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## Insourcing Functions Performed by Federal Contractors: Legal Issues

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## Insourcing Functions Performed by Federal Contractors: Legal Issues

### Abstract

[Excerpt] While agencies are prohibited by federal law and policy from contracting out functions that are “inherently governmental,” other functions could potentially be contracted out. There has long been debate over both general government policies promoting the use of the private sector to perform “commercial functions,” and whether specific functions should be performed by government personnel or contractors. However, since 2008, the insourcing initiatives of recent Congresses and the Obama Administration have generated particular controversy. Several lawsuits have been filed challenging agencies’ determinations to insource particular functions, and broader questions have been raised as to whether agencies’ implementation of insourcing runs afoul of civil service, ethics, or small business laws. This report provides a brief overview of key legal issues related to recent insourcing initiatives. It will be updated as developments occur.

### Keywords

federal agencies, contracting, insourcing, ethics, small business laws

### Comments

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# Insourcing Functions Performed by Federal Contractors: Legal Issues

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February 22, 2013

**Congressional Research Service**

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## Summary

Recent Congresses and the Obama Administration have taken numerous actions to promote “insourcing,” or the use of government personnel to perform functions that contractors have performed on behalf of federal agencies. Among other things, the 109<sup>th</sup> through the 111<sup>th</sup> Congresses enacted statutes requiring the development of policies and guidelines to ensure that agencies “consider” using government employees to perform functions previously performed by contractors, as well as any new functions. The Obama Administration has similarly promoted insourcing, with officials calling for consideration of insourcing in various workforce management initiatives.

Certain insourcing initiatives of the Department of Defense (DOD), in particular, prompted legal challenges alleging that DOD failed to comply with applicable guidelines when insourcing specific functions. The only court to reach the issue assumed, without deciding, that certain guidelines were legally binding. However, other courts have not addressed this issue because of questions about jurisdiction and standing. The parties initially conceded that such suits were cognizable under the Administrative Procedure Act (APA), which permits challenges to agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” although the government has recently asserted that insourcing determinations are committed to agency discretion by law and, thus, not reviewable by the courts.

At first, there was some uncertainty as to whether the U.S. Court of Federal Claims had jurisdiction over such suits under the Administrative Disputes Resolution Act of 1996, or whether the federal district courts had jurisdiction under the APA. However, most courts to address the issue have found that the Court of Federal Claims has exclusive jurisdiction over challenges to insourcing determinations because such determinations are made in connection with “proposed procurements” and at least some contractors are “interested parties.” Later, questions arose about whether contractors who meet the statutory standing requirements (i.e., are “interested parties”) must also meet prudential standing requirements. These judicially self-imposed limits on the exercise of jurisdiction ensure that plaintiffs are within the “zone of interests” to be protected by the statutes they seek to enforce. Initially, judges on the Court of Federal Claims reached differing conclusions as to whether prudential standing requirements applied, although later decisions may suggest that any prudential standing requirements that apply could potentially be easily met. Most recently, the court has had to determine whether vendors whose contracts have expired have standing to challenge insourcing determinations, or whether such challenges are moot.

Other provisions of law could also potentially constrain whether and how agencies may proceed with insourcing in specific circumstances, or limit the activities that former contractor employees may perform after being hired by the federal government. These include (1) contract law, under which agencies could be found to have constructively terminated certain requirements contracts by augmenting their in-house capacity to perform services provided for in the contract; (2) civil service law, which would generally limit “direct hires” of contractor employees; and (3) ethics law, which could limit the involvement of former contractor employees in certain agency actions.

Members of the 112<sup>th</sup> Congress enacted legislation (P.L. 112-239) that calls for the Office of Management and Budget to establish “procedures and methodologies” for use by agencies in deciding whether to insource functions performed by small businesses, including procedures for identifying which contracts are considered for conversion and for comparing the costs of performance by contractor personnel with the costs of performance by government personnel.

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## Introduction

While agencies are prohibited by federal law and policy from contracting out functions that are “inherently governmental,”<sup>1</sup> other functions could potentially be contracted out.<sup>2</sup> There has long been debate over both general government policies promoting the use of the private sector to perform “commercial functions,”<sup>3</sup> and whether specific functions should be performed by government personnel or contractors.<sup>4</sup> However, since 2008, the insourcing initiatives of recent Congresses and the Obama Administration have generated particular controversy.<sup>5</sup> Several lawsuits have been filed challenging agencies’ determinations to insource particular functions, and broader questions have been raised as to whether agencies’ implementation of insourcing runs afoul of civil service, ethics, or small business laws. This report provides a brief overview of key legal issues related to recent insourcing initiatives. It will be updated as developments occur.

## Background

Since January 1955, the federal government has consistently had policies promoting the use of the private sector to produce commercial products and perform commercial services, although the wording of such policies and, particularly, the degree to which they have been implemented by the executive branch have varied over time.<sup>6</sup> The George W. Bush Administration, for example,

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<sup>1</sup> In brief, an “inherently governmental function” is one that is “so intimately related to the public interest as to require performance by Federal Government employees.” 31 U.S.C. §501 note, at §5(2)(A). There has recently been concern about the definition of “inherently governmental functions” and, particularly, whether the existence of multiple and/or contradictory definitions of this term has resulted in the contracting out of functions that must be performed by federal employees. See CRS Report R42325, *Definitions of “Inherently Governmental Functions” in Federal Procurement Law and Guidance*, by John R. Luckey and Kate M. Manuel (surveying existing definitions of inherently governmental functions); CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter*, by Kate M. Manuel, L. Elaine Halchin, and Erika K. Lunder (discussing Obama Administration guidance regarding inherently governmental and related functions).

<sup>2</sup> See, e.g., *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338, 341 n.7 (2004) (treating items on the Federal Acquisition Regulation’s list of “functions approaching inherently governmental” as capable of being contracted out by agencies). Congress can, however, remove agencies’ discretion to contract out particular functions by prohibiting them from doing so (or from using appropriated funds to do so). See, e.g., Consolidated Appropriations Act, 2008, P.L. 110-161, §730, 121 Stat. 1846 (2008) (“None of the funds made available in this Act may be used to study, complete a study of, or enter into a contract with a private party to carry out, without specific authorization in a subsequent Act of Congress, a competitive sourcing activity of the Secretary of Agriculture, including support personnel of the Department of Agriculture, relating to rural development or farm loan programs.”).

<sup>3</sup> See CRS Report R42325, *Definitions of “Inherently Governmental Functions” in Federal Procurement Law and Guidance*, by John R. Luckey and Kate M. Manuel, at pp. 3-8. For purposes of insourcing and outsourcing, a “commercial function” is “[a] recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.” See U.S. Office of Management and Budget, Circular No. A-76 (Revised), May 29, 2003, at D-2, available at [http://www.whitehouse.gov/omb/circulars\\_a076\\_a76\\_incl\\_tech\\_correction](http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction).

<sup>4</sup> See, e.g., Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §832, 122 Stat. 4535 (Oct. 14, 2008) (“It is the sense of Congress that ... the regulations issued by the Secretary of Defense pursuant to section 862(a) of the National Defense Authorization Act for Fiscal Year 2008 ... should ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations.”).

<sup>5</sup> See *infra* “Administrative Procedure Act and Insourcing Guidelines.”

<sup>6</sup> Compare Bureau of the Budget Bulletin No. 55-4 (Jan. 15, 1955) (“[The] Federal Government will not start or carry (continued...)”).

promoted this policy vigorously under the name of “competitive sourcing” (later “commercial services management”), which was a key component of the President’s Management Agenda.<sup>7</sup> Its doing so prompted concern among some commentators, who asserted that competitive sourcing represented a concerted effort to shift work to the private sector and resulted in contractors performing functions that should have been performed by government employees.<sup>8</sup>

Responding, in part, to such concerns, the 109<sup>th</sup> Congress enacted legislation directing the Secretary of Defense to “prescribe guidelines and procedures for ensuring that consideration is given to using Federal Government employees for work that is currently performed or would otherwise be performed under Department of Defense [DOD] contracts.”<sup>9</sup> These guidelines and procedures are to ensure that “special consideration” is given to using government personnel to perform functions that

- had been performed by government employees at any time on or after October 1, 1980;
- are closely associated with the performance of inherently governmental functions;
- are performed under contracts that were not competitively awarded; or
- have been performed poorly by a contractor due to excessive costs or inferior quality.<sup>10</sup>

Subsequent Congresses expanded upon these requirements. First, the 110<sup>th</sup> Congress required that DOD guidelines and procedures also give consideration to using government employees to perform new functions, as well as those that had been contracted out.<sup>11</sup> Then, the 111<sup>th</sup> Congress imposed similar requirements upon civilian agencies.<sup>12</sup>

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(...continued)

on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.”) with Bureau of the Budget Circular A-76 (March 3, 1966) (“The guidelines in this Circular are in furtherance of the Government’s general policy of relying on the private enterprise system to supply its needs.”) and Office of Management and Budget Circular A-76, *supra* note 3 (“The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition.”). See also CRS Report R42341, *Sourcing Policy: Selected Developments and Issues*, by L. Elaine Halchin.

<sup>7</sup> U.S. Office of Management and Budget, Performance of Commercial Activities, 67 Fed. Reg. 69772 (Nov. 19, 2002) (“President [George W. Bush] has identified competitive sourcing—i.e., the process of opening the government’s commercial activities to the discipline of competition—as one of the five main initiatives of his Management Agenda for improving the performance of government.”).

<sup>8</sup> See, e.g., Am. Fed’n of Gov’t Employees (AFGE), Privatization: Cleaning Up the Mess, February 9, 2009, available at <http://www.afge.org/index.cfm?page=2005LegislativeConferenceIssuePapers&fuse=Content&ContentID=1745> (“[Office of Management and Budget] officials illegally watered down the statutory definition when they overhauled the A-76 Circular [in 2003].”).

<sup>9</sup> National Defense Authorization Act for FY2006, P.L. 109-163, §343(a)(1), 119 Stat. 3200-01 (Jan. 6, 2006) (codified at 10 U.S.C. §2461 note).

<sup>10</sup> *Id.* at §343(a)(2)(A)-(D).

<sup>11</sup> National Defense Authorization Act for FY2008, P.L. 110-181, §324, 122 Stat. 60-61 (Jan. 28, 2008) (codified at 10 U.S.C. §2463).

<sup>12</sup> Omnibus Appropriations Act, 2009, P.L. 111-8, §736, 123 Stat. 689-91 (Mar. 11, 2009) (codified at 31 U.S.C. §501 note).

When President Obama took office, these and related legislative actions<sup>13</sup> were supplemented by a number of executive branch initiatives that also promoted insourcing of at least certain functions. President Obama himself paved the way for such initiatives with a March 4, 2009, memorandum on government contracting, which suggested that “contractors may be performing inherently governmental functions.”<sup>14</sup> Although explicitly focused on impermissible and inappropriate outsourcing of inherently governmental functions, this memorandum implied that at least certain functions that have been outsourced should be returned to government performance (i.e., insourced). DOD and the Office of Management and Budget (OMB) both subsequently issued additional guidance regarding insourcing. For example, in a May 28, 2009, memorandum, the Deputy Secretary for Defense called for the development of insourcing plans and stated that insourcing should be part of a “total force approach to workforce management and strategic human capital planning.”<sup>15</sup> OMB took a similar approach in its July 29, 2009, memorandum on “Managing the Multi-sector Workforce,” directing agencies to conduct pilot human capital analyses of programs where the agency has concerns about reliance on contractors.<sup>16</sup>

The President’s FY2011 budget submissions later reiterated the call for agencies to “be alert for situations in which excessive reliance on contractors undermines the ability of the Federal Government to control its own operations and accomplish its missions for the American people.”<sup>17</sup> DOD, in particular, heeded this call, with the Secretary of the Army testifying in February 2010 that the Army intended to insource 7,162 positions in FY2010 and 11,084 positions in FY2011 through FY2015.<sup>18</sup> Such announcements prompted some commentators to object that DOD’s insourcing initiatives had become a “quota driven exercise.”<sup>19</sup> These and

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<sup>13</sup> In addition to requiring the development of insourcing guidelines and procedures, the 109<sup>th</sup> through the 111<sup>th</sup> Congresses enacted other legislation that could promote insourcing, or at least government performance of particular functions. For example, the 111<sup>th</sup> Congress enacted legislation requiring agencies to complete inventories of their service contracts before they “begin, plan for, 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 [OMB] Circular A–76 or any other administrative regulation or directive.” Consolidated Appropriations Act, 2010, P.L. 111-117, §743(g), 123 Stat. 3218 (Dec. 16, 2009). Previously, the 110<sup>th</sup> Congress had enacted legislation requiring OMB to review existing definitions of inherently governmental functions, in part to ensure that such functions are not contracted out. Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §321(a)(1)-(4), 122 Stat. 4411 (October 14, 2008).

<sup>14</sup> President Barack Obama, Government Contracting, Mar. 4, 2009, at 2, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government).

<sup>15</sup> Deputy Secretary of Defense, Insourcing Contracted Services: Implementation Guidance, May 28, 2009, Attachment I, at 1, *available at* <http://ebookbrowse.com/depsecdef-memo-insourcing-contracted-services-implementation-guidance-28-may-09-osd-05339-09-pdf-d182859606>.

<sup>16</sup> Peter R. Orszag, Director, U.S. Office of Management and Budget, Managing the Multi-Sector Workforce, July 29, 2009, *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m-09-26.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf).

<sup>17</sup> ABA Public Contract Law Section, Legislative Coordinating Committee, Insourcing Initiatives, Mar. 6, 2010, *available at* [http://www.arnoldporter.net/resources/documents/Insourcing%20Presentation%20for%20ABA\\_\\_VA\\_804440\\_1\\_%20\\_2\\_.pdf](http://www.arnoldporter.net/resources/documents/Insourcing%20Presentation%20for%20ABA__VA_804440_1_%20_2_.pdf).

<sup>18</sup> See, e.g., Matthew Weigelt, Army Vows to Cut 7,000 Contractor Jobs This Year, *Wash. Tech.*, Feb. 23, 2010, *available at* <http://washingtontechnology.com/articles/2010/02/23/army-insourcing-core-governmental-functions.aspx>.

<sup>19</sup> Professional Services Council, Letter to the Honorable Robert Gates, May 3, 2010, *available at* <http://www.govexec.com/pdfs/050410rb1b.pdf> (objecting that DOD had largely insourced routine commercial functions, not critical positions). The Ike Skelton National Defense Authorization Act for FY2011 responded, in part, to such concerns by prohibiting DOD from establishing goals or quotas for insourcing functions. See P.L. 111-383, §323, 124 Stat. 4184 (Jan. 7, 2011) (codified at 10 U.S.C. §2463). See also National Defense Authorization Act for FY2012, P.L. 112-81, §931(a), 125 Stat. 1543 (Dec. 31, 2011) (indicating that nothing in the revised 10 U.S.C. §129a shall be construed to authorize the establishment of numerical goals or budgetary savings targets for the conversion of functions to performance by DOD civilian personnel or for conversion to performance by contractor personnel).



subsequent insourcing initiatives generated several lawsuits, discussed in more detail below, alleging that DOD failed to comply with its own policies and procedures when determining to insource specific functions.<sup>20</sup>

## Legal Issues

Because federal agencies have broad discretion in determining their own requirements and how they will meet these requirements, whether with their own employees or by contracting out,<sup>21</sup> there do not appear to be any legal barriers to insourcing per se.<sup>22</sup> However, various provisions of federal law could constrain whether and how agencies may proceed with insourcing in particular circumstances, as well as limit the activities that former contractor employees may perform after being hired by the federal government. These provisions include (1) the Administrative Procedure Act, which could potentially preclude agencies from implementing insourcing determinations that were not made in accordance with any applicable statutes, regulations, or guidelines; (2) contract law, under which agencies could be found to have constructively terminated for convenience, or even breached, certain requirements contracts by augmenting their in-house capacity to perform services provided for in the contract; (3) civil service law, which would generally limit “direct hires” of contractor employees; and (4) ethics law, which could limit the involvement of former contractor employees who are hired by the government in certain agency actions. No issues of small business law would appear to be implicated, even though small businesses are generally given special consideration under federal law,<sup>23</sup> and some commentators have expressed concern that insourcing, at least as implemented to date, has disproportionately affected small businesses.<sup>24</sup> However, the Obama Administration has provided that, as a matter of policy, agencies should place a lower priority on reviewing certain functions performed by small businesses when determining which functions should be insourced, as well as give small

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<sup>20</sup> One such suit also alleged that the contractor was denied due process of the law in violation of the Fifth Amendment to the U.S. Constitution because of the Air Force’s failure to comply with its insourcing guidelines. *See Triad Logistics Servs. Corp. v. United States*, 2012 U.S. Claims LEXIS 393, at \*16 (Apr. 16, 2012). However, this allegation was not further developed in the litigation, and no other challenge to an insourcing determination appears to have raised the issue.

<sup>21</sup> *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (“Like private individuals and businesses, the Government enjoys the *unrestricted power to produce its own supplies*, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”) (emphasis added). The legislative branch can, however, restrict the discretion of the executive branch to contract out, or perform in-house, specific functions. *See, e.g.*, Water Resources Development Act, P.L. 101-640, §314, 104 Stat. 4641 (Nov. 28, 1990) (codified at 33 U.S.C. §2321) (“Activities currently performed by personnel under the direction of the Secretary in connection with the operation and maintenance of hydroelectric power generating facilities at Corps of Engineers water resources projects are to be considered as inherently governmental functions and not commercial activities.”); National Defense Authorization Act for FY1994, P.L. 103-160, §848(a)(1), 107 Stat. 1724-25 (Nov. 30, 1993) (codified at 10 U.S.C. §2304e(a)) (prohibiting certain types of competition between DOD and small businesses).

<sup>22</sup> Other aspects of sourcing policy may also raise legal issues, such as whether the agency properly conducted any public-private competitions that resulted in outsourcing determinations. *See, e.g.*, Patricia A. Thompson—Agency Tender Official, B-310910.4 (Jan. 22, 2009). However, such issues are outside the scope of this report.

<sup>23</sup> *See, e.g.*, Small Business Act of 1958, P.L. 85-536, §2(a), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(a)) (“[It is] the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns.”).

<sup>24</sup> *See, e.g.*, Robert A. Burton & James Y. Boland, Concrete Steps Government Should Take to Alleviate Growing Procurement Challenges for Small Businesses, 94 *Fed. Cont. Rep.* 190 (Aug. 17, 2010).

businesses preference when determining who performs work that remains in the private sector after related functions are insourced.<sup>25</sup>

The report does not address any limits on insourcing that may be imposed by agency personnel ceilings or caps, largely because such ceilings or caps pertain to agency personnel, not agency functions. While personnel and functions are obviously related, and there could potentially be instances where agencies experience difficulties in insourcing particular functions due to a lack of personnel, agencies could return functions to in-house performance without hiring new personnel.<sup>26</sup> In addition, such caps or ceilings typically do not raise legal issues like those discussed herein.

## **Administrative Procedure Act and Insourcing Guidelines**

Assuming that the decision to insource particular functions is not “committed to agency discretion by law,”<sup>27</sup> as the government has recently asserted,<sup>28</sup> the Administrative Procedure Act (APA) could potentially constrain such decisions by allowing challenges to agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>29</sup> Where insourcing is concerned, applicable laws could include various statutes requiring DOD to “use the least costly form of personnel consistent with military requirements and other needs of the Department,”<sup>30</sup> or to ensure that the difference in the cost of performing functions with DOD civilian employees, instead of contractors, exceeds certain thresholds when determining whether a function should be insourced.<sup>31</sup> It could also potentially include various guidelines, such as DOD’s directive on “Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support.”<sup>32</sup> Guidelines not based in statutes or regulations are not necessarily enforceable in the same way that statutes and regulations are. However, they could potentially be found to be legally binding if the agency intended to be bound, or has employed the guidelines in such a way that they are binding as a practical matter.<sup>33</sup>

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<sup>25</sup> Office of Management and Budget, Office of Federal Procurement Policy, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56239-40 (Sept. 12, 2011).

<sup>26</sup> *Id.* at 56239 (noting that agencies could reassert control over any functions which they determine should not have been contracted out by strengthening oversight of contractor performance, as well as by insourcing the function).

<sup>27</sup> 5 U.S.C. §701(a)(2).

<sup>28</sup> See *Triad Logistics*, 2012 U.S. Claims LEXIS 393, at \*77. The court did not directly reach the merits of this argument, but expressed concern that, were this argument to prevail, agencies’ insourcing determinations could be “unreviewable.” See *id.*, at \*83 (“Unreviewable decision-making authority by Executive Branch agencies, as proposed by the government, requires close attention.”).

<sup>29</sup> 5 U.S.C. §706(a)(2)(A).

<sup>30</sup> 10 U.S.C. §129a (2010). This language was deleted in December 2011, as part of amendments made to Section 129a by the National Defense Authorization Act for FY2012. See P.L. 112-81, §931(a), 125 Stat. 1543.

<sup>31</sup> 10 U.S.C. §2463(e)(1)(c).

<sup>32</sup> See Office of the Sec. of Defense, Directive-Type Memorandum (DTM) 09-007, incorporating Change 4, Oct. 2, 2012, available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-007.pdf>.

<sup>33</sup> See, e.g., *Pacific Molasses Co. v. Fed. Trade Comm'n*, 356 F.2d 386, 389-90 (5<sup>th</sup> Cir. 1996) (“When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. This is so even when the defined procedures are ‘... generous beyond the requirements that bind such agency ...’ For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules.”). But see *Farrell v. Dep’t of the Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (“The general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the (continued...)”).

To date, no court appears to have directly addressed whether the non-statutory guidelines utilized in the Obama Administration's insourcing initiatives are legally binding, although one court seems to have assumed, without deciding, that certain guidelines were binding.<sup>34</sup> Rather, the litigation has focused, first, upon whether the U.S. Court of Federal Claims or the federal district courts have jurisdiction over challenges to insourcing determinations and, more recently, upon whether contractors who meet certain statutory standing requirements (i.e., are "interested parties") must also meet prudential standing requirements, as well as whether challenges to insourcing determinations are moot after the vendor's contract expires.

## **Jurisdiction of the Federal District Courts or the Court of Federal Claims**

In the earliest cases challenging DOD's insourcing initiatives, the parties generally agreed that insourcing determinations were reviewable under the APA,<sup>35</sup> but contested whether the Court of Federal Claims or the federal district courts had jurisdiction over such challenges. This question arose because the APA's waiver of the government's sovereign immunity as to suits brought against it in the federal district courts is limited, and does not apply if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."<sup>36</sup> Among the other statutes waiving the government's sovereign immunity is the Tucker Act, as amended by the Administrative Dispute Resolution Act (ADRA) of 1996, which provides that, effective January 1, 2001, the U.S. Court of Federal Claims has exclusive trial-level 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 a proposed procurement.<sup>37</sup>

The key questions in the initial cases were, thus, (1) whether plaintiffs challenging insourcing determinations are "interested parties," and (2) whether insourcing determinations are made "in connection with a procurement or a proposed procurement." If the plaintiffs were interested parties and insourcing determinations were made in connection with procurements or proposed procurements, then the Court of Federal Claims would have exclusive jurisdiction over such challenges pursuant to the Tucker Act, as amended by ADRA. However, if insourcing

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(...continued)

agency intended the statement to be binding.").

<sup>34</sup> See *Santa Barbara Applied Research, Inc. v. United States*, 98 Fed. Cl. 536, 546-49 (2011) (Firestone, J.) (finding that certain actions by the Air Force (e.g., allocating fewer civilian employees to perform particular functions than had been requested by the program offices, using DTM-COMPARE to account for overtime risk) were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law).

<sup>35</sup> See *Vero Tech. Support, Inc. v. U.S. Dep't of Defense*, 733 F. Supp. 2d 1336, 1340 (S.D. Fla. 2010) ("There appears to be no dispute that the APA governs the Plaintiff's claim. Rather the dispute concerns which court has jurisdiction to hear the APA claim."). Although the government has also argued that contractor challenges to insourcing determinations constitute contract disputes, which are within the exclusive jurisdiction of the Court of Federal Claims under the Contract Disputes Act, this argument has generally been rejected. See, e.g., *K-Mar Industries v. U.S. Dep't of Defense*, 752 F. Supp. 2d 1207 (W.D. Okla. 2010); *Rothe Development, Inc. v. U.S. Dep't of Defense*, 2010 U.S. Dist. LEXIS 116934 (W.D. Tex. Nov. 3, 2010), *motion to amend denied*, 2011 U.S. Dist. LEXIS 5236 (W.D. Tex. Jan. 19, 2011).

<sup>36</sup> 5 U.S.C. § 702. Because it is a sovereign, the United States is immune to suits without its consent. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

<sup>37</sup> Ch. 359, 24 Stat. 505 (Mar. 3, 1887) (codified, as amended, at 28 U.S.C. § 1491(b)(1)).

determinations were not made in connection with procurements or proposed procurements, then the federal district courts would have jurisdiction under the APA.<sup>38</sup>

### ***Majority View That the Court of Federal Claims Has Exclusive Jurisdiction***

Most federal appellate and district courts that have considered the question have found that contractors' challenges to insourcing determinations fall within the exclusive jurisdiction of the Court of Federal Claims because at least some contractors are interested parties, and insourcing determinations are made in connection with proposed procurements. For example, in *Rothe Development, Inc. v. Department of Defense*, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") upheld a decision by the district court finding that a contractor was an interested party because it had a "direct economic interest as a prospective bidder" in any contracts that would be awarded to perform the functions if the functions were not insourced.<sup>39</sup> In reaching this conclusion, the Fifth Circuit relied upon the definition of "interested party" given in the Competition in Contracting Act (CICA) of 1984, which has generally been found to apply for purposes of the Tucker Act.<sup>40</sup> CICA defines an "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."<sup>41</sup> The Fifth Circuit similarly affirmed the district court's finding that an insourcing determination is made in "connection with" a procurement or proposed procurement for purposes of the Tucker Act because federal law defines "procurement" as including:

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,

and the process of determining a need for property or services "necessarily includes the choice to *refrain* from obtaining outside services."<sup>42</sup> The court further emphasized the incongruity between the district court's having jurisdiction when an agency determines to insource, but not when it

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<sup>38</sup> It is unclear whether the federal district courts would exercise jurisdiction over challenges to insourcing determinations if such determinations were found to be made in connection with a procurement, but contractors were found not to be "interested parties" for purposes of ADRA. See *Vero Tech. Support*, 733 F. Supp. 2d at 1341-42 (suggesting that standing to bring suit in the Court of Federal Claims under ADRA is "narrower" than standing to bring suit in district court under the APA). The U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") affirmed the district court's decision in this case in an unpublished opinion without addressing the issue. See 437 Fed. App'x 966 (11<sup>th</sup> Cir. 2011).

<sup>39</sup> 666 F.3d 336, 338 (5<sup>th</sup> Cir. 2011), *aff'g* 2010 U.S. Dist. LEXIS 116934. In fact, the Fifth Circuit noted that, "if Rothe had no such interest, it is difficult to imagine how it might demonstrate a particularized injury necessary for Article III standing." *Id.*

<sup>40</sup> See, e.g., *Vero Tech. Support*, 2011 U.S. App. LEXIS 16598, at \*11 (citing *American Federation of Government Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001)). However, it should be noted that, while the Eleventh Circuit relied upon the Federal Circuit's decision in *AFGE* in concluding that ADRA relies on CICA's definition of "interested party," the district court questioned the relevance of this case to determinations of who is an interested party for purposes of ADRA because the case involved a challenge by government employees—not a contractor—to agency sourcing determinations. See 733 F. Supp. 2d at 1343.

<sup>41</sup> P.L. 98-369, §2713, 98 Stat. 1183 (July 18, 1984) (codified, as amended, at 31 U.S.C. §3551(2)).

<sup>42</sup> *Rothe Dev.*, 666 F.3d at 339 (quoting 41 U.S.C. §111). As the Fifth Circuit noted, the Tucker Act does not define "procurement." However, the Office of Federal Procurement Policy Act (OFPPA) does, and its definition has generally been found to apply for purposes of the Tucker Act. See, e.g., *Vero Tech. Support*, 437 Fed. App'x at 769 (citing *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008), as holding that the meaning of "procurement," for purposes of ADRA, comes from the OFPPA).

determines to outsource.<sup>43</sup> The U.S. Court of Appeals for the Eleventh Circuit, in an unpublished decision, and various federal district courts have relied upon similar reasoning in finding that the Court of Federal Claims has exclusive jurisdiction over challenges to insourcing determinations.<sup>44</sup>

The Court of Federal Claims has also consistently found that at least certain challenges to insourcing determinations are within its jurisdiction. For example, in its most recent decision regarding insourcing, *Dellew Corporation v. United States*, the court relied upon the same logic and precedents used by the Fifth Circuit in *Rothe* when finding that contractors are interested parties, and insourcing determinations are made in connection with procurements.<sup>45</sup> Specifically, the *Dellew* court found that the incumbent contractor was an “interested party,” as that term is defined in the Competition in Contracting Act, because it “likely would continue to provide ... services for the Air Force in the future” if the functions were not insourced and, thus, had a “direct economic interest” in the proposed procurement.<sup>46</sup> The *Dellew* court similarly found that the insourcing determination was made in connection with a “procurement,” as that term is defined in the Office of Federal Procurement Policy Act.<sup>47</sup> In reaching this conclusion, the court noted that the decision to insource involved the “process for determining a need for property or services” because it involved a determination that the Air Force needed certain services, and that these services could be provided more cheaply by agency personnel than contractor employees.<sup>48</sup>

### ***Minority View That the Federal District Courts Have Jurisdiction***

In contrast to the majority view, one federal district court has found that the district courts have jurisdiction over challenges to insourcing determinations because such challenges are not within the Court of Federal Claims’ jurisdiction under the Administrative Dispute Resolution Act (ADRA). In *K-Mar Industries, Inc. v. Department of Defense*, the U.S. District Court for the Western District of Oklahoma found that a contractor challenging an insourcing determination is not an “interested party,” within the meaning of the Competition in Contracting Act because no contract or prospective contract is at issue.<sup>49</sup> The *K-Mar* court similarly found that an insourcing determination is not made “in connection with a procurement or a proposed procurement,” given

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<sup>43</sup> *Rothe Dev.*, 666 F.3d at 339 (“Rothe’s construction of procurement would require us to believe Congress intended concurrent jurisdiction over bid protests where the [DOD] determined it could execute functions more cost-effectively with federal employees, but exclusive jurisdiction in the Court of Federal Claims where the [DOD] concluded an outside contract was more efficient. We refuse to adopt so narrow a meaning of procurement.”).

<sup>44</sup> See, e.g., *Vero Tech. Support*, 437 Fed. App’x at 771; *Fisher-Cal Indus., Inc. v. United States*, 2012 U.S. Dist. LEXIS 36508 (D.D.C., Mar. 19, 2012); *Harris Enterprises, Inc. v. U.S. Dep’t of Defense*, 2010 U.S. Dist. LEXIS 143574 (W.D. Tex., Oct. 12, 2010). Another case challenging an agency insourcing determination was settled by the parties without a decision on the merits. See *Rohmann Servs., Inc. v. Dep’t of Defense*, Case No. 10-CV-0061 (W.D. Texas). This appears to have been the earliest of the cases challenging the Obama Administration’s insourcing initiatives, and the terms of the settlement were widely characterized as a “win” for the contractor because the agency continued the contract. See, e.g., Matthew Weigelt, *Small Business Fights Insourcing ... and Wins*, *Wash. Tech.*, May 5, 2010, available at <http://washingtontechnology.com/articles/2010/05/03/procurement-insourcing-boone-v-air-force.aspx>.

<sup>45</sup> No. 12-627C, 2012 U.S. Claims LEXIS 1638 (Dec. 20, 2012).

<sup>46</sup> *Id.* at \*41.

<sup>47</sup> *Id.* at \*36-\*37.

<sup>48</sup> *Id.* at \*37-\*38.

<sup>49</sup> 752 F. Supp. 2d at 1211. In a separate decision, the court denied *K-Mar*’s motion for a preliminary injunction. However, in so doing, it made clear that “[n]othing stated in this order is intended to pre-judge in any way the merits of the procedures-based claims. At this stage the court has no view regarding the merits of any permanent relief based on these claims.” *K-Mar Industries v. U.S. Dep’t of Defense*, 2010 U.S. Dist. LEXIS 126955 (W.D. Okla., Nov. 4, 2010).

the definition of “procurement” in the Office of Federal Procurement Policy Act (OFPPA), which has been adopted for purposes of ARDA.<sup>50</sup> In finding that an insourcing determination did not involve a procurement, the court relied on the plain meaning of the OFPPA, which, it found, provides that procurement begins with determining “a need for property or services,” not with determining “whether there is a need” for property or services.<sup>51</sup> The court also noted that the term “acquisition,” which it characterized as “the critical concept” within the definition of “procurement,” denotes only purchasing or leasing by contract,<sup>52</sup> and that even if ADRA’s grant of jurisdiction arguably applied through a broad reading of the definition of “procurement,” this would not constitute a clear jurisdictional grant and waiver of sovereign immunity, only an implied one, and waivers of sovereign immunity are construed narrowly.<sup>53</sup>

The *K-Mar* court also cited an earlier decision by the Court of Federal Claims wherein the Court of Federal Claims appeared at least somewhat sympathetic to the argument that challenges to agency insourcing determinations are within the jurisdiction of the district courts.<sup>54</sup> There, in finding that it lacked jurisdiction to hear a challenge to an insourcing determination because the plaintiff’s claim was still pending in federal district court, the Court of Federal Claims stated that:

plaintiff’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 insourcing policy decisions is not immediately apparent.<sup>55</sup>

However, the court also noted that it “had not fully explored the issue at this time,”<sup>56</sup> and a subsequent decision by the same judge adopted the majority view that the Court of Federal Claims has exclusive jurisdiction over challenges to insourcing determinations.<sup>57</sup>

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<sup>50</sup> 752 F. Supp. 2d at 1212. The OFPPA defines “procurement” as including “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.” P.L. 93-400, §4, 88 Stat. 796 (Aug. 30, 1974) (codified, as amended, at 41 U.S.C. §111). See *supra* note 42.

<sup>51</sup> *K-Mar Indus.*, 752 F. Supp. 2d at 1212. The government had attempted to argue that, for purposes of ADRA and the OFPPA, the “process for determining a need for property or services” begins with a decision by the agency as to whether there is a need to acquire property or services and, thus, encompasses any insourcing determination.

<sup>52</sup> *Id.* This definition also comes from the OFPPA. See 41 U.S.C. §131 (“[T]he term ‘acquisition’—(1) means the process of acquiring, with appropriated amounts, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and (2) includes—(A) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated; (B) the description of requirements to satisfy agency needs; (C) solicitation and selection of sources; (D) award of contracts; (E) contract performance; (F) contract financing; (G) management and measurement of contract performance through final delivery and payment; and (H) technical and management functions directly related to the process of fulfilling agency requirements by contract.”).

<sup>53</sup> 752 F. Supp. 2d at 1212.

<sup>54</sup> *Id.* at 1213 n.4

<sup>55</sup> *Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784, 792 (2010).

<sup>56</sup> *Id.*

<sup>57</sup> *Triad Logistics Servs. Corp.*, 2012 U.S. Claims LEXIS 393, at \*46-\*47 n.14 (“The court notes that Triad’s case raises different issues from an earlier in-sourcing case brought before this Judge. . . . 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*].”).

## Prudential Standing

While the Court of Federal Claims has consistently found that it has jurisdiction over challenges to insourcing determinations, judges on the court have reached differing conclusions as to whether contractors who meet the statutory standing requirements (i.e., are “interested parties”) must also meet prudential standing requirements and, if so, whether they are within the zone of interests protected by various statutes pertaining to insourcing.<sup>58</sup> The concept of prudential standing is a “judicially self-imposed limit[] on the exercise of federal jurisdiction,”<sup>59</sup> “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>60</sup> In determining whether prudential standing exists, the court focuses upon “whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected by the statute . . . in question,” or whether the plaintiffs are “merely incidental beneficiaries” of the statutory provisions at issue.<sup>61</sup>

Initially, in *Santa Barbara Applied Research, Inc. v. United States*, the Court of Federal Claims expressly rejected the government’s argument that the case should be dismissed on prudential standing grounds because the plaintiff contractor was not “within the zone of interests to be protected” by the statutes governing insourcing.<sup>62</sup> In making this argument, the government had asserted that provisions in the Ike Skelton National Defense Authorization Act (NDAA) for FY2011 prohibiting DOD from imposing any quotas or goals on insourcing without a considered cost analysis “do not provide any benefits to contractors,” and cannot form the basis for a challenge to an insourcing determination.<sup>63</sup> The court disagreed, in part, because it construed the decision by the U.S. Court of Appeals for the Federal Circuit in *American Federation of Government Employees, AFL-CIO v. United States* to mean that prudential standing is not required in bid protests under the Administrative Dispute Resolution Act (ADRA) because ADRA’s standing requirements are “more stringent” than those of the Administrative Procedure Act (APA).<sup>64</sup> However, the court also suggested that, if prudential standing were required, contractors challenging insourcing determinations would possess such standing because the Ike Skelton NDAA “was enacted, at least in part, for the benefit of the contracting community.”<sup>65</sup>

Later, however, in *Hallmark-Phoenix 3, LLC v. United States*, the Court of Federal Claims dismissed on prudential standing grounds a contractor’s challenge to the Air Force’s determination to insource certain supply services that the contractor had provided.<sup>66</sup> The *Hallmark-Phoenix* court did so because it found that prudential standing requirements were applicable to bid protests given Supreme Court precedents, which applied prudential standing analysis in non-APA cases. It also noted that earlier bid protest decisions had imposed prudential

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<sup>58</sup> *Tamerlane, Ltd. v. United States*, 81 Fed. Cl. 752, 759 (2008) (“[The] decisions of one judge . . . on the Court of Federal Claims do not serve to bind another judge of the court.”).

<sup>59</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotations omitted).

<sup>60</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>61</sup> *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 494 n.7 (1998); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).

<sup>62</sup> 98 Fed. Cl. at 544.

<sup>63</sup> *Id.* See *supra* note 19 for further discussion of this provision of the Ike Skelton NDAA.

<sup>64</sup> 98 Fed. Cl. at 544. For more on the *AFGE* decision, see *supra* note 40.

<sup>65</sup> 98 Fed. Cl. at 544.

<sup>66</sup> 99 Fed. Cl. 65 (2011) (Allegra, J.).

standing requirements.<sup>67</sup> The *Hallmark-Phoenix* court further found that the contractor was not within the “zone of interests” protected by the various statutes governing insourcing because these statutes were intended to be enforced by Congress, not the courts.<sup>68</sup> In particular, the court noted that one of the key provisions relied upon by the plaintiff—10 U.S.C. Section 2363(b), which requires that DOD give “special consideration” to using civilian employees to perform certain functions—arose in a “limited budgetary context,” and does not “remotely suggest[] an intent to confer a right to judicial review” upon contractors.<sup>69</sup>

In its next decision, *Triad Logistics Services Corporation v. United States*, the Court of Federal Claims did not reach the question of prudential standing because it dismissed the contractor’s complaint on mootness grounds, as discussed below.<sup>70</sup> However, in its opinion, the court nonetheless expressed both (1) disagreement with the *Hallmark-Phoenix* decision and (2) reservations about whether the plaintiff contractor could be found to be within the zone of interests of one of the statutes that the court relied upon in *Santa Barbara*. Specifically, the *Triad Logistics* court noted that, in its view, the “concept of ‘prudential standing’ does not apply to bid protests,” but that, if it did, the plaintiff contractor could not be found to be within the zone of interests protected by the Ike Skelton NDAA for FY2011 unless that provision were construed to apply retroactively.<sup>71</sup>

More recently, in *Elmendorf Support Services Joint Venture v. United States*, the Court of Federal Claims apparently viewed the prudential standing requirements as applicable, but saw the plaintiffs as satisfying these requirements in light of a recent Supreme Court decision finding that prudential standing requirements are “not meant to be especially demanding,” and “foreclose[] suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.’”<sup>72</sup> According to the *Elmendorf* court, the contractor met this standard because a proposed procurement was involved, and the contractor alleged that “the procurement (read in-sourcing

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<sup>67</sup> *Id.* at 69-71 (citing, among other things, *Bennett v. Spear*, 520 U.S. 154, 163 (1997), which noted that courts will apply the prudential standing requirements unless Congress has “expressly negated” them).

<sup>68</sup> *Id.* at 72-76.

<sup>69</sup> *Id.* at 73-74. The court reached this conclusion, in part, because both the text and legislative history of Section 2463 evidenced an intent that DOD would be accountable to Congress, not the courts, for its performance in insourcing, including its compliance with insourcing guidelines. *Id.* at 74-75. The court also reached a similar conclusion regarding Section 129a of Title 10 of the United States Code, which, prior to being amended in December 2011, required the Secretary of Defense to “use the least costly form of personnel consistent with military requirements and other needs of the Department.” According to the court, the fact that Section 129a’s direction to “use the least costly form of personnel” is “buried” among reporting provisions, and its origin as a “sense of Congress” provision, indicate that it was not intended to benefit contractors. *Id.* at 72-73.

<sup>70</sup> 2012 U.S. Claims LEXIS 393, at \*76 (Horn, J.). In *Triad Logistic’s* case, the Government Accountability Office (GAO), which shares jurisdiction over contractor bid protests with the Court of Federal Claims, had found that it could not hear challenges to insourcing determinations that allege an agency failed to comply with its internal guidelines. See *Triad Logistics Servs. Corp.*, B-403726 (Nov. 24, 2010) (finding that the former 10 U.S.C. §129a (1) did not actually require a cost comparison and (2) did not constitute a procurement statute). Instead, GAO viewed this statute as one governing DOD personnel policy and, thus, outside its jurisdiction to hear protests “concerning an alleged violation of a procurement statute or regulation.”

<sup>71</sup> 2012 U.S. Claims LEXIS 393, at \*71, \*81. A fundamental canon of statutory interpretation is that laws will not be given retroactive effect unless there is clear congressional intent to the contrary. See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.”).

<sup>72</sup> 105 Fed. Cl. 203, 209 (2012) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, — U.S.—, 132 S. Ct. 2199, 2210 (2012)).



process) was flawed.”<sup>73</sup> While the court acknowledged that “Congress no doubt was motivated by fiscal concerns” when it enacted 10 U.S.C. Section 2463 and related provisions requiring comparisons of the costs of performing work with government personnel and contractor employees, it noted that:

the procedures and standards required by these statutes [nevertheless] circumscribe the government’s ability to bring services in-house. At a minimum, incumbent contractors have an interest in ensuring that the calculus is done properly. This competitive impulse creates an incentive to expose ways in which the government may have acted improperly. Refereeing such debates is routine work for the courts.<sup>74</sup>

## **Expired Contracts and Mootness**

Later decisions of the Court of Federal Claims have raised related questions about whether vendors whose contracts have expired have standing to challenge insourcing determinations, or whether such challenges are moot. Initially, this question was framed as one of statutory standing (i.e., are such vendors “interested parties”).<sup>75</sup> However, the most recent decision from the Court of Federal Claims explicitly characterizes this question as one of mootness.<sup>76</sup> The mootness doctrine originates from the “case or controversy” requirement of Article III of the U.S. Constitution,<sup>77</sup> which permits federal courts to entertain only matters in which there is an ongoing justiciable issue.<sup>78</sup> When the “issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,”<sup>79</sup> the case is moot, and no longer presents a justiciable controversy over which a federal court may exercise jurisdiction.<sup>80</sup>

In *Triad Logistics*, the court first distinguished between vendors currently holding contracts, and vendors whose contracts have expired, in finding that the plaintiff contractor was not an interested party and, thus, lacked standing.<sup>81</sup> In so doing, the court asserted that the situation in *Santa Barbara* was different than the situation in *Triad Logistics* because the vendor in *Santa Barbara* had an “ongoing contract” that was “in-sourced after the enactment of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011,” while the contract in *Triad Logistics* had expired before the function was insourced (and before the Ike Skelton National Defense Authorization Act was enacted). A later decision in *Elmendorf Support Services* similarly found that “incumbency is necessary to support standing,”<sup>82</sup> and elaborated upon the *Triad Logistics* court’s concerns about fashioning a “workable remedy” for an improper insourcing determination after the contract has expired. In particular, the *Elmendorf* court noted that vendors who had performed work that was improperly insourced cannot claim monetary damages, and that a declaration that the agency had acted in a way that was “arbitrary, capricious, an abuse of

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., 2012 U.S. Claims LEXIS 393, at \*65.

<sup>76</sup> *Dellew Corp.*, 2012 U.S. Claims LEXIS 1638, at \*46-\*52.

<sup>77</sup> See, e.g., *Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1340 (Fed. Cir. 2008) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984) and *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

<sup>78</sup> See, e.g., *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998).

<sup>79</sup> *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (internal citation omitted).

<sup>80</sup> *NEC Corp.*, 151 F.3d at 1369.

<sup>81</sup> 2012 U.S. Claims LEXIS 393, at \*84-85.

<sup>82</sup> 2012 U.S. Claims LEXIS 1082, at \*7 (Sept. 10, 2012).

discretion, or otherwise not in accordance with law” when insourcing particular functions would do nothing for the vendor in the absence of an injunction ordering the agency to cease performing the work.<sup>83</sup> The court further indicated that it was not inclined to enter such an injunction “now that the Air Force has completely absorbed the work,” because an injunction “would inevitably be more disruptive of services, more disruptive to the lives of individuals, and cause more waste,” than would be caused by preserving the status quo.<sup>84</sup>

Between them, these two decisions could potentially have been construed as granting agencies broad discretion to insource so long as the contract had “ended”—something which an agency can generally cause to occur at any time by exercising its inherent and contractual rights to terminate contracts for convenience.<sup>85</sup> However, the most recent decision from the Court of Federal Claims, *Dellew Corporation*, appears to limit agencies’ ability to moot challenges by terminating contracts, as well as suggests potential remedies for contractors with unexpired contracts who prevail in their challenges to insourcing determinations.<sup>86</sup> The case arose, like other challenges to insourcing determinations, from the Air Force’s decision to insource certain services that the plaintiff had provided. While the case was pending, the Air Force terminated the contract for convenience (apparently based solely upon the insourcing determination) and, then, asserted that the plaintiff lacked standing because it did not have a current contract.<sup>87</sup> The court disagreed. It found that the plaintiff had standing, despite the contract termination, because the contract was terminated in the middle of an option period and, but for the termination, the plaintiff could still have been performing the contract months after the court’s decision.<sup>88</sup> The court also indicated that, in the appropriate circumstances, it could “order a return to the pre-termination status quo for the remaining months” of the contract period (including options).<sup>89</sup> However, the court found that the contractor was not entitled to such an order here because key statutory provisions—requiring cost savings of \$10 million or 10% of personnel-related costs to support an insourcing determination—were not in effect when this particular insourcing determination was made.<sup>90</sup> Rather, at the time the functions were insourced, the applicable guidelines required only that DOD employees “be the most cost effective provider.” In the court’s view, this requirement was because of the “considerable cost savings” evidenced here even after “the errors [that the government made in calculating the costs of performance in-house and by contractor personnel] are taken into account.”<sup>91</sup>

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<sup>83</sup> *Id.* at \*8-\*9.

<sup>84</sup> *Id.* at \*9-\*10.

<sup>85</sup> *See, e.g.*, *Russell Motor Car Co. v. United States*, 261 U.S. 512 (1923); *United States v. Corliss Steam Engine Co.*, 91 U.S. 321 (1875); *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963). *See also* Dietrich Knauth, *Contractor’s Insourcing Protest Loss Carries Silver Lining*, *Law360*, Jan. 4, 2013 (noting that the *Dellew* decision “could essentially prevent agencies from using premature contract terminations to pull the rug out from under contractors after they have protested”).

<sup>86</sup> 2012 U.S. Claims LEXIS 1638.

<sup>87</sup> *Id.* at \*25, \*28.

<sup>88</sup> *Id.* at \*51-\*52.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*63.

<sup>91</sup> *Id.* at \*66-\*67.

## Whether Particular Guidelines Are Binding

If and when these jurisdictional questions are resolved, courts may have to determine which, if any, of the current insourcing guidelines constrain an agency's actions when bringing work in-house.<sup>92</sup> There are a number of such guidelines,<sup>93</sup> some of which are clearly binding upon the agency (e.g., statutes, regulations promulgated by a notice and comment process) and others of which may not be (e.g., statements, policies). Where guidelines not based in statutes or regulations are concerned, courts may need to determine, among other things, whether the agency intended to be bound or has employed the guidelines in such a way that they are binding as a practical matter, because this is key to determining which agency statements and policies are enforceable under the APA.<sup>94</sup>

To date, the only court to address the issue has apparently assumed, without deciding, that DOD's guidance on "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support," among other things, was legally binding.<sup>95</sup> However, as other courts consider the various guidelines that might apply, they could potentially find that certain guidelines are not legally binding, or that any binding guidelines do not require the specific procedures that the agency failed to implement when making its allegedly improper insourcing determination. The latter proved to be the case in *Labat-Anderson, Inc. v. United States*, where the contractor claimed that DOD improperly insourced functions the contractor had performed while DOD prepared to award a new contract.<sup>96</sup> In particular, the contractor claimed that DOD did not follow the procedures for comparing the costs of performing the function in question with government and

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<sup>92</sup> *But see Santa Barbara Applied Research*, 2011 U.S. Claims LEXIS 732, at \*28-\*57 (apparently assuming, without deciding, that all of the guidelines in question were legally binding). Nonetheless, the court in *Santa Barbara* upheld the agency's insourcing determination because it found that various actions taken in making this determination were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

<sup>93</sup> The recent statutes directing agencies to "consider" insourcing certain functions have, among other things, required agencies to develop and implement guidelines for determining which functions should be insourced, a requirement that the Office of Management and Budget (OMB) and individual federal agencies have met by developing several policies that ensure functions are "performed in the most fiscally advantageous way possible," and by establishing procedures for conducting cost comparisons. *See, e.g.*, Omnibus Appropriations Act, 2009, P.L. 111-8, §736, 123 Stat. 689-90 (Mar. 11, 2009) (requiring civilian agencies to develop guidelines); National Defense Authorization Act for FY2008, P.L. 110-181, §324(a)(1), 122 Stat. 60 (Jan. 28, 2008) (requiring defense agencies to develop guidelines); Dep't of Defense, Personnel & Readiness, OSD Costing Information, *available at* [http://prhome.defense.gov/RSI/REQUIREMENTS/INSOURCE/INSOURCE\\_COSTING.ASPX](http://prhome.defense.gov/RSI/REQUIREMENTS/INSOURCE/INSOURCE_COSTING.ASPX); OMB Civilian Fringe Benefit Cost Factor, quoted in *Rohmann Servs., Inc. v. U.S. Dep't of Defense*, No. SA-10-CA-0061-XR, Application for Preliminary Injunction (W.D. Tex., filed Feb. 9, 2010) (requiring agencies to assume certain "fringe costs," as well as loss of manpower productivity, when conducting cost comparisons). Other sources cited by Rohmann include (1) 10 U.S.C. §129a, which previously stated that "[t]he Secretary of Defense shall use the least costly form of personnel consistent with military requirements and other needs of the Department;" (2) Under Secretary of Defense (Personnel and Readiness)'s Guidelines and Procedures for Implementation of 10 U.S.C. §2463, which reads, "[r]equests for manpower shall be fiscally informed and closely managed to ensure responsible stewardship of Defense resources. When a [DOD] Component ... is considering whether to convert from contractor to government performance, manpower managers shall follow standard ... procedures to determine and validate the manpower requirements.... Also, the effectiveness, efficiency, and economy of the activity shall be assessed;" and (3) Insourcing Implementation Guidance, which authorizes the insourcing of "contracted services that [DOD] civilian employees can perform ... if a cost analysis shows that [DOD] civilian employees would perform the work more effectively than the private sector." *See Rohmann Servs., Inc. v. U.S. Dep't of Defense*, No. SA-10-CA-0061-XR, Original Complaint for Declaratory and Injunctive Relief, at ¶¶ 34-36 (W.D. Tex., filed Jan. 26, 2010).

<sup>94</sup> *See supra* note 33 and accompanying text.

<sup>95</sup> *See, e.g., Santa Barbara Applied Research*, 98 Fed. Cl. at 549.

<sup>96</sup> 65 Fed. Cl. 570, 572 (2005).

contractor employees that were set forth in OMB Circular A-76, 10 U.S.C. Section 2462, and Executive Order 12615.<sup>97</sup> However, the Court of Federal Claims ultimately found that

1. the cost-comparison and other requirements of OMB Circular A-76 were binding only insofar as they had been incorporated into agency regulations, and the relevant DOD regulations either did not specify procedures for conducting cost comparisons or did not apply;<sup>98</sup>
2. the agency had complied with the requirements in 10 U.S.C. Section 2462, although not with the allegedly related requirements in OMB Circular A-76 that had not been incorporated into regulations,<sup>99</sup> and
3. Executive Order 12615 did not bind the executive branch because it explicitly stated that it did not create a private right of action, and it did not provide the court with a meaningful standard of review.<sup>100</sup>

Similar findings could result as courts consider the particular insourcing guidelines currently at issue. Additionally, different courts (or different judges on the same court) could potentially reach differing conclusions as to whether particular guidelines are binding.<sup>101</sup>

## **Constructive Termination or Breach of Requirements Contracts**

Because certain contracts provide for the contractor to supply all of the contracting activity's requirements for goods or services, there could also be situations where the government must either delay insourcing so as to allow current contracts to expire, or face the prospect of liability to the contractor for constructive termination for convenience<sup>102</sup> or even breach of contract.<sup>103</sup> This issue is most likely to arise with so-called "requirements contracts," or contracts

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<sup>97</sup> *Id.* at 573-74.

<sup>98</sup> *Id.* at 577-79.

<sup>99</sup> *Id.* at 579-80.

<sup>100</sup> *Id.* at 580-81.

<sup>101</sup> For example, some, but not all, federal circuits have found that the 1983 and 2003 versions of OMB Circular A-76 were issued pursuant to statutory authority, which is one of the conditions for guidelines being reviewable by the federal courts. *See Labat-Anderson*, 65 Fed. Cl. at 578 (2003 version); *Diebold v. United States*, 947 F.2d 787, 800 (6<sup>th</sup> Cir. 1991) (1983 version).

<sup>102</sup> The government always has the right to terminate a contract for convenience, even if the "standard" termination-for-convenience clause was not included in the contract. *See, e.g., G.L.A. Christian & Assocs. v. United States*, 375 U.S. 954 (1963) (court reading the standard termination-for-convenience clause into a contract from which it was lacking). Depending upon the type of contract involved, agencies that no longer need certain services for which they had contracted could also be obligated to pay the contractor, at a minimum, termination costs. For example, unless it terminates the contractor for convenience, the government generally cannot avoid paying the contractor for goods or services contracted for under a firm-fixed-price contract—the preferred type of government contract—if it no longer needs those goods or services. *See, e.g., North Chicago Disposal Co., ASBCA 25535, 82-1 BCA ¶ 15,488 (1981)* (government could not recover when it contracted for removal of "wet garbage" from galleys at the Great Lakes Naval Base and then did not use the service because the galley personnel were unaware of it and disposed of the garbage in-house); *Rolligon Corp., ASBCA 8812, 65-2 BCA ¶ 15,488 (1965)* (government liable for the full contract price when it leased two experimental vehicles from the contractor for a one-year testing-and-evaluation period and then discontinued testing after one month).

<sup>103</sup> Courts often treat governmental failures to comply with the terms of procurement contracts as constructive terminations of the contract. *See, e.g., Nesbitt v. United States*, 543 F.2d 583 (Ct. Cl. 1965); *Integrity Mgmt. Int'l, Inc., ASBCA 18289, 75-1 BCA ¶ 11,235 (1975)*. However, they will generally not convert failure to order under a requirements contract into a termination for convenience when the failure was in bad faith or based on circumstances (continued...)

by which one party, the seller, agrees to satisfy all of the agency's requirements for services and/or items for a specified period of time. That contract is violated if either the buyer does not purchase all of its requirements from the seller, or, if the seller fails to satisfy all of the buyer's needs. The consideration that makes such a contract binding is the buyer's promise to purchase all of its requirements from the seller and the seller's promise to satisfy those requirements.<sup>104</sup>

Because a requirements contract obligates the procuring activity to obtain "all" its requirements from the contractor,<sup>105</sup> not just a certain quantity specified in the contract,<sup>106</sup> developing additional in-house capacity to perform the function—as would be expected to occur with insourcing—could raise legal issues, depending upon the terms of the contract.

If the contract provides for the contractor to supply those goods or services "required to be purchased by the government," it will generally be construed to allow the procuring activity to develop additional in-house capacity during the term of the contract.<sup>107</sup> However, if the contract provides that the contractor is entitled to supply those goods or services "in excess of the quantities which the activity may itself furnish with its own capabilities," it will generally be read to refer to the procuring activity's capabilities at the time of contracting and preclude the development of additional in-house capacity during the term of the contract. For example, in *Maya Transit Company*, the Armed Services Board of Contract Appeals found that the contractor was entitled to an equitable adjustment (i.e., additional payment) under its contract because the procuring activity developed additional in-house capacity to provide busing services and began relying upon this capacity, instead of using the contractor's busing services, to meet its requirements, which had not changed.<sup>108</sup> Similarly, in *Henry Angelo & Sons, Inc.*, the Board granted the contractor recovery under a contract for painting and related work after the procuring activity began using its own personnel to paint military housing because it was less expensive.<sup>109</sup>

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(...continued)

known to the government at the time of contracting. *See, e.g.,* *Torncello v. United States*, 681 F.2d 756 (Fed. Cl. 1982) (termination based on the contractor's prices, which were known to the government at the time of contracting); *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976) (termination in bad faith).

<sup>104</sup> *Aviation Specialists, Inc.*, DOTBCA 1967, 91-1 BCA ¶ 23,534 (Dec. 30, 1990). If the government legitimately has no requirements for the goods or services in question, it has no obligation to purchase anything from the contractor. *See G.T. Folge & Co. v. United States*, 135 F.2d 117 (4<sup>th</sup> Cir. 1943). Any estimates of quantity contained in the solicitation or the contract are nonbinding. *See, e.g., Franklin Co. v. United States*, 381 F.2d 416 (Ct. Cl. 1967) (government not obligated to furnish work orders up to the estimated amount); *Kasehagen Sec. Servs., Inc.*, ASBCA 25629, 86-2 BCA ¶ 18,797 (1986) (contractor must fill orders above the estimate). However, the government could potentially be liable to the contractor if the estimate was negligently prepared. *See, e.g., Alert Care Ambulance Serv.*, VACAB 2844, 90-3 BCA ¶ 22,945 (1990) (government failed to exercise due care in preparing the estimates because it did not consider historical data regarding prior years' requirements); *Pied Piper Ice Cream, Inc.*, ASBCA 20605, 76-2 BCA ¶ 12,148 (1976) (same).

<sup>105</sup> Requirements contracts can contain maximum quantities, requirements in excess of which the contractor is not obligated to meet. *See* 48 C.F.R. §16.503(a)(2). They can also be limited to the procuring activity's needs in a particular geographic area. *See, e.g., Metcom, Inc.*, B-153450 (May 6, 1964) (finding that a requirements contract limited to a particular geographical area is no impediment to the issuance of a new invitation for bids for the same items to be supplied to a different area).

<sup>106</sup> Even in an "indefinite quantity contract," there is some minimum quantity specified in the contract. The government is only liable to the contractor for orders up to this amount. *See, e.g.,* 48 C.F.R. §16.504(a)(1); Peter J. Brandon, AGBCA 91-186-1, 92-1 BCA ¶ 24,648 (1991).

<sup>107</sup> *See, e.g., Export Packing & Crating Co., Inc.*, ASBCA 16133, 73-2 BCA ¶ 10,066 (1973); *Applied Painting & Decorating Co.*, ASBCA 15919, 73-2 BCA ¶ 10,358 (1973).

<sup>108</sup> ASBCA 20186, 75-2 BCA ¶ 11,552 (1975).

<sup>109</sup> ASBCA 15082, 72-1 BCA ¶ 9,356 (1972).

In so doing, the Board explicitly noted that “[t]he Government does not have an arbitrary right to develop and use potential capabilities at the expense of a contractor.”<sup>110</sup>

## Civil Service Laws and Limitations on “Direct Hires”

Civil service laws could also impose certain limitations upon agencies’ implementation of insourcing by requiring that government positions generally be filled through a competitive process with selections based on merit.<sup>111</sup> Because of this requirement, it is typically not possible for an agency insourcing a function to hire, on the spot, the person currently performing that function under a contract.<sup>112</sup> Only when an agency has “direct hire” authority, or other similar authority, may it hire “any qualified person” without engaging in the appropriate competitive process.<sup>113</sup> Currently, agencies have direct hire authority on a temporary basis under the National Defense Authorization Act for FY2004, as amended by National Defense Authorization Act for FY2008, for “Federal Acquisition positions.”<sup>114</sup> These include positions in the General Schedule (GS) contracting and purchasing series, as well as other positions in the GS series “in which significant acquisition-related functions are performed.”<sup>115</sup> However, agencies generally lack such authority for other positions, which means that they cannot directly hire contractor employees, although a person who performed a particular function on behalf of a contractor would probably be well qualified when competing for any government position that would perform that function.

It should also be noted that civil service laws are intended to protect the integrity of the government hiring process and applicants for government positions, not employers concerned about the possibility of the government hiring “their” employees.<sup>116</sup> Regardless of how sizable or destructive to a firm,<sup>117</sup> such loss of employees would not appear to give rise to any cause of action against the government, particularly in the absence of “no-solicitation” clauses in federal contracts.<sup>118</sup> Depending upon their terms, such clauses could potentially preclude one party to a contract from attempting to hire the employees of its vendors. However, such clauses are not

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<sup>110</sup> *Id.*

<sup>111</sup> *See, e.g.*, 5 U.S.C. §§3309-3318; 5 C.F.R. Parts 211 & 337.

<sup>112</sup> “Targeting” contractors’ employees by informing them of government positions and encouraging them to apply is generally permissible, even if some commentators have characterized it as inconsistent with the intent of the “Merit System’s hiring and other procedures.” *See* David Hubler, *Is the Government Trying to Steal Your Best Employees?*, *Wash. Tech.*, Aug. 26, 2009, available at <http://washingtontechnology.com/articles/2009/08/26/contractors-worries-feds-fish-for-their-employees.aspx>. For example, in *Labat-Anderson*, the court noted, without expressing any disapproval, that the agency emailed employees of the incumbent contractor encouraging them to apply for positions with the agency after determining to insource functions performed by the contractor. *Labat-Anderson*, 65 Fed. Cl. at 573.

<sup>113</sup> *See* U.S. Office of Personnel Management, Direct-Hire Authority (DHA) Fact Sheet, available at <http://www.opm.gov/DirectHire/factsheet.asp> (discussing the possible ways in which agencies can be authorized to make direct hires).

<sup>114</sup> P.L. 108-136, §1413(a), 117 Stat. 1665-66 (Nov. 24, 2003) (codified at 41 U.S.C. §1703) (authority through September 30, 2007); P.L. 110-181, §853, 122 Stat. 250 (Jan. 28, 2008) (authority through September 30, 2012); P.L. 112-239, §1103,—Stat.—(Jan. 2, 2013) (authority through September 30, 2017).

<sup>115</sup> 41 U.S.C. §1703(g)(1)(A).

<sup>116</sup> *See, e.g.*, Matthew Weigelt, *Defense Officials Hone Their Insourcing Strategy*, *Wash. Tech.*, Feb. 3, 2010, available at <http://ebookbrowse.com/army-secretary-directs-strategic-insourcing-federal-computer-week-feb-3-2011-pdf-d92004136> (quoting some contractors as objecting to the government’s “aggressiveness” in hiring their employees).

<sup>117</sup> *Id.* (describing one small business that lost 20% of its workforce to the government).

<sup>118</sup> *See, e.g.*, Hubler, *supra* note 112.

standard terms of government contracts. Similarly, even if employers were to draft covenants not to compete that could be construed to prevent their employees from working for the government in the future, such clauses are generally enforceable only against the employee, not against any party who subsequently hires them.<sup>119</sup>

## **Ethics Laws and the Activities of Former Contractor Employees**

The federal ethics and conflict of interest laws and regulations would not prohibit or necessarily prevent the employment by a federal agency of an individual from the private sector who has experience, expertise, or knowledge about or concerning a particular project, contract, or other such matter. Once employed, however, there may exist certain narrow limitations on the official duties or conduct of that government employee in relation to matters in which that employee may have a continuing or *current* personal financial interest, or concerning which a former employer of that individual is a direct party to a governmental transaction or other such matter.

Unlike employees in the private sector, federal employees and officials are subject to several layers of ethics and conflict of interest laws and regulations which seek to limit or restrict personal “conflicts of interest,” and to assure fealty to the overall, public interest, as opposed to private financial or economic interests of persons or companies. The principal *statutory* method of dealing with potential conflicts of interest in the executive branch is through disqualification or “recusal” requirements which prohibit a federal official from participating in any particular governmental matter in which that official, or those close to the official, has any financial interest.<sup>120</sup> This conflict of interest provision, which is a criminal statute, is directed only at *current* and *existing* financial interests and connections, and does not reach past affiliations, employments, or previous representations of private clients.<sup>121</sup>

While the *statutory* disqualification provision is a criminal law covering only *current* financial interests of the official, there are also “regulatory” recusal requirements that might apply in narrow circumstances to certain *past* affiliations and previous economic interests. Such recusals are generally required in relation to a “particular matter involving specific parties,” when entities or organizations previously affiliated with the federal official are now *parties* to or *represent* parties in those matters. The regulations provide that a federal official should recuse or disqualify himself or herself from working on a particular governmental matter involving specific parties if a “person for whom the employee has, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee” is a party or represents a

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<sup>119</sup> For example, when Oracle hired the former chief executive officer of Hewlett-Packard, Hewlett-Packard filed suit against this individual to enforce a confidentiality agreement, not against Oracle. *See* *Hewlett-Packard Co. v. Hurd*, No. 110CV181699, Civil Complaint for Breach of Contract and Threatened Misappropriation of Trade Secrets (Cal. Sup. Ct., filed Aug. 26, 2010). Because they are restraints of trade, covenants not to compete and similar agreements are looked upon with disfavor by the courts and will generally be enforced only when they are reasonable in terms of the times, places, and activities which they encompass. *See, e.g.,* *Kolani v. Hluska*, 75 Cal. Rptr. 2d 257 (Cal. App. 1998); *Rector-Phillips-Morse v. Vroman*, 489 S.W.2d 1 (Ark. 1973).

<sup>120</sup> 18 U.S.C. §208. Interests “imputed” to the employee are the financial interests of that employee’s spouse or dependents, or the financial interests of an organization in which the employee *is* affiliated as an officer, director, trustee, general partner or employee, or one “with whom he is negotiating or has any arrangement concerning prospective employment.”

<sup>121</sup> *CACI, Inc.-Federal v. United States*, 719 F.2d 1567,1578 (Fed. Cir. 1983); *Center for Auto Safety v. F.T.C.*, 586 F. Supp. 1245, 1246 (D.D.C. 1984).

party in such matter.<sup>122</sup> This one-year recusal requirement, as to matters involving an official's former employers, businesses, clients, or partners, applies to any officer or employee of the executive branch, but applies narrowly only to "a particular matter involving specific parties" when such former employer or business associate is or represents a party to the matter. Matters "involving specific parties" may apply to such things as contracts, investigations, or prosecutions involving specifically identified individuals or parties, as opposed to broader "particular matters" which may involve a number of persons or entities (such as most rule making). Notwithstanding the fact that a past employer, client, or business associate with whom the employee has a "covered relationship" may be a party or represent a party to such a matter, an employee may, as with the regulatory restriction on current interests, receive authorization by his or her agency to participate in the matter.<sup>123</sup>

There are also recusal requirements in regulations concerning such matters when a party (or one representing a party) had made an "extraordinary payment" to the official prior to the official's entry into government. The regulations of the Office of Government Ethics provide for a *two-year* recusal requirement which bars an official in the executive branch from participating in a particular matter in which a "former employer" is or represents a party when that former employer had made an "extraordinary payment" to the official prior to entering government. An "extraordinary payment" is one in excess of \$10,000 in value made by an employer after the employer has learned that the employee is to enter government service, and one which is not an ordinary payment (that is, a payment other than in conformance with the employer's "established compensation, benefits or partnership program").<sup>124</sup> This disqualification provision may also be waived in writing by an agency head, or if the individual involved is the head of an agency, by the President or his designee.<sup>125</sup>

Finally, there are now additional restrictions on certain presidential appointees issued by way of executive order. On January 21, 2009, President Obama issued an executive order requiring the signing of an "ethics pledge" by all presidential and vice presidential appointees to full-time, non-career positions in the executive branch, including all non-career SES appointees, and appointees to positions excepted from competitive service because they are of a confidential or policy making nature (such as Schedule C appointments).<sup>126</sup> The "ethics pledge" places two additional restrictions on such appointees entering the executive branch, with respect to their former employers or clients. Initially, such "appointees" may not participate in, and must recuse themselves for two years after entering federal service from any particular governmental matter involving specific parties when a former client or former employer of the appointee is a party to or represents a party in that particular matter.<sup>127</sup> This extends the similar regulatory recusal requirement applicable to all executive branch officials from one year to two years for such "appointees."<sup>128</sup> Secondly, any such "appointees" who were registered "lobbyists"<sup>129</sup> prior to

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<sup>122</sup> 5 C.F.R. §2635.502(a), (b)(1)(iv).

<sup>123</sup> 5 C.F.R. §2635.502(c), (d).

<sup>124</sup> 5 C.F.R. §2635.503(b)(1).

<sup>125</sup> 5 C.F.R. §2635.503(c).

<sup>126</sup> Executive Order 13490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

<sup>127</sup> E.O. 13490, Section 1, para. 2.

<sup>128</sup> See 5 C.F.R. §2635.502(a), (b)(1)(iv).

<sup>129</sup> "Lobbyists" are those required to register and file under the Lobbying Disclosure Act of 1995, as amended, including employees listed as lobbyists of organizations registering under the law. See 2 U.S.C. §§1602 *et seq.* The restriction applies if one had been a "lobbyist" within two years of his or her appointment.



entering the executive branch are under additional and further restrictions. Such appointees/former lobbyists may not, for two years after entering the government, (1) participate in any particular matter on which the appointee had lobbied within the two years prior to his or her appointment, (2) participate in the specific issue area in which that particular matter falls, or (3) seek or accept employment with any agency that the appointee had lobbied within the two years prior to entering government service.<sup>130</sup>

## Small Business Law

Small businesses generally receive special consideration under federal law and policy.<sup>131</sup> For example, it is the “declared policy of Congress that the Government should ... insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small-business enterprises,”<sup>132</sup> and there are a number of contracting preferences for various types of small businesses, including set-asides, sole-source awards, and price evaluation preferences.<sup>133</sup> However, such protections do not appear to furnish grounds for challenging an insourcing determination even if, as some commentators allege, insourcing disproportionately affects small businesses.<sup>134</sup> Under most provisions of federal law, preferences for small business apply only in the case of “acquisitions” or “contract opportunities,”<sup>135</sup> which could be construed to mean that they exist only when an agency has determined to contract out a function, not when it is determining whether to contract out a function.<sup>136</sup> While the regulations implementing Section 8(a) of the Small Business Act are somewhat broader in that they refer to agency “requirements,”<sup>137</sup> there does not appear to be any precedent for construing the regulatory prohibition upon removing a requirement from the 8(a)

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<sup>130</sup> E.O. 13490, Section 1, para. 3.

<sup>131</sup> See *supra* note 23.

<sup>132</sup> 15 U.S.C. §631(a).

<sup>133</sup> See 15 U.S.C. §637(a) (set-asides and sole-source awards for small businesses owned and controlled by socially and economically disadvantaged individuals); 15 U.S.C. §637(m) (set-asides for women-owned small businesses); 15 U.S.C. §644(g) (set-asides for small businesses generally); 15 U.S.C. §657a (set-asides, sole-source awards and price evaluation preferences for Historically Underutilized Business Zone (HUBZone) small businesses); 15 U.S.C. §657f (set-asides and sole-source awards for service-disabled veteran-owned small businesses).

<sup>134</sup> See Burton & Boland, *supra* note 24. Such commentators are concerned that the functions currently performed by small businesses are more likely to be insourced than those performed by larger firms, and several small business associations have called upon the Obama Administration to abandon its insourcing initiatives. See, e.g., U.S. Chamber of Commerce et al., Letter to the President, Aug. 19, 2010, available at [http://www.techamerica.org/content/wp-content/uploads/2010/08/Coalition\\_Letter\\_President\\_Obama-Insourcing\\_Moratorium\\_8-19-2010.pdf](http://www.techamerica.org/content/wp-content/uploads/2010/08/Coalition_Letter_President_Obama-Insourcing_Moratorium_8-19-2010.pdf) (“Given Secretary Gates’ recent acknowledgement that insourcing does not save money, Senator Menendez’s concerns that insourcing is ‘counter-intuitive’ to your Administration’s goal of creating Federal contracting opportunities, particularly for small and minority owned businesses, and the current state of the nation’s economy, **we respectfully urge your Administration to issue a revision to the insourcing agenda calling for an immediate moratorium on all insourcing efforts throughout the Federal government.**”) (emphases in original).

<sup>135</sup> By definition, an “acquisition” is “the *acquiring by contract* with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.” 48 C.F.R. §2.101 (emphasis added).

<sup>136</sup> Cf. *supra* note 52 and accompanying text (noting that “acquisition” has a narrower meaning than “procurement” under the OFPPA).

<sup>137</sup> See, e.g., 13 C.F.R. §126.606 (“A [contracting officer] may request that SBA release an 8(a) requirement ... However, SBA will grant its consent only where neither the incumbent nor any other 8(a) participant can perform the requirement.”).

Program without the consent of the Small Business Administration (SBA) to mean that agencies need the SBA's permission to insource functions formerly contracted out through the 8(a) Program.<sup>138</sup> However, the Obama Administration's Interagency Taskforce on Federal Contracting Opportunities for Small Business has recommended that the "relationship between policies that address the rebalancing of agencies' relationship with contractors and small business contracting policies" be clarified,<sup>139</sup> and its policy letter on the performance of inherently governmental and critical functions explicitly addressed insourcing of functions performed by small business contractors. Among other things, the policy letter directs agencies, when reviewing outsourced work for potential insourcing, to place a lower priority on reviewing work performed by small businesses that is not inherently governmental, particularly if the agency has not met its small business goals.<sup>140</sup> The policy letter also directs agencies to give small businesses preference when determining who performs the private-sector work that remains after related activities are insourced.<sup>141</sup>

## Congressional Actions

While most of the legal issues related to insourcing discussed herein arise from agencies' implementation of insourcing initiatives, there is considerable scope for Congress to influence whether and how insourcing is implemented. The 112<sup>th</sup> Congress enacted legislation that calls for the Office of Management and Budget (OMB) to establish "procedures and methodologies" for use by agencies in deciding whether to insource functions performed by small businesses, including procedures for (1) identifying which contracts are considered for conversion; (2) determining whether particular functions are inherently governmental or critical functions; and (3) comparing the costs of performance by contractor personnel with the costs of performance by government personnel.<sup>142</sup> This legislation also requires agency Offices of Small and Disadvantaged Business Utilization (OSDBUs) to review and to advise on insourcing determinations, and SBA procurement center representatives (PCRs) to consult with OSDBUs and other agency personnel on insourcing determinations.<sup>143</sup>

Other legislative options are possible if concerns related to insourcing persist. Broadly, Congress could restrict the scope of any insourcing by, for example, requiring that agencies complete a "public-private competitive sourcing analysis" and determine that the "provision of such goods or services by Federal employees provides the best value to the taxpayer" before using government personnel to provide goods or services previously performed by a "private sector entity."<sup>144</sup>

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<sup>138</sup> In fact, a recent decision by the Court of Federal Claims upheld an agency's determination to remove a requirement from the 8(a) Program without the SBA's consent. See *K-LAK Corp. v. United States*, 98 Fed. Cl. 1 (2011).

<sup>139</sup> *Report of the Interagency Task Force on Federal Contracting Opportunities for Small Business*, 7 (Sept. 23, 2010), available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/contracting\\_task\\_force\\_report.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/contracting_task_force_report.pdf).

<sup>140</sup> 76 Fed. Reg. at 56239.

<sup>141</sup> *Id.* at 56239-40. Specifically, the letter instructs agencies to use the "rule of two"—which generally requires that a contract be "set aside" for small businesses if at least two small businesses are capable of performing it at a fair market price—when deciding whether small or "large" businesses should perform the remaining private-sector work.

<sup>142</sup> National Defense Authorization Act for FY2013, P.L. 112-239, §1655,—Stat.—.

<sup>143</sup> *Id.* at §1621.

<sup>144</sup> Freedom from Government Competition Act, H.R. 1474, S. 785, at §4(e). A provision in the House-passed National Defense Authorization Act for FY2012 (H.R. 1540, §939) would also have limited agencies' ability to insource by requiring the consideration of certain information when estimating and comparing the costs of performing functions with DOD civilian employees and contractor personnel. However, this provision was not included in the bill as enacted.

Alternatively, Congress could broaden the scope of insourcing with legislation, like that introduced in the 109<sup>th</sup> through 111<sup>th</sup> Congresses, which encourages agencies to insource particular functions.<sup>145</sup>

More narrowly, Congress could also expand or limit the jurisdiction of particular courts over contractors' challenges to insourcing determinations; require that agency insourcing guidelines be promulgated in ways that are more or less likely to be found to be legally binding; expand or limit direct hire authority; impose or remove restrictions upon the activities of former contractor employees who enter government service; or otherwise seek to protect small businesses from the effects of insourcing determinations. For example, some Members of the 112<sup>th</sup> Congress introduced legislation that would have amended 31 U.S.C. Section 3551(1) to provide that the term "protest" includes a written objection to the "conversion of a function that is being performed by a private sector entity to performance by a Federal employee," and that "any small business whose economic interest would be affected by the conversion" is an "interested party."<sup>146</sup> This legislation would also have amended the Small Business Act to prohibit an agency from converting functions performed by small businesses to performance by federal employees unless it has "made publicly available, after providing notice and an opportunity for public comment," its procedures for making insourcing determinations.<sup>147</sup> The requirement that agency procedures be made publicly available after a notice-and-comment period, in particular, could help remove questions as to whether agencies are bound by their insourcing guidelines that could arise when these guidelines are promulgated as policy or guidance documents.<sup>148</sup> However, questions about prudential standing could potentially remain, notwithstanding the enactment of this legislation, because prudential standing is a "judicially self-imposed limit[] on the exercise of federal jurisdiction."<sup>149</sup>

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<sup>145</sup> See, e.g., Correction of Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act, S. 991, §4 (requiring agencies to report on how "wrongly contracted out work will be insourced," among other things).

<sup>146</sup> Subcontracting Transparency and Reliability Act of 2012, H.R. 3893, §301.

<sup>147</sup> *Id.*, at §302.

<sup>148</sup> See *supra* notes 92-101 and accompanying text. The House-passed National Defense Authorization Act for FY2013 would similarly prohibit civilian agencies from insourcing a function performed by a small business unless the agency "makes publicly available the procedures and methodologies" it used in making the determination to insource, including those for (1) determining which contracts were considered for potential conversion, (2) evaluating whether a function is inherently governmental or critical, and (3) estimating and comparing costs. H.R. 4310, as passed by the House, at §1658. However, agencies subject to these requirements would not necessarily have to promulgate their procedures and methodologies through a notice-and-comment process.

<sup>149</sup> *But see Bennett*, 520 U.S. at 163 (noting that Congress can "expressly negate" prudential standing requirements).

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