Law Office of
Jon W. van Horne*

18222 Flower Hill Way, #112
Gaithersburg MD 20879-5300
(202) 478-2921
Fax: (202) 478-2921
***Admitted to Practice**
In the District of Columbia

February 2, 2010

Court of Federal Claims Jurisdiction Over Non-Procurement Protests

[A Government Contracting Alert from the Office of Jon W. van Horne.][1]

In a recent Court of Federal Claims decision (Ozdemir v. United States, 89 Fed. Cl. 631 (2009)), Judge Damich clarified the Court's jurisdiction over protests of solicitations and awards of contracts other than procurement contracts. In a time when the government is pumping out vast sums for economic recovery through a number of formal vehicles (grants, etc.), this remedy could become increasingly important to those frustrated in their dealings with the federal government.

The Ozdemir case arises from the very first solicitation issued by the Department of Energy's Advanced Research Projects Agency ("ARPA-E"). This solicitation requested concept papers so ARPA-E could select promising energy-related technologies for research and development funding. To provide this funding, the solicitation identified grants, cooperative agreements and technology investment agreements as the anticipated legal vehicles. Interested parties were required to request an "application control number" by a given deadline. Mr. Ozdemir failed to make a timely request for this number and the agency refused to consider his concept paper when he submitted it.

The government chose to defend against Mr. Ozdemir's protest by moving to dismiss on the theory that the Court did not have jurisdiction because the solicitation did not relate to a procurement. Although the parties argued over whether or not the solicitation related to a

procurement (the solicitation included one reference to a procurement instrument), the Court sidestepped this issue to deal with a more fundamental issue, whether the Court had jurisdiction over non-procurement protests.

After concluding that the precedents offered by the government did not support their position that the Court's bid protest jurisdiction did not extend beyond procurement matters, the Court proceeded to set out two bases for its conclusion that its bid protest jurisdiction extends beyond procurement matters. (Senior Judge Merrow applied similar reasoning in Red River Holdings, LLC, v. United States, 87 Fed. Cl. 768 (2009), however, in that earlier case the protest involved a maritime contract, which was clearly a procurement matter, and the parties agreed that the Court had jurisdiction; the jurisdiction issue was raised *sua sponte* by the Court.)

First, the Court found support in something cleverly called the Last Antecedent Rule (which, it turns out, is rather like the Pirate Code, more of a suggestion than a rule). The Last Antecedent Rule is a rule of statutory interpretation that was explained by the Federal Circuit in Anydrides & Chems. Inc. v. United States, 130 Fed.3d 1481, 1483 (Fed. Cir. 1997) (quoting 2A Sutherland Statutory Construction, 4th ed., § 47.33):

> The rules of grammar apply in statutory construction:
>
> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

The government focused on the last phrase of the jurisdictional statute (28 USC § 1491(B)(1)), “in connection with a procurement or proposed procurement,” claiming that this phrase modified the entire sentence. Because there is no comma immediately before this phrase, the Court, applying the Last Antecedent Rule, determined that the phrase modified only the immediately preceding phrase (“any alleged violation of statute or regulation”), not the entire

sentence. Thus, the rest of the sentence provides several independent bases of jurisdiction, including a protest against a solicitation for proposals for a proposed contract and a protest against a proposed award. The Court found its jurisdiction in these phrases since ARPA-E had clearly issued a solicitation which contemplated an award.

Also the government argued that "contract" in this context meant procurement contract, relying on the definitions in the Federal Grant and Cooperative Agreement Act (31 USC 6301-08), the Court found this assertion unsupported and held that "contract" in § 1491(b)(1) encompasses a wide range of formal agreements, including grants and cooperative agreements.

The Court also noted that the ARPA-E solicitation clearly contemplated an "award," giving the Court a second basis for jurisdiction as a protest against a proposed award. This does not seem to me to be as strong a basis for jurisdiction, since at best, Mr. Ozdemir was complaining about a refusal to consider an award to him, not a proposed award to a third party. However, given the Court's expansive reading of 1491(b)(1) (including the noted "hexadic" use of the conjunction "or"), the idea that one could protest an "award," without reference to a contract (however defined) and without reference to a solicitation raises some interesting possibilities. Might it cover a financially significant endorsement of a commercial product by a federal agency or federal official that prejudiced a competitor (prejudice being a required element of the Court's jurisdiction)?

The Court found further support for its reading of § 1491(b)(1) in its analysis of the history of the Court's bid protest jurisdiction. Specifically, the Court noted that prior to enactment of the current language in § 1491(b)(1) in the Administrative Dispute Resolution Act of 1996 ("ADRA"), the Court had jurisdiction over protests involving award of non-procurement contracts, such as timber sales, and that there is no indication that ADRA in any way was intended to restrict the Court's bid protest jurisdiction, only to expand it.

Although this decision was not the first since 1996 to recognize the Court's jurisdiction over non-procurement protests, it certainly is unique in its thorough discussion of the issue, all the more intriguing for having occurred in a *pro se* case.

My personal perspective is that federal agencies have for some time been looking for creative ways to avoid exposure to bid protests, mostly by using highly complex, multi-agency IDIQ procurement vehicles or by having support contractors doing what would normally be agency procurements. It will be interesting to see, in this environment, how the agencies react to this clear assertion of the Court's jurisdiction over non-procurement bid protests.