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¶ 5 BID PROTEST JURISDICTION AND STANDING: *Percipient.ai* Presents Federal Circuit With Critical Questions

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The U.S. Court of Appeals for the Federal Circuit recently held oral argument in *Percipient.ai v. U.S.*, No. 2023-1970, an appeal that raises significant questions of bid protest jurisdiction and standing. We briefly introduced the procedural issues raised through this appeal in *Eyes on the Docket: Significant Appeals Before the Federal Circuit*, 37 NCRNL ¶ 54. And, we previously discussed the significant substantive issues raised by Percipient's underlying protest, particularly those relating to the acquisition of commercial products and services in *Postscript: Mandatory Consideration of Commercial Products*, 37 NCRNL ¶ 38.

Procurement Background

The National Geospatial-Intelligence Agency (NGA) solicited an indefinite-quantity, indefinite-delivery contract vehicle called SAPPHIRE to support collection and analysis of geospatial data. As part of SAPPHIRE, NGA planned to leverage "computer vision" technology—a form of artificial intelligence that uses and trains computers to interpret the visual world. NGA awarded the SAPPHIRE IDIQ contract to CACI, along with a first task order.

Percipient is a commercial technology company that developed a commercially available computer vision software, Mirage. Percipient did not submit a proposal for the SAPPHIRE solicitation. Nor did Percipient file any protest before the proposal submission deadline. Percipient does not claim the capability to perform the full SAPPHIRE work scope.

Instead of competing for or protesting the SAPPHIRE solicitation, Percipient pursued opportunities with NGA and CACI to provide Mirage as part of the overarching SAPPHIRE program. After several rounds of discussions and demonstrations, CACI eventually notified Percipient that CACI

would develop its own computer vision software (as alleged in the publicly available complaint, presumed true at this point in the proceedings).

Court Of Federal Claims Proceedings

Percipient filed a bid protest complaint at the U.S. Court of Federal Claims alleging that the NGA failed its obligations under the Federal Acquisition Streamlining Act, 10 USCA § 3453:

> Percipient has alleged a non-frivolous violation of 10 U.S.C. § 3453, which provides, in short, that defense agencies and their contractors must acquire "commercial products" "to the maximum extent practicable." [10 USCA] § 3453(b)(1)–(2).To that end, the statute requires agencies to conduct market research throughout the procurement process—including before each task order award—to identify commercial products that (1) "meet the agency's requirements," (2) "could be modified to meet the agency's requirements," or (3) "could meet the agency's requirements if those requirements were modified to a reasonable extent." [10 USCA] § 3453(c)(1)–(2). In addition, offerors of commercial products must be given an opportunity to compete. [10 USCA] § 3453(a)(3).

Percipient.ai, Inc. v. U.S., 165 Fed. Cl. 331 (2023), 65 GC ¶ 101. In many respects, the protest theory builds on the arguments that the COFC and Federal Circuit recognized in *Palantir USG, Inc. v U.S.*, 904 F.3d 980 (Fed. Cir. 2018), 60 GC ¶ 287. See Schooner, *Commercial Products and Services: Raising the Market Research Bar or Much Ado About Nothing?*, 32 NCRNL ¶ 52; and *Postscript: Mandatory Consideration of Commercial Products*, 37 NCRNL ¶ 38.

The United States and CACI moved to dismiss the protest on several grounds, including that:

1. Percipient is not an "interested party" with standing to protest because it did not submit a proposal for the SAPPHIRE solicitation, did not protest the SAPPHIRE solicitation before the proposal submission deadline, and cannot meet the full scope of SAPHIRE requirements;

2. The complaint challenges an issue of contract administration rather than contract formation, which purportedly falls beyond the scope of bid protest jurisdiction and must be resolved, if ever, under the Contract Disputes Act (CDA);

3. The complaint is untimely because Percipient did not protest the SAPPHIRE solicitation before proposal submission, failing the so-called *Blue & Gold* rule derived from *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320 (or, alternatively, by the doctrine of laches); and

4. The protest is barred by the Federal Acquisition Streamlining Act, which prohibits, subject to certain exceptions, COFC jurisdiction over any protest "in connection with the issuance of... a task or delivery order." 10 USCA § 3406(f)(1).

Judge Bruggink initially denied the motions to dismiss in the decision reported at 165 Fed. Cl. 331. Unfortunately, the opinion contained a clear legal error. It stated that "FASA's task order bar will not apply when, as here, a task order exceeds $25,000,000." But that exception is applicable to task orders that are protested to the Government Accountability Office; it has no relevance to the COFC's jurisdiction.

The Government and CACI moved for reconsideration. After a status conference, Judge Bruggink promptly vacated his prior decision, ordered additional briefing to address the FASA task order protest bar, and issued an unpublished order dismissing Percipient's protest as barred by FASA:

> Percipient's protest is directly and causally related to the agency's issuance of Task Order 1. Specifically, Percipient alleges that—after the agency issued Task Order 1, which directed CACI to develop and deliver a computer vision system—the agency violated [10 USCA] § 3453 because it failed to consider whether Percipient's product could meet those same requirements. That challenge is barred by FASA.

Percipient.ai, Inc. v. U.S., No. 23-28C, 2023 WL 3563093 (Fed. Cl. May 17, 2023).

Federal Circuit Proceedings

Percipient quickly appealed to the Federal Circuit and sought expedited proceedings. See Practice Notes to Federal Circuit Rule 27. A procedural order issued by Federal Circuit Judge Lourie welcomed Percipient to "self-expedite" the appeal by filing its own briefs and the joint appendix early. The court did not find sufficient cause to shorten the standard time that the Government and CACI would have to file their response briefs. The order did, however, commit that "the case will be placed on the next available oral argument calendar after briefing is complete." This assurance of the next-available argument date may be a meaningful expedient, as there can be significant delay between (1) the date when a case is fully briefed and (2) the date set for argument. Promptly scheduled argument, however, does not reduce the time it takes the merits panel to issue a decision after oral argument, which can vary dramatically in each case—from a few weeks to many, many months. See *Harmonia Delayed: Anticipating the Federal Circuit's Next Decision on Bid Protest Timeliness*, 35 NCRNL ¶ 61.

In its briefing, Percipient argued that the COFC was wrong to dismiss its protest under the FASA bar. The United States and CACI urged the Federal Circuit to affirm dismissal based on the FASA protest bar; alternatively, they invited the court to affirm dismissal based on several of the same procedural arguments that Judge Bruggink rejected in his initial opinion (e.g., "interested party" status, *Blue & Gold*, contract administration).

● *FASA Protest Bar*—The COFC's bid protest jurisdiction encompasses "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 USCA § 1491(b)(1). The phrase "in connection with" has been interpreted as "very sweeping in scope." *RAMCOR Services Group v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999), 41 GC ¶ 361. The FASA protest bar uses similar language, with a subtle addition. FASA restricts protests that are "in connection with *the issuance or proposed issuance of* a task or delivery order." 10 USCA § 3406(f)(1) (emphasis added). Percipient's protest is clearly connected to a task order; the question is whether Percipient's protest is connected to *the issuance of* a task order.

This is an important issue. There is a vibrant collection of litigation (and inconsistent opinions) at the COFC focused on the nuanced distinction between (a) the full scope of the COFC's protest jurisdiction over alleged violations of law "in connection with a procurement" and (b) the FASA bar precluding protests "in connection with the issuance" of a task or delivery order. Protest grounds relating to task or delivery orders are often dismissed for lack of jurisdiction, particularly where the plaintiff is ultimately trying to obtain the protested task order for itself. E.g., *Harmonia Holdings Group, LLC v U.S.*, 156 Fed. Cl. 238 (2021), 63 GC ¶ 321; *Dyncorp, International, LLC v. U.S.*, 152 Fed. Cl. 490 (2021); *Mission Essential Personnel, LLC v. U.S.*, 104 Fed. Cl. 170 (2012). In several cases, however, the COFC has found that a protest involving a task order is simultaneously "in connection with a procurement," yet not "in connection with the issuance" of a task order—permitting jurisdiction. E.g., *mLINQS, LLC v. U.S.*, No. 22-1351, 2023 WL 2366654 (Fed. Cl. Mar. 6, 2023); *Tolliver Group, Inc. v. U.S.*, 151 Fed. Cl. 70 (2020); *BayFirst Solutions, LLC v. U.S.*, 104 Fed. Cl.

493 (2012); *MORI Associates, Inc. v. U.S.*, 102 Fed. Cl. 503 (2011); *Global Computer Enterprises, Inc. v. U.S.*, 88 Fed. Cl. 350, *modified on recons.*, 88 Fed. Cl. 466 (2009).

Going into oral argument, the Government had reason to be confident in its interpretation of the FASA protest bar to preclude Percipient's protest. After all, the argument did succeed before Judge Bruggink. And, both times the Federal Circuit has previously encountered the FASA protest bar, the court strictly applied the statutory text to unanimously hold that the protests at issue were barred. *22nd Century Technologies, Inc. v. U.S.*, 57 F.4th 993 (Fed. Cir. 2023), 65 GC ¶ 24; *SRA International, Inc. v. U.S.*, 766 F.3d 1409 (Fed. Cir. 2014), 56 GC ¶ 316.

Most significantly, in *SRA* the court held that the protest challenging an agency's post-award organizational conflict of interest waiver was barred from judicial review because the waiver was "directly and causally connected to issuance" of the underlying task order. 766 F.3d at 1413. But in *SRA* and *22nd Century*, the protester was, in essence, challenging an agency's decision *to issue* a task order to a company other than the protester. Artful pleading aside, the protesters sought to have a task order *issued* to one company instead of another. The protests were not just "in connection with" a task order, they were "in connection with the issuance" of a task order.

The *Percipient.ai* oral argument discussion suggests that the court is finally ready to articulate context for *SRA* and *22nd Century* by interpreting and explaining the significance of the phrase "the issuance…of" in the FASA protest bar provision.

Federal Circuit Judge Richard G. Taranto presided over argument, joined by Judges Kara F. Stoll and Raymond C. Clevenger III. (The oral argument recording is available on the Federal Circuit's website, https://cafc.uscourts.gov/home/oral-argument/listen -to-oral-arguments/.) All three judges expressed concern with the Government's position on the FASA protest bar; those concerns went largely unanswered:

> U.S. Counsel: If we are talking about the SAPPHIRE procurement, and… how CACI and the NGA are carrying out Task Order 1, that activity has to be in connection with Task Order 1… in connection with the issuance of Task Order 1….
>
> Judge Taranto: You just changed the statutory language… the statute doesn't preclude…review of everything in connection with a task order.
>
> U.S. Counsel: It doesn't…but this Court has said that "in connection with"…is a "direct and causal relationship" to the issuance of a task order.
>
> Judge Taranto: …. I just can't get over what to me is just the blindingly obvious point that the direct connection was about what directly leads to the task order, not what follows from…the issuance of the task order—that was the context in which that language is used [in *SRA*]…. No case says that everything that follows from the existence of a task order, namely its implementation, is somehow an attack on the issuance of a task order.
>
> U.S. Counsel: I don't know that it has ever been addressed…. *22nd Century* and *SRA* are both instances of activities that are being challenged post award of a task order.
>
> Judge Stoll: Isn't it true that the plaintiff in both of those cases was saying: "Hey, that task order should have been issued to me?" …. Don't we have to read both of those cases bearing in mind what the remedy was that was being sought there?... Shouldn't the broad language of *SRA* be read with the context of the facts in front of the court?….
>
> U.S. Counsel: The remedy that Percipient is seeking here is effectively undoing the activities of the task order.

Judge Taranto: … Where does this phrase "activities" come into the statute?

U.S. Counsel: It is not in the statute ….

Judge Taranto: …but that still does not make it a remedy to undo the issuance of a task order.

* * *

Judge Clevenger: What is wrong with an interpretation of "in connection with the issuance" that means "directly leads to, not what follows"? …. What is wrong with a definition that says it is "before and not after?"…Assume we are going to adopt that definition, what is wrong with it?

U.S. Counsel: … If the Court were to adopt a definition of "in connection with the issuance of a task order" that excludes conduct afterwards… then I think that resolves this particular issue.

We won't know until the panel issues its decision, but based on these and other exchanges we will be surprised if the Federal Circuit finds the FASA protest bar applicable here.

● *Interested Party*—To the extent the judges signaled a favorable ruling for Percipient on the FASA protest bar, the tables seemed to turn when it came to the issue of Percipient's standing to protest. If the panel issues a precedential opinion that decides Percipient's interested party status (in either direction), the implications for the bid protest system—and the federal procurement system as a whole—could be significant.

Some context is necessary to appreciate the excerpted dialog that follows. To pursue a protest at the COFC, a plaintiff must satisfy the baseline standing (and other justiciability) requirements of Article III. When Congress creates a private right of action, it can and often does impose additional "statutory standing" requirements. One of the most familiar statutory standing requirements applies when a plaintiff challenges agency action as contrary to statute or regulation under the Administrative Procedure Act (APA). Under the APA, standing is limited to a person "adversely affected or aggrieved by agency action," 5 USCA § 702, which the U.S. Supreme Court has interpreted to mean the plaintiff must assert an interest that is arguably within the "zone of interests" to be protected or regulated by the statute that is allegedly violated. This "zone of interests" test applicable under the APA "is not meant to be especially demanding," and results in most agency action being "presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

The relatively lenient zone of interests standard does not apply to bid protests filed at the COFC under 28 USCA § 1491(b)(1). In *American Federation of Government Employees v. U.S.*, 258 F.3d 1294 (Fed. Cir. 2001), 43 GC ¶ 292 (*AFGE*), the Federal Circuit interpreted the "interested party" language in § 1491(b)(1) to resemble the standing rules applicable to protests filed at the Government Accountability Office under the Competition in Contracting Act. From that starting point, the "interested party" test has evolved over a series of Federal Circuit decisions, typically requiring a protester to (1) be an actual or prospective offeror and (2) have a direct economic interest in the procurement. For thorough discussion of this history, see *Aero Spray, Inc. v. U.S.*, 156 Fed. Cl. 548 (2021), 63 GC ¶ 338.

In many cases, companies that intend to perform a procurement contract as a subcontractor rather than a prime contractor will not be able to satisfy the "interested party" standard, because the subcontractor will not qualify as an actual or prospective offeror. *MCI Telecommunications Corp. v. U.S.*, 878 F.2d 362 (Fed. Cir. 1989), 31 GC ¶ 231. Shorthand aside, simply calling the protester a "subcontractor"—a term that is notoriously difficult to define with precision—does not

guarantee dismissal. See *Distributed Solutions, Inc. v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008); *Boeing Co.*, Comp. Gen. Dec. B-414706, 2017 CPD ¶ 274, 2017 WL 3888309; *Mythics, Inc.*, Comp. Gen. Dec. B-418785, 2020 CPD ¶ 295, 2020 WL 5425788, 62 GC ¶ 299. This is consistent with the general principle that a standing analysis requires consideration of the context surrounding the plaintiff and each of its claims. *Digitalis Education Solutions, Inc. v. U.S.*, 664 F.3d 1380 (Fed. Cir. 2012), 54 GC ¶ 7 ("We cannot analyze standing in a vacuum, but rather must take into account the circumstances of the litigant."); *Oracle America, Inc.*, Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180, 2018 WL 2676823, 60 GC ¶ 195 ("Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement.")

As a guiding principle, however, there is good reason to scrutinize the standing of a lower-tier supplier to utilize the bid protest process. Judge Clevenger seemed concerned with the practical implications of opening the COFC protest doors to potentially every supplier in the procurement system:

> Judge Clevenger: If we find that your client has standing, then presumably every person who is supplying…your competitors who might come forward with a software package that is close to or could be modified for use… they would all have standing as well?
>
> Percipient Counsel: …if there is a competitor who offers a product that meets the…requirements, then absolutely.
>
> Judge Clevenger: So if you took it over into the setting of a contract for building a warehouse or something, everybody who has lumber would qualify…. This contract says we need so many linear feet of wood of this particular kind—anybody who can supply that would have standing… assuming they have a violation of law….
>
> Percipient Counsel: Assuming that there is an independent statutory or regulatory provision that applies post-award…
>
> Judge Clevenger: Yes, there has to be a violation of law to trigger 1491(b)….
>
> Percipient Counsel: Again, statutory or regulatory… provisions that apply post-award are rare, so….
>
> Judge Clevenger: …We know how government contracts work, and we know about all of the rules and regulations encapsulated … under contracts. So, anybody who is going to supply lumber who looked … at the issue could say I think there has been a violation of this regulation in connection with the task order, or with the contract….
>
> * * *
>
> Judge Clevenger: I think you are agreeing that any supplier, or person that has the capacity to supply an element that is involved in a contract for which they could not be a bidder or prospective bidder, will still have standing to vindicate a violation of law … across the whole panorama of federal government contract law.
>
> Percipient Counsel: I think so, your honor... This Court has defined procurement quite broadly…and therefore your jurisdiction is quite broad. If somebody can show a direct economic interest…in a statutory or regulatory violation that applies post-award, the plain language of 1491(b)(1) would give the court jurisdiction, for sure.

Opposing counsel disputed the assertion that "statutory or regulatory provisions that apply post-award are rare."

Percipient's counsel seemed to refine its position in its rebuttal exchange with Judge Taranto,

excerpted below. Taranto asked whether it would be consistent with *AFGE* for the court to analyze (1) whether Percipient has an economic interest in enforcing FASA, rather than (2) whether Percipient qualifies as a prospective offeror with respect to a procurement. In response, Percipient's counsel emphasized the company's ability to satisfy the interested party standard *but for* the government's alleged failure to satisfy its obligations under FASA:

> Judge Taranto: Some of what I think you have been saying, and certainly what I have been thinking—is that, for purposes of applying the "interested party… in connection with" piece of 1491, I want to look at the statute that is being alleged to be violated….And then I think, well, the predecessor case, or an important predecessor case of…*AFGE* said—we don't think this "interested party" language is like APA "aggrieved party" language … [that] led to the usual zone of interests test [which focuses on] the statute whose violation is alleged, and we think the 1491 interested party clause is narrower than that. Are you asking us to do something essentially inconsistent with that interpretation of the interested party [standard]?
>
> Percipient Counsel: No…it is narrower than the APA standing—in the sense that you have to have a direct competitive… interest, you have to be a prospective offeror—if the government does what they are supposed to do. But we unquestionably are. We are the offeror of this commercial item if the government does what they are supposed to do and ensures to the maximum extent practicable that commercial items would be procured.
>
> And the flip side of what they are trying to do is preclude all enforcement of this provision….

This echoes the kind of but-for reasoning that we are accustomed to in other flavors of bid protest litigation. Consider a cardinal change protest theory, for example. 10 USCA § 3406(f)(1)(A); *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993), 35 GC ¶ 492. If a protester alleges that an agency committed a cardinal change (violating CICA) by adding new work to Procurement A that should have been subject to some standalone Procurement B, it is generally irrelevant that the protester did not (or could not) bid for Procurement A. That is because, but for the alleged violation of CICA, the protester would be a prospective offeror for Procurement B. *Northrop Grumman Corp. v. U.S.*, 50 Fed. Cl. 443 (2001), 43 GC ¶ 408. But what is the analog to Procurement B in this case, and is Percipient's interest in that analogue sufficient to satisfy the statutory standing requirements of 28 USCA § 1491(b)?

Concluding Thoughts

Percipient's appeal presents questions of paramount importance; the panel's opinion may impact the procurement process far beyond the parameters of this protest.

A clean interpretation of the FASA protest bar could greatly simplify jurisdictional issues that currently drive vexing uncertainty in protest litigation involving IDIQ task and delivery orders. (This problem does not arise with orders awarded against General Services Administration Schedule contracts, *Coast Professional, Inc. v. U.S.*, 828 F.3d 1349 (Fed. Cir. 2016) (n.4), 58 GC ¶ 254).

If the panel tackles the interested party issue in a precedential opinion, it is imperative that the decision provides a clear statement and explanation for the legal standard to be applied moving forward. Protests and protesters appear in all shapes and sizes, at all stages of the procurement process, involving a wide variety of procurement vehicles and mechanisms. They must all navigate the "interested party" framework. Cf. *SEKRI, Inc. v. U.S.*, 34 F.4th 1063 (Fed. Cir. 2022), 64 GC ¶ 163; *Appeals To Watch: SEKRI Asks the Federal Circuit To Walk Another Protest Timing Tightrope*, 36 NCRNL ¶ 18; *Postscript: In SEKRI, The Federal Circuit Takes the High Road to Protest Timeliness*, 36 NCRNL ¶ 33.

Every precedential Federal Circuit decision impacting that framework carries the risk of "unpredictable second and third order effects" in future cases. *Per Aarsleff A/S v. U.S.*, 829 F.3d 1303 (Fed. Cir. 2016), 58 GC ¶ 255 (Reyna, J. concurring). We hope the panel will keep that risk in mind as it resolves this appeal. *NEC & AJ*