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"Give Me Your Huddled Masses": COFC Still Beckons To Protesters

July 15, 2011 by W. Bruce Shirk and Kerry O'Neill

The U.S. Court of Federal Claims' ("COFC") decision in *Jacobs Technology, Inc. v. United States*, No. 11-180C, 2011 WL 2044581 (Fed. Cl. May 26, 2011) ("*Jacobs Technology*") does double duty, affirming once again the availability of the COFC as a convenient forum for aggrieved offerors challenging a resolicitation and providing us a useful primer on the perennial issues of jurisdiction, ripeness, standing, and agency discretion in the context of pre-award protests.

In *Jacobs Technology* the COFC considered a United States Special Operations Command ("USSOCOM" or "the Agency") competitive acquisition in which plaintiff Jacobs Technology, Inc. ("Jacobs") had prevailed over IBM Global Business Services ("IBM"), for the work under a solicitation for an information technology services management contract. IBM filed a protest with the Government Accountability Office ("GAO"), which sustained the protest and recommended that the Agency amend the solicitation and allow offerors to submit revised proposals. The Agency understandably acted on that advice and Jacobs, understandably offended, filed a protest with the COFC challenging the Agency's actions. The Government then filed, *inter alia*, a motion to dismiss, arguing: (1) lack of jurisdiction; (2) ripeness; (3) lack of standing; and (4) that the Agency action was "committed to Agency discretion" as a matter of law.

The Government's first argument turned on the notion that, to successfully invoke Tucker Act jurisdiction, a party must not only allege improper agency

action, but also point to a violation of a specific statute or regulation. The court characterized this argument as "seemingly extraordinary," pointing out that the Tucker Act "grants the court jurisdiction over "(1) 'a solicitation,' (2) a 'proposed award,' (3) an 'award' *or* (4) 'any alleged violation of statute or regulation'" and that the fourth cause of action being "preceded by 'or' . . . clearly indicates that [it] is a separate ground of jurisdiction." *Jacobs Tech.*, 2001 WL 2044581, at *1-2. The COFC then noted that the Government's argument "seems to be based on a conflation of two different grounds for jurisdiction;" in this case an objection to a solicitation, on the one hand and, on the other, an objection to an alleged violation of statute or regulation. *Jacobs Tech*., 2011 WL 2044581, at *2. Taking this basic analysis a step further, the COFC dismissed the Government's reliance on *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340 (Fed. Cir. 2008) and *Data Monitor Systems, Inc. v. United States*, 74 Fed. Cl. 66 (2006) ("DMS"), noting that *Distributed Solutions* involved only the ground of objection to violation of statute or regulation and was irrelevant and that if the DMS court meant to require a party objecting to a solicitation to point to a violation of statute or regulation then, like the Government in this case, it may "have conflated" the two separate grounds of jurisdiction. The court believed it more likely, however, that the DMS court was in fact addressing only the ground of violation of statute or regulation so that it was likewise irrelevant, although it does not explicitly say so.

The COFC concluded its lengthy and analytical rejection of the Government's conflation-based argument by endorsing the reasoning of the decision in *Ceres Gulf, Inc. v. United States,* 94 Fed. Cl. 303 (2010), holding that "the jurisprudence of the Court of Federal Claims and the Federal Circuit over many years confirms that it is sufficient for . . . jurisdiction that an interest party challenge a resolicitation, merely alleging that the agency was arbitrary in doing so." *Jacobs Tech.*, 2011 WL 2044581, at *4.

The COFC next rejected the Government's argument that Jacobs' claims were not ripe for review because the Agency had not yet made a final award. The

court again adverted to the COFC's reasoning and conclusion in *Ceres Gulf v. United States*, which identified two factors relevant to a determination that an agency decision is ripe for review. First, "the agency action must be final in the related senses that it "consummates" an agency decision-making process and that it determines "rights or legal obligations." Second, a withholding of court consideration of the Agency action must cause hardship to the plaintiff, *i.e.*, have "an immediate and substantial impact" on it. *Jacobs Tech.*, 2011 WL 2044581, at *4. Both factors were satisfied here. First, USSOCOM's decision to resolicit the contract effectively voided its award to Jacobs and constituted a *de facto* rescission, clearly consummating the agency decision-making process. Second, Jacobs would be required to bear the expense and effort of recompeting, with only the *possibility* of being an awardee, a clear hardship. The court further reviewed and rejected the Government's ripeness argument on policy grounds, albeit in language rather more indirect and gracious than the arguments deserved. In effect, the court concluded that the Government's argument amounted to an assertion that (i) an agency may always amend a Request for Proposal, therefore, (ii) any agency action short of a contact award can not be final, so that (iii) a protest challenging the terms of a solicitation can never be ripe, which is (iv) an outcome directly contrary to the plain language of the Tucker Act.

As to standing, the COFC held that Jacobs had the requisite direct economic interest to challenge the Agency's action under the Tucker Act because, its contract having been effectively rescinded, the company was no longer an awardee but an offeror possessing the requisite direct economic interest. *Centech v. United States,* 78 Fed. Cl. 96 (2007) (holding that the plaintiff was a bidder prejudiced by the agency's action because, although the award to the plaintiff was suspended, the contract was reprocured and thereby created a *de facto* rescission).

Finally, the court dismissed the Government's "agency discretion" argument, stating that "What [it] boils down to is that the agency has not yet finalized its

decision-making . . . [by awarding the contract], which sounds like a repackaging of the [previously decided] ripeness argument." *Jacobs Tech.*, 2011 WL 2044581, at *6.

The really "extraordinary" aspect of this case is, we think, the Government's insistence on making arguments which are quite obviously supported neither by statutory language nor case law. The Government's determination to bring and maintain its jurisdictional and ripeness arguments is nothing less than egregious because the first is flatly contrary to the plain language of the Tucker Act and the second, if carried to its logical conclusion, would require the substantial if not total elimination of pre-award protests. Score one for justice (with a lower case "j").

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