

A copy of the response in opposition to dismissal filed in *Harris* is submitted herewith as Attachment 3. The majority of Plaintiff's arguments in K-MAR's Response [Doc. 28] are, for all intents and purposes, identical to the arguments rejected in *Harris*.¹

Defendants acknowledge that *Harris* is not controlling in this jurisdiction. However, the fact that another United States District Court, confronted with practically the same jurisdictional arguments presented by Plaintiff herein, ordered dismissal for lack of subject-matter jurisdiction, is certainly persuasive.²

2. Plaintiff's reliance on *dicta* from *Vero Tech - COFC* is misplaced.

Exhibits submitted with K-MAR's Response [Doc. 28] include a magistrate judge's report and recommendation (Plaintiff's Exh. 1) filed in *Vero Technical Support, Inc. v. Department of Defense, et al.*, Case No. 10-14162-CIV-Graham/Lynch, United States District Court for the Southern District of Florida ("*Vero Tech - SD Florida*"), and an order

¹Beginning at page 3 of the *Harris* brief, practically all of the arguments advanced in that brief are reproduced almost word-for-word (and sometimes verbatim) in K-MAR's Response [Doc. 28], albeit in a different order. For example, the argument that starts at the bottom of page 4 of the *Harris* brief ("The term 'interested party' is a term of art ...") and continues to the top of page 6 of that brief ("... will instead simply not allocate funds for new contracts.") appears at pages 10 through 12 of K-MAR's Response. Arguments on pages 7 and 8 of the *Harris* brief appear at pages 6 through 10 of K-MAR's Response; pages 9 and 10 of the *Harris* brief are reproduced at pages 12 through 14 of K-MAR's Response; etc.

²Motions to dismiss are pending in *K-MAR Industries, Inc. v. United States Department of Defense et al.*, Case No. 1:10-CV-00456-HSO-JMR, United States District Court for the Southern District of Mississippi, and *Rothe Development, Inc. v. United States Department of Defense et al.*, Case No. 5:10-CV-00743-XR, United States District Court for the Western District of Texas, two other cases identified in Defendant's Notice of Related or Companion Cases [Doc. 22]. The remaining cases identified in that pleading have been dismissed.

(Plaintiff's Exh. 2) filed in *Vero Technical Support, Inc. v. United States*, Case No. 10-575C, United States Court of Federal Claims ("*Vero Tech - COFC*").

Plaintiff juxtaposes the two courts' decisions, declares in no uncertain terms, "The Magistrate Judge had it exactly backwards" in *Vero Tech - SD Florida*, K-MAR's Response [Doc. 28] at 3,³ and directs this Court's attention to the Honorable Marian Blank Horn's order in *Vero Tech - COFC*. K-MAR's Response [Doc. 28] at 3-4. Specifically, Plaintiff emphasizes the following language from the *Vero Tech - COFC* order:

Moreover, 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 the insourcing policy decisions is not immediately apparent.

K-MAR's Response [Doc. 28] at 4, quoting Plaintiff's Exh. 2 (*Vero Tech - COFC* Order [Doc. 31 therein]) at 8 (emphasis added by Plaintiff).

K-MAR's Response [Doc. 28] neglects to quote or refer to the language that immediately follows in the *Vero Tech - COFC* order:

In this Order, however, the court does not address the propriety of jurisdiction in the Court of Federal Claims, and has not fully explored the issue at this time.

Plaintiff's Exh. 2 at 8.

Clearly, the language Plaintiff relies on is *dicta*. See Attachment 1 at 1 ("... the Court

³After an independent review, the Honorable Donald L. Graham, United States District Judge for the Southern District of Florida, affirmed, adopted, and ratified in its entirety the magistrate judge's report. See Defendant's Notice of Related or Companion Cases [Doc. 22], Attachment 2-c thereto (*Vero Tech - SD Florida* Order [Doc. 33 therein]).

notes that the language relied upon by counsel in that opinion, that ‘Tucker Act jurisdiction to challenge the insourcing policy decisions is not immediately apparent,’ is dicta.”).

When the Court of Federal Claims (COFC) did explore the issue in a similar case, it found that it had jurisdiction. In *LABAT-Anderson, Inc. v. United States*, 65 Fed.Cl. 570 (2005), the plaintiff first filed suit in the District Court for the District of Columbia seeking to enjoin the Government from taking over certain work that the plaintiff had been performing under a contract with the Defense Logistics Agency, a component of DOD. LABAT alleged that the decision to move the work in-house without resoliciting the contract and winning a public/private cost comparison violated several sources of law, including DOD procurement regulations. *Id.* at 572. The Government argued successfully to the district court that it lacked subject-matter jurisdiction because the case involved a procurement and was therefore within the exclusive jurisdiction of COFC. *Id.* at 573-74.

COFC recognized that subject-matter jurisdiction was a threshold issue and noted:

The Tucker Act provides jurisdiction in this court

to render judgment on an action by an *interested party* objecting [1] to a solicitation by a Federal agency for bids or proposals for a proposed contract or [2] to a proposed award or the award of a contract or [3] *any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.*

28 U.S.C. § 1491(b)(1) (emphasis added). Thus, the jurisdictional issues are (1) whether this case involves a procurement and (2) whether LABAT is an “interested party.”

LABAT, 65 Fed.Cl. at 574.

The facts did “not concern a solicitation or award, but a decision by the Government *not* to conduct a solicitation.” *Id.* (emphasis in the original). Nevertheless, COFC found that the case involved a procurement. Although the case did not involve “review of a solicitation or award, it is a challenge to an ‘alleged violation of statute or regulation in connection with a procurement’” *Id.*, quoting 28 U.S.C. § 1491(b)(1).

As to whether LABAT was an “interested party,” COFC found that LABAT “was the incumbent contractor and it was capable of providing the needed services and supplies.” *LABAT*, 65 Fed.Cl. at 575. LABAT would be “a legitimate competitor” for a new contract. *Id.* “The Government’s decision not to renew the contract affected LABAT’s direct economic interest.” *Id.* “LABAT lost the opportunity to earn revenue by not being allowed to compete” for a renewed contract, and LABAT alleged that it incurred other losses from the Government’s decision to take the work in-house. *Id.* Thus, COFC concluded, “Plaintiff is an interested party within the meaning of section 1491(b)(1).” *Id.*

K-MAR’s disclaimers notwithstanding, this case does involve a procurement and K-MAR is an interested party. *Cf.* K-MAR’s Response [Doc. 28] at 7 (“*A. This Case Does Not Involve a Tucker Act ‘Procurement’*”) and at 10 (“*B. KMI is Not an ‘Interested Party’ Under the Tucker Act*”). Just as the plaintiff did in *LABAT*, K-MAR challenges a government decision to in-source and alleges violations of federal law in connection with that decision. *See, e.g.*, Complaint [Doc. 1] at 2, ¶¶ 3-4 (“Defendants have made a final decision to insource Defendants’ insourcing decision is not in accordance with insourcing procedures

required by 10 U.S.C. § 2643 which Defendants have bound themselves to.”). Just as the plaintiff did in *LABAT*, K-MAR claims that it is the incumbent contractor and should continue to perform the work. *See, e.g.*, Complaint [Doc. 1] at 4, ¶ 17, at 13, ¶ 61, at 16, ¶ 87 (incumbent status); at 2, ¶ 7 (“... in a fair cost analysis of like costs comparison, KMI is the true ‘low cost provider.’”); at 11, ¶ 49 (“KMI, not Defendants, is the low cost provider ...”); at 11, ¶ 50 (“KMI seeks through this lawsuit to keep its scope of work in the competitive realm in order to re-compete for the work.”).

Even though Plaintiff’s decisions to file suit in this Court and to invoke the APA might “resonate” with a COFC judge, that judge did not fully explore or address the propriety of jurisdiction in *Vero Tech - COFC*. Plaintiff’s Exh. 2 at 8. In the published *LABAT* decision, COFC did explore the issue and found that the suit was a procurement suit within the meaning of the Tucker Act’s provisions conferring jurisdiction over such suits to COFC.

3. Plaintiff’s FOIA claims do not salvage this Honorable Court’s jurisdiction.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides an enforceable right of access to federal agency records except to the extent that such records are protected from disclosure by various exceptions and exclusions. “Under 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’” *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). Judicial authority to devise a remedy and to enjoin agency action can be invoked only if the agency has contravened all three components of this obligation. *Id.*

Congress intended to reserve the role of the courts for two occasions: (1) when the agency does not show due diligence in processing a plaintiff's individual request or is lax overall in meeting its obligations under FOIA, and (2) when the plaintiff can show a genuine need and a reason for urgency in gaining access to the information. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615-16 (D.C. Cir. 1976).

Under FOIA, an agency must respond to a request by making the records "promptly available" unless they fit within an exemption. 5 U.S.C. § 552(a)(3)(A). The statute sets time frames for an agency response, 5 U.S.C. § 552(a)(6)(A), but those time frames

should not be read as a congressional imprimatur, conclusively establishing the necessity of court action when an agency does not comply particularly where the administrative delay arises from an agency's attempt to comply fully with the spirit of the FOIA by supplying all requested information, whether exempt or not, unless there is a vital reason not to disclose it.

Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977).

The "unusual circumstances" justifying a delayed FOIA response include:

- (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;
- or
- (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

5 U.S.C. § 552(a)(6)(B)(iii)(I)-(III).

An employee who improperly discloses confidential records may face administrative

and legal sanctions, including termination from employment, imposition of a criminal fine, and imprisonment for up to one year. 18 U.S.C. § 1905; *see also Dow Chemical Co. v. United States*, 476 U.S. 227, 248 n. 10 (1986) (“Federal law, under the Trade Secrets Act, 18 U.S.C. § 1905, makes it a crime for government employees to disclose trade secret information.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 288-89 (1979) (discussing the interplay between FOIA and 18 U.S.C. § 1905 and noting that § 1905 “imposes criminal sanctions on Government employees who make unauthorized disclosures of certain classes of information submitted to a Government agency, including trade secrets and confidential statistical data.”); 5 U.S.C. § 552a(i)(1) (willful violations of the Privacy Act are misdemeanors punishable by fine of up to \$5,000).

The Army’s response to Plaintiff’s FOIA request demonstrates a justified delay. Fort Sill’s Administrative Services Division has advised Plaintiff that (1) “[y]our request is being processed,” (2) the request “was forwarded to the Directorate of Plans, Training, Mobilization, and Security” for processing, (3) the Directorate “conducted a search and located files which may contain records responsive to your request,” and (4) the Army would “examine these records” and “consult with other agencies” prior to making a final decision. Complaint [Doc. 1], Plaintiff’s Exh. 6 thereto; *see also* K-MAR’s Response [Doc. 28], Plaintiff’s Exh. 3 thereto.⁴

⁴Although Plaintiff must demonstrate this Court’s jurisdiction and has submitted letters responding to its FOIA request, Defendants believe that Plaintiff has not provided a copy of the FOIA request at issue for the Court to review. *Cf.* Complaint [Doc. 1] at 3, ¶ 11 (referring generally to the matters requested: “documentation of [the] insourcing decision

Plaintiff tacitly acknowledges that Defendants' employees must review carefully the potentially responsive records before deciding what to release. Although Plaintiff asserts that the exemptions do not apply, Plaintiff identifies in its complaint the possible application of FOIA Exemptions 4, 5, and 6. *See* Complaint [Doc. 1] at 9, ¶ 36 (“[T]he FOIA exceptions for proprietary financial information (Exemption 4), predecisional and interagency communications (Exemption 5) and invasion of privacy (Exemption 6) ... do not apply.”); *see also* 5 U.S.C. §§ 552(b)(4) (FOIA does not require disclosure of “trade secrets and commercial or financial information obtained from a person and privileged or confidential”), 552(b)(5) (“... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”), and 552(b)(6) (“... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

Incident to its notice that it was processing the request, the Army offered Plaintiff “the opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii); *compare with* Complaint [Doc. 1], Plaintiff’s Exh. 6 thereto (“I assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact me at the number below.”). Plaintiff has not responded to that offer or otherwise exhausted its administrative remedies.

including cost analysis, human resources determination and workforce determination”).

Plaintiff has not shown that Defendants improperly withheld agency records and “the language of FOIA and the overwhelming weight of case law indicate that a federal court does not have subject-matter jurisdiction unless the plaintiff has exhausted administrative remedies.” *Durham v. United States*, Case No. CIV 08-0201, 2008 WL 5978929 (D. N.M. Dec. 30, 2008) (slip op.) (citing cases).

In light of the applicable law and the circumstances of this case, this Honorable Court should decline to exercise FOIA jurisdiction. In the alternative, should this Court determine that Plaintiff has demonstrated FOIA jurisdiction, such jurisdiction cannot be used to bypass the jurisdictional requirements for Plaintiff’s challenge to the in-sourcing decision.

Prayer for Relief

WHEREFORE, Defendants respectfully pray for an order of this Honorable Court granting Defendants’ Motion to Dismiss for Lack of Subject-Matter Jurisdiction [Doc. 23].

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the Electronic Case Filing (ECF) System for filing and transmittal of a notice of electronic filing to the following ECF registrants:

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ATTACHMENTS

No. **Description**

Documents filed in *Harris Enterprises, Inc., and Speed Aviation, Inc. v. United States Department of Defense and United States Department of the Air Force*, Case No. 5:10-CV-00573, United States District Court for the Western District of Texas:

- 1 Order [Doc. 16 therein], filed October 12, 2010
- 2 Judgment [Doc. 17 therein], filed October 12, 2010
- 3 Plaintiff's Response to Defendants' Motion to Dismiss [Doc. 9 therein], filed August 16, 2010

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

K-MAR INDUSTRIES, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-10-0984-F
)	
UNITED STATES DEPARTMENT)	
OF DEFENSE AND UNITED)	
STATES DEPARTMENT OF THE)	
ARMY,)	
)	
Defendants.)	

ORDER

This order addresses defendants’ motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P. (Doc. no. 23.)

Plaintiff is K-Mar Industries, Inc. Defendants are the United States Department of Defense and the United States Department of the Army. The complaint alleges that plaintiff provides Training Support Center services and operates a Multimedia/Visual Information Service Center at Fort Still, Oklahoma. The complaint seeks declaratory and injunctive relief under 5 U.S.C. § 706(2) of the Administrative Procedures Act (APA), alleging that defendants violated insourcing procedures when they decided to insource, for performance by their own civilian employees, the Training Support Center portion of the work currently performed by plaintiff. These claims are sometimes referred to in this order as the procedures-based claims. Plaintiff also seeks production of records under the Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(B),(E).

In support of their motion defendants argue that the Tucker Act as amended by the Administrative Dispute Resolution Act (ADRA), 28 U.S.C. §1491(b)(1), confers

exclusive jurisdiction over plaintiff's procedures-based claims to the United States Court of Federal Claims (CFC). Defendants also contend that the Contract Disputes Act, 41 U.S.C. § 601 et seq., (CDA), confers exclusive jurisdiction on the CFC with respect to the procedures-based claims. Defendants contend that the FOIA claim should be dismissed because plaintiff has not exhausted its administrative remedies under that Act.

Standards

Rule 12(b)(1) motions generally take one of two forms. First, a moving party may make a facial attack on the complaint's allegations as to the existence of subject matter jurisdiction. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir.1995) (internal citation omitted). In reviewing a facial attack, the district court must accept the allegations in the complaint as true. *Id.* Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction is based. *Id.* at 1003. In reviewing a factual attack, a court has wide discretion to allow affidavits and other documents and to resolve any disputed jurisdictional facts. *Id.* In the course of a factual attack under Rule 12(b)(1), a court's reference to evidence outside the pleadings does not convert the motion into a Rule 56 motion. *Id.*

For purposes of the motion, defendants assume, without admitting, the facts alleged in the complaint. (Doc. no. 23, p. 2, n.1.) Defendants, therefore, appear to regard their motion as a facial attack on jurisdiction. Both parties, however, have submitted extraneous evidence for the court's consideration.¹ Typically, when matters

¹For example, plaintiff's moving papers include a letter (in addition to the letter attached to the complaint) from the Department of the Army regarding plaintiff's FOIA request. Plaintiff also quotes from an interview with Secretary of Defense Robert Gates. Defendants do not object to the court's consideration of any outside evidence, and defendants have, themselves, submitted a brief filed in another action as an exhibit to their reply brief.

outside the pleadings are considered, the motion is considered a factual attack on jurisdiction. As a practical matter, however, here it makes little difference whether the motion is considered as a facial or factual attack on jurisdiction. Whether the allegations are presumed true by the court, or whether the allegations are found to be true because they are verified and are expressly undisputed for purposes of the motion, the court's analysis begins by taking the allegations as true. The only difference in the two types of analysis concerns the court's reliance on extraneous evidence offered by the parties with their papers. This distinction is also of little importance here because neither party objects the court's consideration of this outside evidence.

Accordingly, whether the motion is analyzed as a facial attack on jurisdiction with all extraneous evidence excluded from the court's consideration and with mentions of such evidence deleted from this order; or whether the motion is analyzed as a factual attack on jurisdiction, in which case the court finds that the allegations are undisputed for purposes of the motion and it considers the unchallenged, outside evidence that has been offered, the results stated in this order are the same.

Jurisdiction over the Procedures-Based Claims

Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). It is presumed that an action lies outside this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction. *Id.* Plaintiff has filed this action under the APA, and there is no dispute that 28 U.S.C. § 1331 provides subject matter jurisdiction over an APA challenge. In a suit against a federal agency, however, a plaintiff must satisfy an additional jurisdictional burden because the United States may not be sued without its consent. Fostvedt v. United States, 978 F.2d 1201, 1202 (10th Cir. 1992), citations to United States Supreme Court authorities omitted. The existence of consent is a prerequisite for jurisdiction. United States v. Mitchell, 463 U.S. 206, 212 (1983). The

United States consents to be sued only when Congress unequivocally expresses in its statutory text its intention to waive the United States' sovereign immunity. Fent v. Oklahoma Water Resources Board, 235 F.3d 553, 556 (10th Cir. 2000).

The APA provides that in most circumstances an action in a court of the United States seeking relief other than money damages shall not be dismissed nor relief therein be denied on the ground that it is against the United States. Normandy Apartments, Ltd. v. U.S. Dept. of Housing and Urban Development, 554 F.3d 1290, 1295 (10th Cir. 2009), quoting the APA, 5 U.S.C. § 702.² The complaint in his action seeks declaratory and injunctive relief. It seeks no money damages. The court concludes that the complaint seeks relief other than money damages and comes within the United States' waiver of sovereign immunity as stated in the APA if the limitation stated in the APA regarding the reach of its waiver of immunity does not apply.

In that regard, the APA's waiver of sovereign immunity does not apply if any other statute that grants consent to suit, expressly or impliedly forbids the relief which is sought. *See*, last sentence of § 702 quoted *infra* at n.2. Defendants argue that pursuant to this limitation, the ADRA ousts the district court's jurisdiction under the APA.

In 1996, Congress amended the Tucker Act by enacting the ADRA which added 28 U.S.C. §1491(b) to the Tucker Act. Colorado Dept. of Human Services v. United

²Section 702 provides in pertinent part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.... The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein...confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

States, 74 Fed. Cl. 339, 344 (Fed. Cl. 2006). Section 1491(b)(1), sometimes described as expanding the CFC's jurisdiction to include both pre-award and post-award "bid protest" cases, *id.*, provides as follows.

Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on *an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.* (Emphasis added for purposes of later discussion.)

Although this language would appear to provide concurrent jurisdiction to United States district courts and the CFC, the ADRA contains a sunset provision which provides as follows.

The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code, shall terminate on January 1, 2001 unless extended by Congress. 28 U.S.C. § 1491, statutory notes at FN 1.

The sunset date was not extended by Congress. Accordingly, the ADRA provides for exclusive jurisdiction in the CFC if that Act applies, thereby depriving the plaintiff of the option to bring suit in the district court under the APA.

It is therefore necessary to determine whether the ADRA, by its terms, applies to this action. Tracking the language of the ADRA, the court finds that this is not an action by "an interested party" bringing an objection "to a solicitation by a Federal agency for bids or proposals for a proposed contract" or "to a proposed award" or to "the award of a contract." Holding aside for the moment the question of whether plaintiff constitutes an interested party for purposes of the ADRA, the complaint simply does not allege an objection to a solicitation, or to a proposed award, or to the award of a contract. Rather, the complaint alleges an objection to a decision to

insource, a decision which implicitly includes a decision *not* to procure and therefore *not* to solicit, award, contract or propose a contract.

As for the interested party requirement, the Federal Circuit has held that the definition of “interested party” for purposes of the ADRA is borrowed from 31 U.S.C. § 3551(2), included in the definitions of the Competition in Contracting Act (CICA). American Federation of Government Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001). The CICA defines “interested party” as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of *the contract* or by failure to award *the contract*.” *Id.*, quoting the CICA (emphasis added). This definition strongly suggests that as a pre-requisite to qualification as “an interested party” for purposes of the ADRA, a contract or a prospective contract must be in issue. Further supporting this conclusion is the fact that § 3551, by its terms, applies only to contract disputes. *Id.*

The ADRA also reaches “an action by an interested party objecting to... any alleged violation of statute or regulation *in connection with* a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1) (see italicized text of §1491(b)(1) quoted above, emphasis added). This is arguably the broadest coverage provision in the ADRA.

Even this provision, however, requires the objecting party to be an “interested party” within the meaning of the ADRA.

Moreover, for this provision to apply, a decision “in connection with a procurement or a proposed procurement” must be alleged. The Federal Circuit has held that the ADRA borrows the definition of “procurement” from 41 U.S.C. §403(2), part of the Office of Federal Procurement Policy Act (OFFPPA). Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008). Title 41 U.S.C. § 403(2) 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.

Defendants argue that this definition includes a decision to insource because “the process for determining a need for property or services” begins with a decision by the agency as to whether or not there is a need to acquire property or services. Although this is a reasoned argument, the court rejects it for several reasons.

For one thing, the portion of the § 403(2) definition that comes after the comma could have provided, but does not, that the process of acquiring services begins with the process of determining “*whether there is a need*” for property or services. Instead, the definition provides that the acquisition process begins with the process for determining “*a need for property or services.*”

Also, it is arguable that the part of the definition that comes after the comma does not apply at all except to the extent that there is an on-going process of acquiring property or services as required by the part of the definition that precedes the comma.

Also, the portion of the definition that comes after the comma describes the acquisition process as “ending with contract completion and closeout.” The definition says nothing about the possibility that the acquisition process might end with a decision not to acquire services or to insource.

Important, also, is the fact that 41 U.S.C. §403(16) of the OFFPA defines “acquisition” -- the critical concept within the definition of “procurement” -- exclusively in terms of purchasing or leasing by contract. *See*, 41 U.S.C. § 403(16).

Finally, even if the ADRA’s grant of jurisdiction arguably applies through defendants’ proposed broad reading of the incorporated definition of procurement, this

does not constitute a clear jurisdictional grant and waiver of immunity, rather, it is an implied one, and waivers of sovereign immunity are construed narrowly.³

These considerations, combined with the fact that this action only challenges the defendants' compliance with their own procedures regarding the decision to insource, cause the court to conclude that this action is not one "in connection with a procurement or a proposed procurement," the broadest of the potentially applicable phrases of the ADRA.

Alternatively, even if this action were "in connection with a procurement or a proposed procurement," that phrase only applies with respect to an action by an interested party objecting to "any alleged violation of statute or regulation" in connection with a procurement or a proposed procurement. Although this action cites the statutes and regulations pursuant to which the procedures plaintiff claims were violated were promulgated, the complaint does not allege a violation of these statutes or regulations *per se*.

Based on the language of the ADRA and other statutes incorporated in the ADRA for definitional purposes, the court concludes that this action does not come within the exclusive jurisdiction of the CFC or the waiver of sovereign immunity provided by the ADRA.⁴

³*See, American Federation of Government Employees, AFL-CIO*, 258 F.3d at 1301, referring to 28 U.S.C. § 1491(b) as a statute which provides the CFC with "jurisdiction over bid protest cases," *id.* at 1297, and as a statute which waives the United States' sovereign immunity and which should therefore be construed narrowly. *Id.* at 1301.

⁴This court agrees with dicta in another insourcing case, *Vero Technical Support, Inc. v. United States*, No. 10-575C. In an order in that case Judge Marian Blank Horn 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 the insourcing policy decisions is not immediately apparent." (Doc. no. 28, ex. 2, order of September 29, 2010, p. 8.) Judge Horn went on to note, however, that her order did not address the propriety of the jurisdiction of the CFC
(continued...)

The above conclusion is consistent with the Tenth Circuit's statement in Normandy that only contract claims come within the "impliedly forbids" language of the APA.⁵ Normandy states: "while the plain language of the Tucker and Little Tucker Acts does not distinguish between claims founded on contracts and those founded on the Constitution, statutes, or regulations, we – like other circuits – have limited the application of the 'impliedly forbids' exception to the APA waiver of sovereign immunity to contract claims." *Id.* at 1299, citations omitted. In Normandy, the Tenth Circuit held that even when a contractor alleged that the Department of Housing and Urban Development had not followed its own regulations when the agency made the decision to abate financial housing subsidies paid to plaintiff under a contract, and even when this regulations-based claim was alleged alongside a breach of contract claim over which the CFC had exclusive jurisdiction, the regulations-based claim was not a contract claim within the meaning of the Tucker Act. For this reason the Tenth Circuit held that the district court erred when it dismissed the regulations-based claim because it was proper to hear that claim in the district court under the waiver of immunity provided by the APA. *Id.* at 1299-1301.

Normandy explained as follows.

It is true, of course, that ... the regulatory violations that [the Plaintiff] asserts implicate is contractual relationship with [the agency]. . . . But this does not convert a claim asserting rights based on federal regulations into one which is, at its essence, a contract claim. When the source of rights asserted is constitutional, statutory, or regulatory in nature, the fact that resolution of the claim requires some reference to contract does not

⁴(...continued)
and that she had not fully explored the issue.

⁵The "expressly forbids" limitation (as contrasted with the "impliedly forbids" limitation) does not apply because the ADRA does not expressly preclude application of the APA waiver in this action. For example, the ADRA says nothing about exclusive jurisdiction in the CFC for actions alleging a violation of agency procedures, or for actions challenging agency decisions to insource.

magically transform the action . . . into one on the contract and deprive the court of jurisdiction it might otherwise have. Rather, litigants may bring statutory and constitutional claims in federal district court even when the claims depend on the existence and terms of a contract with the government. Similarly, an order compelling the government to follow its regulations is equitable in nature and is beyond the jurisdiction of the Court of Federal Claims.

Normandy, at 1299-1300, citations and quotations omitted.

Thus, unless this action includes a contract claim, the Tenth Circuit would hold that the ADRA cannot impliedly oust this court of its jurisdiction. Normandy provides the proper approach for categorizing a claim as a contract-based claim for this purpose. *Id.* at 1299. The classification depends on the source of the rights upon which plaintiff bases its claims, and upon the type of relief sought. *Id.*

Here, plaintiff challenges only the defendants' compliance with insourcing procedures. The complaint expressly rejects a breach of contract theory of liability, and plaintiff seeks no contractual relief. This is not a case of artful pleading to disguise the true nature of the action. Rather, plaintiff is master of its complaint and plaintiff has opted to pursue limited theories of liability and limited types of relief, none of which are contract-based.⁶ Accordingly, the "impliedly forbids" exclusion to the APA's waiver of sovereign immunity cannot apply because no contract claim is alleged.

To the extent that defendants' arguments are based on congressional intent and the legislative history of the ADRA, or public policy arguably favoring the CFC's

⁶It is entirely speculative as to whether there will ever be a future solicitation or a contract regarding the Training Support Center services. Even if plaintiff ultimately prevails and the court finds that defendants' insourcing procedures were violated, compliance with those procedures may result in the same decision, that is, a decision to insource rather than to outsource the services. If the services are outsourced, this action does not seek a determination that plaintiff should win that contract.

exclusive jurisdiction over contractual matters as well as disputes such as this one, such arguments cannot trump the actual language of the APA, or the Tucker Act as amended by the ADRA. Nor can defendants' policy arguments trump the fundamental judicial principle which requires the court to read narrowly any unclear waiver of immunity such as the one argued for here by the defendants under the ADRA.

Defendants' motion for dismissal based on the ADRA will be denied.

The Contracts Dispute Act.

The Contracts Dispute Act confers exclusive jurisdiction on the CFC for "[e]ach claim by a contractor against the government relating to a contract..." 41 U.S.C. § 605(a). The CDA bars district court jurisdiction if the court determines that plaintiff's claims against a government agency are essentially contractual in nature. B & B Trucking, Inc. v. United States Postal Service, 406 F.3d 766, 768 (6th Cir. 2005), citation and quotations omitted. The classification of an action as one which is or is not essentially contractual for purposes of the CDA depends on both the source of the rights upon which plaintiff bases its claim, and upon the type of relief sought or appropriate. *Id.*, citation and quotations omitted. The plaintiff's title or characterization of its claims is not controlling. *Id.*, citation and quotations omitted. A plaintiff may not avoid the jurisdictional bar of the CDA in district court merely by alleging violations of regulatory or statutory provisions. *Id.*, citation and quotations omitted.

The relief sought in this action asks the court to hold the insourcing decision unlawful as a violation of the defendants' own insourcing procedures, and to set that decision aside. The source of the rights alleged in this action is not contractual, it is the procedures put in place by the defendants. Nor is the relief requested contractual in nature; no relief such as damages for breach of contract, or seeking specific

performance, are sought. Rather, the complaint recognizes that whether or not the insourcing decision is enjoined, plaintiff's contract will terminate on schedule. (*See*, doc. no. 1, ¶ 62.)

The court concludes that this is not an action against the government relating to a contract within the meaning of the CDA. Defendants' motion for dismissal based on the CDA will be denied.

The Freedom of Information Act Claim

Defendants argue the FOIA claim should be dismissed because plaintiff has not exhausted its FOIA administrative remedies.

The FOIA, 5 U.S.C. § 552(a)(6)(C)(i), expressly deems administrative remedies to have been exhausted if the agency fails to comply with the applicable time limits stated in that paragraph of the Act. Nothing in the statute suggests that a FOIA claim should be dismissed for failure to exhaust administrative remedies in the circumstances presented here, which include the fact that plaintiff has filed a FOIA request; that plaintiff has received two letters in response, neither of which states a date for production; and that time limits provided for in the statute have expired. *See*, 5 U.S.C. § 552(a)(6)(A), (B) (stating time limits).

In contrast to the cases cited by defendants, here there are no issues regarding lack of notice to the government of plaintiff's FOIA request, or the sufficiency of plaintiff's FOIA request. Plaintiff has not taken a scattershot approach to its request and has not failed to appeal a denial despite notification of appeal rights. *See* cases cited by defendants including, Roberts v. Paulson, 263 Fed. Appx. 745, 747-48 (10th Cir. 2008) (affirming dismissal where plaintiff did not allege he had complied with notice requirements of the FOIA); Durham v. United States, 2008 WL 5978929 at *2 (D. N. Mex. 2008) (dismissal for lack of jurisdiction appropriate where complaint bore no indication that plaintiff pursued his FOIA request prior to filing complaint at all,

as complaint appeared to be an original request and plaintiff had not brought the request to the attention of relevant agencies); and Scherer v. United States Department of Education, 78 Fed. Appx. 687, 690 (10th Cir. 2003) (FOIA claim properly dismissed where plaintiff took a “scattershot approach” to his FOIA requests, including failure to pursue administrative appeal of initial denial even though he was notified of his appeal rights), unpublished.

Moreover, many of defendants’ arguments concern the merits of their contention that delays have been justified rather than the propriety of dismissal for failure to exhaust remedies. This court may or may not ultimately be required to determine whether any delays have been justified, but even cases cited by defendants state that the government’s due diligence may be an issue for the court. *See, e.g., Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615-16 (D.C. Cir. 1976) (courts have a role when the agency does not show due diligence in processing a plaintiff’s request or is lax in meeting its obligations under the FOIA), superseded to some extent by statutory amendment not material here.

The motion to dismiss the FOIA claim for failure to exhaust administrative remedies will be denied.

Ruling

After careful consideration, defendants’ motion to dismiss is **DENIED**.

Dated this 4th day of November, 2010.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE