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¶ 171 Fed. Cir. Narrows Task Order Protest Bar, Broadens Interested-Party Test

Percipient.ai, Inc. v. U.S., 2024 WL 2873163 (Fed. Cir. June 7, 2024)

The task order protest bar in the Federal Acquisition Streamlining Act (FASA) did not bar a protest by a supplier of commercial software that sought to enforce a statutory preference for commercial products without challenging the issuance of the task order, the U.S. Court of Appeals for the Federal Circuit has held in reversing the Court of Federal Claims. The Federal Circuit tailored the standing requirement to these specific protest allegations and held that in the context of a protest alleging violations of the commercial-item preference without challenging the contract, an interested party includes a prospective offeror of commercial or nondevelopmental services or items whose direct economic interest would be affected by the statutory violation.

The National Geospatial-Intelligence Agency (NGA) issued its SAFFIRE solicitation seeking "an enterprise repository backbone for storing, managing, and disseminating data" and computer vision (CV) systems, a form of artificial intelligence. Task Order 1, solicited with the SAFFIRE solicitation, required development of the CV systems. NGA awarded the SAFFIRE contract and Task Order 1 to CACI Inc.-Federal.

Percipient.ai Inc. filed a protest at the COFC alleging that NGA violated 10 USCA § 3453 by failing to consider Percipient's commercial CV platform, Mirage, which could meet SAFFIRE's CV requirements. Percipient could not meet the other solicitation requirements but expected NGA and CACI to comply with § 3453 by considering Mirage for the CV system. Percipient did not bid for the SAFFIRE contract or challenge the SAFFIRE solicitation or award.

When Percipient's attempts to convince NGA and CACI to consider using Mirage failed, Percipient filed a protest asking the COFC to enjoin NGA's alleged § 3453 violation.

The COFC held that FASA precluded jurisdiction. Percipient appealed.

FASA Bar—FASA bars protests "in connection with the issuance or proposed issuance of a task or delivery order." 10 USCA § 3406(f)(1). Consistent with its focus on "issuance," FASA bars a protest challenging the issuance of the task order directly or by challenging an improper Government action that makes the task order's issu-

ance improper. *SRA Int'l, Inc. v. U.S.*, 766 F.3d 1409 (Fed. Cir. 2014) (e.g., waiver of an organizational conflict of interest (OCI)); 56 GC ¶ 316.

In holding that FASA did not bar Percipient's protest, the Federal Circuit analyzed each count of the complaint. Count one alleged that NGA violated § 3453 by refusing to ensure that the SAFFIRE contractor incorporated commercial or nondevelopmental items "to the maximum extent practicable." Count one targeted NGA's § 3453 violation after issuance of the task order and did not mention or challenge the issuance of the task order.

Similarly, count two alleged that NGA violated § 3453 by failing to require CACI to conduct market research before proceeding to develop the CV system. This inaction is not in connection with NGA's issuance or proposed issuance of the task order. Instead, the focus is on CACI's actions after issuance of Task Order 1 and the failure to evaluate Mirage for SAFFIRE's CV system.

Count three alleged that "NGA improperly delegated inherently governmental authority" by allowing CACI to develop CV software before conducting market research and by allowing CACI to decide agency policy for developing AI technology. Count three does not mention Task Order 1, challenge its issuance to CACI, or relate more broadly to the issuance of Task Order 1.

Lastly, count four alleged that "NGA engaged in arbitrary, capricious, and unlawful conduct by resisting innovation, by insisting on the wasteful approach of software development, and by engaging in bad faith conduct." No count four allegation mentions task orders or relates to issuance of a task order.

The Government and the dissent disagreed with the Federal Circuit's FASA holding. The Government interpreted the language "in connection with" in § 3406(f) to bar all protests relating to work performed under a task order. It argued that whatever comes after a task order falls under the task order bar. In support, the Government cited *SRA International*, which held that a disputed OCI waiver was "directly and causally connected to issuance of [a task order]" so that the challenge to that waiver—which would have undermined the task order—was barred.

The Federal Circuit said the Government's interpretation was too broad. FASA refers to protests "in connection with the issuance or proposed issuance" of a task order. The Government read FASA as barring all protests in connection with a task order—including work performed by a proper awardee after issuance of a proper task order—rather than just those protests made "in connection with the *issuance or proposed issuance of* a task" order. (Court's emphasis). This flouts the principle of construing a statute to give effect to all its terms.

The Federal Circuit also said that, read in context, *SRA*'s reference to "directly and causally connected to issuance of [a task order]" refers to Government action in the direct causal chain sustaining the issuance of a task order, not to all actions taken under or after issuance of a proper task order.

SRA's protest sought to set aside a task order, citing an alleged improper OCI waiver after the task order award. SRA argued that the task order bar did not apply because the alleged violation was "temporally separated" from issuance of the task order.

SRA held that the OCI waiver was directly and causally connected to the task order's issuance because the agency issued the waiver in order to proceed with the task order. Read in context, *SRA*'s statement that the OCI waiver was "directly and causally connected to issuance" does not broadly refer to work performed under, or events caused by, the task order. Instead, the *SRA* language refers to a challenge to the issuance of the task order regardless of whether the alleged violation occurred after issuance of the task order.

In contrast to *SRA*, Percipient did not challenge the issuance or proposed issuance of a task order, and the requested relief would not alter NGA's issuance of the task order to CACI. Rather, Percipient challenged NGA's and CACI's failure to review Mirage before developing the CV system, the Federal Circuit said in holding that the FASA bar did not apply.

Jurisdiction—The Tucker Act provides the COFC with jurisdiction over:

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> an action by an interested party objecting to [1] a solicitation by a Federal agency for bids or proposals for a proposed contract or to [2] a proposed award or the award of a contract or [3] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 USCA § 1491(b)(1).

The defendants argued that Percipient's prong-three protest challenged contract performance and administrative activities and therefore did not challenge actions "in connection with a procurement or a proposed procurement."

The phrase "in connection with a procurement or proposed procurement" involves "a connection with any stage of the federal contracting acquisition process, including 'the process for determining a need for property or services.' " *Distributed Sols., Inc. v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008); 50 GC ¶ 332. "[I]n connection with" is "very sweeping in scope." *RAM-COR Servs. Grp., Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999); 41 GC ¶ 361. And "procurement" encompasses "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Solutions*, quoting 41 USCA § 403(2).

Contrary to defendants' argument, "in connection with a procurement or proposed procurement" includes more than the issuance of a task order and connected acquisition-related decisions. This is important for § 3453 requirements to maximize acquisition of commercial items, which can be violated after contract award. Defendants' argument would allow agencies to ignore § 3453 by deferring decisions about commercial products until after contract award.

Thus, Percipient's protest is "in connection with a procurement," the Federal Circuit said.

Interested Party—To have standing under the Tucker Act, a plaintiff must be an "interested party." The Federal Circuit has defined "interested party" when the challenged Government action is a solicitation, an award, or a proposed award—i.e., when the challenge is under prongs one or two (with or without a prong-three challenge to the solicitation or award). See, e.g., *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S.*, 258 F.3d 1294 (Fed. Cir. 2001) (*AFGE*); 43 GC ¶ 292.

Distinguishing AFGE: In *AFGE*, relying on prongs two and three, federal employees challenged the decision to award a contract to a private company instead of using Government facilities and personnel. To determine standing, *AFGE* applied the Competition in Contracting Act (CICA) definition of "interested party": "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." 31 USCA § 3551(2)(A).

In *Percipient*, the Government relied on *AFGE*'s interpretation of "interested party" to challenge standing. The Federal Circuit said that while *AFGE* is controlling for what it covers, *Percipient* presents a different scenario. Unlike the *AFGE* plaintiffs, Percipient did not challenge a solicitation or an award or proposed award of a contract, so its claim could not come within the first two prongs of § 1491(b)(1). The Federal Circuit has not interpreted "interested party" when the protest is, and must be, based solely on the third prong—"any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

In *AFGE*, the protest under prong three challenged the contract award, and plaintiffs could not properly use prong three to evade the constraint on standing under the first two prongs. *Percipient* involved no such overlap or potential evasion, the Federal Circuit said.

Percipient presented the different question—who is an "interested party" under prong three only, where the challenged action is not the solicitation, award, or proposed award of a contract. For these allegations, "interested party" is not limited to "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."

For Percipient's protest involving only prong three and alleged violations of § 3453 that do not challenge the solicitation or contract, Percipient is an interested party because it offered a commercial product that had

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a substantial chance of being acquired to meet NGA's needs had the violations not occurred.

Four reasons support this conclusion. First, because prong three covers more actions than CICA, CICA's definition of interested party does not apply to actions that can be challenged only under prong three. CICA limits protests to written objections to solicitations, awards or proposed awards of a contract, cancelation of a solicitation, termination, or cancelation of an award, and "[c]onversion of a function that is being performed by Federal employees to private sector performance."

In contrast, prong three covers challenges to "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." Instead of being defined by the specific actions listed in CICA, prong three is defined by a statutory or regulatory violation across the full range of actions connected with an actual or proposed procurement.

Second, "interested party" should be interpreted based on the context of prong three, which authorizes challenges to "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." A procurement includes "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 USCA § 111. Thus, prong three covers actions beyond the solicitation or the award stage, the first two Tucker Act prongs. It is also broader than any CICA protest category.

Third, the Court must tailor the interested-party analysis to the alleged violation of § 3453, which requires agencies to ensure that "offerors of commercial services, commercial products, and nondevelopmental items" have "an opportunity to compete in any procurement to fill such requirements" "to the maximum extent practicable." This requirement is not limited to the award of the entire contract and applies even to "components of items supplied to the agency." § 3453(b)(2).

If parties who offer commercial and nondevelopmental items likely to meet contract requirements but who cannot bid on the entire contract or a task order cannot challenge statutory violations in connection with procurements, § 3453 "would have minimal bite—it would rely on an agency to self-regulate and on contractors like CACI to act against their own interest."

Fourth, FASA was enacted in 1994 and requires agencies to procure commercial items to meet agency needs. The Court doubted that the next Congress would promulgate § 1491(b), intending to eliminate meaningful enforcement of the post-award preferences for commercial items in § 3453.

The Court also noted that precedent supports interpreting "interested party" in light of the different prongs in § 1491(b)(1). *Weeks Marine, Inc. v. U.S.,* 575 F.3d 1352 (Fed. Cir. 2009) (plaintiff in a pre-award solicitation protest (i.e., prong one) has standing if it demonstrates a non-trivial competitive injury that can be addressed by judicial relief); 51 GC ¶ 303.

The Court also rejected the dissent's legislative-history arguments, noting that CICA's legislative history is not helpful because any parallel between CICA and § 1491(b) breaks down for a protest under prong three that does not object to a solicitation or award. CICA, governing protests at the Government Accountability Office, does not include prong three.

Furthermore, congressional concern that establishing a subcontractor's right to protest in the now-repealed Brooks Act would establish precedent that subcontractors have privity of contract with the Government does not apply here. In contrast to prong one and two cases, Percipient's prong-three allegation of procurement-related illegalities does not suggest subcontractor-Government privity.

Accordingly, after rejecting a timeliness challenge, the Federal Circuit held that, in the context of alleging violations of § 3453 without challenging the contract, an interested party includes an offeror of commercial or nondevelopmental services or items whose direct economic interest would be affected by the alleged statutory violation. The Federal Circuit therefore reversed the dismissal.

♦ **Practitioner's Comment**—The lengthy majority

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and dissenting opinions in this appeal offer many contrasting interpretations of statutory text, but one of those contrasting interpretations can be found within the majority opinion itself, where the majority offers divergent readings of the statutory phrase "in connection with." That same phrase appears in both the FASA task order bar and in the Administrative Dispute Resolution Act's (ADRA) grant of jurisdiction under prong three, but the majority opinion offers two very different takes on what that phrase means in the context of FASA and ADRA. On the one hand, the majority's analysis ascribes a narrow meaning to "in connection with" for purposes of the FASA task order bar, rejecting a reading that would apply the bar to "anything that stems from, is tied to, or results from the issuance of a task order," including work performed under a task order. On the other hand, the majority's approach to ADRA jurisdiction under the third prong of § 1491(b) is in line with the Federal Circuit's prior precedent, which has read the statutory phrase "in connection with" to be "very sweeping in scope." *RAMCOR*, 185 F.3d at 1289.

For the FASA task order bar, the majority's reading of "in connection with" represents a marked turn away from the Federal Circuit's approach to the FASA task order bar in prior decisions such as *SRA* and *22nd Century Techs., Inc. v. U.S.*, 57 F.4th 993 (Fed. Cir. 2023); 65 GC ¶ 24, which spoke of the task order bar in broad terms as having "effectively eliminate[d] all judicial review for protests made in connection with a procurement designated as a task order." Whether the majority's approach goes too far beyond the statutory text and the letter and spirit of binding precedent, as the dissent would have it, could be tested in the near term should the Federal Circuit consider the case en banc. Otherwise, in the longer term, practitioners can expect to see protest complaints in task order procurements that assiduously avoid alleging any error in the actual award of the task order and ostensibly do not seek to set aside the awarded task order. Some may read the majority opinion as inviting creative lawyering in the drafting of bid protest complaints in task order procurements. But, as a practical matter, we are dubious that there will be many viable task order protests outside the specific context of the statutory preference for commercial products and services at issue in *Percipient*. In most instances, a disappointed offeror in a task order procurement that otherwise would be barred by FASA will be hard pressed to find reasons for protesting the award that do not include challenging the task order award itself.

The majority's approach to the phrase "in connection with" under the third prong of § 1491(b) stands in stark contrast to its approach to the FASA task order bar. Here, the majority's analysis tracks the "very sweeping scope" of ADRA's grant of jurisdiction to cover "any stage of the federal contracting acquisition process." *Distributed Sols.*, 539 F.3d at 1346. Indeed, the dissenting opinion in *Percipient* takes no issue with the majority's application of the third prong of ADRA's jurisdictional grant insofar as it pertains to the broad grant of jurisdiction under § 1491(b). Rather, the dissent's disagreement with the majority's application of ADRA concerns the "interested party" requirement under that statute. According to the dissent, the majority's holding "fashion[s] a new, relaxed standing test that allows potential subcontractors, for the first time, to challenge government contracts under § 1491(b)." The panel majority's analysis—particularly of so-called "prong three" protests under § 1491(b)—certainly can be read to endorse bid protest standing for potential subcontractors. But here, again, we think that the exception the majority's decision has carved out will prove to be quite narrow and essentially limited to its facts. As the majority opinion articulated its holding, it found that Percipient, "in the context of this case involving alleged violations of 10 U.S.C. § 3453 without challenging the contract," was an "interested party" as an "offeror of commercial or nondevelopmental services or items whose direct economic interest would be affected by the alleged violation of the statute." In other words, there are many stars that must align for prospective subcontractors to fall within the ambit of the exception to *AFGE* created by *Percipient*. As with other seemingly blockbuster decisions that appear to upend established bid protest precedent—and, here, we are thinking of *Inserso Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020); 62 GC ¶ 180, and the *Blue & Gold* waiver rule—the decision in *Percipient* may prove to be just another anomaly that is limited to its facts, with little practical impact.

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