The Gardner Law Firm
A Professional Corporation

David F. Barton

745 E. Mulberry Avenue, Suite 500
San Antonio, Texas 78212-3154
(210) 733-8191 (210) 733-5538 (Fax)
dfb@tglf.com • www.tglf.com

FOR IMMEDIATE RELEASE
Tuesday, February 23, 2010

SMALL BUSINESS CONTRACTOR PREVAILS IN DEFENSE INSOURCING LAWSUIT

Air Force withdraws decision, extends contract term;

Case may signal open season on major Obama Administration initiative

SAN ANTONIO – In a fast-moving lawsuit filed in the U.S. District Court here, a small business contractor who had been told that its multimedia services contract would be insourced for performance by civilian government employees by the end of this month scored a major victory today when the Air Force decided to withdraw that decision and extend the contractor's term.

By withdrawing its decision, the Air Force avoided a risky preliminary injunction hearing on Wednesday of this week. But the Air Force's evasive maneuver likely also gives contractors adversely affected by recent Department of Defense ("DoD") insourcing decisions new resolve to contest what has become a key political payoff for government employee unions and their allies in the Democratic Congress and the Obama Administration. A key purpose of this push for in-sourcing of current work performed by contractors to performance by the government is to move an estimated 40,000 people onto government payrolls with the intent of ballooning union membership.

The contractor, Rohmann Services, Inc. of San Antonio ("RSI"), has performed a multimedia and audiovisual services contract at Edwards Air Force Base in California since 1997.

In October of 2009, the Air Force began the process of insourcing RSI's contract work, but only publicly revealed its intent in mid-January of this year. Though the Air Force was obligated under DoD procedures to keep RSI if a cost analysis showed RSI to be less costly than DoD's civilian employees, the Air Force's civilian cost analysis "omitted several positions entirely, and failed to include government-set overhead, fringe benefit, and overtime factors," resulting in an artificially low civilian cost, according to RSI President Ronald W. Boone.

(cont'd)

RSI's de facto victory represents "quite a watershed" and will likely result in further challenges since "some government sources were hoping that the insourcing could not be challenged," said RSI attorney David F. Barton of The Gardner Law Firm. "The pleadings in this case, and the Air Force's reaction, showed that purported conventional wisdom was wrong."

Congress passed the insourcing statute for DoD, 10 U.S.C. § 2463, in 2006. The statute directed DoD to establish procedures for insourcing, but did not dictate the content of those procedures. Rather than use discretionary language, the outgoing Bush Administration issued procedures in 2008 that bound DoD to certain requirements when insourcing, including an obligation to correctly determine and account for the "full cost of manpower" using a cost analysis. Since taking office, the Obama Administration has dramatically accelerated the pace of insourcing at DoD and other federal agencies.

RSI argued, and the Air Force did not contest, that Congress had required DoD to develop insourcing procedures to guarantee fairness to all parties—contractor and civilian—and that DoD had bound the Air Force to those procedures.

RSI further argued that the Air Force's compliance with those requirements was reviewable in the U.S. District Court as a "classic case" of procedural noncompliance by a federal agency under the Administrative Procedure Act. The Air Force disagreed and moved to dismiss the case on the basis that (1) the Contract Disputes Act ("CDA") of 1978 applied, and (2) that the bid protest provisions of the Tucker Act applied, either argument potentially vesting exclusive jurisdiction in the Court of Federal Claims in Washington, DC. RSI countered that the CDA did not provide an adequate remedy sufficient to oust the District Court of jurisdiction because the Court of Federal Claims cannot provide injunctive relief in such cases, and that the CDA did not apply because this case was not founded on any contractual provision and the only issue was DoD's clear violation of its own procedures. That DoD's actions may also have had contractual consequences and resulted in contractual injuries was not sufficient to convert RSI's Administrative Procedure Act claims into CDA claims. Finally, the Tucker Act's bid protest provisions did not apply because the procedures DoD had bound itself to were not formal regulations. RSI did not request money damages.

The Air Force's concession leaves the jurisdictional issue undecided for the time being, "but I am confident we made the right choice by filing here [in San Antonio]," Barton said. "The Supreme Court has said that the policies of the Administrative Procedure Act take precedence over the purposes of the Tucker Act, and that the Court of Federal Claims' jurisdiction under the latter is to be narrowly construed." Even though the choice of court sounds benign, Barton noted "if this is a CDA claim, then insourcing is effectively unreviewable," due to a litany of "practical problems and opportunities for agency mischief" under that statute.

In the meantime, "this will hopefully embolden others in our position to defend their contracts against arbitrary insourcing" Boone said.

The case was Rohmann Services, Inc. v. United States Department of Defense and United States Department of the Air Force, *No. 10-CV-0061, in the United States District Court for the Western District of Texas, San Antonio Division, Judge Xavier Rodriguez.* (cont'd)

Ranked the Number 1 firm in Construction Law for the past two years by the San Antonio Business Journal, the 15 attorneys of The Gardner Law Firm also handle government contract, corporate, real estate, employment, immigration, and environmental and water law matters. Mr. Barton recently represented the Plaintiff in Rothe Development Corporation v. DoD, *545 F.3d 1023 (Fed. Cir. 2008), the case that held DoD's affirmative action in procurement statute facially unconstitutional, the first such holding of its kind involving federal procurement. More information at:* http://www.tglf.com

Rohmann Services, Inc. is certified as a small business by the United States Small Business Administration and as set forth in Chapter 19 of the Federal Acquisition Regulations. RSI maintains a Top Secret Facility Clearance granted by the Defense Security Service and performs a wide variety of defense and technology contracts, with 24 years of experience in the industry. Each member of its corporate management has served as a member of the Armed Services or has had direct affiliation. RSI's corporate headquarters are located at 2349 South W.W. White Road in San Antonio, Texas. More information at: http://www.rsinsa.com

###

More information is available from David F. Barton, Attorney and Shareholder of The Gardner Law Firm.