and is "in connection with a procurement or proposed procurement." Therefore, plaintiff's claim is within the subject matter jurisdiction of this court.[14]

[14] The court notes that Triad's case raises different issues from an earlier in-sourcing case brought before this Judge. See Vero Tech. Support, Inc. v. United States, 94 Fed. Cl. 784 (2010). In Vero, the undersigned concluded, based on the procedural history in that case, that this court lacked jurisdiction to review the DoD's in-sourcing decision of Vero's contract under the Tucker Act. Prior to filing in this court, Vero had filed suit in the United States District Court for the Middle District of Florida. The District Court had dismissed Vero's claims for lack of jurisdiction, but the time for Vero to appeal to the United States Court of Appeals for the Eleventh Circuit had not expired when Vero filed suit in the United States Court of Federal Claims. Id. at 787. Because the claim filed in the United States Court of Federal Claims was based on the same operative facts and raised the same claims as raised earlier in the United States District Court, this court dismissed the lawsuit filed in this court pursuant to 28 U.S.C. § 1500 (2006). See Vero Tech. Support, Inc. v. United States, 94 Fed. Cl. at 796-97. In Vero, although the court offered a preliminary view on the broader issue of jurisdiction to review in-sourcing challenges under the Tucker Act, further and more in-depth review has led the court to the different conclusion than suggested in Vero. In Vero, the court stated:

> [P]laintiff's deliberate choice of forum in the District Court and chosen basis for jurisdiction, traditional APA jurisdiction, resonates with this court. Without a contract or solicitation at issue, even as amended by the ADRA, Tucker Act jurisdiction to challenge the insourcing policy decisions is not immediately apparent. In this Order, however, the court does not address the propriety of jurisdiction in the Court of Federal Claims, and has not fully explored the issue at this time. As noted, however, plaintiff still has an appeal available to resolve the District Court jurisdiction issue raised by the dismissal of the lawsuit initiated in that court.

Id. at 792; see also Rothe Develop., Inc. v. Dep't of Def., No. SA-10-CV-743-XR, 2010 WL 4595824, at *6 (W.D. Tex. Nov. 3, 2010) (slip opinion) ("The COFC's [Court of Federal Claims'] denial of jurisdiction in that case [Vero Technical Support, Inc. v. United States] rested on the fact that the district court case was still pending because

Standing

Having determined that this court has subject matter jurisdiction to review protests relating to in-sourcing decisions by the DoD, the court must address another threshold matter, whether Triad has standing to raise its claims related to the Air Force's decision to in-source the work formerly performed by Triad under Triad's completed contract. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (describing standing as a "threshold jurisdictional question"); see also Myers Investigative & Sec. Servs. v. United States, 275 F.3d at 1369 ("[S]tanding is a threshold jurisdictional issue."); GTA Containers, Inc. v. United States, 11–606C, 2012 WL 373371, at *7 (Fed. Cl. Feb. 6, 2012); Virgin Islands Paving, Inc. v. United States, No. 11-687C, 2012 WL 274032, at *6 (Fed. Cl. Jan. 31, 2012) ("As a threshold matter, a plaintiff contesting the award of a federal contract must establish that it is an 'interested party' to have standing under 28 U.S.C. § 1491(b)(1).").

The United States Supreme Court has stated that:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized,[15] and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

Subsequently, the United States Court of Appeals for the Federal Circuit wrote:

> In general, standing requires that the plaintiff show an injury in fact, "a casual connection between the injury and the conduct complained of," and that his injury would likely be redressable by court action. Lujan v.

Vero was still within its time frame for filing an appeal. The Court did not render any holdings regarding the merits of Vero's jurisdictional claims."). Moreover, on Vero's appeal to the United States Court of Appeals for the Eleventh Circuit, in an unpublished decision, the Eleventh Circuit found jurisdiction in the Court of Federal Claims, as well as that Vero was an interested party. See Vero Tech. Support Inc. v. U.S. Dep't of Def., 437 F. App'x 766.

[15] "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." (footnote in Lujan v. Defenders of Wildlife, 504 U.S. at 560 n.1).

> Defenders of Wildlife, 504 U.S. 555, 560 (1992). However, the Supreme Court has also explained that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." Id. at 573 n.7.

Todd Constr., L.P. v. United States, 656 F.3d 1306, 1315 (Fed. Cir. 2011).[16]

As noted recently by the United States Court of Appeals for the Federal Circuit, "[o]nly an 'interested party' has standing to challenge a contract award." Digitalis Educ. Solutions, Inc. v. United States, 664 F.3d 1380, 1384 (Fed. Cir. 2012); see also Am. Fed'n of Gov't Emps. v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001), cert. denied, 534 U.S. 113 (2002); L-3 Commc'ns Corp. v. United States, 99 Fed. Cl. 283, 288 (2011) ("In addition to alleging a violation of a statute or regulation, a plaintiff must qualify as an 'interested party' under the Tucker Act."); CS-360, LLC v. United States, 94 Fed. Cl. 488, 495 (2010) ("The pivotal element of standing in a bid protest is whether a protester qualifies as an 'interested party' under § 1491(b)(1)."). In Digitalis the court reconfirmed that: "[a]n interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract. Thus, a party must show that it is 1) an actual or prospective bidder and 2) that it has a direct economic interest." Digitalis Educ. Solutions, Inc. v. United States, 664 F.3d at 1384 (citing Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006)); Brooks Range Contract Servs., Inc. v. United States, 101 Fed. Cl. 699, 705-706 (2011).

Explaining construction of the term "interested party," the Federal Circuit in Weeks Marine, Inc. v. United States indicated:

> In American Federation of Government Employees v. United States, we reviewed at length the history of § 1491(b)(1) and concluded that Congress did not intend to confer standing under the more liberal standing rules of the Administrative Procedure Act, 5 U.S.C. § 702, but instead limited standing under § 1491(b)(1) to "disappointed bidders" and to prospective bidders whose chances of securing the award would be adversely affected. [Am. Fed'n of Gov't Emps. v. United States,] 258 F.3d 1294, 1302 (Fed. Cir. 2001). We stated that we "construe the term 'interested party' in § 1491(b)(1) in accordance with the [Competition in

[16] Although many of the standing cases discuss the issue in the context of the Article III courts, see Abraxis Bioscience, Inc. v. United States, 625 F.3d 1359, 1363 (Fed. Cir. 2010), "[s]tanding is a constitutional requirement pursuant to Article III and it is a threshold jurisdictional issue," reh'g and reh'g en banc denied (Fed. Cir.), cert. denied sub nom. APP Pharm. v. Navinta LLC, 132 S. Ct. 115 (2011), the standing requirement applies equally to cases brought in the United States Court of Federal Claims. See Weeks Marine, Inc. v. United States, 575 F.3d at 1359 ("'The Court of Federal Claims, though an Article I court,...applies the same standing requirements enforced by other federal courts created under Article III.'") (quoting Anderson v. United States, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

> Contracting Act, 31 U.S.C. §§ 3551-56], and hold that standing under § 1491(b)(1) is limited to actual or prospective bidders or offerors whose *direct economic interest* would be affected by the award of the contract or by failure to award the contract." Id. at 1302.

Weeks Marine, Inc. v. United States, 575 F.3d at 1375 (emphasis in original); see also Rothe Develop., Inc. v. United States Dep't of Def., 2010 WL 4595824, at *5 (slip opinion). Also, according to the Federal Circuit: "'[P]rejudice (or injury) is a necessary element of standing,'" Weeks Marine, Inc. v. United States, 575 F.3d at 1360 (quoting Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d at 1370) and "'[t]o establish prejudice, [the protestor] must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process.'" Weeks Marine, Inc. v. United States, 575 F.3d at 1359 (quoting Info. Tech. & Applications v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)). "Under the APA standard as applied in the Scanwell line of cases, and now in ADRA cases, 'a bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" Banknote Corp. of America, Inc. v. United States, 365 F.3d at 1351 (quoting Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332); see also Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332 (quoting Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973)) ("When a challenge is brought on the second ground, the disappointed bidder must show 'a clear and prejudicial violation of applicable statutes or regulations.'").

In Watterson Construction Co. v. United States, a Judge of the United States Court of Federal Claims stated:

> As a threshold matter, a plaintiff contesting the award of a federal contract must establish that it is an "interested party" to have standing under 28 U.S.C. § 1491(b)(1). See Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002) ("[S]tanding is a threshold jurisdictional issue."). The United States Court of Appeals for the Federal Circuit has construed the term "interested party" to be synonymous with the definition of "interested party" provided in the CICA, 31 U.S.C. § 3551(2)(A). See Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006) (citing decisions adopting the CICA definition of "interested party" to convey standing under 28 U.S.C. § 1491(b)(1)).

Watterson Constr. Co. v. United States, 98 Fed. Cl. 84, 89 (2011). Whether standing is identified as a "threshold jurisdictional issue," see Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d at 1369, a "threshold matter," see Watterson Constr. Co. v. United States, 98 Fed. Cl. at 89, or a "pivotal element," see CS-360, LLC v. United States, 94 Fed. Cl. at 495, determination of whether a plaintiff has standing as an interested party should be addressed prior to proceeding with an analysis of the statutes and procedures at issue, which is fundamental to an analysis of prudential standing. Absent interested party status, a plaintiff is not, jurisdictionally, properly before the court.

In the current litigation defendant acknowledges that this court "is the exclusive forum in which Triad may assert its allegation that a Federal agency violated a statute or regulation in connection with a 'procurement or proposed procurement,'" but defendant asserts that Triad is not an interested party and lacks standing to pursue its claims in this court in this court.[17] In fact, defendant maintains that a decision by the DoD to in-source is unreviewable anywhere. Defendant, cites to Federal Circuit decisions in American Federation for Government Employees v. United States, 258 F.3d 1294 and Weeks Marine, Inc. v. United States, 575 F.3d 1352, to argue that "Triad is certainly not a 'disappointed bidder' that has suffered a 'competitive injury,'" and, therefore, is not an interested party pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1). According to the defendant, plaintiff did not allege an unlawful or improperly awarded contract, issuance of a defective solicitation, work shifted to another contractor without compensation, "[r]ather, the Air Force simply made the internal decision not to contract for the work Triad would like to perform." Therefore, defendant continues, "[w]hatever injury Triad may have possibly suffered as a result of this decision, it cannot be classified as a 'competitive injury,' redressable by rectifying an error in the conduct of a competition, which is necessary in order for Triad to be an 'interested party' pursuant to 28 U.S.C. § 1491(b)(1)."

[17] The United States has taken evolving positions on jurisdiction and standing as related to in-sourcing 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 in-sourcing protests before this Court." (footnote omitted). See, e.g., Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 67 ("On March 4, 2011, defendant filed a motion to dismiss the amended complaint, asserting that this court lacks subject matter jurisdiction."); Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 541 ("The government has moved to dismiss SBAR's [Santa Barbara Applied Research, Inc.] complaint on the grounds that SBAR does not having standing to challenge the Air Force's decision to in-source and thus this court lacks jurisdiction to hear the case under RCFC 12(b)(1)."); K-Mar Indus., Inc. v. United States Dep't of Def., 752 F. Supp. 2d 1207, 1209 (W.D. Okla. 2010) ("In support of their motion [to dismiss] defendants argue that the Tucker Act as amended by the Administrative Dispute Resolution Act, confers exclusive jurisdiction over plaintiff's procedures-based claims to the United States Court of Federal Claims. Defendants also contend that the Contract Disputes Act, confers exclusive jurisdiction on the CFC [Court of Federal Claims] with respect to the procedures-based claims.") (internal citations omitted); Rothe Develop., Inc. v. United States Dep't of Def., 2010 WL 4595824, at *1 (slip opinion) ("The motion to dismiss argues that exclusive jurisdiction over the insourcing challenges is granted to the Court of Federal Claims by the Tucker Act, as amended by the Administrative Disputes Resolution Act and by the Contract Disputes Act.") (internal citations omitted). Additional in-sourcing complaints continue to be filed in the United States District Courts and in this court, with various positions taken by the parties regarding subject matter jurisdiction and standing.

Plaintiff acknowledges that it must establish that it is an actual or prospective bidder, which possesses the "requisite direct economic interest," (quoting Rex Serv. Corp. v. United States, 448 F.3d at 1307), and which had a substantial chance of receiving the contract, but asserts that Triad is such an interested party under the Tucker Act. Plaintiff argues that it qualifies as

> an "interested party" because it was the incumbent contractor at the time Government made an arbitrary and capricious interpretation and application of the business rules (DTM 09-007) established by DoD for estimating and comparing the full costs of civilian and military manpower and contract support and continues to provide and bid on other contracts for similar services as implemented by the Office of the Secretary of Defense (OSD) Personnel and Readiness division, which were based upon a false premise, which prejudiced Triad, and which has adversely affected every case study conducted by the Air Force and potentially every DoD component agency.

Triad also argues that incumbent contractors who are victims of in-sourcing, such as Triad, "are interested parties because they have a direct economic interest, as having lost their contracts due to arbitrary and capricious in-sourcing decisions, and, if a competitive procurement were held, the contractor, as the immediately incumbent contractor, would be presumed to have a substantial chance of competing for the contract." Triad additionally cites to the decision in Santa Barbara, in which a contractor, whose contract work was in-sourced by the Air Force, was found to have standing under the Tucker Act. See Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 543.

The defendant argues that, not only had plaintiff's contract been completed, but, also, the work at issue had been in-sourced prior to Triad filing its current complaint in this court. The defendant states, "Triad's contract is finished and the newly-hired employees are performing the vehicle maintenance services previously performed by Triad." In response, plaintiff alleges that "[t]he Agency's entire argument in this section is based on a false premise. Triad is not asking the Court to direct the Agency to award the work to Triad. Rather, Triad is asking the Court to direct the Agency to perform a cost study that strictly complies with DoD's 'guidelines and procedures,'" in order to determine the least costly method of performance in accordance with 10 U.S.C. § 129a. To which defendant replies, "another cost study following in-sourcing guidelines would be a meaningless academic exercise." According to defendant, regardless of whether or not defendant were to conduct another cost analysis, because no solicitation has been issued for future work on which plaintiff could bid, nor is a solicitation likely to be issued, since government personnel are currently performing the work, Triad has no interest in a contract to perform vehicle operations and maintenance services at Columbus Air Force Base. Therefore, according to defendant, plaintiff does not have an economic interest by which to meet standing requirements.

As noted above, in Santa Barbara, the court determined that the plaintiff "has standing to challenge the Air Force's decision to in-source." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 542. The court determined that the plaintiff in Santa Barbara

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

Id. at 543 (emphasis added). In Santa Barbara, the court stated that: "Where a protestor stands to lose future work for which it likely would have been competed because of alleged errors in the cost comparison mandated by Congress, the protestor should have standing to challenge the decision to in-source." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 543. Even though the court in Santa Barbara determined that the plaintiff had standing to bring a protest in the Court of Federal Claims, the court ultimately granted the defendant's motion for judgment on the administrative record, concluding that the Air Force's decision making process to in-source the plaintiff's work was not arbitrary and capricious. See id. at 553.

In the Santa Barbara case, the court stated that "SBAR has a government contract…." Id. at 543 (emphasis added). Therefore, it appears from the Santa Barbara court's use of the present tense that the contractor still had an ongoing contract and a direct economic interest at the time the complaint in Santa Barbara was filed. In the above-captioned case, Triad's contract had ended and government employees had began performing the contract functions previously performed by Triad, prior to when plaintiff filed the second complaint currently under review. Therefore, whether Triad, which was no longer performing under an existing contract when this lawsuit was filed, can be considered to have a "direct economic interest" to meet the interested party standing requirements, Digitalis Educ. Solutions, Inc. v. United States, 664 F.3d at 1384, is a more difficult question than presented in Santa Barbara.

Defendant suggests that the situation in which Triad finds itself is one requesting conversion of work from agency performance to contractor performance, which is commonly referred to as "out-sourcing" and is subject to different statutory provisions and agency guidance than regarding in-sourcing. The Omnibus Appropriations Act, 2009 strongly discourages such conversions. Section 737 of Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, states:

> None of the funds appropriated or otherwise made available by this or any other Act may be used to begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of

> Management and Budget Circular A-76 or any other administrative regulation, directive, or policy.

Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 691 (Mar. 2009). Likewise, attachment 2 to DTM 09-007, "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support," states in part,

> Conversions From Government to Contractor Performance. The DoD Components are required to conduct public-private competitions in accordance with Reference (d), section 2461 of Reference (e), and other applicable laws and regulations in determining whether to convert a commercial activity performed by any civilian DoD personnel or by any number of military personnel to private-sector performance.

The Air Force cannot easily reverse the in-sourcing 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 in-sourcing decision.

Prudential Standing

Defendant alternatively argues that this case should be dismissed on prudential standing grounds and asserts that the prudential standing doctrine requires the "plaintiff to demonstrate, at a minimum, that its interest is 'arguably within the zone of interests to be protected or regulated' by the statute at issue," (quoting Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. at 632), and that it is a direct beneficiary of the statute at issue, not merely an incidental beneficiary. Therefore, defendant argues, "Triad lacks standing because both 10 U.S.C. § 2463 and 10 U.S.C. § 129a were enacted for the benefit of the government, not contractors." The plaintiff responds that "[t]he zone of interests test is generous and relatively undemanding," and that "Triad has been deprived of the opportunity to participate in what should have ultimately resulted in an open and competitive procurement process. As such, according to plaintiff, Triad falls within the 'zone of interests' protected or regulated by 10 U.S.C. § 129a and 10 U.S.C. § 2463…."

As quoted above, 10 U.S.C. § 129a, titled "General personnel policy," instructs the Secretary of Defense to use the least costly form of personnel consistent with military requirements and particularly to consider the advantages of converting from one form of personnel to another for the performance of a specified job. See 10 U.S.C. § 129a. In Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65, the court acknowledged that, "[s]everal cases suggest that…plaintiff would qualify as an

'interested party' under section 1491(b)(1)," Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at. 67-68 (citing among other cases, Santa Barbara Applied Research Inc. v. United States, 98 Fed. Cl. 542–43), but concluded that the court "need not decide, however, whether plaintiff is an interested party for purposes of section 1491(b)(1) because it finds, in any event, that Hallmark fails to meet prudential standing requirements." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at. 68. The Judge in Hallmark-Phoenix stated, "[t]his provision [section 129a of Title 10] was enacted in section 1483(a) of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101–510, 104 Stat. 1485, 1715, the purpose of which was to provide a '[r]estatement of law relating to annual personnel strength authorizations, annual manpower requirements reports, and annual National Guard and reserve component procurement report[s].' H.R. Conf. Rep. 101–923, at 3233 (1990)." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 72 (quoting Pub. L. No. 101–510 (Nov. 1990)). As further indicated in Hallmark-Phoenix, "[c]onsistent with this purpose, all of the half a dozen or so provisions that constituted section 1483, including section 129a, refer to reports and requests made to Congress. It strains reason to suggest that Congress would bury amongst these reporting provisions a section intended to allow contractors to challenge decisions made by the Secretary on the basis of whether they constituted 'the least costly form of personnel.'" Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 72-73 (footnote omitted).

In addition, the Hallmark-Phoenix court addressed 10 U.S.C. § 2463, titled "Guidelines and procedures for use of civilian employees to perform Department of Defense functions," also quoted above, which instructs the Under Secretary of Defense for Personnel and Readiness to devise and implement guidelines and procedures to ensure that consideration is given to using qualified DoD civilian employees to perform new functions and functions that are performed by contractors. See 10 U.S.C. § 2463. In this regard, the Hallmark-Phoenix court stated, "Section 2463(b)(2) makes similar provision for the use of civilian employees to perform 'a new requirement,'" and "prohibits the use of 'public-private competitions' designed to promote outsourcing for a variety of functions newly assigned to Department of Defense civilian employees." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 73-74. The Hallmark-Phoenix court reasoned:

> While those guidelines [issued by the Secretary of Defense pursuant to 10 U.S.C. § 2463] are specific in mapping out procedures for comparing private versus public costs, nothing in them remotely suggests an intent to confer a right to judicial review—nor does it seem that the agency, in deciding what sort of guidance to issue, could expand the scope of interests covered by the statute so as to afford prudential standing to someone who did not have standing under the statute itself.

Id. at 74.

In addition to disagreeing as to whether Triad is within the "zone of interest," of 10 U.S.C. § 129a or 10 U.S.C. § 2463, the parties also disagree as to whether

prudential standing applies at all in protest cases, with defendant citing Hallmark-Phoenix and plaintiff citing Santa Barbara. The Santa Barbara court determined that "the concept of 'prudential standing' does not apply to bid protests under section 1491(b)(1)," Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544. The Hallmark-Phoenix court, however, concluded that "the Supreme Court has made quite clear that the prudential standing analysis is overarching and applies, as a general matter, both inside and outside the APA arena." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 69.

Triad states, "'Congress may grant an express right of action to a person who otherwise would be barred by prudential standing rules,'" (quoting Jewelers Vigilance Comm., Inc. v. Ullenberg Corp., 823 F.2d 490, 493 (Fed. Cir. 1987), and argues that Congress, by virtue of the Tucker Act, has conferred standing to protestors in this court who are interested parties, relying on the Santa Barbara decision. Plaintiff also asserts that "[t]here are no Tucker Act post-award bid protest cases since the AFGE case was decided that have applied an additional 'prudential standing' test to the previously defined standing/'interested party' test outlined in the AFGE opinion," which "confers standing on 'an interested party objecting to a solicitation by a Federal agency.'" (quoting Am. Fed'n of Gov't Emps., AFL-CIO v. United States, 258 F.3d at 1299 (quoting 28 U.S.C. § 1491(b))). Plaintiff adds that "[n]o separate prudential standing analysis is necessary in Tucker Act post award bid protest cases. This is clear from reading the decisions in Tucker Act bid protest cases." By contrast, the defendant argues that "[i]n Hallmark, the Court correctly determined that the prudential standing doctrine applies to bid protests." According to the defendant, "the Hallmark decision and its detailed analysis of both the prudential standing doctrine as well as the legislative history of both 10 U.S.C. §§ 129a and 2463 provides additional grounds for granting our motion to dismiss based upon Triad's lack of prudential standing."

In Santa Barbara, the court stated, "[t]he government's alternative contention that the court should dismiss the case on 'prudential standing' grounds is without merit. To begin, the court agrees with SBAR that the concept of 'prudential standing' does not apply to bid protests under section 1491(b)(1). Prudential standing is typically applied to challenges under the Administrative Procedure Act ('APA') 5 U.S.C. § 500 et seq., which has more liberal standing criteria than those set in section 1491(b)(1)." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544. Looking to the Federal Circuit's decision in American Federation of Government Employees, AFL-CIO v. United States, 258 F.3d 1294, the Santa Barbara court reasoned that "the Federal Circuit held that it was rejecting the 'less stringent' standing requirements imposed under the APA in favor of the 'interested party' test, based on the definition in CICA. AFGE [v. United States], 258 F.3d at 1302. Under AFGE, once a party satisfies the more stringent 'interested party' test, standing is established." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544 (citation omitted). Therefore, the Santa Barbara court determined "[h]aving satisfied the 'interested party' test, SBAR has established standing. Moreover, even if 'prudential standing' were required, the court

finds that the Ike Skelton NDAA[18] was enacted, at least in part, for the benefit of the contracting community…. The court finds that the mandates in Ike Skelton NDAA are sufficient to provide grounds for review when potential contractors challenge a procurement-related in this context, and thus SBAR has satisfied any prudential standing requirement." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544.

By contrast, the court in Hallmark-Phoenix did not fully analyze whether the plaintiff was an interested party because the court first concluded that the Hallmark-Phoenix plaintiff had failed to meet the prudential standing requirements. The Hallmark-Phoenix court disagreed with the Santa Barbara court that prudential standing did not apply to protests and the Hallmark-Phoenix court indicated that unless expressly negated, "the Supreme Court has made quite clear that the prudential standing analysis is overarching and applies, as a general matter, both inside and outside the APA arena." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 69. See id. at 70 (citing Bennett v. Spear, 520 U.S. 154, 163 (1997)). The Hallmark-Phoenix court

[18] Ike Skelton National Defense Authorization Act for Fiscal Year 2011. Pub. L. 111–383, 124 Stat. 4127, 4184. The Act amended 10 U.S.C. § 2463 with the following:

> SEC. 323. PROHIBITION ON ESTABLISHING GOALS OR QUOTAS FOR CONVERSION OF FUNCTIONS TO PERFORMANCE BY DEPARTMENT OF DEFENSE CIVILIAN EMPLOYEES.
>
> (a) PROHIBITION.--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.
>
> (b) DECISIONS TO INSOURCE.--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.

Id.

stated that United States Supreme Court cases such as Bennett v. Spear, 520 U.S. 154, "compel a conclusion that the prudential standing doctrine applies to this court's bid protest jurisdiction." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 70. Challenging the Santa Barbara conclusion that prudential standing did not apply to protest cases, the Hallmark-Phoenix court concluded it "would be odd for this court to carve out an exception to the normal prudential standing principles for bid protest actions when other courts have not hesitated to apply these principles to similar cases. Thus, when they shared jurisdiction under section 1491(b)(1), the district courts held that the prudential standing doctrine applied to bid protest cases." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 71 (citing Am. Fed'n of Gov't Emps., AFL–CIO v. Babbitt, 143 F. Supp. 2d 927, 932–33 (S.D. Ohio 2001); Am. Fed'n of Gov't Emps., AFL–CIO v. United States, No. CIV.A. SA00CA1508 HG, 2001 WL 262897, at *6–7 (W.D. Tex. Mar. 7, 2001)) (footnote omitted). The Hallmark-Phoenix court also noted that the Federal Circuit's decision in American Federation of Government Employees, AFL-CIO v. United States does not compel the conclusion that prudential standing requirements should not apply to protests. Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 71-72.[19]

As noted above, this court has found the plaintiff does not qualify as an interested party, so this court does not need to reach the question of whether the prudential standing doctrine precludes jurisdiction over plaintiff's claims. This court also does not reach the issue of whether prudential standing is applicable to a plaintiff in a protest action. A subsequent challenge to a DoD in-sourcing decision in which a plaintiff is found to be an interested party can generate another analysis, as was done in Hallmark-Phoenix, of whether the prudential standing doctrine is applicable to in-sourcing protests, or if Congress, by virtue of the Tucker Act, has granted protestors, who are interested parties, an express right of action, which might otherwise be barred by prudential standing rules.

In addition to the above arguments, the government also alleges that a DoD in-sourcing decision is entirely unreviewable. According to the government, the decision not procure is committed to agency discretion by law, citing to 5 U.S.C. § 701(a)(2) (2006). Defendant claims a "court may not review an agency decision pursuant to the APA standard of review, where the 'agency action is committed to agency discretion by law.'" Defendant argues, "[h]ow an agency allocates its appropriated funds is an example of the type of agency decision 'traditionally regarded as committed to agency discretion,'" (quoting Lincoln v. Vigil, 508 U.S. 182, 192-93 (1993)). Defendant argues that in the above-captioned protest, "the Air Force has decided to allocate its limited

[19] In Hallmark-Phoenix, the court determined that "neither section 129a nor section 2463 confers prudential standing upon plaintiff to challenge the in-sourcing decision here," concluding that "the text, structure and legislative history of these provisions all reveal that these statutes were not designed to confer benefits on outside contractors. And it is that negative intent, rather than the absence of an affirmative intent to confer standing on outside contractors, that ultimately dictates the conclusion that plaintiff here lacks the prudential standing to challenge the Air Force's in-sourcing decision." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 76, 78-79.

funds to pay for additional civilian personnel, rather than contracting for the vehicle support services at Columbus Air Force Base. Budgeting decisions such as this are generally committed to agency discretion as a matter of law." According to the defendant, "[b]udgeting decisions are only reviewable if Congress has, in the text of a statute, expressly circumscribed the agency's discretion in such a manner that the courts would have 'a meaningful standard against which to judge the agency's exercise of discretion.'" (quoting Lincoln v. Vigil, 508 U.S. at 191, 193). The defendant contends that, "neither 10 U.S.C. § 2463 nor 10 U.S.C. § 129a contains any 'judicially manageable' guidance that indicates how the Defense Department is to allocate its limited funds." (footnote omitted).

In response, plaintiff argues that "[t]he Government's contention that the Court should dismiss this case because the decision not to procure is committed to agency discretion by law is without merit." Plaintiff continues, "[w]ithout effective judicial oversight, there is no effective means to ensure that the Government is using the most cost effective method to procure services and that it is properly conducting cost studies." The Hallmark-Phoenix court concluded: "That the application of these standing requirements leaves plaintiff with no remedy may seem unfair to some. But, it is important to note that the actions taken by the Air Force here are of a sort that traditionally have not been subject to bid protest review…. In the court's view, internal agency decisions of the sort at issue do not suddenly become reviewable because they are predicated on an in-sourcing decision." Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 80.

This court cannot agree with the broad statement by the Hallmark-Phoenix court. As noted in Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. 536, "[t]his court has recognized the right of contractors to challenge decisions under OMB Circular A–76 not to out-source work where the protestors were among those who were selected for cost comparative purposes with the government in-house organization. See LABAT–Anderson, Inc. v. United States, 65 Fed. Cl. 570, 575–76 (2005). This court has also allowed potential contractors to challenge decisions to cancel a solicitation and not to compete work, where the protestor might have won the award." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 543.[20]

Moreover, although enacted subsequent to the events leading to plaintiff's claim, the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, quoted above, states in relevant part:

[20] But see Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 75 & 75 n.16 (finding "[i]t is reasonable to assume that in not requiring agencies to conduct formal competitions, like those associated with out-sourcing determinations made under OMB Circular A–76, Congress intended to avoid the protest litigation occasioned by such competitions," and concluding that it is the statutory language of Circular A–76 which requires, among other features, a public-private competition with an issuance of a solicitation which "led this court to conclude that contractors may protest an agency's decision not to outsource a particular requirement.") (footnote omitted).

> DECISIONS TO INSOURCE.--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.

Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111–383, §323(b), 124 Stat. 4127, 4184. In Santa Barbara, the court determined that "even if 'prudential standing' were required, the court finds that the Ike Skelton NDAA [National Defense Authorization Act for Fiscal Year 2011] was enacted, at least in part, for the benefit of the contracting community." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544. The Santa Barbara court also indicated, "[t]he Ike Skelton NDAA modified 10 U.S.C. § 2463 in January 2011 to prevent the DoD from imposing any specific quotas or goals on in-sourcing without a considered cost analysis and mandated that the DoD conduct a specific cost comparison that takes into account the 'full costs of civilian and military manpower' before making any in-sourcing decision, where, as here, cost alone is the deciding criteria." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544. The court in Santa Barbara concluded that "the mandates in Ike Skelton NDAA are sufficient to provide grounds for review when potential contractors challenge a procurement-related [sic] in this context, and thus SBAR has satisfied any prudential standing requirement." Id.

As in Hallmark-Phoenix, the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 does not apply to the Triad case because the statute was enacted after the second in-sourcing decision by the Air Force.[21] As noted by the United States Supreme Court, there is a presumption against statutory retroactivity when the statute at issue is unambiguous. See Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974)) ("Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision,' even though that law was enacted after the events that gave rise to the suit. There is, of course, no conflict between that principle and a *presumption* against retroactivity when the statute in question is unambiguous.") (emphasis in original); see also Caddell v. Dep't of Justice, 96 F.3d 1367, 1371 (Fed.

[21] See Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. at 74 (finding the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 was inapplicable to the case before the court, "as the in-sourcing decision here was made prior to the January 7, 2011, effective date of this statute," and "the amended statute makes specific reference to the existing Defense Department guidelines, that feature does not, in this court's view, make in-sourcing decisions under the amended statute reviewable.").

Cir. 1996) ("[W]e hold that the presumption against statutory retroactivity applies in this case…."). The language of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 does not include any indication that the Section 323 was meant to be retroactively applied. Unreviewable decision-making authority by Executive Branch agencies, as proposed by the government, requires close attention. 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 Ike Skelton National Defense Authorization Act for Fiscal Year 2011 was enacted for the benefit of contractors or provides sufficient judicially manageable guidelines,[22] to assist in providing standing for future plaintiffs wishing to challenge future in-sourcing decisions by the DoD.

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 in-sourcing 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 in-sourced after the enactment of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, that incumbent contractor could be in a different position than the plaintiff in this case. Plaintiff's complaint was properly filed in this court, but for the specific reasons discussed above, plaintiff does not have standing to proceed on its claims. Defendant's motion to dismiss plaintiff's complaint is **GRANTED**. Plaintiff's complaint is **DISMISSED.** The Clerk's Office shall enter **JUDGMENT** consistent with this opinion.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge

[22] As noted above, the court in Santa Barbara found that, "Congress' decision to require compliance with DTM 09–007 for in-sourcing decisions based, like this one, on cost savings alone gives the court a meaningful standard against which to judge the Air Force's exercise of discretion." Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. at 544-45.