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Federal Circuit Opens the Door to Commercial Subcontractor Protests

A new appellate court decision allows potential subcontractors to assert that their commercial solutions should have been considered by agencies and their contractors.

BY STEPHEN L. BACON

The Federal Acquisition Streamlining Act of 1994 (FASA) requires that agencies, "to the maximum extent practicable," procure commercial products and services.[1] To achieve this objective, agencies must conduct market research and require their prime contractors and subcontractors at all levels of the supply chain to incorporate commercial solutions.[2]

In 2018, the U.S. Court of Appeals for the Federal Circuit issued a landmark decision regarding FASA's preference for commercial items.[3] In *Palantir USG, Inc. v. United States*, the Federal Circuit ruled that the Army violated FASA by failing to reasonably determine whether its need for a Distributed Common Ground System could be met with Palantir's commercial software.

The *Palantir* decision added teeth to FASA's market research requirements and gave companies a path to argue that their commercial solutions must be reasonably considered for an agency's prime contract requirements. But *Palantir* did not address whether a similar path would be available to a potential *subcontractor* that could offer its commercial product or service to meet only a *portion* of the agency's requirements.

In June of this year, a divided three-judge panel of the Federal Circuit answered that question in the affirmative. In *Percipient.ai, Inc. v. United States*, the majority ruled that Percipient had standing to allege that the National Geospatial-Intelligence Agency (NGA) violated FASA by failing to reasonably evaluate whether Percipient's commercial product could have been provided under a subcontract with CACI, Inc.-Federal (CACI) to meet a portion of NGA's requirements for its SAFFIRE procurement.[4]

The majority narrowly interpreted FASA's so-called "task order bar," expanding the scope of protests related to task orders that may be brought to the Court of Federal Claims (COFC). More importantly, the Federal Circuit ruled – for the first time ever – that a potential subcontractor could qualify as an "interested party" with standing to protest at the COFC under the Tucker Act.

The *Percipient* decision is likely to have profound implications for agencies and contractors at all levels of the supply chain. Indeed, there is now a very real threat that potential subcontractors could file suit if their commercial solutions are not adequately considered by agencies and their contractors.

Background

NGA issued the SAFFIRE solicitation to procure a visual intelligence data repository referred to as "SER" that would be integrated with a computer vision (CV) artificial intelligence system. The SAFFIRE contract was awarded to CACI as an indefinite-delivery, indefinite-quantity (IDIQ) contract.

Percipient has a commercial CV platform known as "Mirage." Percipient did not submit its own proposal in response to the SAFFIRE solicitation because it could not meet the NGA's SER requirements. However, Percipient believed that NGA and CACI would evaluate whether Mirage could be used for SAFFIRE's CV system.

After the SAFFIRE contract was awarded, Percipient informed NGA that Mirage could meet the solicitation's CV system requirements while avoiding "hundreds of millions of dollars" in costs NGA would expend on

government-developed software. NGA told Percipient to contact CACI about participating in SAFFIRE, but CACI advised Percipient that the "ship has sailed" on potentially using Mirage as the CV system.

NGA subsequently acknowledged that CACI's statement was an "unfortunate miscommunication," and Percipient was eventually allowed to demonstrate Mirage for CACI and NGA. Ultimately, however, NGA decided to proceed with CACI's plan to develop the CV system in house under the SAFFIRE contract's first task order.

Percipient responded by filing a bid protest in the Court of Federal Claims (COFC) alleging that NGA violated FASA's preference for procuring commercial products and services under 10 U.S.C. § 3453. The government and CACI moved to dismiss Percipient's complaint on several grounds, including that the COFC lacked jurisdiction to decide the protest and that Percipient lacked "standing" to challenge NGA's decision.

After initially denying the motions to dismiss, the COFC later reversed course and granted the motions after it concluded that it lacked jurisdiction to decide Percipient's protest under the provision of FASA that prohibits task order protests at the COFC.[5] Percipient appealed the COFC decision to the Federal Circuit.

Jurisdiction

The provision of FASA known as the task order bar provides that a COFC "protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order."[6] The COFC ruled that it lacked jurisdiction to decide Percipient's protest because the FASA violations it alleged were "directly and casually connected to the issuance" of a task order to CACI.[7]

Specifically, the COFC determined that, "without the task order, the work that Percipient is challenging would not be taking place and Percipient could not allege this § 3453 violation."[8] The "directly and causally connected" standard applied by the COFC was based on the Federal Circuit's 2014 decision in *SRA Int'l, Inc. v. United States*, which established the governing interpretation of the task order bar for the last decade.[9]

The majority of the Federal Circuit panel reversed the COFC decision and concluded that Percipient's protest was not precluded by the task order bar under the standard adopted in *SRA*. The majority interpreted FASA and the *SRA* decision "to mean that a protest is barred if it challenges the issuance of the task order directly or by challenging a government action (e.g., waiver of an organizational conflict of interest) whose wrongfulness would cause the task order's issuance to be improper."[10]

After examining Percipient's complaint, the majority concluded that the allegations did "not assert the wrongfulness of, or seek to set aside, any task order," nor did they address "how NGA worded, issued, or proposed to issue its task order."[11] The majority rejected the government's view that the task order bar broadly covered "anything that stems from, is tied to, or results from issuance of a task order, including challenges to work performed under Task Order 1" issued to CACI.[12]

Contrary to the government's and the dissent's reading of the *SRA* decision, the majority stated that the "directly and causally connected" standard should be understood "to refer 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."[13]

In addition to ruling that Percipient's protest was not precluded by the task order bar, the majority also held that the protest fell within the Court's jurisdiction to decide "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."[14] The Government and CACI argued that Percipient's protest challenged CACI's performance and administration of the SAFFIRE contract, but not a "procurement or proposed procurement."

The majority, however, concluded that the statutory violations alleged by Percipient were sufficiently connected to the SAFFIRE procurement to fall within the Court's jurisdiction under the Tucker Act. Notably, the majority adopted an expansive interpretation of "procurement" that "includes stages between issuance of a contract award and contract completion."[15] In other words, a "procurement or proposed procurement" in the context of SAFFIRE was not limited to the original IDIQ award and the award of Task Order 1, but encompassed the potential acquisition of a commercial product through a subcontract with CACI.

Standing

Under the Tucker Act, only an "interested party" has standing to protest.[16] More than 20 years ago, in *Am. Fed'n of Gov't Emps., AFL–CIO v. United States (AFGE)*, the Federal Circuit determined that an "interested party" under the Tucker Act is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract."[17]

A potential subcontractor has never qualified as an "interested party" under

the *AFGE* standard. But the majority concluded that the *AFGE* standing test did not apply to Percipient because its protest did not object to a solicitation or contract award.

The Tucker Act permits three categories of protests: (1) objections to solicitations; (2) challenges to the proposed award or award of a contract; and (3) "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."[18]

Because Percipient's protest was based solely on the third prong, and did not "directly or indirectly challenge a solicitation for or actual or proposed award of a government contract," the majority ruled that the standing requirements of *AFGE* did not apply.[19] Instead, the majority held that "Percipient is an interested party because it offered a commercial product that had a substantial chance of being acquired to meet the needs of the agency had the violations [of 10 U.S.C. § 3453] not occurred."[20]

The majority's decision was motivated by a concern that "the statutory guarantees under § 3453 could become illusory were parties like Percipient, under these facts, unable to protest."[21] If potential subcontractors like Percipient could not protest, the majority feared that "the statute would have minimal bite" and enforcement "would rely on an agency to self-regulate and on contractors like CACI to act against their own interest."[22]

The lone dissenting judge strongly disagreed with the majority's decision to extend "interested party" standing to a potential subcontractor for the first time ever. In the dissent's view, the *AFGE* decision *was* controlling and should have been applied to deny standing to Percipient, "a wishful potential subcontractor."[23] The dissent also rejected the majority's "worry that § 3453's goals are illusory, and that the statute cannot be enforced unless potential subcontractors are granted standing to bring § 3453 prong three protests."[24]

Conclusion

The drafters of FASA believed that, by procuring commercial products and services, agencies could "eliminate the need for research and development, minimize acquisition lead time, and reduce the need for detailed design specifications or expensive product testing."[25] In practice, however, it is all too common for agencies and their prime contractors to prefer the development of "in house" systems over integrating existing commercial solutions.

While *Palantir* confirmed that FASA requires agencies to give reasonable consideration to commercial solutions, *Percipient* made clear that this requirement extends to all levels of the supply chain. To avoid the risk of a protest in the wake of *Percipient*, agencies and their contractors will need to give careful consideration to commercial solutions that could meet a subset of their needs.

Given the potential implications of the *Percipient* decision, the government and/or CACI may seek "en banc" review by all the judges on the Federal Circuit. If *Percipient* remains good law, it could spur a wave of similar lawsuits.

As the dissenting judge noted, there are a "vast number of potential subcontractors who can so easily allege possession of a suitable off-the-shelf product or service and inadequate agency attention to [FASA's] requirements."[26] Only time will tell if these "potential subcontractors will soon flood the Claims Court with…protests" that allege a violation of FASA's preference for commercial products and services.[27] CM

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ENDNOTES

1 10 U.S.C. § 3453(a). The requirements of FASA also apply to civilian agencies. *See* 41 U.S.C. § 3307. For consistency, this article will reference the FASA requirements codified under Title 10.
2 10 U.S.C. §§ 3453(b)(2), (c).
3 Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018).
4 Percipient.ai, Inc. v. United States, No. 2023-1970, 2024 WL 2873163 (Fed. Cir. June 7, 2024)
5 Percipient.ai, Inc. v. United States, No. 23-28C, 2023 WL 3563093 (Fed. Cl. May 17, 2023).
6 10 U.S.C. § 3406(f)(1).
7 Percipient.ai, 2023 WL 3563093, at *3.
8 Id.
9 766 F.3d 1413-14 (Fed. Cir. 2014).
10 Percipient.ai, 2024 WL 2873163, at *4.
11 Id. at *4, *5.
12 Id. at *5.
13 Id. at *6.
14 Id. at *7 (citing 28 U.S.C. § 1491(b)(1)).
15 Id.
16 28 U.S.C. § 1491(b)(1).
17 Am. Fed'n of Gov't Emps., AFL–CIO v. United States (AFGE), 258 F.3d 1294, 1302 (Fed. Cir. 2001) (adopting the definition of "interested party" under the Competition in Contract Act).
18 28 U.S.C. § 1491(b)(1).
19 Percipient.ai, 2024 WL 2873163, at *8.
20 Id.
21 Id. at *11.
22 Id.
23 Id. at *13.
24 Id. at *22.
25 S. Rep. No. 103-258, at 5 (1994).
26 Percipient.ai, 2024 WL 2873163, at *25.
27 Id.

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