wiley

ALERT

Federal Circuit Holds *En Banc* That Only "Actual or Prospective Bidders or Offerors" May Protest at COFC

September 2, 2025

WHAT: In *Percipient.ai, Inc. v. United States*, the U.S. Court of Appeals for the Federal Circuit held in a 7-4 *en banc* decision that the definition of "interested party" under the Tucker Act (28 U.S.C. § 1491 (b)(1)) remains "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." The August 28 decision maintains the status quo following the Federal Circuit's vacatur of a 2024 panel decision that included prospective subcontractors alleging post-award violations of the statutory preference for commercial items in the definition of "interested party."

WHAT IT MEANS FOR INDUSTRY: This decision comes after a 2024 three-judge panel decision in this matter that broadened the definition of who can challenge government procurement actions at the U.S. Court of Federal Claims (COFC). The panel's decision, *Percipient.ai, Inc. v. United States*, 104 F.4th 839 (Fed. Cir. 2024), allowed 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. Wiley's alert on the panel decision noted that the panel's interpretation could have potentially led 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's and prime contractor's failure to do so. Thus, in reasoning that the Tucker Act's definition restricted bid protests at the COFC to only "actual or prospective offerors or bidders," the *en banc* decision maintains the

Authors

Tracye Winfrey Howard
Partner
202.719.7452
twhoward@wiley.law

Morgan W. Huston
Associate
202.719.4743
mhuston@wiley.law

Nicholas T. Iliff, Jr.
Associate
202.719.3150
niliff@wiley.law

Practice Areas

Bid Protests

Government Contracts

status quo following the Federal Circuit's vacatur of the panel's June 7, 2024 decision.

BACKGROUND: The National Geospatial-Intelligence Agency (NGA) awarded an IDIQ contract, called SAPPHIRE, and an initial task order to CACI, Inc., aiming to enhance its visual intelligence data capabilities using computer vision technology. Percipient.ai, 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 the COFC ruling, and the Federal Circuit panel reversed. The panel's key holdings involved (i) the scope of FASA's jurisdictional bar on the COFC's ability to entertain protests that involve a task order, and (ii) the definition of an "interested party," which provided standing to a putative subcontractor alleging a post-award violation of procurement law. In November 2024, the court granted rehearing *en banc* and vacated the panel's June 2024 decision, reinstating the COFC decision dismissing the case on jurisdictional grounds.

Jurisdiction: The split Federal Circuit panel in June 2024 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. When the court vacated that panel ruling, it reinstated the COFC dismissal, but stated that it would not revisit and does not require additional briefing on the issue. Indeed, the *en banc* decision does not mention it.

Standing: The *en banc* court held that Percipient's proposed definition of "interested party," which expanded it to include potential subcontractors alleging only a violation of statute or regulation (i.e., not challenging the terms of a solicitation or a contract award), was "countertextual, unsupported by the statutory history, and contravenes our long-standing precedent as to the Court of Federal Claims and its predecessor court." Thus, while the panel opinion had expanded standing for bid protests at COFC, the court declined to do this *en banc*, and the COFC dismissal for lack of standing remains intact.

DISSENT: Four judges issued a dissenting opinion. Judge Stoll, who authored the vacated panel opinion, also authored this dissent, joined by Chief Judge Moore, Judge Lourie, and Judge Taranto, who also sat on the panel's majority. The dissent argued that the *en banc* majority improperly referred to the Competition in Contracting Act (CICA) for the definition of
"interested party." The dissent would have held that, under the Tucker Act and Federal Circuit case law, "a party with an interest in any alleged violation of statute or regulation in connection with a procurement or proposed procurement" qualified as an interested party, even if that party was not an actual or potential bidder or offeror. The dissent argued that "[u]nder the plain language of § 1491(b)(1), an agency action that is not a solicitation may be challenged" by a party that was not an actual or potential bidder or offeror. The majority opinion disputed the dissent's reasoning in footnotes.

IMPLICATIONS: While the panel's decision in this matter had received significant attention, the *en banc* opinion largely maintains the status quo. Because vendors of commercial items that are potential subcontractors will not be treated as "interested parties" under the Tucker Act, they will be unable to pursue protests at the COFC for lack of standing.