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ALERT

Federal Circuit Expands Standing and Jurisdiction in Protests at the Court

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WHAT: In *Percipient.ai, Inc. v. United States*, a split panel of the U.S. Court of Appeals for the Federal Circuit held that the Federal Acquisition Streamlining Act (FASA) "task order bar" does not apply to claims that an agency and its prime contractor violated 10 U.S.C. § 3453 by allegedly failing to consider a commercial product to meet contract needs. The panel also interpreted the definition of "interested party" under the Tucker Act (28 U.S.C. § 1491(b)(1)) to include prospective subcontractors alleging post-award violations of the statutory preference for commercial items, rejecting the argument, for purposes of the alleged statutory violation, that an interested party must have been an actual or prospective offeror. The panel also rejected the argument that Percipient.ai's challenge related to contract administration rather than a contract award.

WHAT DOES IT MEAN FOR INDUSTRY: This decision appears to broaden the scope of who can challenge government procurement actions at the U.S. Court of Federal Claims (COFC), allowing offerors of commercial products or services to file protests even if they did not bid on the prime vehicle and even if the award relates to a task order under an indefinite delivery/indefinite quantity (IDIQ) contract. The panel's interpretation potentially will lead to more opportunities for vendors of commercial products or services to have their products evaluated and incorporated into government contracts, or otherwise provide them a legal avenue to challenge the agency and prime contractor's failure to do so. This apparent expansion of standing could lead to increased scrutiny of agency procurement practices and more litigation as commercial vendors seek to enforce their rights under the Tucker Act. And it provides another forum to bring certain types of protests relating to task orders: challenges relating to

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

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post-award violations of at least some procurement laws.

BACKGROUND: The National Geospatial-Intelligence Agency (NGA) awarded an IDIQ contract, called SAPPHIRE, and a task order to CACI, Inc., aiming to enhance its visual intelligence data capabilities using computer vision technology. Percipient.ai (Percipient), which offers a commercial computer vision platform called "Mirage," claimed that NGA and CACI failed to properly evaluate its product in violation of 10 U.S.C. § 3453, which mandates a preference for commercial products or services in government procurements. The COFC dismissed Percipient's protest for lack of jurisdiction, citing the FASA task order bar in 10 U.S.C. § 3406 (f) that vests exclusive jurisdiction over protests regarding the issuance of a task order under an IDIQ contract with the U.S. Government Accountability Office.

Percipient appealed, and over a lengthy dissent, the Federal Circuit panel reversed. Though the decision covered much territory, contractors and practitioners will be most interested in two of the holdings: (i) the scope of FASA's jurisdictional bar on the COFC's ability to entertain protests that involve a task order, and (ii) the panel's analysis of the definition of an "interested party," which provided standing to a putative subcontractor alleging a post-award violation of procurement law.

Jurisdiction: The split Federal Circuit panel ruled that the FASA task order bar does not preclude jurisdiction in this case because Percipient's claims did not challenge the *issuance* of a task order. Rather, the task order had already been issued to CACI, and the protest did not allege any infirmities to the solicitation or seek to upend the award of the task order to CACI. Instead, Percipient alleged that during performance of the task order, the government and CACI failed to implement the statutory preference for commercial products or services in 10 U.S.C. § 3453, which the panel interpreted as requiring agencies *and their prime contractors* to incorporate commercial products or services to the maximum extent practicable. And because Percipient alleged a violation of statutory or regulatory law "in connection with" the SAPPHIRE procurement, the panel held that the COFC had jurisdiction under the "third prong" of the Tucker Act, 28 U.S. C. § 1491(b)(1).

Standing: The panel held that the definition of "interested party" included a potential subcontractor who alleged that it was capable of providing a commercial product that could meet the agency's needs, allowing Percipient to have standing despite not challenging the terms of a solicitation or being an "actual or prospective" offeror. Specifically, the panel held: "[W]here a plaintiff, invoking only prong three of the jurisdiction under 28 U.S.C. § 1491(b)(1), asserts a violation of 10 U.S.C. § 3453 without directly or indirectly challenging a solicitation for or actual or proposed award of a government contract, the plaintiff is an interested party if it is an offeror of a commercial product or commercial service that had a substantial chance of being acquired to meet the needs of the agency had the violation not occurred."

IMPLICATIONS: This ruling appears to expand the availability of protests at the COFC, at least those relating to statutory requirements to evaluate commercial products and services. Vendors of commercial items now have a clearer path to challenge procurement decisions that overlook their offerings, at least at the COFC, even if they did not bid on the underlying vehicle. For prime contractors holding task orders, there may now be an increased emphasis on assessing whether their business decisions during performance align with statutory procurement obligations and preferences that previously were primarily the concern of procuring

agencies.

There is much more to be said about this decision. For example, it remains to be seen if this type of protest would be available for other violations of procurement law, or if it is cabined to the statutory preference for commercial products or services in 10 U.S.C. § 3453. But for now, as the dissent says, this is a "very important government contract case" that all contractors and practitioners should study closely.