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JURISDICTIONAL STANDING & "PRUDENTIAL" STANDING IN PROCUREMENT PROTESTS AT THE U.S. COURT OF FEDERAL CLAIMS : A MUDDLED RELATIONSHIP

By Benjamin J. Lambiotte

By statute, the U.S. Court of Federal Claims has original jurisdiction over an "action *by an interested party* objecting to a solicitation by a Federal agency for bids or proposals for a proposed contractor 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."[1] The U.S. Court of Appeals for the Federal Circuit holds that a plaintiff is an "interested party" for such purposes if it is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or failure to award the contract."[2] In recent preaward and "insourcing" protests before the COFC, it has become typical for the Government to argue that, in addition to establishing that the protester is an "interested party" for purposes of the court's jurisdictional statute, the plaintiff must also establish "prudential standing"—meaning that the plaintiff's interests are "within the zone of interests to be protected or regulated" by the particular statute "at issue" in the case and that the plaintiff was the intended beneficiary, not merely an incidental beneficiary, of the enactment at issue.[3] Typically, these arguments are raised in a preliminary motion to dismiss by which the Government seeks to derail the plaintiff's attempt to obtain judicial review of the merits of the protest. A docket search shows that "prudential standing" issues have been raised or discussed in at least nine COFC procurement cases in 2011 and 2012, and of these, the doctrine has been addressed substantively in at least seven COFC decisions.[4]

The Federal Circuit has not yet addressed directly whether protesters must establish

IN BRIEF

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"prudential standing." In the absence of controlling precedent from the higher court, COFC decisions on the matter over the past two years have been inconsistent. In the "insourcing" context in particular, the issue is often bound up with larger jurisdictional questions about whether the court has the power to hear challenges to an agency's decision to have agency or Government personnel perform work previously contracted out. This BRIEFING PAPER begins with a discussion of general federal jurisdictional standing and "prudential standing" concepts and then examines the evolution of bid protest standing doctrine in COFC decisions, surveys the reasoning of recent COFC decisions on "prudential standing," and, along the way, offers some views why the doctrine is inapposite to the protest context and should not present an additional obstacle to judicial review of an agency decision by a party with the "direct economic interest" necessary to establish standing under the court's jurisdictional statute.

General Federal Jurisdictional Standing & Prudential Standing Concepts

Informed consideration of whether there is, or should be, a "prudential standing" overlay in addition to basic standing requirements is impossible without a basic understanding of standing doctrine and how it has evolved in procurement protest practice in the federal courts. Constitutional separation of powers is the ultimate wellspring of the requirement that a plaintiff establish "standing" to sue in federal court.[5] Generally, federal courts are vested with limited power to resolve only actual "Cases" and "Controversies" within jurisdictional grants prescribed by Congress.[6] Principles of standing and statutory jurisdictional requirements are designed to ensure that federal courts act only within their constitutionally prescribed purview and hear only those disputes that are appropriately resolved by the Judicial Branch of the Government.[7]

Generally, in federal Article III district courts, a plaintiff invoking the jurisdiction of the court to challenge an action of the U.S. Government bears the burden of demonstrating "standing" by establishing "three constitutional minima: (1) that the party has suffered an 'injury in fact,' (2) that the injury is 'fairly traceable' to the challenged action of the defendant, and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"[8] These standards govern jurisdictional standing in challenges of federal agency action under the Administrative Procedure Act, 5 U.S.C.A. § 702, which confers standing on "a person… adversely affected or aggrieved by agency action."[9] If, by these measures, the plaintiff lacks standing, then the defect is of constitutional magnitude; the court lacks the very power under Article III to hear the case.

In addition to jurisdictional standing rooted in constitutional separation of powers concerns, the federal courts have, over time, adopted various threshold self-imposed limits on the exercise of jurisdiction, said to reflect a properly limited role of the courts in democratic society, grouped together under the rubric of "prudential standing."[10] The concept of "prudential standing is such a "judicially self-imposed limit[ ] on the exercise of federal jurisdiction."[11] In the particular context of judicial review of agency action, the U.S. Supreme Court has recognized that, in addition to demonstrating an injury in fact to the

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plaintiff's interests, "the interest sought to be protected by the complainant [must] arguably [be] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[12] While originally forged in the crucible of review of agency action in a case brought "under the generous review provisions of the APA," application of the "zone of interests" prudential standing doctrine has not been confined to APA contexts.[13] The Supreme Court has also indicated that the "zone of interests" test requires something more than that plaintiffs are "merely incidental beneficiaries" of the statutory or constitutional provision at issue.[14]

The Evolution Of Standing Doctrine In COFC Practice

This section of the PAPER examines the fate of the "zone of interests" prudential standing test in challenges of agency procurement decisions before the COFC and its relationship to core jurisdictional standing requirements that have evolved since 1996 when the COFC's original, and now exclusive, jurisdiction over preaward and postaward procurement protests was clarified. Because, properly understood, basic standing requirements exist to enforce limitations on the power of the court to hear and decide certain issues, the examination begins with a discussion of the limited statutory jurisdiction of the COFC and how "standing" doctrine reflects those limits.

■ Standing Before & After The ADRA: Scanwell & The APA

The Federal Circuit has observed that the COFC is not an Article III court but that it "applies the same standing requirements enforced by other federal courts created under Article III."[15] Because the COFC deals with claims against the federal government, sovereign immunity is another limit to its authority. As the COFC has noted:[16]

> The U.S. Court of Federal Claims is a court of "special and, therefore, limited jurisdiction" *Blazavich* v. *United States*, 29 Fed. Ct. Cl. 371, 373 (1993). Because the court was established pursuant to Article I of the United States Constitution, 28 U.S.C. § 171(a), its powers are limited to that granted by Congress and its own rules, which were adopted under Congressional authority. *In re United States*, 877 F.2d 1568, 1571 (Fed. Cir. 1989).
>
> It is well established that this Court possesses jurisdiction over a matter only to the extent that the United States has waived its sovereign immunity, and that waivers should be strictly construed in favor of the Government. *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

The Tucker Act, the COFC's principal jurisdictional statute, identifies in general terms certain classes of claimants who may have standing to seek relief in the court, if they are able to meet specific standing standards developed in controlling decisional law. As regards claims against the United States Government, under the Tucker Act's "claims" provisions, 28 U.S.C § 1491(a), Congress granted the COFC the power to hear and adjudicate:[17]

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of the an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

and:[18]

> any claim by or against, or dispute with, a contractor arising under [the Contract Disputes Act, 41 U.S.C.A. § 7104(b)(1)], including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under [the CDA, 41 U.S.C.A. § 7103].

As regards protests of agency procurement decisions, the Tucker Act currently grants to the COFC jurisdiction to hear and decide both preaward protests (predicated on an alleged defect or illegality of a solicitation brought prior to contract award) and postaward protests (the classic "disappointed bidder" protest brought after award). Under 28 U.S.C.A. § 1491(b)(1), the COFC has power:

> 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…without regard to whether suit is instituted before or after the contract is awarded.

Embedded within that grant of original jurisdiction is a key term—"interested party"—that identifies the essential characteristics of a plaintiff with jurisdictional standing.

In 1996, when it adopted the current language in 28 U.S.C.A. § 1491(b)(1), Congress did not specifically define the term. While the Tucker Act requires expressly that the APA, 5 U.S.C.A. § 706 (permitting the COFC to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"),[19] provide the substantive standard of review in cases brought under § 1491,[20] Congress did not likewise mandate that the APA, 5 U.S.C.A. § 702, "adversely affected or aggrieved by agency action" standing standard govern actions brought under 28 U.S.C.A. § 1491. The substantive content of the "interested party" standing vessel was thus left to the courts to decide. Whether Congress intended "interested party" to mean something more or less than what the APA, 5 U.S.C.A. § 702, requires, or something else, engendered considerable uncertainty about standing in procurement challenges. Part of the puzzle involved an amendment to the Tucker Act by the Administrative Dispute Resolution Act of 1996[21] that, by 2001, ended the former concurrent jurisdiction of federal district courts with the COFC over certain procurement protests.

The ADRA modified the Tucker Act to add what is now 28 U.S.C.A. § 1491(b)(1).[22] Prior to the enactment of the ADRA, the U.S. district courts, not the COFC, had jurisdiction over all postaward bid protests.[23] The COFC heard only postaward bid protests, over which it had concurrent jurisdiction with the district courts, under a curious and strained theory that stretched to the limit the COFC's Tucker Act jurisdiction over contract "claims." The jurisdictional notion was "that the government made an implied contract with prospective bidders to fairly assess their bids, and that the Court of Federal Claims had jurisdiction under the Tucker Act, which granted jurisdiction to the Court of Federal Claims 'to render judgment upon any claim against the United States founded...upon any... implied contract with the United States.' 28 U.S.C. § 1491(a)."[24] Unsurprisingly given its roots in such a legal fiction, review was very narrow and not open to many claimants. Perhaps because of this very demanding standard, in its 1983 *CACI, Inc.-Federal v. United States* decision,[25] the Federal Circuit expressly declined to impose the Supreme Court's prudential standing "zone of interests" requirements[26] in "disappointed bidder" protests alleging violation of this implied duty, calling application of such principles a "misinterpretation" of the bases of COFC jurisdiction.[27]

In the ADRA, Congress granted concurrent jurisdiction over *all* bidding disputes—preaward or postaward—to federal district courts and the COFC, but only on a transitional basis.[28] A sunset provision in the ADRA provided that unless Congress acted, the jurisdiction of the district courts would expire on January 1, 2001, and all procurement cases thereafter would be filed exclusively in the COFC.[29] Congress did not so act, and, since 2001, the COFC has had exclusive jurisdiction over all procurement challenges, whether arising preaward or postaward.[30]

The pre-ADRA cases formerly handled exclusively in the federal district courts were virtually all "disappointed bidder" cases involving challenges brought *after* the contract at issue was awarded to someone other than the plaintiff.[31] Insofar as jurisdictional standing was concerned, the Federal Circuit, in *Scanwell Laboratories, Inc.* v. *Schaffer*,[32] established that the standing test under the APA, 5 U.S.C.A. § 702, a statute very familiar to the district courts, which confers standing on "a person…adversely affected or aggrieved by agency action," applied to such postaward bid protests. As it evolved, the "*Scanwell*" standing doctrine became understood as holding that "a disappointed bidder on a government contract was a person aggrieved under the APA and had standing to seek a limited review of the contract award."[33]

But, after 1996, the COFC came to grips with 28 U.S.C.A.§ 1491(b)(1), including its embedded "interested party" standing standard and its express grant of original preaward protest jurisdiction. In the postaward context formerly within the province of the district courts, and in such cases before the COFC—where one bidder's ox had been gored by allegedly unlawful or arbitrary agency action—it was relatively easy to apply the clear *Scanwell* "disappointed bidder" standing test and difficult to see any daylight between the 28 U.S.C.A. § 1491(b)(1) "interested party" standard and the APA, 5 U.S.C.A. § 702, "aggrieved party"

standard. But in the post-ADRA milieu, when the COFC had to apply the § 1491(b)(1) "interested party" test to all sorts of procurement challenges, including preaward protests to alleged defects in a solicitation under the section's direct grant of original jurisdiction, the exercise become murkier.

One problem was that the APA, 5 U.S.C.A. § 702, "aggrieved party" standard was viewed as fairly lenient. This the D.C. Circuit itself recognized in *Scanwell*, in musing about the risks of potentially opening judicial floodgates,[34] and the Federal Circuit came to see it as exactly that in later bid protest standing cases. It is reasonable to posit that this very leniency is why, by 2001, when the COFC assumed exclusive jurisdiction over all forms of procurement challenges, concepts akin to prudential standing had crept into some, but not all, of the cases.[35]

Indeed, when the Federal Circuit, in its seminal 2001 *American Federation of Government Employees, AFL-CIO v. United States* (*AFGE*) decision,[36] first examined post-ADRA bid protest standing comprehensively, it faced a record in which the COFC decision on appeal had framed the *Scanwell* APA, 5 U.S.C.A. § 702, standing test in a way that required a "zone of interests" showing as part of a three-pronged test: "The requirements for establishing standing under the APA are well settled. Claimants…must demonstrate that: (1) they have suffered sufficient 'injury-in-fact'; (2) that the injury is 'fairly traceable' to the agency's decision and is 'likely to be redressed by a favorable decision'; *and (3) that the interests sought to be protected are 'arguably within the zone of interests to be protected or regulated by the statute… in question.*'"[37] This additional prong resembles the Supreme Court's "zone of interests" prudential standing test[38] but wrapped into the basic jurisdictional standing inquiry, instead of treating it as an additional prudential hurdle that must be cleared after jurisdictional standing is established.

There is no doubt that "prudential standing" serves, by design, a restrictive "gatekeeper" function, at least in the context of review under the APA. In the progenitor U.S. Supreme Court cases first articulating the "prudential standing" doctrine, *Association of Data Processing Service Organizations, Inc. v. Camp*, the relationship between imposition of a further prudential "zone of interests" standing hurdle and the "generosity" of the APA's scope of review, is unmistakable.[39]

The APA standing test articulated by the U.S. Supreme Court in *National Credit Union Administration v. First National Bank & Trust Co.*,[40] which the COFC quoted and applied at the trial level in *AFGE*,[41] reflects the limiting function of an additional "zone of interests" hurdle. Indeed, the COFC in *AFGE* did not even analyze the "injury in fact" and "traceability/redressability" prongs of the *National Credit Union* test. Instead, the COFC rejected the plaintiffs' claim to standing summarily because the court held that the plaintiffs—two Government employees and their union who were protesting an agency decision to contract out depot services—did not fall within the zone of interests of Office of Management and Budget Circular A-76 or the Federal Activities Inventory Reform Act.[42]

On appeal, the Federal Circuit in *AFGE* confronted directly whether 28 U.S.C.A. § 1491(b)(1) "interested party" standing would be given a scope commensurate with APA, 5 U.S.C.A. § 702, standing. By 2001, when the Federal Circuit tackled the issue, the COFC sometimes included an additional prudential "zone of interests" element to the APA standing test, as the COFC had applied to deprive the protesters of review in *AFGE*.[43]

On appeal in *AFGE*, the protesters argued that the term "interested party" "should be construed according to its ordinary dictionary definition," and that they were interested parties because they stood to lose their jobs if the depot services were contracted out.[44] Alternatively, they argued that the term "interested party" "should be interpreted as encompassing parties who satisfy the APA requirements for standing," and that they satisfied those requirements because they fell within the "zone of interests" protected by OMB Circular A-76 and the FAIR Act.[45] The Government steered clear of the lower court decision's gloss on the APA, 5 U.S.C.A. § 702, and argued for a completely different standard: that applied in bid protests before the Government Accountability Office under its jurisdictional statute, the Competition in Contracting Act, which used the same term, and defined "interested party" as follows:[46]

> The term "interested party," with respect to a contract or a solicitation or other request for offers...means 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.

The Federal Circuit noted that it had described *Scanwell* standing narrowly, permitting protests only by disappointed bidders. Examining references to *Scanwell* in the ADRA's legislative history, the court posited that Congress may have intended the court to exercise 28 U.S.C.A. § 1491(b)(1) jurisdiction "over disputes brought by disappointed bidders only."[47] But it also considered a broader construct: "On the other hand, because *Scanwell* itself is based on the APA, Congress could have intended to give the Court of Federal Claims jurisdiction over any contract dispute that could be brought under the APA. Because the language of 5 U.S.C.A. § 702 is quite broad, parties other than actual or prospective bidders might be able to bring suit."[48]

Ultimately, the Federal Circuit decided that the term "interested party" in 28 U.S.C.A. § 1491(b)(1) was to be construed "in accordance with the CICA" and held that bid protest "standing under § 1491(b)(1) is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[49] In so doing, relying in part on the rule that waivers of sovereign immunity are to be construed narrowly, the Federal Circuit clearly intended to reject an expansive APA, 5 U.S.C.A. § 702, standard that could include a protester other than an actual or prospective bidder or offeror. Just as clearly, the appellate court viewed the CICA "interested party" standard as narrower and more restrictive than the APA, 5 U.S.C.A. § 702, three-part standing test. Because the plaintiffs in *AFGE* were a union and Government employees who had formerly performed the contracted work, and not disappointed bidders or offerors, the Federal Circuit held, they lacked jurisdictional standing under 28 U.S.C.A. § 1491(b)(1).[50] But what became of the vestigial "zone of interests" qualifier applied in some COFC cases after *Scanwell* to restrict the scope of APA, 5 U.S.C.A. § 702, review was less clear, because, in applying the CICA-based "interested party" standard to the case before it, the Federal Circuit needed to go no further than that the case arose in the postaward context and that the protesters were not actual or prospective bidders or offerors.

■ Current 28 U.S.C.A. § 1491(b)(1) "Interested Party" Standing: Different Standing/Prejudice Standards For Postaward & Preaward Protests

Following *AFGE*, the Federal Circuit further fleshed out the meaning of the 28 U.S.C.A. § 1491(b)(1) "interested party" party standing test, equating the "direct economic interest" prong borrowed from CICA with a showing that the challenged agency action resulted in prejudice to the protester.[51] In *Information Technology & Applications Corp. v. United States*, the court faulted the COFC for resolving in the negative the question whether the agency erred *before* even considering prejudice to the protester and thus failing to recognize that a preliminary determination as to whether the protester was or was not prejudiced was the essence of the "direct economic interest" standing inquiry.[52] In the context of the postaward protest before it, the Federal Circuit further described the prejudice that must be demonstrated to establish standing as whether "there was a 'substantial chance' [the protester] would have received the contract award but for the alleged error in the procurement process."[53] The "but for/substantial chance" test was reasonably straightforward to apply in the classic "disappointed bidder" postaward protest setting.

But the 28 U.S.C.A. § 1491(b)(1) jurisdictional grant encompasses not only protests to the "proposed award or the award" of a contract after announcement of the award decision, but also to preaward objections "to a solicitation by a Federal agency for bids or proposals for a proposed contract" and, also, generally, to "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," a very broad swath of potential actions. Particularly in the context of protests alleging a defect in a solicitation prior to the proposed award, the "but for/substantial chance" standing test proved to be of limited utility. Practically speaking, it often posed an almost insuperable obstacle to review, even to "actual or prospective bidders" that met comfortably the basic *AFGE* standing test.

In its 2009 *Weeks Marine, Inc. v. United States* decision, the Federal Circuit recognized the difficulty a bidder in the preaward context faces in establishing the type of "but for" prejudice required under the "substantial chance" test applicable to postaward protests.[54] The *Weeks* court began its analysis by declaring that 28 U.S.C.A. § 1491(b)(1) "imposes more stringent standing requirements than Article III."[55] It then distilled the *AFGE* "interested party" standing test: a protester has standing as an "interested party" if it: "'(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest.'"[56] The court observed that, where there has been no award, there is no factual predicate for a "but for/substantial chance" prejudice analysis, a point the Government underscored in its argument that, at the preaward stage, any potential injury to the protester arising from the alleged defect in the solicitation was essentially speculative. The Federal Circuit agreed with the protester that establishing this specific type of prejudice was an unfairly rigorous burden for a preaward protest, and accordingly, adopted as the law of the circuit a more relaxed standard the trial court below borrowed from the COFC decision in *WinStar Communications, Inc. v. United States*.[57] A preaward protester would still have to demonstrate prejudice to establish its standing as an "interested party," but the specific type of "direct economic interest" it was required to establish was identification of a "non-trivial competitive injury which [could] be addressed by judicial relief," and not that it had a "substantial chance" of receiving an award "but for" the alleged defect.[58] The Federal Circuit observed that, by its terms, 28 U.S.C.A. § 1491(b)(1) authorizes facial challenges to defects in solicitations, and that "in some cases the injury stemming from a facially illegal solicitation may in and of itself be enough to establish standing; in such a case a bidder should not have to wait until the solicitation is applied unfavorably to establish injury."[59]

Importantly, the *Weeks Marine* court expressed deep concern that, absent a less rigorous standing test for preaward protests, erroneous agency action that arguably deprived a bidder of an opportunity to compete fully and fairly might evade judicial review entirely. This was a consequence compelled by the Federal Circuit's decision in *Blue & Gold Fleet L.P.* v. *United States*,[60] where the court rejected as untimely a postaward protest to a defect in the solicitation that the bidders could have protested prior to award. In that case, the court held that "[v]endors cannot sit on their rights to challenge what they believe to be an unfair solicitation, roll the dice, and see if they receive the award."[61] In *Weeks Marine*, the Federal Circuit noted that it "would be anomalous" if the court "set up a judicial scheme whereby a party runs afoul of the [*Blue & Gold Fleet*] waiver rule if it waits to challenge a solicitation…but is properly dismissed on standing grounds if it raises the challenge pre-award."[62] The court found that a reduced right to compete is sufficient injury, at least at the preaward stage when the state of the record generally provides an insufficient factual predicate to apply the more rigorous "substantial chance" prejudice/standing test.[63]

■ Prudential Standing Doctrine In Post-ADRA COFC Cases: Ontario Power

The first distinct post-ADRA application of "prudential standing" doctrine in a COFC case brought under the Tucker Act occurred in *Ontario Power Generation, Inc.* v. *United States*.[64] Apparently brought under the "claims" provisions of the Tucker Act, 28 U.S.C.A. § 1491(a), *Ontario Power* was not a Government procurement protest. Rather, it was a case brought by a corporation owned by and chartered by a Canadian provincial government, which had purchased U.S.-produced coal, seeking to recover excise taxes and reclamation fees paid by the U.S. sellers to the U.S. Government, on the theory that those taxes and fees, passed through in the purchase price of the coal, violated the Export Clause to the U.S. Constitution.[65]

Judge Allegra, writing for the COFC, held that the foreign purchaser lacked "constitutional" standing, as it could not satisfy its burden to show injury in fact fairly traceable to the imposition of the tax and fee by the U.S Government defendant. Notably, to reach this conclusion, Judge Allegra relied exclusively on U.S. Supreme Court standing jurisprudence.[66] He neither cited nor explicitly applied the Tucker Act's statutory 28 U.S.C.A § 1491(b)(1) "interested party" standard.[67]

After finding that Ontario Power lacked standing, the court (arguably unnecessarily) went even

further, holding that the plaintiff also could not demonstrate "prudential standing," because it could show neither that it was within the zone of interests of the Export Clause, nor that it was the direct beneficiary of that provision of the Constitution. In "importing" prudential standing requirements into a Tucker Act claim, Judge Allegra expressly acknowledged that he was "[b]reaking new ground." As its mandate for this advent, the court relied on the acquiescence of both parties, and the court's impression that the COFC had frequently applied Article III standing doctrine in its cases.[68]

■ Prudential Standing Doctrine In Post-ADRA COFC Insourcing Protests: Santa Barbara vs. Hallmark-Phoenix

In a "pure" procurement context, "prudential standing" issues have arisen recently and most sharply at the COFC in a series of challenges brought under the Tucker Act to agency decisions to "insource" services—to use agency personnel to perform work formerly done by contractors.[69] These cases, brought by incumbent contractors aggrieved by the loss of their contracts, test the boundaries of 28 U.S.C.A. § 1491(b)(1) "violation of statute or regulation in connection with a procurement or a proposed procurement" jurisdiction, in addition to raising standing and prudential standing issues.[70] In two of these cases, the decisions of the COFC judges were poles apart.[71]

In *Santa Barbara Applied Research* v. *United States*,[72] the first of these insourcing COFC cases, decided in April 2011, an incumbent logistics support contractor challenged the Air Force's decision to insource services formerly provided by the contractor at four of nine bases, where the decision had not yet been implemented. The crux of the plaintiff's claim was that the Air Force failed to properly perform comparative analyses—specifically, cost comparisons—required by Department of Defense guidelines and procedures devised and implemented by the agency pursuant to the direction of Congress in amendments to 10 U.S.C.A. § 2463 to give "special consideration" to using on a regular basis civilian DOD employees to perform certain enumerated functions, as opposed to awarding competitive contracts for those functions.

The Government moved to dismiss the claim on multiple grounds, including lack of jurisdictional standing, arguing that, because the case did not involve a formal public-private competition, the contractor did not suffer "competitive injury" and therefore, was not an "interested party" for purposes of 28 U.S.C.A. § 1491(b)(1). The Government also argued that the Federal Circuit had established a "prudential standing" test in *Galen Medical Associates* v. *United States*,[73] and that the plaintiff could not pass that test because it was not within the zone of interests of the insourcing statutes implicated in the case and was not the direct beneficiary of these enactments.[74]

Judge Firestone first disposed of the Government's jurisdictional standing argument, noting that 28 U.S.C.A. § 1491(b)(1) provided the court with jurisdiction to hear claims by "interested parties" challenging agency action "in connection with a procurement," and that the Federal Circuit in *Distributed Solutions, Inc.* v. *United States*,[75] had interpreted that language broadly to encompass actions involving "a connection with any stage of the federal contract acquisition process, including the process for determining a need for property or services."[76] Next, addressing the "interested party/competitive injury" test of *AFGE* and *Weeks Marine*, she distinguished the *AFGE* plaintiffs—Government employees not eligible to competitively bid for the outsourced work at issue there, who therefore lacked competitive injury—from the contractor-plaintiff before her that would be deprived by the Government's insourcing decision of the ability to compete in the future for work it formerly performed at the four bases. The economic injury to the plaintiff, she wrote, "cannot be denied."[77]

The judge also rejected the Government's attempt to put a new gloss on the *Weeks Marine* "non-trivial competitive injury" standing standard. The Government argued that the "non-trivial competitive injury" test only applies where the injury arises from the agency's violation of a statute or regulation intended to promote competition, and because the statutes involved in the case did not mandate any type of public-private competition, any injury of the plaintiffs was,

essentially, not "competitive" injury. Brushing aside this narrow interpretation, the court held that "[w]here a protestor stands to lose future work for which it is likely would have competed because of alleged errors in the cost comparison mandated by Congress, the protestor should have standing to challenge the decision to in-source."[78]

The court also rejected the Government's attempt to import a "prudential standing" requirement into 28 U.S.C.A. § 1491(b)(1) procurement protests. The court observed that "prudential standing" is typically associated with challenges to agency action under the APA, and that the Federal Circuit in *AFGE* explicitly rejected the "less stringent" standing requirements imposed under the APA in favor of the "interested party" test borrowed from CICA.[79] Agreeing with the plaintiff, Judge Firestone held that the Federal Circuit's 2004 decision in *Galen* did not require something more to establish standing than what *AFGE* required in 2008. *Galen*, she held, required a protester to show nothing more or less than that it was prejudiced by an error in the Government's decision—and did not impose a "prudential standing" hurdle in addition to the "interested party" test.[80] After concluding that *Galen* did not require a protester to establish "prudential standing" in a case founded on 28 U.S.C.A. § 1491(b)(1), Judge Firestone went on to hold that, even if it were required, 2011 amendments to 10 U.S.C.A. § 2463 that prevented the DOD from establishing specific insourcing quotas or goals without conducting a mandatory case-by-case cost comparison were intended to benefit the contracting community.[81]

As discussed below, over the past two years the Government has attempted to harness the *Galen* decision in multiple, concerted attempts to import prudential standing requirements into COFC procurement protest jurisprudence over the past two years, making it worth a brief pause to understand the true import of the case. In *Galen*, the Federal Circuit did not announce a new, sweeping additional prudential standing hurdle for bid protest cases. The protester's standing, under any theory or doctrine, was simply not at issue in *Galen*. Unsurprisingly, then, the Federal Circuit's opinion in that case does not even mention "prudential standing."

Galen was a postaward protest involving a negotiated procurement and a "best value" determination. The Federal Circuit noted that in such contexts, applicable standards of review afford the agency an extraordinary high level of discretion, but there was no suggestion that judicial review should be withheld altogether.[82] The court articulated the noncontroversial principle that even if a clear violation of a procurement regulation is proven in selecting the awardee, relief cannot be granted to the protester on the merits unless it first shows that the error prejudiced the protester. In the course of discussing the prejudice requirement, the *Galen* decision, in dicta, quoted by-then quite stale dicta from a pre-ADRA 1974 COFC opinion in *Keco Industries, Inc. v. United States*,[83] stating that "[n]ot every regulation is established for the benefit of bidders as a class, and still fewer may create enforceable rights."[84] This point was not essential to the disposition of the issues in the case.

The Federal Circuit held that to establish prejudice, the protester must show that it would have had a "substantial chance" of receiving the award. Below the COFC had found that the protester finished second and concluded that, but for the alleged errors, the protester would indeed have had a substantial chance of receiving the award. The Federal Circuit, without extended discussion, agreed that the prejudice element was satisfied and proceeded to discuss the merits.[85] Yet, despite the fact that *Galen* is not, by any measure, a prudential standing case, and that the sole snippet in it that remotely evokes "zone of interests/direct beneficiary" elements was utterly inconsequential to the decision and, therefore, *obiter dicta*, the Government continues to press it before the COFC as support for imposition of an additional "prudential standing" requirements. At least one important COFC prudential standing decision has indirectly relied on it for that proposition.

One month after release of the *Santa Barbara* decision rejecting a prudential standing overlay, in another insourcing case, the Government found a more receptive COFC judge in *Hallmark-Phoenix 3 LLC* v. *United States*.[86] This decision, in nearly all respects is completely antipodal to Judge Firestone's decision in *Santa Barbara*, although

the facts and contexts of the cases were similar. *Hallmark-Phoenix* was a challenge by a small business set-aside awardee of an Air Force contract for vehicle operations and maintenance services at Cape Canaveral to the Air Force's decision to insource the work and provide notice to the contractor that it would decline to exercise the last two option years of the contract. The protester asserted that the agency had not followed insourcing guidelines promulgated pursuant to 10 U.S.C.A. §§ 2436 and 129a.[87]

In *Hallmark-Phoenix*, Judge Allegra seized the opportunity to expand his "groundbreaking" imposition of prudential standing in *Ontario Power* to a procurement case, specifically, another insourcing case. He questioned whether an incumbent notified that the Government would not exercise out-year options prospectively could qualify as a "prospective bidder" for purpose of the 28 U.S.C.A. § 1491(b)(1) "interested party" test, a proposition he found "debatable."[88]

But he decided he did not even need to reach that threshold jurisdictional standing question because the plaintiff failed to meet prudential standing requirements.[89] After an extended discussion articulating "prudential standing" principles set forth in Supreme Court and federal appeals court decisions, he declared that the doctrine was generally applicable in federal cases and suggested that it must be applied, perhaps with some variations he did not specify, in all protest cases brought under 28 U.S.C.A § 1491(b)(1).[90] The rationale for the doctrine, he wrote, "based on properly limiting the role of the courts, especially where separation of powers concerns are lurking…snugly fits this case."[91] He found that neither the language nor the purpose of § 1491(b)(1)'s "interested party" standard could be read as negating the prudential standing requirement. In this regard, Judge Firestone's analysis in *Santa Barbara*, he concluded, was simply incorrect.[92]

Judge Allegra went on to parse the same insourcing statutes involved in *Santa Barbara* closely and concluded that neither conferred prudential standing on the protester.[93] In finding that the plaintiff was not an intended beneficiary of those statutes, he relied on an analogy to *American Telephone & Telegraph Co. v. United States* (*AT&T*),[94] where the Federal Circuit upheld the COFC's dismissal on remand of AT&T's claim for damages against the Navy, based on the Government's alleged violation of an appropriations statute limiting award of certain firm-fixed-price contracts and requiring periodic congressional reporting, as well as alleged violations of various DOD internal regulations.[95] Openly conceding that *AT&T* was "not a prudential standing case," he nonetheless leaned heavily on it in concluding that the statutes at issue in *Hallmark-Phoenix* indicated that "Congress intended to reserve for itself, and not any court, the twin job of deciding whether the [DOD] has properly in-sourced various tasks and of requiring the agency to change[ ] its policies as proved necessary."[96] Despite acknowledging explicitly that prudential standing law does not require any "indication of congressional purpose to benefit the would be plaintiff," he concluded that the "text, structure, and legislative history" of the insourcing provisions indicated that they "were not designed to confer benefits on outside contractors," and that it was "that negative intent, rather than the absence of affirmative intent…that ultimately dictates the conclusion that plaintiff here lacks the prudential standing to challenge the Air Force's in-sourcing decision."[97] In a postscript, while again acknowledging expressly that it was not a prudential standing case, Judge Allegra dredged up the *Galen* decision, concluding that its "prejudice" analysis "harkens back to language in many prudential standing cases" and reinforced the court's conclusion that the plaintiff lacked prudential standing.[98]

2011–2012 COFC Prudential Standing Decisions: Inconsistent Roads To The Same End Point

According to controlling Federal Circuit jurisprudence, no decision of the COFC is binding precedent in other COFC cases.[99] Diametrically opposed, irreconcilable views of different COFC judges on prudential standing reflected in the *Santa Barbara* and *Hallmark-Phoenix* decisions leave both the COFC's other judges and protesters with a range of approaches to dealing with the Government's frequent assertions that the doctrine should bar a protester's claims. Significantly, however, the result has been consistent: no COFC decision since

Hallmark-Phoenix has applied prudential standing to dismiss a claim. As illustrated in the 2011 and 2012 COFC decisions surveyed below, three basic approaches to disposing of prudential standing arguments appear in the holdings: (1) implicitly or explicitly, there is no additional prudential standing requirement in bid protest cases; (2) even if there is, Supreme Court and other federal court precedent indicate that the test is not meant to be especially demanding, and that it is satisfied in the particular case; or (3) there is no need to reach the issue, because the plaintiff cannot establish jurisdictional standing.

■ MORI Associates

In its December 2011 decision in *MORI Associates, Inc.* v. *United States*,[100] the COFC again confronted a prudential standing argument. There, a small business contractor brought a preaward protest challenging the Department of Health and Human Services' cancellation of a previous award and issuance of a new solicitation of task orders to perform Help Desk services, part of the canceled work, which were not set aside for small business bidders. The Government moved to dismiss the count of the complaint relating to the cancellation, contending, among other things, that the agency decision to cancel the award was beyond the court's jurisdiction, because the Federal Acquisition Regulation "integrity, fairness and openness" and "impartial, fair, and equitable treatment" provisions the plaintiff cited did not impose any substantive duties on the Government.[101] The court rejected these arguments, finding that it had jurisdiction over the plaintiff's cancellation claim, relying on the *Scanwell*-era implied duty of the Government to consider bids fairly, which the court found had essentially codified in the FAR provisions upon which protester relied, and which had been interpreted prior to the ADRA to encompass a duty not to arbitrarily cancel a solicitation. Jurisdiction over alleged breaches of such classic *Scanwell* duties, the court concluded, was preserved by the ADRA.[102]

In the course of finding that it had jurisdiction, the court addressed the jurisdictional requirement in all 28 U.S.C.A. § 1491(b)(1) protests that the plaintiff establish prejudice: "In bid protests, prejudice 'is a necessary element of standing,' and in all cases 'standing is a threshold jurisdictional issue.'"[103] The court applied the preaward protest "non-trivial competitive injury" standard of *Weeks Marine*.[104] The protester's standing, the court noted, was not challenged directly by the Government, but was "instead addressed obliquely."[105] Here, again, the *Galen* dictum reared its scarlet head: "The government quotes dicta from the Federal Circuit's *Galen Medical Associates* opinion, which ultimately quotes dicta from the Court of Claims' opinion in *Keco Industries*, stating '[n]ot every regulation is established for the benefit of bidders as a class, and still fewer may create enforceable rights.'" The Government made "passing reference" to *Hallmark-Phoenix*'s "prudential standing" holding in arguing that the FAR provision the plaintiff cited could not form the basis of the protest.[106]

The court roundly rejected the Government's arguments, reiterating that the passages from *Galen* and *Keco* were mere dicta, and that the breadth of the language of the 28 U.S.C.A. § 1491(b)(1) jurisdictional grant over "*any* alleged violation of statute or regulation" bespoke Congress's intent to "expand[ ] standing beyond the zone-of-interests test."[107] Following Judge Firestone's approach in *Santa Barbara*, the *MORI* court concluded that, even if the test applied, it was hard to see how the agency's obligations under the FAR to "[e]nsure that contractors receive impartial, fair, and equitable treatment" and to conduct business "with complete impartiality and with preferential treatment for none" would not have been intended to protect the interests of offerors.[108]

■ Triad Logistics

The COFC next addressed prudential standing in *Triad Logistics Services Corp. v. United States*. a decision issued in April 2012.[109] There, an Air Force contractor protested the agency's decision to insource airfield logistics support work it formerly performed, alleging that the Air Force failed to make a proper cost comparison as required by 10 U.S.C.A. §§ 129a and 2463. The Government moved to dismiss, arguing that the protester, whose contract performance period had expired at the time the agency decided to insource the support work, lacked "interested party" standing, and that it failed to demonstrate prudential standing.[110] As to the nature and purpose of insourcing statutes,

the Government refined the "for the benefit of the Government" theory embraced by Judge Allegra in *Hallmark Phoenix*, further arguing that Congress intended insourcing decisions to be committed to agency discretion, and, therefore, such decisions were unreviewable under the APA, 5 U.S.C.A. § 701(a)(2).[111]

After a thorough exposition of COFC jurisdictional standing principles, Judge Horn surveyed in detail the opposing prudential standing conclusions in the *Santa Barbara* and *Hallmark Phoenix* cases. The court had no difficulty finding that it had jurisdiction over the protester's claims because the claims had a sufficient connection to a "procurement" within the meaning of 28 U.S.C.A. § 1491(b)(1), a term the Federal Circuit had interpreted broadly in *Distributed Solutions, Inc.* v. *United States*.[112] Ultimately, however, the court concluded that the plaintiff's protest failed for want of "interested party" standing, holding that protester lacked an economic interest in the contract work because its contract had ended by the time of the Air Force's decision to insource, and the work was, in fact, being performed by the Air Force at the time the protester filed its operative complaint.[113] The court expressly declined to reach the general question whether prudential standing was applicable to procurement protests, and whether the doctrine would preclude the protester's claim in the specific case before it.[114] Nor did it take up plaintiff's argument that the Tucker Act's specific grant of an interested party's right to challenge violations of law or regulation in connection with a procurement fell within the rubric of prudential standing decisions, such as *Jewelers Vigilance Committee* v. *Ullenberg Corp.*,[115] which recognize that Congress may grant an express right of action to a person who might otherwise be barred by the doctrine.[116]

The court, did, however register disagreement with the conclusions of both the Government and *Hallmark Phoenix* that a protester could never have a remedy for an agency's failure to conduct a proper cost analysis required by insourcing statutes, refusing to endorse the proposition that those internal agency decisions to insource were committed entirely to the agency's discretion. While concluding that the protester was "not an interested party" and, therefore, did "not possess standing to sue," the court, however, did "not conclude that an incumbent contractor challenging an insourcing decision could never satisfy the interested party requirements."[117]

■ Elmendorf Support Services

The COFC next addressed prudential standing substantively in its June 22, 2012, decision in *Elmendorf Support Services Joint Venture* v. *United States*,[118] yet another Air Force insourcing case. There, an incumbent contractor challenged the Air Force's decision to insource base supply services, rather than exercising an option to renew the incumbent's contract. The Government moved to dismiss, contending that the court lacked subject matter jurisdiction because there was no pending procurement and that the plaintiff lacked "interested party" standing and could not meet prudential standing requirements because it was not within the zone of interests protected by the insourcing statutes requiring comparative cost analyses.[119] The court found that it had jurisdiction. It cited the Federal Circuit's *Distributed Solutions* holding for the proposition that 28 U.S.C.A. § 1491(b)(1) broadly conferred on the court power to hear suits by interested parties for "any alleged violation of statute or regulation in connection with a procurement or proposed procurement," which included "all stages of the process of acquiring property or services."[120] As to the protester's standing, the court found that it was an actual or prospective bidder, with a direct economic interest in the proposed procurement of services at issue. It had "no difficulty finding that plaintiff clearly has a financial interest in maintaining its incumbency."[121]

As to prudential standing the court sidestepped the threshold issue whether a protester must satisfy prudential standing requirements at all, but followed *Santa Barbara's* alternative disposition of the prudential standing issue in concluding that contractors in the plaintiff's position were within the zone of interests of statutes requiring agencies to conduct comparative cost analyses when making insourcing decisions. The court rejected the *Hallmark Phoenix* holding that those statutes reflected Congress's intent that such decisions were reviewable only through congressional oversight.[122]

Further, the court noted that the prudential standing test "is not meant to be especially demanding."[123] It quoted the U.S. Supreme Court's 2012 decision in *Match-E-B-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*[124] to hold that the doctrine "forecloses suit only when plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[125] The court did not find the protester's interests so attenuated, and it was "satisfied that plaintiff has standing to proceed."[126]

■ BINL, Inc.

Bringing the COFC's prudential standing jurisprudence full circle, later in June 2012, Judge Firestone, author of the seminal *Santa Barbara* decision, issued a decision in a preaward bid protest, *BINL, Inc.* v. *United States*,[127] denying the Government's motion to dismiss for lack of standing and failure to demonstrate prudential standing. In that case, seven small business transportation service providers that moved DOD personnel household goods protested the inclusion of provisions in the 2012 transportation solicitations requiring TSPs to refund freight charges on shipments lost or entirely destroyed in transit, where the DOD also required the TSPs pay the full replacement cost of the goods at destination, or to ship the replacement to the destination, at the TSPs' expense. The TSPs argued that the inclusion of the freight refund provisions were contrary to traditional transportation liability principles of the Carmack Amendment[128] and arbitrary and capricious, in light of the manner in which the DOD had implemented a congressional mandate, codified in 10 U.S.C.A. § 2636a, to provide the DOD personnel with "full replacement value" of lost of destroyed household goods shipments.[129] The Government moved to dismiss, arguing that the TSPs lacked "interested party" standing and could not demonstrate prudential standing, in that they were not within the zone of interests of the "full replacement value" statute.[130]

In deciding the standing issue, the court applied the preaward *Weeks Marine* "non-trivial competitive injury" standard. Rejecting the Government's argument that any injury to the protesters did not affect their competitive standing because the economic impact of the challenged solicitation provisions affected all TSPs equally, the court found that the inclusion of the challenged terms had a disparate economic impact on the seven relatively small TSPs, accepting the protesters' evidence that they had less of an ability to absorb the cash flow impacts and economic risks of freight refunds than larger TSPs and would likely have to bid higher rates, which might place them outside the competitive range for award of transportation contracts.[131]

Turning to prudential standing, Judge Firestone agreed with protesters that "the concept of prudential standing does not generally apply to bid protests under 28 U.S.C.A. § 1491(b)(1)," citing her own *Santa Barbara* decision and *MORI Associates*.[132] Further, she held, even if there were such a requirement, the protesters had established prudential standing under the "full replacement value" mandate statute. Rejecting implicitly the Government's argument, derived from *Hallmark Phoenix*, that a plaintiff had to establish that it was a "direct beneficiary" of the statute or regulation at issue, she noted that the Supreme Court's formulation of prudential standing required that the plaintiff show only that its interests were *either* within the zone of interests the statute protected *or regulated*, and that the test was not meant to be especially demanding.[133] She held: "[10 U.S.C.A. § 2636a] may have been enacted to primarily benefit servicemembers, but plaintiffs are nonetheless regulated by the statute.... [P]laintiffs are entities regulated under the statute, and their injury relates directly to implementation of the statute."[134]

■ Dellew Corp.

Finally, in December 2012, in *Dellew Corp. v. United States*, an insourcing protest involving termination of a contract for Air Force support services at Pacific Air Forces Major Command, Judge Miller confronted the same familiar set of jurisdictional and prudential standing challenges raised by the Government in prior insourcing cases.[135] Following the broad view of subject matter jurisdiction under 28 U.S.C.A § 1491(b)(1) indicated by *Distributed Solutions,* she found that the court had subject matter jurisdiction over the protester's claims, because

the insourcing decision "involved a 'process for determining a need for property or services' and was made 'in connection with a procurement or proposed procurement.'"[136] Because the protester was an incumbent contractor that filed the protest before the effective date of the Air Force's termination, and that asserted that it would "expect to compete for future government contracts but for the errors made by the Air Force in its in-sourcing decision," the court concluded that the protester was an "interested party" with standing under 28 U.S.C.A § 1491(b)(1).[137] As to prudential standing, Judge Miller inequivocally joined the ranks of the COFC judges who "declined to heed the clarion call of *Hallmark Phoenix*" and rejected the Government's attempt to dismiss.[138] She saw the statutes and procedures Congress adopted requiring agency studies to support insourcing decisions and reports to Congress as limits on the agency's ability to insource and concluded that "[a]n incumbent contractor arguably comes within the zone of interests protected and therefore has prudential standing to challenge an in-sourcing decision under these statutes and regulations."[139]

Conclusion & Observations

While the COFC continues to grapple with unresolved issues as to whether a plaintiff bringing a procurement protest under 28 U.S.C.A. § 1491(b)(1) must, in addition to demonstrating its standing as an "interested party" under the statute, also meet prudential standing standards, and, if so, precisely what standards must be met, in no case other than *Hallmark-Phoenix* has the court dismissed a protest for lack of prudential standing. The insertion of the prudential standing doctrine in COFC jurisprudence and its expansion to procurement protests brought under § 1491(b)(1) is largely the handiwork of a single judge expressing a distinct philosophy and the product of a concerted effort by the Government to persuade other COFC judges to use prudential standing as an instrument of early dismissal.

In any event, the reticence of many of the COFC judges to impose prudential standing as an additional hurdle to a protester seeking review of adverse agency action on procurement matters is well founded, for several reasons. In justifying a troubling outright denial of any remedy to insourcing protesters in *Hallmark-Phoenix*, Judge Allegra evinced concern over opening the floodgates at the COFC to such protests.[140] But, at the COFC, procedural and substantive hurdles to any protester at the court are already quite formidable. As evidenced by myriad COFC decisions dismissing protests without review for want of standing, the Tucker Act's internal "interested party" standing standard is a relatively difficult one to meet. On the merits, also, the Government is entitled to substantial deference, and the substantive burden of proof a protester meets is a heavy one.[141] In short, generally, it is already difficult for a protester to succeed in a COFC protest without the additional pitfall of prudential standing requirements.

Further, any notion that prudential standing is an immutable doctrine that must be applied in all 28 U.S.CA. § 1491(b)(1) cases is difficult to reconcile with the scope of jurisdiction under the statute itself. Application of prudential standing doctrine—which focuses on the "zone of interests" created by a statute or regulation—assumes that every protest will be based on some alleged violation of statute or regulation. That may not strictly be true in a preaward protest objecting to a solicitation. To be sure, 28 U.S.CA. § 1491(b)(1) authorizes expressly a protest of "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," but that is not the exclusive basis of a § 1491(b)(1) protest.

In addition, 28 U.S.C.A. § 1491(b)(1) authorizes, independently, protests "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." In a preaward context, wholly apart from a claim that the agency violated a statute or regulation, a protester may also object to a solicitation on the grounds that some provision of the solicitation is arbitrary, capricious, or irrational.[142] A protester may thus obtain relief under the Tucker Act when a challenged solicitation provisions *either* lacks a rational basis *or* involves a violation of statute or regulation.[143] The action lacks a rational basis and is arbitrary and capricious if the agency fails to provide "a

coherent and reasonable explanation of the exercise of its discretion."[144] A court must find an agency decision arbitrary and capricious—thus lacking a rational basis—if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view of the product of agency expertise."[145]

Thus, claims brought in a preaward protest may not depend on allegations of violation of any particular statute or regulation at all, but on lack of a rational basis for the agency's action.[146] In such a case, how could the court apply a prudential standing test to measure the extent to which the protester's interests were within the zone of interests to be benefited or regulated by a specific statute or regulation where no violation of any such enactment is alleged?

Moreover, the procurement-related cases upon which Judge Allegra relied in *Hallmark-Phoenix* to bridge the gap between federal cases, where prudential standing is required, and Tucker Act protests—cases upon which the Government continues to rely in perennial motions to dismiss—lend little weight, even by analogy, to the notion that the doctrine should apply in protest cases. *Ontario Power* itself was not a procurement case at all, but a claim against the Government by a foreign sovereign invoking a provision of the U.S. Constitution to seek an affirmative recovery. Further, the court's discussion and disposition of prudential standing was utterly unnecessary to its primary basis for dismissing the case: that the plaintiff lacked standing under applicable U.S. Supreme Court standards (*not* under the standards of the Tucker Act), because it could not prove injury in fact fairly traceable to the imposition of the tax and fee by the U.S Government defendant.[147]

The issue in the *AT&T* case, upon which *Hallmark-Phoenix* also relies by analogy, was whether a statute that prohibited the DOD from obligating or expending funds for fixed- price contracts in excess of $10 million for major weapons systems or subsystems absent certain findings by the Under Secretary of Defense for Acquisition created a private right of direct action for enforcement of the statute's congressional spending limitations.[148] Once again, prudential standing was simply not at issue or even discussed in the case.

In considering whether the principles articulated in *AT&T* support persuasively imposition of a preliminary prudential standing hurdle in all procurement protests, as *Hallmark Phoenix* suggests, the *AT&T* case must be understood in its unique context. At the beginning of the tortured history of the long-running case, AT&T sought to recover over $50 million in cost overruns in addition to the $34.5 million fixed price of the sonar array contract at issue after the contract was performed.[149] Thus, the case was a contract dispute about a fully performed contract, not a preaward or postaward procurement protest brought under 28 U.S.C.A. § 1491(b)(1). Initially, AT&T sued in the COFC under the Contracts Disputes Act, seeking reformation of the firm-fixed-price contract into a cost-reimbursement type contract to recover the massive overrun, relying in part on the DOD's failure, at the inception of the contract, to make the findings the statute required for major subsystem fixed-price contracts exceeding $10 million. In the first of a series of decisions, the COFC held that the statutory violation rendered the contract void *ab initio*.[150]

The Federal Circuit, *en banc*, reversed, holding that the contract was not void, because it was clear that "Congress did not intend that this enactment would terminate fully performed contracts because of this flawed compliance," and remanded the case back to the COFC to determine what remedy, if any, AT&T had for the DOD's noncompliance with the spending restrictions in the statute.[151] On remand, the COFC dismissed AT&T's claims outright, holding that "non-compliance with [the statute] is not an actionable wrong."[152] On appeal of the dismissal back to the Federal Circuit, the appellate court agreed.[153] The Federal Circuit held that the statute did not confer explicitly a private right of action, and that it contained congressional reporting provisions envisioning enforcement only through legislative, not judicial means.[154] The court concluded that AT&T had no right to challenge the agency's choice of a fixed-price type of contract years after the contract was fully performed.[155]

In the context of the *AT&T* case, it is easy to understand why the Federal Circuit was unwilling to acknowledge a judicially enforceable interest on AT&T's part in enforcement of a statute that, if followed by the DOD in the first place, would have prohibited the award of the fixed price contract AT&T obtained, long after AT&T had performed and collected $34.5 million on the contract. Indeed, in an analysis reminiscent of the Federal Circuit's later *Blue & Gold Fleet* waiver decision,[156] COFC Judge Wiese pointed out in the *AT&T* remand decision:[157]

> [T]he time to have raised such concerns was when the…contract was being negotiated, not years after its completion.…Surely, as a sophisticated government contractor knowledgeable in the regulations that guide the government in the formation of its contracts, AT&T must have been aware of this regulation and the opportunity it presented to influence the ultimate choice of contract type. However, so far as we can tell from this record, AT&T never questioned the contracting officer's decision to use a fixed-price incentive-fee contract for the…procurement. Now it is too late to do so.

When this ruling reached the Federal Circuit again, the court agreed that AT&T had waived any claim relating to the choice of contract type by failing to challenge it prior to award, when an effective remedy was available.[158] This suggests that, had AT&T challenged the agency action in a preaward protest under 28 U.S.C.A. § 1491(b)(1), instead of waiting until it won and performed the contract, it may have at least had a right to judicial review of the choice-of-contract decision.

In *Hallmark-Phoenix*, Judge Allegra seized upon and harnessed to his prudential standing ruling some similarities in congressional reporting and review requirements between the spending restriction at issue in *AT&T* and the statutory insourcing directives. He regarded these requirements as an indication that Congress intended to foreclose judicial review of agency insourcing activity.[159] This supported his view that the COFC should, in all procurement protests, require, as a threshold matter, proof that the statute or regulation at issue was enacted for the direct (not incidental) benefit of the protester. If not, *Hallmark-Phoenix* suggests, then review should be withheld without further inquiry into whether the "interested party" competitive injury standing requirements of 28 U.S.C.A. § 1491(b)(1) are met (much less reaching the merits)—all to maintain the purity of separation of powers, the prudential standing doctrine's basic foundation.

One problem with this rigid construct is that it compels the conclusion that the corollary of negative "zone of interest" and "direct beneficiary" findings is that the statute or regulation at issue serves governmental interests only and reflects intent that any review or redress of executive agency noncompliance be by the legislature or agency only, regardless of any demonstrable competitive injury the agency's violation may cause to an existing or prospective bidder. But, as the elemental "zone of interests to be protected or regulated" test articulated by the Supreme Court itself suggests, prudential standing in federal jurisprudence has never required so tight a fit between the interests of the plaintiff and the intended benefits of the enactment.[160] Judge Miller recognized this in her ruling in *Dellew,* acknowledging that the statutes at issue were budgetary in nature and required reporting to Congress, but refusing to agree that these were indications of Congress's intent to eliminate judicial review.[161] Moreover, *Hallmark-Phoenix*'s emphasis on "negative intent"—that there was no indication that Congress intended the insourcing statutes at issue to benefit contractors[162]—cannot readily be reconciled with the U.S. Supreme Court's latest prudential standing decision in *Match-E-B-Nash-She-Wish Band*, which addresses the relationship of claimed plaintiff's interest to the intended purpose of the statute. As the COFC recognized in *Elmendorf*, only "when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" should suit be foreclosed.[163] Any requirement that a plaintiff be a direct, intended beneficiary of the enactment at issue to demonstrate prudential standing would go far beyond the relatively loose relationship between the plaintiff's interests and the enactment's purposes the *Match-E-B-Nash-She-Wish Band* test suggests.

Another problem is the boundless expansiveness of the notion that when Congress or an

agency gives direction or guidance in a statute or regulation touching on procurement matters or mandates reporting or other oversight to Congress or to the agency, it is somehow signaling an intention to foreclose judicial review. While this may be a justifiable view in the peculiar context of a postperformance contract dispute like *AT&T*—where the contractor did not challenge the alleged violation prior to award, but then claimed a right to a judicial remedy for the very same violation after full performance—it cannot be reconciled with the basic, stated purpose of 28 U.S.C.A. § 1491(b)(1) in the context of a preaward or postaward bid protest.

In 28 U.S.C.A. § 1491(b)(1), Congress conferred upon persons meeting the demanding "interested party" standard an explicit right of judicial review of objections to a solicitation for bids or proposals for a proposed contract and any alleged violation of statute or regulations in connection with a procurement or a proposed procurement. This express grant of jurisdiction itself reflects positively Congress's intention to allow judicial review of the specific types of agency decisions set forth in the statute, but only by persons who are able to meet the threshold standing requirements set forth explicitly in it. This should be dispositive of any separation of powers concerns. Further, the standing requirements embedded in the statute, as articulated and applied in the Federal Circuit's decisions, are demanding enough to serve any prudential "gatekeeping" function.

Especially jarring and lacking in support in the *Hallmark-Phoenix* decision are the Government's continuing suggestions that the Federal Circuit established a prudential standing requirement in *Galen*. Even staunch prudential standing proponent Judge Allegra acknowledges that this is not so.[164] As discussed above, the *Galen* dictum was just that, and, in turn in quoted equally nondispositive dictum from *Keco*, a 1974 *Scanwell*-era pre-ADRA case.[165]

Careful analysis of the appellate decisions demonstrates that, other than *obiter dicta* and snippets from cases decided on other grounds but that coincidentally echo one or more elements of prudential standing where the key question was not before it, the Federal Circuit has never addressed whether the additional obstacle of prudential standing is or should be required in a procurement protest brought under post-ADRA 28 U.S.C.A. § 1491(b)(1), or, if so, what a protester would have to show to establish prudential standing. Until that tribunal tackles those issues directly, uncertainty and lack of uniformity in COFC decisions will likely continue. The recent ruling by a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit in *Grocery Manufacturers Association* v. *Environmental Protection Agency*,[166] holding that lack of prudential standing is jurisdictional, depriving the court of the power to reach any other issue—a matter over which the Circuits are now split—will only exacerbate the uncertainty and confusion of the standing/prudential standing muddle.

GUIDELINES

These *Guidelines* are intended to assist protesters and their counsel in understanding standing requirements in bid protests at the COFC. Every case is different, and these practice points may not apply in every situation, but until the Federal Circuit resolves the conflict among COFC judges as to whether a protester must demonstrate prudential standing, as well as its status as an "interested party" under 28 U.S.C.A. § 1491(b)(1), and precisely what prudential standing requires, protesters and their counsel before the COFC should be prepared to follow these recommendations. They are not, however, a substitute for professional representation in any specific situation.

1. Assume that the Government will move to dismiss the complaint for lack of prudential standing, probably relying on *Ontario Power*, *Galen*, and *Hallmark-Phoenix*.

2. Make sure the court understands that *Galen*, in fact, does not represent the Federal Circuit's imposition of a prudential standing requirement in protests brought under 28 U.S.C.A. § 1491(b)(1), and that *Ontario Power* was not a procurement protest at all.

3. Argue that Congress, in adopting 28 U.S.C.A. § 1491(b)(1), expressly intended to confer a right of judicial review before the COFC

upon "interested parties" meeting the statute's integral (and demanding) standing test of the agency procurement-related actions and decisions described in the statute and that fidelity to separation of powers concerns animating prudential standing doctrine does not require imposition of an additional obstacle to COFC review.

4. Point out that, other than in *Hallmark-Phoenix*, none of the over half dozen COFC decisions addressing prudential standing within the last two years has dismissed a protest for want of prudential standing.

5. As in *Santa Barbara*, *MORI*, *Elmendorf*, and *BINL*, argue alternatively that, even if prudential standing is required, the protester meets the test, which the U.S. Supreme Court has recently reiterated is not intended to require an especially demanding fit between the protester's interests and the intended purpose of the statute or regulation alleged to have been violated. Remember that the protester's interests must be within the zone of interests the statutes and regulations at issue were intended to not only *benefit*, but also to *regulate*. Anticipating that the Government will argue that such statutes and regulations were intended only for the sole "benefit of the Government," be prepared to show how the statutes and regulations at issue either benefit or regulate (or both benefit and regulate) the protester in connection with the challenged contract or solicitation.

6. In a preaward context, if the facts and law support it, consider pleading as a separate count or claim arbitrary, capricious, or irrational agency action or decisions related to the solicitation challenged, theories not dependent on the agency's arguable violation of any particular statute or regulation. This will illustrate and help the court understand why prudential standing simply cannot be applied as an immutable threshold requirement in all procurement protests brought under 28 U.S.C.A. § 1491(b)(1).

★ REFERENCES ★

1/ 28 U.S.C.A. § 1491(b)(1) (emphasis added).

2/ Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001), 43 GC ¶ 292 (AFGE).

3/ Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. 630, 632 (2002), aff'd, 369 F.3d 1298 (Fed. Cir. 2004).

4/ See Dellew Corp. v. United States, 108 Fed. Cl. 357 (2012), 55 GC ¶ 42 (insourcing protest); Elmendorf Support Servs. J.V. v. United States, 105 Fed. Cl. 203 (2012), 54 GC ¶ 255 (insourcing protest); Triad Logistics Servs. Corp. v. United States, No. 11-43C, 2012 WL 5187846 (Fed. Cl. Apr. 16, 2012) (insourcing protest); BINL, Inc. v. United States, 106 Fed. Cl. 26 (2012) (preaward protest); MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503 (2011) (preaward and cancellation protest); Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. 536 (2011), 53 GC ¶ 237 (insourcing protest); Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65 (2011) (insourcing protest).

5/ Allen v. Wright, 468 U.S. 737, 752 (1984).

6/ U.S. Const. art. III, § 2, cl. 1.

7/ Grocery Mfrs. Ass'n v. Envtl. Protection Agency, 693 F.3d 169, 174 (D.C. Cir. 2012).

8/ Grocery Mfrs., 693 F.3d at 174 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

9/ 5 U.S.C.A. § 702 ("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.").

10/ Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Barrows v. Jackson, 346 U.S. 249 (1953)).

11/ Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

12/ Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

13/ Bennett v. Spear, 520 U.S. 154, 163 (1997) (test applied in suit brought under citizen suit provisions of the Endangered Species Act).

14/ National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 494 n.7 (1998).

15/ Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009), 51 GC ¶ 303 (quoting Anderson v. United States, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003)).

16/ Lockheed Martin Corp. v. United States, 50 Fed. Cl. 550, 553–54 (2001), aff'd, 48 Fed. Appx. 752 (Fed. Cir. 2002).

17/ 28 U.S.C.A. § 1491(a)(1).

18/ 28 U.S.C.A. § 1491(a)(2).

19/ 5 U.S.C.A. § 706(2)(a).

20/ 28 U.S.C.A. § 1491(b)(4).

21/ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996).

22/ Pub. L. No. 104-320, § 12(a).

23/ See Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1331–32 (Fed. Cir. 2001), 43 GC ¶ 29 (explaining pre-ADRA jurisdiction).

24/ Garufi, 283 F.3d at 1331.

25/ CACI, Inc.-Fed. v. United States, 719 F.2d 1567 (Fed. Cir. 1983).

26/ Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

27/ CACI, Inc.-Fed., 719 F.2d at 1572.

28/ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), (b), 110 Stat. 3870, 3874 (1996).

29/ Pub. L. No. 104-320, § 12(d).

30/ Baltimore Gas & Elec. Co. v. United States, 290 F.3d 734, 737 (4th Cir. 2002).

31/ Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294 (Fed. Cir. 2001), 43 GC ¶ 292 (AFGE).

32/ Scanwell Labs., Inc. v. Schaffer, 424 F.2d 859 (D.C. Cir. 1970).

33/ AFGE, 258 F.3d at 1301 (quoting Int'l Eng'g Co. v. Richardson, 512 F.2d 573, 579 (D.C. Cir. 1975)).

34/ Scanwell, 424 F.2d at 872–73.

35/ See, e.g., Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 578 (1974) (in protest involving selection of an awardee, the COFC observed in dictum that "[n]ot every regulation is established for the benefit of bidders as a class, and still fewer may create enforceable rights"). But not all post-ADRA COFC bid protest decisions after Scanwell applied the "zone of interests" prong of the Supreme Court's Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) standing test. See, e.g., WinStar Commc'ns, Inc. v. United States, 41 Fed. Cl. 748, 756 (1998) (holding that "there is no additional requirement of showing that the procurement statute or regulation at issue was intended to benefit… the protester," citing Cubic Applications, Inc. v. United States, 37 Fed. Cl. 345, 353 n.4 & 356–57 (1997), 39 GC ¶ 106).

36/ AFGE, 258 F.3d 1294.

37/ AFGE, 46 Fed. Cl. 586, 595 (2000), 42 GC ¶ 205 (quoting Nat'l Credit Union, 522 U.S. at 488) (emphasis added).

38/ Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

39/ See Ass'n of Data Processing Serv. Orgs., 397 U.S. at 156; Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987) (what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "'generous review provisions'" of the APA may not do so for other purposes).

40/ Nat'l Credit Union, 522 U.S. at 488.

41/ AFGE, 46 Fed. Cl. at 595.

42/ AFGE, 46 Fed. Cl. at 600.

43/ AFGE, 46 Fed. Cl. at 595.

44/ Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1299 (Fed. Cir. 2001), 43 GC ¶ 292 (AFGE).

45/ AFGE, 258 F.3d at 1299.

46/ AFGE, 258 F.3d at 1299 (quoting CICA, 31 U.S.C.A. § 3551(2) (Supp. IV 1998)).

47/ AFGE, 258 F.3d at 1301.

48/ AFGE, 258 F.3d at 1301 (footnote omitted).

49/ AFGE, 258 F.3d at 1302.

50/ AFGE, 258 F.3d at 1302.

51/ See, e.g., Info. Tech & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2004), 45 GC ¶ 30.

52/ Info. Tech., 316 F.3d at 1319.

53/ Info. Tech., 316 F.3d at 1319 (citing Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999), 41 GC ¶ 212).

54/ Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359–61 (Fed. Cir 2009), 51 GC ¶ 303.

55/ Weeks Marine, 575 F.3d at 1359.

56/ Weeks Marine, 575 F.3d at 1359 (quoting Rex Serv. Corp. v. United States, 448 F.3d 1305, 1308 (Fed. Cir. 2006), 48 GC ¶ 184).

57/ WinStar Commc'ns, Inc. v. United States, 41 Fed. Cl. 748, 763 (1998), cited in Weeks Marine, 575 F.3d at 1361–62.

58/ Weeks Marine, 575 F.3d at 1361–62.

59/ Weeks Marine, 575 F.3d at 1363.

60/ Blue & Gold Fleet L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320.

61/ Blue & Gold Fleet, 492 F.3d at 1314 (quoting Argencord Mach. & Equip. v. United States, 68 Fed. Cl. 167, 175 n.14 (2005), 47 GC ¶ 459).

62/ Weeks Marine, 575 F.3d at 1363.

63/ Weeks Marine, 575 F.3d at 1363; see also Magnum Opus Techs., Inc. v. United States, 94 Fed. Cl. 512, 530–31 (2010), 52 GC ¶ 243 ("Given the nature of a protest brought prior to the award of a contract or issuance of a solicitation, there is no meaningful way to further assess the prejudice to the plaintiff after examination of the merits—if the failure to hold a competition was wrongful or there was a material error in the solicitation, then the plaintiff has been wrongfully deprived of the opportunity to fully and fairly compete, which suffices to establish prejudicial injury on the merits."). In certain COFC preaward cases decided after Weeks Marine, especially where proposals have been submitted and/or evaluated to some extent, the Government has argued for application of the "substantial chance" test. Occasionally the COFC has indulged the argument, but held that the outcome of the standing inquiry would be the same under either test. See, e.g., Orion Tech., Inc. v. United States, 102 Fed. Cl. 218, 227–28 (2011), 54 GC ¶ 41; CS-360, LLC v. United States, 94 Fed. Cl. 488, 495 n.6 (2010), 52 GC ¶ 361.

64/ Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. 630, 632 (2002), aff'd, 369 F.3d 1298 (Fed. Cir. 2004).

65/ U.S. Const. art. I, § 9, cl. 5.

66/ Ontario Power, 54 Fed. Cl. at 631–632 (citing Bennett v. Spear, 520 U.S. 154, 168–69 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

67/ Ontario Power, 54 Fed. Cl. at 631–632.

68/ Ontario Power, 54 Fed. Cl. at 632. ("[N]one of the parties disputes that these prudential standing requirements may be applied in this court in cases brought under the Tucker Act, a conclusion that seemingly flows from the numerous cases that have applied Article III constitutional standing principles to this court.")

69/ The impetus for "insourcing" was recent initiatives and budgetary legislation designed to discourage performance of inherently governmental functions by private contractors and excessive reliance on contractors, where such reliance undermines the ability of the Federal Government to control its own operations or erodes competition. Congress passed and the President signed legislation requiring that "special consideration" be given to using Government personnel to perform those functions (1) recently performed by Government employees, (2) closely associated with the performance of inherently governmental functions, (3) performed pursuant to a contract awarded on a noncompetitive basis, or (4) performed poorly by a contractor because of excessive costs or inferior quality. Although many insourcing efforts were abandoned because they failed to produce expected cost savings, they engendered a number of lawsuits, primarily by DOD contractors, some of which were brought in the district courts and others before the COFC. See Manuel & Maskell, Congressional Research Service Report R41810, Insourcing Functions Performed

by Federal Contractors: An Overview of the Legal Issues 1–7 (May 7, 2012).

70/ Fundamental jurisdictional questions were among these issues. Initially, both plaintiffs and the Government concurred that challenges to "insourcing" were reviewable under the APA, but there were also questions whether such claims were cognizable in federal district court or, on the other hand, exclusively before the COFC under its post-ADRA 28 U.S.C.A. § 1491(b)(1) jurisdiction. While the majority of courts have concluded that such challenges lie within the exclusive subject matter jurisdiction of the COFC under the Tucker Act, "outlier" decisions remain. See Manuel & Maskell, Congressional Research Service Report R41810, Insourcing Functions Performed by Federal Contractors: An Overview of the Legal Issues 8–9 (May 7, 2012).

71/ See generally Nash, "Jurisdiction Over Protests of In-Sourcing Decisions: Judicial Disagreement," 25 Nash & Cibinic Rep. ¶ 60 (Dec. 2011).

72/ Santa Barbara Applied Research, Inc. v. United States, 98 Fed. Cl. 536 (2011), 53 GC ¶ 237.

73/ Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324 (Fed. Cir. 2004), 46 GC ¶ 293.

74/ Santa Barbara, 98 Fed. Cl. at 542.

75/ Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), 50 GC ¶ 332.

76/ Santa Barbara, 98 Fed. Cl. at 543 (internal citation and quotation marks omitted).

77/ Santa Barbara, 98 Fed. Cl. at 543.

78/ Santa Barbara, 98 Fed. Cl. at 543.

79/ Santa Barbara, 98 Fed. Cl. at 544.

80/ Santa Barbara, 98 Fed. Cl. at 544.

81/ Santa Barbara, 98 Fed. Cl. at 544.

82/ Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004), 46 GC ¶ 293.

83/ Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 578 (1974)

84/ Galen Med. Assocs., 369 F.3d at 1330 (quoting Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 578 (1974)).

85/ Galen Med. Assocs., 369 F.3d at 1331.

86/ Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65 (May 2011).

87/ Hallmark-Phoenix, 99 Fed. Cl. at 66–67.

88/ Hallmark-Phoenix, 99 Fed. Cl. at 68.

89/ Hallmark-Phoenix, 99 Fed. Cl. at 68.

90/ Hallmark-Phoenix, 99 Fed. Cl. at 69–72.

91/ Hallmark-Phoenix, 99 Fed. Cl. at 70.

92/ Hallmark-Phoenix, 99 Fed. Cl. at 72 n.11.

93/ Hallmark-Phoenix, 99 Fed. Cl. at 72–79.

94/ Am. Tel. & Tel Co. v. United States, 307 F.3d 1374 (Fed. Cir. 2002), 42 GC ¶ 459, cert. denied, 540 U.S. 937 (2003) (AT&T).

95/ In AT&T, the primary issue was whether § 8118 of the Fiscal Year 1988 DOD Appropriations Act, Pub. L. No. 100-202, created a private right of action for enforcement of its congressional spending limitations. Below, the COFC dismissed AT&T's suit, holding that "non-compliance with the statute is not an actionable wrong.... [P]laintiffs cannot claim a protectable interest in the proper application of Section 8118 for Congress intended to give them none." AT&T v. United States, 48 Fed. Cl. 156, 160 (2000). On appeal, the Federal Circuit upheld the dismissal, concluding that, [i]n sum, the language of section 8118 provides for legislative oversight and enforcement. The section does not create a cause of action inviting private parties to enforce the provision in courts." 307 F.3d at 1379. The court also bolstered its conclusion with a separation of powers rationale, reiterating its en banc ruling in an earlier phase of the long-running dispute that it was not "the judicial role to discipline the agency's noncompliance with the supervisory and reporting instructions of congressional oversight," 307 F.3d at 1379 (quoting AT&T v. United States, 177 F.3d 1368, 1375 (Fed. Cir. 1999), 41 GC ¶ 254 (en banc) (remanding to COFC)).

96/ Hallmark-Phoenix, 99 Fed. Cl. at 77.

97/ Hallmark-Phoenix, 99 Fed. Cl. at 78–79.

98/ Hallmark-Phoenix, 99 Fed. Cl. at 79–80

99/ West Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994).

100/ MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503 (2011).

101/ MORI Assocs., 102 Fed. Cl. at 521–22.

102/ MORI Assocs., 102 Fed. Cl. at 522–25.

103/ MORI Assocs., 102 Fed. Cl. at 541 (quoting Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369–70 (Fed. Cir. 2002), 44 GC ¶ 25).

104/ MORI Assocs., 102 Fed. Cl. at 542 (citing Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1363 (Fed. Cir 2009), 51 GC ¶ 303).

105/ MORI Assocs., 102 Fed. Cl. at 542.

106/ MORI Assocs., 102 Fed. Cl. at 542.

107/ MORI Assocs., 102 Fed. Cl. at 542 (emphasis in original).

108/ MORI Assocs., 102 Fed. Cl. at 542.

109/ Triad Logistics Servs. Corp. v. United States, No. 11-43C, 2012 WL 5187846 (Apr. 16, 2012).

110/ Triad Logistics, 2012 WL 5187846, at *6.

111/ Triad Logistics, 2012 WL 5187846, at *6.

112/ Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), 50 GC ¶ 332, discussed in Triad Logistics, 2012 WL 5187846, at *10–*16.

113/ Triad Logistics, 2012 WL 5187846, at *16–*21.

114/ Triad Logistics, 2012 WL 5187846, at *24.

115/ Jewelers Vigilance Committee v. Ullenberg Corp., 823 F.2d 490, 493 (Fed. Cir. 1987).

116/ Triad Logistics, 2012 WL 5187846, at *24.

117/ Triad Logistics, 2012 WL 5187846, at *26.

118/ Elmendorf Support Servs. Joint Venture v. United States, 105 Fed. Cl. 203 (2012), 54 GC ¶ 255.

119/ Elmendorf Support Servs., 105 Fed. Cl. at 207.

120/ Elmendorf Support Servs., 105 Fed. Cl. at 208.

121/ Elmendorf Support Servs., 105 Fed. Cl. at 208. Curiously, although it relied on Santa Barbara in its standing analysis, the Elmendorf court appears to have applied the postaward "substantial chance" test for "direct economic interest," as opposed to the preaward Weeks "non-trivial competitive injury" standard applied in Santa Barbara. See 105 Fed. Cl. at 209 ("[T]here is a substantial chance that, given the opportunity, plaintiff would perform the services in the future.").

122/ Elmendorf Support Servs., 105 Fed. Cl. at 209.

123/ Elmendorf Support Servs., 105 Fed. Cl. at 209 (citing Match-E-B-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012)).

124/ Match-E-B-Nash-She-Wish Band, 132 S. Ct. 2199.

125/ Elmendorf Support Servs., 105 Fed. Cl. at 109 (quoting Match-E-B-Nash-She-Wish Band, 132 S. Ct. at 2210) (internal quotation marks omitted).

126/ Elmendorf Support Servs., 105 Fed. Cl. at 109.

127/ BINL, Inc. v. United States, 106 Fed. Cl. 26 (2012).

128/ 49 U.S.C.A. § 14706.

129/ BINL, 106 Fed. Cl. at 30.

130/ BINL, 106 Fed. Cl. at 30.

131/ BINL, 106 Fed. Cl. at 37–38.

132/ BINL, 106 Fed. Cl. at 38–39.

133/ BINL, 106 Fed. Cl. at 39 (citing Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

134/ BINL, 106 Fed. Cl. at 39.

135/ Dellew Corp. v. United States, 108 Fed. Cl. 357 (2012), 55 GC ¶ 42.

136/ Dellew, 108 Fed. Cl. at 370 (citing Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008), 50 GC ¶ 332).

137/ Dellew, 108 Fed. Cl. at 371.

138/ Dellew, 108 Fed. Cl. at 374–75.

139/ Dellew, 108 Fed. Cl. at 375.

140/ Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65, 80 & n.24 (2011).

141/ See, e.g., Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332–33 (Fed. Cir. 2001), 43 GC ¶ 29 (protester "bears a heavy burden," and the agency is "entitled to exercise discretion upon a broad range of issues" (internal citations and quotation marks omitted)).

142/ See 28 U.S.C.A. § 1491(b)(4) (citing 5 U.S.C.A. § 706(2)(a)).

143/ Garufi, 238 F.3d at 1332 (Fed. Cir. 2001).

144/ Garufi, 238 F.3d at 1332.

145/ Ala. Aircraft Indus., Inc. v. United States, 586 F.3d 1372, 1375 (Fed. Cir. 2009), 52 GC ¶ 25 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

146/ See, e.g., Distributed Solutions, Inc., v. United States, 104 Fed. Cl. 368, 381–82 (2012), 50 GC ¶ 332 ("The absence of any rationale for assigning the procurement of the software products to [an existing contractor] is a separate basis for protest.").

147/ See Ontario Power Generation, Inc. v. United States, 54 Fed. Cl. 630, 632 (2002), aff'd, 369 F.3d 1298 (Fed. Cir. 2004).

148/ Am. Tel. & Tel Co. v. United States, 307 F.3d 1374 (Fed. Cir. 2002), 42 GC ¶ 459, cert. denied, 540 U.S. 937 (2003) (AT&T).

149/ AT&T v. United States, 177 F.3d 1368 (Fed. Cir. 1999), 41 GC ¶ 254 (en banc).

150/ AT&T v. United States, 32 Fed. Cl. 672 (1995), 37 GC ¶ 125.

151/ AT&T, 177 F.3d at 1375.

152/ AT&T v. United States, 48 Fed. Cl. 156, 160 (2000) (on remand).

153/ AT&T, 307 F.3d 1374.

154/ AT&T, 307 F.3d at 1379.

155/ AT&T, 307 F.3d at 1381.

156/ In Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359–61 (Fed. Cir. 2009), 51 GC ¶ 303, the Federal Circuit articulated a special "non-trivial competitive injury" standard applicable to a preaward protest under 28 U.S.C.A. § 1491(b)(1), noting that its Blue & Gold Fleet L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320, decision held that a protester's failure to challenge a defect in a solicitation in a preaward protest constituted a waiver.

157/ AT&T v. United States, 48 Fed. Cl. at 161.

158/ AT&T, 307 F.3d at 1380–81.

159/ Hallmark-Phoenix 3, LLC v. United States, 99 Fed. Cl. 65, 78–79 (2011).

160/ See Clark v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987) (zone of interests test is "not meant to be especially demanding").

161/ Dellew, 108 Fed. Cl. at 374–75.

162/ Hallmark-Phoenix, 99 Fed. Cl. at 78–79.

163/ Elmendorf Support Servs. J.V. v. United States, 105 Fed. Cl. 203, 209 (2012), 54 GC ¶ 255 (quoting Match-E-B-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012)).

164/ Hallmark-Phoenix, 99 Fed. Cl. at 79.

165/ Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004), 46 GC ¶ 293 (quoting Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 578 (1974)).

166/ Grocery Mfrs. Ass'n v. Envtl. Protection Agency, 693 F.3d 169, 174 (D.C. Cir. 2012).

BRIEFING PAPERS