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SUBCONTRACTOR CHALLENGES TO FEDERAL AGENCY PROCUREMENT ACTIONS

By Matthew H. Solomson and Jeffrey L. Handwerker

Over the last decade, subcontractors have come to play an increasingly central role in the Federal Government procurement system. Notwithstanding this trend, the prevailing view to date has been that subcontractor bid protest rights are highly limited—or potentially even nonexistent. Indeed, a review of the decisions to date indicates that the U.S. Court of Federal Claims has yet to recognize a subcontractor bid protest action.

As a result, subcontractors can find themselves in the untenable position of having to bear the negative effects of wrongful prime contractor or Federal Government action that could be redressed in court if the same subcontractor had contracted directly with the Government. This apparent limitation of federal court jurisdiction has increased in importance in recent years as the Federal Government has more frequently chosen to outsource its procurement function, either by awarding large prime contracts and thereby insulating the Government from having to deal directly with additional contractors or by awarding so-called "management and operating" (M&O) contracts under which a prime contractor is often authorized, among other things, to manage procurement functions on behalf of the Government.

This BRIEFING PAPER examines whether the prevailing view described above—that there is no jurisdiction over subcontractor challenges to federal procurement actions—is correct. After reviewing the data on Federal Government subcontracting spending that indicates an increasing dependence on subcontractors and discussing the current view of the highly limited bid protest rights of subcontractors, the PAPER traces the development of the various bid protest jurisdictions in the district courts and the Court of Federal Claims. Then, the PAPER turns to its central contention—that subcontractors arguably are *not* precluded from bringing certain procurement-related, bid protest-type actions.

IN BRIEF

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Growing Role Of Subcontractors

In 1991, an assistant comptroller general testifying before the U.S. Senate Committee on Governmental Affairs noted "the changing role of many prime contractors from fabricating weapons and products to integrating work done by subcontractors" and the Department of Defense's concomitant "growing dependence on subcontracts."[1] Indeed, even at that time, subcontract costs within the DOD comprised more than 50% of procurement costs.[2] Subcontracts awarded by the DOD in 1990 alone totaled approximately $55 billion—"a sum larger than the combined budget authority of the Departments of Transportation ($30.2 billion), Energy ($14 billion), and Interior ($6.7 billion)."[3] Between 1993 and 2002, DOD subcontracts increased by more than 40%, from $53 billion to $75.5 billion.[4]

This marked increase in subcontracting has not been confined to the DOD. The Department of Energy, the largest civilian contracting agency in the Federal Government, spent $22.4 billion on contracts in fiscal year 2004, the majority of which—$18.9 billion, roughly 85% of the DOE's funding—was dedicated to large M&O contracts.[5] M&O contractors manage a variety of DOE sites, including laboratories and production facilities.[6] Under M&O or "facilities management contracts," prime contractors are responsible for performing, managing, and integrating work at a DOE site and often subcontract specific and not insignificant segments of their work to other businesses.[7] In 2004, DOE's 34 M&O contractors procured nearly $6.5 billion in goods and services from subcontractors.[8]

Furthermore, as prime contracts become "larger and longer in duration," the Federal Government is not simply outsourcing substantive tasks; rather, the Government has outsourced its procurement functions as well.[9] In many cases, the "number of layers of contracts" is "in many cases, four, five, six layers deep."[10] The subcontracting situation "is another byproduct of not having enough acquisition professionals in the government."[11] That is, as one commentator has stated, "[i]f you have enough procurement professionals in the government you would award smaller, more discrete contracts, and then manage them effectively. But if you don't have enough people, there's a tremendous amount of pressure to award massive contracts to small numbers of contractors and let them subcontract."[12] In that regard, top defense industry executives have noted that the DOD's growing reliance on "lead systems integrators" is among the chief problems facing the acquisition system, in part because they are permitted to become the acquisition authority.[13]

Limited Bid Protest Rights Of Subcontractors

According to conventional wisdom, one notable consequence of being a subcontractor—as opposed to a prime contractor—is that bid protest remedies are assumed to be highly limited, if not nonexistent. In a 2003 BRIEFING PAPER, the author noted that "[s]ince subcontractor arrangements are essentially private matters between prospective prime contractors and subcontractors, aggrieved subcontractors have few rights in a federal forum to challenge alleged violations of the procurement statutes

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or regulations during contract formation."[14] For example, while a protest may be filed at the Government Accountability Office by an "interested party," the GAO's bid protest jurisdictional statute, the Competition in Contracting Act, and its regulations exclude subcontractor protests.[15] Specifically, CICA defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[16] Moreover, the GAO's regulations state that "GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided."[17]

At the U.S. Court of Federal Claims, the situation is more complicated. The COFC's jurisdictional statute, the Tucker Act, also confers standing on an "interested party" to challenge certain Government procurement actions.[18] Unlike the GAO statute, however, the Tucker Act does not itself define the term "interested party." Despite this statutory silence, the U.S. Court of Appeals for the Federal Circuit has imported the GAO definition of "interested party" into the Tucker Act, suggesting that subcontractors have no standing before the COFC either. In one recent COFC postaward bid protest case, the plaintiff argued that its designation as a subcontractor should be ignored by the court in favor of focusing instead on the substance of the plaintiff's performance, which would have been as significant as the prime contractor's performance. The COFC rejected the subcontractor's argument, explaining that its "appellate authority [the Federal Circuit] has squarely rejected the notion that a subcontractor qualifies as an 'interested party'…, leaving no room for the type of scrutiny Plaintiff urges into what lies beneath this subcontractor's nomenclature."[19] Nevertheless, as discussed below, there are arguments that could lead to a different result.

History Of Bid Protests In Federal Courts

In 1940, the U.S. Supreme Court held in *Perkins v. Lukens Steel Co.* that Congress enacted procurement laws for the protection of the Government, rather than for the benefit of private parties contracting with the Government.[20] Accordingly, the Court found that that a Government contractor lacked standing to sue the Government either to allege a violation of procurement law or otherwise to contest the award of a contract.[21] In short, the Supreme Court refused to recognize standing for disappointed bidders to bring *any* class of bid protest action. Notably, this decision predated the Administrative Procedure Act, which Congress enacted in 1946 to empower private parties to challenge in court allegedly unlawful or improper federal administrative agency actions.[22] However, even in the immediate aftermath of the APA, disappointed bidders continued to lack standing to challenge contract award decisions or otherwise obtain legal redress of claims relating to the award of a Government contract to another competitor.

In 1956, the U.S. Court of Claims held in *Heyer Products Co. v. United States* that when a party submits a bid for a federal contract, the United States enters into an implied contract with that contractor obligating the Government to consider honestly and fairly the contractor's bid.[23] If the Government fails to do so, the court ruled, a disappointed bidder is entitled to recover its bid and proposal expenses.[24] The decision thereby introduced for the first time a remedy (albeit a limited one) for disappointed bidders on Government contracts. The Court of Claims reasoned:[25]

> It was an implied condition of the request for offers that each of them would be honestly considered, and that that offer which in the honest opinion of the contracting officer was most advantageous to the government would be accepted. No person would have bid at all if he had known that "the cards were stacked against him."

The court also concluded that, if the Government knew at the outset of the procurement that it was going to give another party a contract, as opposed to the protesting plaintiff, then the agency "practiced a fraud on plaintiff and on all other innocent bidders."[26] In such a case,

the court held, the Government "induced [contractors] to spend their money to prepare their bids on the false representation that their bids would be honestly considered."[27]

The Court of Claims did not base its decision on the text of any particular statute; that is, no statute by its terms explicitly provided for a bid protest cause of action. Rather, the court permitted itself to entertain the bid protest-like suit only because the court first found the existence of an implied-in-fact contract to fairly consider bids.

In light of the Supreme Court's decision in *Lukens*, however, no bid protest cause of action in district court was available to contractors. Moreover, no action was available in any forum to recover a remedy other than bid and proposal preparation costs. In 1970, in *Scanwell Laboratories, Inc. v. Schaffer*, the U.S. Court of Appeals for the District of Columbia Circuit established that bid protest actions, seeking injunctive relief, could proceed under the APA.[28] The court explained:[29]

> [T]he essential thrust of appellant's claim…is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of illegal activity….

Thus, in *Scanwell*, the D.C. Circuit established that the district courts could entertain allegations by disappointed bidders that Government agencies had violated procurement laws or regulations or otherwise acted arbitrarily and capriciously in procurement decisions.[30] The remaining circuit courts eventually adopted the rationale of the *Scanwell* decision, thereby opening even more forums to bid protest actions and other suits challenging procurement-related agency action. To prevail in such a case, plaintiff protesters bore a "heavy burden" to show either that an agency procurement decision had no rational basis or that a "procurement procedure involved a clear and prejudicial violation of applicable statutes or regulations."[31]

The advent of district court jurisdiction offered disappointed bidders both an alternative to the *Heyer Products*-type suit that could be brought at the Court of Claims and an opportunity to seek nonmonetary relief (the set aside of a contract award).[32]

In 1982, Congress enacted the Federal Courts Improvement Act (FCIA), eliminating the Court of Claims and creating two new courts—the U.S. Claims Court, which inherited the jurisdiction of the Court of Claims' trial division and the U.S. Court of Appeals for the Federal Circuit, which inherited the jurisdiction of the court's appellate division.[33] The FCIA established for the successor Claims Court (renamed the Court of Federal Claims in 1992[34]) its first bid protest jurisdiction grounded in explicit statutory text. The FCIA provided:[35]

> To afford complete relief on any contract claim brought *before the contract is awarded*, the court shall have *exclusive jurisdiction* to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.

In an early case interpreting the FCIA, the Federal Circuit held, based on the phrase "before the contract is awarded," that the Claims Court only had jurisdiction over preaward bid protest cases.[36] As a result of that ruling, the court only exercised jurisdiction in bid protest cases if the suit was filed before the award of the contract in question.

Another dispute regarding the FCIA concerned whether district courts retained *Scanwell* jurisdiction over preaward bid protest cases. Some circuit courts, citing the "exclusive jurisdiction" language, held that the FCIA precluded district courts from exercising jurisdiction over preaward bid protest cases concurrently with the Claims Court. Other circuits, in contrast, maintained that Congress had not intended to divest district courts of concurrent jurisdiction over preaward bid protest cases.[37]

In 1996, Congress resolved this issue when it enacted the Administrative Disputes Resolution Act (ADRA), which in relevant part provides:[38]

> Both the United 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 regulation in connection with a procurement or proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether the suit is instituted before or after the contract is awarded.

This legislation remains in effect today, codified at 28 U.S.C.A. § 1491(b)(1), and is significant for two primary reasons: (1) it empowered both the COFC and the district courts to hear bid protests; and (2) it did not distinguish between preaward and postaward bid protests, as had the FCIA.

For bid protest suits and challenges to agency procurement actions under § 1491(b)—commonly referred to as the Tucker Act—ADRA imported the judicial review provisions of § 10(e) of the APA (codified at 5 U.S.C.A. § 706), mirroring the *Scanwell* standard of review.[39] This effectively nullified the effect of a Federal Circuit decision holding that the COFC could not review many types of agency procurement actions that the district courts had entertained under the APA pursuant to *Scanwell* jurisdiction.[40]

The COFC now has exclusive jurisdiction "over the actions described in Section 1491(b)(1)," the district court's jurisdiction over such suits having terminated on January 1, 2001, pursuant to a "sunset" provision within ADRA.[41] ADRA establishes the framework in the COFC under which subcontractor standing issues must be examined.

Potential Standing Under Tucker Act Or APA

■ Tucker Act Definition Of "Interested Party"

Because "privity of contract"—i.e., a contractual relationship, either express or implied in fact—does not exist between a subcontractor and the Government, a subcontractor ordinarily cannot recover amounts owed to it by the prime contractor directly from the United States.[42] But this so-called "no privity" rule only addresses whether a subcontractor may sue the Government to recover damages under a contract.[43]

As described above, however, the Tucker Act, as amended by ADRA, establishes the contours of the COFC's jurisdiction to hear bid protest and related suits brought by an "interested party," although the Tucker Act does not itself define the term "interested party."[44] As a result, the COFC and the Federal Circuit were left to fill in the void.

In 2001, the Federal Circuit did so in *American Federation of Government Employees, AFL-CIO v. United States* (*AFGE*), holding that the term "interested party" as used in the Tucker Act must be defined in the same manner as the same term is defined under CICA, the GAO's bid protest jurisdictional statute,[45] as follows: [46]

> The term "interested party," with respect to a contract or a solicitation or other request for offers...means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

Although the CICA definition "by its own terms, applies only to contract disputes decided by the Comptroller General of the GAO," the Federal Circuit believed that "the fact that Congress used the same term [i.e., "interested party"] in § 1491(b) [the Tucker Act] as it did in the CICA suggests that Congress intended the same standing requirements that apply to protests brought under the CICA to apply to actions brought under § 1491(b)(1)."[47]

In so holding, the Federal Circuit in *AFGE* rejected the alternative argument that "interested party" standing under 28 U.S.C.A. § 1491(b)(1) should be interpreted consistent with the APA standing principles,[48] under which "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[49] Application of APA standing principles—such as in a *Scanwell* action—would have resulted in a broader definition of "interested party" than is the case under the CICA approach.[50] While acknowledging

that ADRA "did explicitly invoke the APA standard of review" and that Congress intended to provide the COFC with *Scanwell* jurisdiction, the Federal Circuit was "not convinced that Congress, when using the term 'interested party' to define those who can bring suit under § 1491(b)(1), intended to confer standing on anyone who might have standing under the APA."[51]

Because subcontractors are not actual or prospective bidders on a Government contract as required under CICA, *AFGE* and other Federal Circuit decisions following it appear to suggest that a subcontractor can never be an "interested party" under the Tucker Act and thus cannot have standing to file a bid protest action in the COFC. [52] Indeed, as noted earlier in this PAPER, the GAO—based in part on CICA's definition of "interested party"—under its regulations "will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided."[53] Likewise, a recent COFC decision concluded that the Federal Circuit "*squarely* rejected the notion that a subcontractor qualifies as an 'interested party' under the CICA definition."[54] Nevertheless, as described below, *AFGE* did not deal "squarely" with the full range of actions over which the COFC has jurisdiction, and therefore jurisdiction over subcontractor protests could remain as a viable proposition.

■ Challenging Alleged Violation Of Statute Or Regulation

The Tucker Act, as amended by ADRA, allows for three distinct causes of action: (1) "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract"; (2) "an action by an interested party objecting…to a proposed award or the award of a contract"; and (3) "an action by an interested party objecting to…any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[55] Arguably, this language is sufficiently broad to encompass certain types of subcontractor challenges to contract award decisions.

For example, the Federal Circuit in *RAMCOR Services Group, Inc. v. United States* rejected the Government's position that a plaintiff can "only invoke [28 U.S.C.A.] § 1491(b)(1) jurisdiction by including in its action an attack on the merits of the underlying contract award."[56] The court there characterized as "sweeping" the Tucker Act language concerning challenges asserting a "violation of a statute or regulation in connection with a procurement or proposed procurement," and, on the basis of this "sweeping" language, concluded that jurisdiction exists over challenges to actions that are collateral to the underlying contract award.[57]

In particular, *RAMCOR* involved a challenge to an agency's decision to override an automatic stay of contract award under CICA that is triggered by the timely filing of a GAO preaward bid protest.[58] The Federal Circuit held that the Tucker Act "does not require an objection to the actual contract procurement, but only to the 'violation of a statute or regulation in connection with a procurement or a proposed procurement.'"[59] Because the "phrase 'in connection with' is very sweeping in scope," "[a]s long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."[60] The key jurisdictional question under *RAMCOR*, then, is whether "an agency's actions under a statute…clearly affect the award and performance of a contract."[61] To determine whether an agency violated an underlying statute or regulation—e.g., the CICA stay provision was at issue in *RAMCOR*—the Federal Circuit explained that "ADRA explicitly imports the APA standards of review into the Court of Federal Claims' review of agency decisions."[62]

In the context of an action that alleges a violation of a procurement statute or regulation, the CICA definition of "interested party" does not appear to fit. The *AFGE* case, discussed above, that established the CICA definition of "interested party" as controlling did not involve a "violation of statute or regula-

tion in connection with a procurement or a proposed procurement" and therefore did not discuss *RAMCOR*. Rather, *AFGE* involved an objection "to a solicitation by a Federal agency."[63]

The problem that arises when the CICA definition of "interested party" is applied in "violation of statute or regulation in connection with a procurement or a proposed procurement" cases is that, while the CICA definition is concerned with whether the plaintiff is "affected by the award of the contract or by failure to award the contract,"[64] the Federal Circuit has made clear that a *RAMCOR*-type action may be brought independent of whether the plaintiff objects to the actual contract procurement. CICA's definition of "protest" is more limited than the scope of actions described by the Tucker Act and does not include an independent "violation of statute or regulation in connection with a procurement or a proposed procurement" prong:[65]

> The term "protest" means a written objection by an interested party to any of the following:
>
> (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
>
> (B) The cancellation of such a solicitation or other request.
>
> (C) An award or proposed award of such a contract.
>
> (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Moreover, while the CICA definition of "protest" and "interested party" are concerned with "Federal agency" solicitations, offers, and awards,[66] the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1) by its terms is concerned more broadly with federal agency action. Consistent with the sweeping nature of the statutory text, the Federal Circuit in *RAMCOR* thus explained that, as an alternative to challenging an agency procurement action under § 1491(b)(1) in the COFC, "a contractor may instead pursue a district court action under the APA to seek redress."[67] In sum, *AFGE*'s applicability arguably may be limited to the first two prongs of the Tucker Act described above—protest actions that may also be filed with the GAO pursuant to CICA—particularly in light of *AFGE*'s failure to discuss a *RAMCOR*–type suit.

While *AFGE* held that Congress, by enacting ADRA, did not intend "to expand the class of parties who can bring bid protest actions in the Court of Federal Claims,"[68] it is important to note once again that the Federal Circuit did not address the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1). Instead, the court in *AFGE* concluded that references to *Scanwell* jurisdiction in the legislative history of § 1491(b)(1) were meant to encompass only "bid protest cases brought under the APA by disappointed bidders" challenging "a Federal contract award."[69] *AFGE*'s view of the legislative history, however, does not account for the fact that, in a *RAMCOR*-type suit, a contract award is not at issue.[70] That being the case, *AFGE* should be limited to its facts, and standing to raise a *RAMCOR*-type action should be evaluated under APA standards.

Under the APA, questions of standing are resolved—not under the CICA definition of "interested party"—but under the "zone of interests" test. As noted above, the APA confers standing on a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"[71] To establish standing, claimants "must demonstrate that: (1) they have suffered sufficient 'injury-in-fact;' (2) that the injury is 'fairly traceable' to the agency's decision and is 'likely to be redressed by a favorable decision;' and (3) that the interests sought to be protected are 'arguably within the zone of interests to be protected or regulated by the statute…in question.'"[72] Application of this test would likely permit a subcontractor to challenge certain agency actions, depending on the purpose and scope of the underlying statute or regulation allegedly violated.[73] This view is consistent with a number of *Scanwell* decisions that applied the APA "zone

of interests" test to examine whether a subcontractor had standing to allege a violation of a procurement law or regulation.[74]

To invoke the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1), the crucial issue for a subcontractor will be to identify precisely the agency procurement action to be challenged as unlawful. While there may be other possibilities, a plaintiff subcontractor's most obvious target is agency action in the form of subcontract approval pursuant to FAR 44.2, "Consent to Subcontracts."[75] Where that FAR provision applies, a subcontractor could attempt to challenge an agency's approval of a subcontract award made in violation of other procurement regulations, such as those governing organizational conflicts of interest for example,[76] as a violation of a regulation in connection with a procurement.

By focusing on an agency's allegedly illegal procurement action and the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1), a plaintiff subcontractor not only could potentially avoid the CICA "interested party" definition, but also could avoid a line of cases rejecting subcontractor bid protests on the grounds that "to bring a bid protest in [the COFC], the plaintiff must have competed in a government-sponsored solicitation, which was issued by a federal agency and not a private party."[77] For example, in *Blue Water Environmental, Inc. v. United States*, a plaintiff subcontractor sought to set aside a contract awarded for environmental cleanup work at the Brookhaven National Laboratory, which is owned by the DOE but operated by an M&O prime contractor.[78] The Government moved to dismiss the case on the grounds that the contract at issue was not with the United States, and that the M&O contractor was neither a federal agency nor a "purchasing agent" for the DOE when it solicited offers for the subcontract.[79] Holding that "in order to establish jurisdiction, the plaintiff must prove...that [the M&O contractor] is itself a federal entity or is acting as an 'agent' for a federal entity," the COFC ultimately granted the Government's motion to dismiss.[80] In other words, the decision appears to be premised on the notion that the subject of the challenge must be federal action, whether by the Government itself or by the Government's authorized agent.

Like the Federal Circuit in *AFGE*, the COFC in *Blue Water* did not have occasion to address the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1). And, while the court rejected the plaintiff's contention that the M&O contractor was a federal agency due to the DOE's "day-to-day supervision," the COFC declined to "reach[] the issue of whether DOE's supervision of [the M&O contractor] might qualify as federal actions for other purposes."[81] In a *RAMCOR*-type suit, one need not establish "that the entity that issues the solicitation must be a federal agency."[82] Instead, *RAMCOR* suggests that a subcontractor need only identify federal agency action that potentially violates a "statute or regulation in connection with a procurement"—a phrase that the Federal Circuit has interpreted broadly.[83]

In sum, *AFGE* arguably does not preclude a subcontractor from initiating an action in the COFC under 28 U.S.C.A. § 1491(b)(1) "objecting to...any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[84] Moreover, even if a subcontractor ultimately *is* precluded from bringing a "violation of statute or regulation" action in that court, *RAMCOR*—in addition to other district and circuit court decisions—held that a subcontractor would have standing in district court, assuming the subcontractor met the APA "zone of interests" standing test.[85] Finally, the Tenth Circuit has held, in *City of Albuquerque v. U.S. Department of the Interior*, based on *AFGE*, that ADRA "did not affect the district court's ability to hear cases challenging the government's contract procurement process so long as the case is brought by someone *other than* an actual or potential bidder."[86] Thus, even if the COFC or the Federal Circuit ultimately were to reject the argument suggested in this PAPER, a district court should nonetheless have jurisdiction over *RAMCOR*-type suits challenging agency procurement actions under the APA.

★ GUIDELINES ★

These *Guidelines* are intended to assist companies and their legal counsel in considering their legal options should issues arise in connection with the award of a subcontract. They are not, however, a substitute for professional representation in any specific situation.

1. Identify a specific federal agency action—as opposed to prime contractor behavior—that might be challenged under the Tucker Act. Be prepared to explain why the plaintiff subcontractor is within the "zone of interests" of the regulation or statute allegedly violated.

2. If filing suit in the COFC, make clear that the cause of action is based on the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1), and that the challenge is aimed at federal agency action, not that of a private entity (e.g., a prime contractor).

3. As discussed, *AFGE* is the primary obstacle to subcontractor standing in the COFC. Be ready to argue that *AFGE* should be limited to its facts, as it did not address *RAMCOR* or the "violation of statute or regulation" prong of 28 U.S.C.A. § 1491(b)(1). Emphasize that, under *Scanwell* and the APA, district courts previously recognized the possibility of subcontractor suits challenging agency procurement actions.

4. Remember that cases such as *Blue Water* are distinguishable. Do not argue that a prime contractor essentially acted "on behalf of" the Government; rather, focus the challenge on whether a specific federal agency action was contrary to statute or regulation.

5. Consider filing suit in federal district court, instead of the COFC, under the reasoning of the Tenth Circuit in *City of Albuquerque*.

6. In any suit, as in the case of any bid protest, make certain that you meet any applicable timeliness requirements or statutes of limitations. Additionally, wherever possible, explore means to resolve the dispute without resort to litigation, such as through negotiations or alternative dispute resolution.

★ REFERENCES ★

1/ GAO, Inadequate Controls Over DOD Subcontracts Cost Government Millions of Dollars 1–2 (GAO/T-NSIAD-91-37, May 22, 1991) (statement of Frank C. Conahan, Assistant Comptroller General (National Security and International Affairs Division)) (discussing the resulting "substantial increase in subcontracting activities").

2/ Id. at 2.

3/ Id. (explaining that "DOD does not have direct management control over subcontracts because its contractual relation is with the prime contractors, not the subcontractors").

4/ GAO, Contract Management: DOD Needs Measures for Small Business Subcontracting Program and Better Data on Foreign Subcontracts 4 (GAO-04-381, Apr. 5, 2004).

5/ GAO, Department of Energy: Improved Oversight Could Better Ensure Opportunities for Small Business Subcontracting 1, 26 (GAO-05-459, May 13, 2005); see also Stamps, "Subcontractor GAO Protests," Briefing Papers No. 89-5 (Apr. 1989) (discussing various types of large prime contracts including "facility management contracts" and "installation operation & maintenance contracts").

6/ See GAO, supra note 5, at 1; see also FAR 17.6; DEAR pt. 970.

7/ See GAO, supra note 5, at 1.

8/ Id.

9/ See Clark & Moutray, The Future of Small Businesses in the U.S. Federal Government Marketplace 15–16 (working paper presented at the International Public Procurement Conference, Ft. Lauderdale, Fla., Oct. 21–23, 2004) (opining that "larger participation by small business will come at the subcontracting level" and that "[t]he time has come for large prime contractors to be held fully accountable for the manner in which they comply with the federal government's subcontracting laws"), available at http://www.sba.gov/advo/stats/wkp04mccm.pdf.

10/ See Interview with Prof. Steven Schooner, George Washington University Law School, available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html (posted June 21, 2005).

11/ Id.

12/ Id.

13/ See 47 GC ¶ 355 (discussing meeting between members of the Defense Acquisition Performance Assessment project and representatives from both industry and the DOD).

14/ Feldman, "Subcontractors in Federal Procurement: Roles, Rights & Responsibilities," Briefing Papers No. 03-3, at 11 (Feb. 2003).

15/ Id. (discussing 31 U.S.C.A. § 3551 and opining that a subcontractor would not qualify as an "interested party" and describing the exception for subcontractor protests under 4 C.F.R. § 21.5(h) as "an almost nonexistent situation").

16/ 31 U.S.C.A. § 3551(2)(A).

17/ 4 C.F.R. § 21.5(h); see 4 C.F.R. § 21.13; see also Geo-Centers, Inc., Comp. Gen. Dec. B-261716, 95-2 CPD ¶ 69, 37 GC ¶ 538 (GAO "will no longer entertain protests of procurements conducted by DOE's management and operating prime contractors unless specifically requested to do so by DOE."); 37 GC ¶ 313 (discussing DOE's decision to "neither accept nor rule on subcontractor protests in connection with subcontracts awarded by its management and operating contractors after June 2, 1995").

18/ 28 U.S.C.A. § 1491(b)(1).

19/ Eagle Design & Mgmt., Inc. v. United States, 62 Fed. Cl. 106, 108 (2004), 46 GC ¶ 380.

20/ Perkins v. Lukens Steel Co., 310 U.S. 113, 126 (1940).

21/ Id. at 126–27.

22/ 5 U.S.C.A. §§ 701–706.

23/ Heyer Prods. Co. v. United States, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

24/ Id.

25/ Id. at 412.

26/ Id. at 413.

27/ Id.

28/ Scanwell Labs. Inc. v. Schaffer, 424 F.2d 859 (D.C. Cir. 1970), 12 GC ¶ 64.

29/ Id. at 864 (discussing 5 U.S.C.A. § 702).

30/ See 5 U.S.C.A. § 706(2)(A) (APA scope of review).

31/ Kentron Hawaii Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973).

32/ See, e.g., Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).

33/ Pub.L. No. 97-164, 96 Stat. 25 (1982) (emphasis added).

34/ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992).

35/ Pub. L. No. 97-164, § 133(a) (emphasis added).

36/ United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983).

37/ See generally Shea & Shaengold, "A Guide to the Court of Appeals for the Federal Circuit," Briefing Papers No. 90-13, at 7 (Dec. 1990).

38/ Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (1996) (codified at 28 U.S.C. § 1491(b)). See generally McCullough, Pollack & Alerding, "Bid Protest Practice in the Court of Federal Claims," Briefing Papers No. 00-10 (Sept. 2000).

39/ See 28 U.S.C.A. § 1491(b)(4).

40/ John C. Grimberg Co., 702 F.2d 1362.

41/ Pub. L. No. 104-320, § 12(d).

42/ United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550–51 (Fed. Cir. 1983); see also Globex Corp. v. United States, 54 Fed. Cl. 343, 347 (2002), 44 GC ¶ 464 ("Because subcontractors typically are not in privity of contract with the Government, the well-entrenched general rule is that subcontractors cannot directly sue the Government.").

43/ See 28 U.S.C.A. § 1491(a)(1) (COFC has "jurisdiction to render judgment upon any claim against the United States founded upon…any express or implied contract with the United States.").

44/ See 28 U.S.C.A. § 1491(b)(1).

45/ 31 U.S.C.A. § 3551(2).

46/ American Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1299 (Fed. Cir. 2001), 43 GC ¶ 292 (quoting 31 U.S.C.A. § 3551(2)).

47/ Id. at 1302.

48/ Id.

49/ 5 U.S.C.A. § 702.

50/ See 258 F.3d at 1298; see also National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998).

51/ 258 F.3d at 1302.

52/ Eagle Design & Mgmt., Inc. v. United States, 62 Fed. Cl. 106, 108–09 (2004), 46 GC ¶ 380.

53/ 4 C.F.R. § 21.5(h); see 4 C.F.R. § 21.13.

54/ 62 Fed. Cl. at 108 (emphasis added).

55/ 28 U.S.C.A. § 1491(b)(1); see also OTI America, Inc. v. United States, 68 Fed. Cl. 108, 113 (2005), 48 GC ¶ 30 ("In essence, the ADRA confers on this court jurisdiction over three types of action that are commonly termed 'bid protests.'").

56/ RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999), 41 GC ¶ 361.

57/ Id.

58/ See 31 U.S.C.A. § 3553(c)(2). See generally Nash, "Protests at the Court of Federal Claims: Jurisdiction To Review the Override of the Automatic Stay of Procurements," 13 Nash & Cibinic Rep. ¶ 54 (Oct. 1999).

59/ 185 F.3d at 1289.

60/ Id.

61/ Id.

62/ Id. at 1290 (discussing 28 U.S.C.A. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.")).

63/ American Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1299 (Fed. Cir. 2001), 43 GC ¶ 292 ("As recognized by the parties and by the Court of Federal Claims, the statute confers standing on 'an interest party objecting to a solicitation by a Federal agency,' but does not further define who is encompassed by the term 'interested party.'").

64/ 31 U.S.C.A. § 3551(2).

65/ 31 U.S.C.A. § 3551(1); Michael J. O'Kane, Comp. Gen. Dec. B-257384, 94-2 CPD ¶ 120, 36 GC ¶ 577 ("As stated above, under CICA we have jurisdiction to consider objections to solicitations, proposed awards, and awards of contracts. A complaint concerning the rejection of an application under a pre-qualification procedure does not involve a solicitation or an actual or proposed contract award. Therefore, we do not have jurisdiction under CICA to consider protests based solely on such complaints.").

66/ 31 U.S.C.A. § 3551(1).

67/ 185 F.3d at 1290.

68/ 258 F.3d at 1300.

69/ 258 F.3d at 1301–02 (quoting 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996)).

70/ PGBA, LLC v. United States, 57 Fed. Cl. 655, 658 (2003), 45 GC ¶ 432 (explaining that in RAMCOR, "the Federal Circuit determined that this court could review the merits of an override independent of any consideration of the merits of the underlying contract award"); see also Northrop Grumman Corp. v. United States, 50 Fed. Cl. 443, 455–56 (2001), 43 GC ¶ 408 (citing AFGE and Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000), 42 GC ¶ 145, and holding that contractor that did not submit a proposal on the original contract had standing to bring bid protest alleging that new contract

work was awarded without competition in violation of CICA). But see Fire-Trol Holdings, LLC v. United States, 62 Fed. Cl. 440, 444 (2004), 46 GC ¶ 411 ("Despite Fire-Trol's intention to bid when solicitations are issued…, its intention alone does not establish that Fire-Trol is an [interested party]."). See generally Jackson, Koehl & Crick, "Recognizing & Challenging Out-of-Scope Changes," Briefing Papers No. 03-13 (Dec. 2003).

71/ 5 U.S.C.A. § 702.

72/ 258 F.3d at 1298 (citing National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998).

73/ Cf. 258 F.3d at 1301 ("Because the language of 5 U.S.C.A. § 702 is quite broad, parties other than actual or prospective bidders might be able to bring suit.").

74/ See Amdahl Corp. v. Baldrige, 617 F. Supp. 501 (D.D.C. 1985); Contractors Eng'rs Int'l, Inc. v. U.S. Dep't of Veteran Affairs, 947 F.2d 1298, 1300–01 (5th Cir. 1991), 34 GC ¶ 175 (discussing Amdahl); Information Sys. & Networks Corp. v. U.S. Dep't of Health & Human Servs., 970 F. Supp. 1, 9 n.9 (D.D.C. 1997) ("In fact, the Amdahl or Contactors Engineers holdings are really no more than zone of interest analyses which enumerate circumstances whereby [subcontractor] standing may be found.").

75/ See also 41 GC ¶ 225 (discussing DOD efforts to eliminate bias in the subcontractor selection process); Keyes, Government Contracts Under the Federal Acquisition Regulation § 44.2 (3d ed. 2003) ("Consent to Subcontracts"); Feldman, supra note 14, at 4–5.

76/ See FAR subpt. 9.5.

77/ Blue Water Envtl., Inc. v. United States, 60 Fed. Cl. 48, 51 (2004), 46 GC ¶ 173.

78/ Id. at 48–49.

79/ Id.

80/ Id. at 51.

81/ Id. at 52.

82/ See id. at 51.

83/ See RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999), 41 GC ¶ 361; Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000), 42 GC ¶ 145 (holding COFC has jurisdiction to decide a subcontractor's claim that the Government violated the Armed Services Procurement Act); OTI Am., Inc. v. United States, 68 Fed. Cl. 108, 117 (2005), 48 GC ¶ 30 (finding subject matter jurisdiction "[i]n light of the broad language of [28 U.S.C.A. §] 1491(b) and Congress's expressed intent that [28 U.S.C.A. § 1491(b)] encompass the entire procurement process"). See generally McCullough, Pollack & Staley, "Feature Comment: Third Year of COFC Postaward Bid Protest Jurisdiction: A Work in Progress," 42 GC ¶ 138 (Apr. 12, 2000) (discussing Phoenix Air).

84/ Cf. Alaska Central Express, Inc. v. United States, 50 Fed. Cl. 510 (2001) (discussing AFGE and RAMCOR); Fire-Trol Holdings, LLC v. United States, 62 Fed. Cl. 440, 444 (2004), 46 GC ¶ 411.

85/ See 185 F. 3d at 1290; Amdahl Corp. v. Baldrige, 617 F. Supp. 501 (D.D.C. 1985); Contractors Eng'rs Int'l, Inc. v. U.S. Dep't of Veteran Affairs, 947 F.2d 1298, 1300–01 (5th Cir. 1991), 34 GC ¶ 175; Information Sys. & Networks Corp. v. U.S. Dep't of Health & Human Services, 970 F. Supp. 1, 9 n.9 (D.D.C. 1997).

86/ City of Albuquerque v. U.S. Dep't of the Interior, 379 F.3d 901, 911 (10th Cir. 2004) (emphasis added) ("[T]he legislative history of [ADRA] does not lead to the conclusion Congress intended to leave parties who were not actual or prospective bidders without a remedy. [The agency] has not provided, nor have we found, any piece of legislative history suggesting parties who had some avenue available to seek redress before the passage of the [ADRA] would be left without an avenue for relief after the Act became effective."); see also Advanced Sys. Tech., Inc. v. Barrito, No. Civ. A. 05-2080ESH, 2005 WL 3211394, *4 (D.D.C. Nov. 1, 2005) (explaining that the Tenth Circuit in Albuquerque "permitted an APA claim brought by the city that challenged an agency's procurement process because the ADRA's provisions apply only to 'an interested party'"); National Treasury Employees Union v. Internal Revenue Service, No. Civ. A. 04-CV-0820, 2006 WL 416161, *3 (D.D.C. Feb. 22, 2006) (citing Albuquerque for the proposition that "nothing in the Disputes Act deprives this court of jurisdiction over non-interested parties").