**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

ROTHE DEVELOPMENT, INC.	§	
	§	
A Texas Corporation	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	CIVIL ACTION NO.
	§	
UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES DEPARTMENT OF THE AIR FORCE,	§ § §	5:10-CV-00743-XR
	§	
Defendants,	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants, the United States Department of Defense and United States Department of the Air Force (collectively "Defense Department" or "defendant"), file this reply to Plaintiff's Response to Defendants' Motion to Dismiss and would show as follows:

We previously explained that this Court does not possess subject matter jurisdiction over this complaint because Congress vested exclusive jurisdiction over plaintiff's allegations in the United States Court of Federal Claims ("COFC") through the Tucker Act, 28 U.S.C. § 1491(b)(1), as amended by the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870. Mot. Dismiss 4-8. The COFC's exclusive bid protest jurisdiction covers not only actual and proposed procurements, but also agency decisions with "a connection with any stage of the federal contracting process, including 'the process for determining a need for property or

services.'" *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008) (quoting 41 U.S.C. § 403(2)); *see also Resource Conservation Group, LLC v. United States*, 597 F.3d 1238, 1246 (Fed. Cir. 2010). Rothe Development, Inc. ("Rothe") challenges the Defense Department's decision to use civilian employees rather than a contractor ("the insourcing decision") to provide information technology services which Rothe previously provided. Rothe, therefore, is alleging a violation of statute or regulation in connection with a procurement, which can only be raised pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1). Accordingly, this Court should dismiss Rothe's claims challenging the insoursing decision for want of jurisdiction.[1]

I. Reply to Plaintiff's Summary

A. The Burden of Establishing Jurisdiction Remains on Plaintiff.

Without supporting authority, Rothe contends that the burden has shifted to defendant to establish jurisdiction. This is argument has no merit. A plaintiff bears the burden to show by a preponderance of the evidence that jurisdiction is proper. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001) ("[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."); *see also Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

B. The Tucker Act and/or the Contracts Disputes Act Provide Exclusive Jurisdiction over the Decision to Insource..

Rothe next assumes, without supporting authority, that "clear federal question jurisdiction" exists. This argument is again incorrect. Indeed, every case that has considered the question of

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[1] Rothe also asserts its status as an incumbent contractor injured by not being able to continue to perform the services previously provided under its contract. (Comp. ¶ ¶ 31, 55, 56, and 59). Please see Docket No. 10 pp7-8.

jurisdiction over an insourcing decision has held otherwise. *See, Labat-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 582 (2005); *Space Mark v. United States*, 45 Fed. Cl. 267, 268 (1999) (entertaining protest brought by bidder challenging USAF insourcing decision); *Vero Technical Support, Inc. v. United States Department of Defense*, Exhibits 3-4 to Docket No. 10; *Labat-Anderson, Inc. v. United States*, 346 F.Supp. 2d 145, 155 (D.D.C. 2004); and *Harris Enterprises, Inc. v. United States Department of Defense,* Cause No. 10-CA-0573-FB, (W.D. Tx., October 12, 2010). Plaintiff, on the other hand, can show no cases that have found district court jurisdiction in an insourcing challenge.

C. Rothe Has Not Met its Burden to Establish a Right to Immediate Injunctive Relief on its FOIA Claim.

Plaintiff next contends that its complaint and application for preliminary injunction are sufficient to grant immediate injunctive relief on its FOIA claim. Defendant respectfully submits that the Court has already found otherwise in its Order of September 9, 2010. (Docket No. 5).

II. Rothe Has Alleged a Tucker Act Claim.

A. The Court of Appeals for the Federal Circuit's Decision in *Distributed Solutions* and 41 U.S.C. § 403(2) Both Prove That the Court of Federal Claims Would Possess Jurisdiction Pursuant to ADRA.

In Section II A 1 and 2 of the response, plaintiff argues that this case does not involve a procurement, alleging that "procurement" does not include the obtaining of services through sources other than by contract. Response at 4-7. Relying upon the definition of "procurement" provided in the Office of Federal Procurement Policy Act ("OFPPA"), 41 U.S.C. § 403(2), the plaintiff contends that a procurement is predicated upon the existence of a contract award process. Response (Docket No. 11) at 5. As a result, the plaintiff argues that an in-sourcing decision cannot be "in connection

with a procurement or proposed procurement." *Id.*

Although the plaintiff is correct that, pursuant to *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1345 (Fed. Cir. 2008), 41 U.S.C. § 403(2) does provide the applicable definition of "procurement," plaintiff is incorrect in asserting that this definition bars its type of claim. The OFPPA defines "procurement" as follows:

> The term "procurement" **includes all stages of the process of acquiring** property or **services**, beginning with the process for determining the need for property or services and ending with contract completion and closeout.

41 U.S.C. § 403(2) (emphasis added). As the Federal Circuit explained in *Distributed Solutions*, however, the COFC's exclusive jurisdiction encompasses "not only actual and proposed procurements, but also agency decisions with a connection with any stage of the federal contracting process, including the process for determining a need for property or services." 539 F.3d at 1346. As the COFC and the Federal Circuit have recognized, "procurement," as interpreted by *Distributed Solutions*, is quite broad. *See, e.g., K-Lak Corp. v. United States*, – Fed. Cl. –, 2010 WL 3123265, at *4 (Aug. 3, 2010); *Todd Const. L.P. v. United States*, 85 Fed. Cl. 34, 45 (2008).

Indeed, *Distributed Solutions* supports a finding that the COFC would have jurisdiction. In *Distributed Solutions*, USAID issued a request for information to various software vendors, seeking information and prices. 539 F.3d at 1342. After obtaining the information, instead of issuing a solicitation itself, the agency opted to have an incumbent contractor select a company as a subcontractor to perform the work. *Id.* at 1342-43. Two vendors not selected by the prime contractor brought suit, alleging that the procurement violated 15 U.S.C. § 631(j) and § 632(o)(2). *Distributed Solutions, Inc. v. United States*, 76 Fed. Cl. 524, 527 n.2 (2007). The Government

moved to dismiss, arguing that because there had not been a Government solicitation, the selection did not fall within ADRA's definition of "procurement." *Distributed Solutions*, 539 F.3d at 1343. The Federal Circuit, however, held that the scope of ADRA was "very sweeping" and that ADRA permitted challenges so long as the Government had "initiated 'the process for determining a need' for acquisition" of an good or service. *Id.* at 1346 (quoting 41 U.S.C. § 403(2)).

As does Rothe, the plaintiff in *Distributed Solutions* alleged that a Federal agency's decision **not to contract** work and instead to obtain the needed services through means other than a Federal solicitation violated a statute or regulation. *Id.* at 1344. In finding jurisdiction pursuant to the Tucker Act, the Federal Circuit held that the Tucker Act does not require the protestor to challenge an award or proposed award or there to be a Federal solicitation in order to challenge the decision not to compete the work. *Id.* at 1346. Here, too, Rothe complains that the agency initiated an independent cost analysis for the purpose of comparing the cost of continuing to contract to the cost of providing the services through Government employees. It is the decision **not to contract** for those services that the plaintiff is challenging.

Nothing in the statute or *Distributed Solutions* or any other case suggests that Court of Federal Claims's jurisdiction is limited to those cases where the Government acquires services through contractors. Morever, this argument does not consider the cases cited by the Defendant where decisions by Federal agencies to insource work were reviewed pursuant to the Tucker Act, such as *Labat Anderson* and *Weeks Marine*. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1362 (Fed. Cir. 2009); *Labat-Anderson, Inc.*, 65 Fed. Cl. at 582; *Space Mark*, 45 Fed. Cl. at 268 (1999); *Harris Enterprises*, Case No. 10-CA-573-FB, Docket No. 16 (W.D. Tex Filed Oct. 12,

2010); *Vero Technical Support v. Dep't of Defense*, No. 10-cv-14162-DLG, Docket No. 33 (S.D. Fla. Filed Aug. 18, 2010) (adopting magistrate's recommendation at Docket No. 29 (Aug. 5, 2010).[2]

B. Rothe Has Failed To Refute That It Would Qualify As An "Interested Party" For Purposes Of The ADRA.

In the motion to dismiss, we noted that the ADRA, as interpreted by the Federal Circuit, confers jurisdiction upon the Court of Federal Claims to entertain challenges to decisions to insource contracts. Mot. to Dismiss (Docket No. 10) at 4-6. The motion specifically highlighted *Labat-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 582 (2005), in which the Court of Federal Claims adjudicated the correctness of the Defense Department's insourcing decision. Id. (also citing *Space Mark v. United States*, 45 Fed. Cl. 267, 268 (1999) (challenge to USAF insourcing decision); *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1362 (Fed. Cir. 2009) (holding that even before a solicitation is issued, potential bidder with a definite economic statement in the procurement would have standing)).

Additionally, the motion to dismiss noted that district courts have dismissed challenges to insourcing decisions, because they have found that the ADRA vested the COFC with exclusive jurisdiction over in-sourcing decisions. *See, e.g.*, *Harris Enterprises, Inc. v. United States Department of Defense*, Cause No. 10-CA-0573-FB, (W.D. Tx., October 12, 2010); *Vero Technical Support, Inc. v. United States Department of Defense*, Case No. 2:10-cv-14162-DLG, Docket No. 29 (S.D. Fla. Aug 4, 2010) (magistrate's recommendation that complaint be dismissed because of

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[2] In "Arguments of Other Courts," Rothe argues that *Harris Enterprises* and *Vero*, two district court decisions dismissing other insourcing challenges were incorrectly decided, making many of the same arguments as in the other portions of the brief. Response at 8. However, Rothe makes the same mistakes that it does elsewhere in its response, ignoring the expansive definition of "procurement" adopted by the Court of Appeals for the Federal Circuit in *Distributed Solutions*. 539 F.3d at 1343.

the ADRA) (Docket No. 10 Exhibit 3 and Exhibit 4) (order adopting in full magistrate's recommendation); *Labat-Anderson, Inc. v. United States*, 346 F.Supp. 2d 145, 155 (D.D.C. 2004) (transferring challenge to Department of Defense insourcing decision to COFC). Since the passage of the ADRA, therefore, both the COFC and the district courts have held that the COFC has exclusive jurisdiction over insourcing determinations pursuant to the ADRA.

Moreover, Rothe fails to address the basis for their interested party status. An insourcing decision cannot be made without consideration of whether it is in the best interests of the Government to continue to contract for its requirements. And when it decides to contract, contractors interested in bidding on such contracts are affected. In its response, plaintiff purports to distinguish *Labat-Anderson*,[3] contending that it only involved a temporary decision to insource with an eye towards future bid solicitations. Response at 12, 15-16. Yet, plaintiff does not point to any authority that suggests that this is a distinction with a difference, and the precedent demonstrates that it is not. *Cf Space Mark*, 45 Fed. Cl. at 268. The case, by Rothe's own admission, does involve jurisdiction over a decision to insource and Rothe simply disagrees with its application.

Rothe next argues that *Space Mark* involved an outsourcing decision where a contract award process was part of the consideration. Again, however, Rothe points to no authority that the lack of an ongoing contracting award process would make a difference.[4] Response at 16. Further, *Space Mark*, 45 Fed. Cl. at 268 clearly identifies the case as a challenge to the government's decision to

[3] 65 Fed. Cl. at 582

[4] This argument is also contradicted by the *Distributed Solutions* decision.

insource the work. In fact, *Space Mark* is very similar to the present case wherein the Government first considered the viability of contracting the work before ultimately deciding to insource.[5] *Id.*

Plaintiff also cites *American Federation of Government Contractors v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("AFGE"), but does not provide any authority indicating that it would not fit within the referenced definition when its claim is premised on a government failure to award a contract in this instance. Additionally, although Rothe claims that the Government is engaging in "hypocrisy" by making its current arguments in light of *AFGE*, it ignores intervening statutory changes. Response at 17. In *AFGE*, a 2001 decision, the Federal Circuit held that Federal employees did not have standing to challenge an agency's decision to out-source work to a contractor. 258 F.3d at 1302. In 2007, however, Congress added Section (b)(5) to ADRA, with small amendments in 2008. That section now reads:

> If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

28 U.S.C. § 1491(b)(5). In addition, the section to which Section (b)(5) refers, 31 U.S.C. § 3551(2)(B), now includes within the definition of "interested party" the Federal official who

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[5] Although plaintiff devotes a further two pages to reiterating its argument that Tucker Act jurisdiction is not clear, Response at 16-18, it provides no further analysis than it did before, and cannot overcome the statutory language and relevant precedent. Please see reply arguments at II A 1-2 above. Plaintiff also cites *American Federation of Government Contractors v. United States (AFGE),* 258 F.3d 1294, 1302 (Fed. Cir. 2001), but again does not provide any authority indicating that it would not fit within the referenced definition when its claim is premised on a government failure to award a contract in this instance.

created the Federal employees "bid" or the employees' designated representative (*i.e.*, union). Congress expanded this definition of "interested party" contained within 31 U.S.C. § 3551(2)(B) in 2004. Pub. L. 108-375, § 326(a)(2), Oct. 28, 2004, 118 Stat. 1848. Although prior to 2004, a Federal employee or his union representative did not have standing to challenge an award to a private contractor, the subsequent amendments have expanded the definition of "interested party," partially altering *AFGE*'s limitation. Rothe's attempt to use *AFGE* as a sword against the Government must fail, therefore, because the Government's positions have always been consistent with the statutory language.[6]

C. Rothe's Claims Are Based upon on Alleged Violations of 10 U.S.C. §§ 129a and 2463.

In section II C, Rothe argues that its claims do not depend upon a violation of statute or regulation and, therefore, they are entitled to enforce Defendant's procedures concerning the decision to insource the instant work in district court. Response at pp 14-4. But, this argument is contradicted by Rothe's Complaint, which specifically seeks to invoke the alleged protections provided pursuant to 10 U.S.C.§§ 129a and 2463. Complaint at pp 2, 5-6 and 12. If Rothe is not alleging that the USAF violated 10 U.S.C. § 2463 in connection with the decision to insource the

[6] In light of the 2006 amendments to10 U.S.C. §§ 2462 and 2463, which changed the focus of the statute from ensuring that the Defense Department considered out-sourcing to ensuring that Department of Defense civilian employee positions were not improperly out-sourced, it may very well be that Rothe is no longer within the "zone of interest" of the statute, and, therefore, would not possess prudential standing. *See Allen v. Wright*, 468 U.S. 737, 751 (1984); *Ontario Power Generation, Inc. v. United States*, 54 Fed. Cl. 630, 633 (2002) (holding that Canadian purchaser of American coal was not within the zone of interest of the Export Clause). Rothe would need to demonstrate prudential standing in wherever it chose to file suit, whether a district court or the COFC. *See generally Allen*, 468 U.S. at 751. Whether Rothe possesses the requisite prudential standing, therefore, is a separate question from whether it qualifies as an "interested party." Because this is a challenge to a "procurement," therefore, the COFC should resolve whether Rothe possesses prudential standing.

information technology services, then Rothe simply has no claim. Furthermore, Rothe cites no post-ADRA authority permitting district court review of claims relating to a decision not to contract[7].

Because Rothe is alleging a violation of statute or regulation in connection with a procurement as defined by *Distributed Solutions*, the Court of Federal Claims has exclusive jurisdiction. This Court, therefore, should join the other district courts which have considered the issue and hold that the proper forum, if any, is the United States Court of Federal Claims.

III. Rothe's Arguments Regarding The Contract Disputes Act Appear to Contradict Its Own Complaint

In the motion to dismiss, the Government demonstrated that, even if the allegations were construed as contract claims, the COFC still would have exclusive jurisdiction. Motion to Dismiss at 7-8. Plaintiff contends that its claims are inconsistent with Contract Disputes Act ("CDA") jurisdiction and that the relief sought does not have a contractual origin. Response at 18-20. Plaintiff appears to contradict its own Complaint, which asserts that Rothe's rights stem from its contract.

Rothe's Complaint makes it clear that its only source of rights for seeking relief is as the incumbent contractor. Comp. ¶¶ 2, 7-8, 17, 25-28, 31, 36, 42, 43-49, 52, 54-56, and 59. Without that status Rothe, has no basis to challenge the insourcing decision. And, although Rothe argues that Defendant is blurring the relief it is seeking, Response at 19-20, Rothe's own Complaint invokes its contract: "Defendants will continue to receive full performance from [Rothe] as the low cost provider if the insourcing is enjoined. . . ." Comp ¶ 56. *See also* Comp. ¶ 55 "[Rothe] has been injured in that the insourcing decision was unreasonable and the result of an unfair process. [Rothe]

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[7] Rothe cites to three recent APA cases that are simply irrelevant to the present case as they do not involve a decision not to contract. Response at 14.

seeks through this lawsuit to keep **its scope of work** in the competitive realm in order to compete for the work." (emphasis added).[8]

Regardless of whether Rothe's complaint is characterized as alleging a breach of contract or a violation of statute or regulation in connection with a procurement, the result is the same: the Court of Federal Claims would have exclusive jurisdiction, and this Court should dismiss the complaint.

IV. This Court Cannot Proceed Under Its General Federal Question Jurisdiction and The Administrative Procedures Act.

In its final argument, Plaintiff contends that this Court still possesses jurisdiction pursuant to the Administrative Procedures Act, 5 U.S.C. § 702 ("APA") and 28 U.S.C. § 1331 (Federal question jurisdiction). Response at 21-26.

But the cases upon which Rothe relies are pre-ADRA. Response at 23-24 (citing *Megapulse, Inc. v. Lewis,* 672 F.2d 959 (D.C. Circuit 1982); *SRS Technologies v. United States*, 843 F.Supp. 740 (D.D.C. 1994); *Sharp v. Weinberger,* 843 F. Supp. 740 (D.D.C. 1994)). As noted above, the ADRA eliminated district court APA jurisdiction over cases in which the plaintiff alleges a violation of statute or regulation in connection with a procurement. 28 U.S.C. §1491(b)(1). As a result, the Court of Federal Claims and the district courts have consistently held that challenges to insourcing

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[8] Rothe also asserts that language in the Magistrate Judge's decision in *Vero Technical Support* incorrectly invoked the *Christian* doctrine, *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 424 (Ct. Cl. 1963). Although Defendant has not asserted the *Christian* doctrine as support for its position in this case, Defendant does assert that the instant contract expressly incorporated the CDA. Defendants Motion to Dismiss, Docket No. 10, Exhibits 1 and 2. (Disputes arising out of the contract are to be resolved under the CDA.). In similar circumstances, the United States District Court for the District of Maryland dismissed a complaint seeking injunctive relief pursuant to the APA and 28 U.S.C. § 1331, finding that the CDA preempted district court jurisdiction over all contractor claims against the Government relating to a contract. *Lockheed Martin Corp. v. Defense Contract Audit Agency*, 397 F.Supp. 659, 668 (D. Md. 2005).

decisions are now within the jurisdiction of the Court of Federal Claims. *See Labat-Anderson, Inc.*, 65 Fed. Cl. at 582; *Space Mark*, 45 Fed. Cl. at 268 (entertaining protest brought by bidder challenging USAF insourcing decision); *Vero Technical Support, Inc.*, Case No. 2:10-cv-14162-DLG, Docket Nos. 29 and 33; *Harris Enterprises*, Case No. 10-CA-573-FB, Docket No. 16; *Labat-Anderson, Inc.*, 346 F.Supp. 2d at 155.

In an attempt to overcome this clear precedent, Rothe principally relies upon *Normandy Apartments, Ltd. v. HUD*, 554 F.3d 1290 (10th Cir. 2009). This case is simply irrelevant. First, it did not concern a procurement or means of acquiring goods and services, but, instead, an allegation that a Federal agency had violated its own regulations when it decided to terminate a housing contract. 554 F.3d at 1300. Quite simply, there was no challenge to how the Government intended to acquire goods or services in the future. *See id.* Second, the *Normandy* court found district court jurisdiction, because the COFC could not issue an injunction in a contract case, and, therefore, the plaintiff had no other adequate remedy. *Id.* In contrast, the ADRA explicitly provides for injunctive relief for all protestors who can demonstrate a "violation of statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(2) ("To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief . . . ."). Rothe, unlike Normandy Apartments, therefore, does have an adequate remedy before the COFC to obtain its injunctive relief, and the APA does not apply. 5 U.S.C. § 704 (waiving sovereign immunity only where "there is no other adequate remedy in a court.").

PRAYER

Wherefore premises considered, Defendants respectfully request that Plaintiff's claims in this action be dismissed for lack of subject matter jurisdiction and for such other and further relied as Defendant may be justly entitled.

Respectfully submitted,

JOHN E. MURPHY
UNITED STATES ATTORNEY

By: _/s/ Mitchell L. Weidenbach_
MITCHELL L. WEIDENBACH
Assistant United States Attorney
Texas Bar No. 21076600
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216-5597
Telephone: (210) 384-7360
Facsimile: (210) 384-7312
Email: mitch.weidenbach@usdoj.gov

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss was served upon the following by via the Court's CM/ECF system on this 2nd day of November, 2010 addressed as follows:

David F. Barton
THE GARDNER LAW FIRM
745 E. Mulberry Avenue, Suite 500
San Antonio, Texas 78212-3149

/s/ Mitchell L. Weidenbach
MITCHELL L. WEIDENBACH
Assistant United States Attorney