

Federal Circuit Increases Jurisdictional Scope for Bid Protests in *Percipient.ai, Inc. v. United States*

Background

On June 7, 2024, the U.S. Court of Appeals for the Federal Circuit broadened the Court of Federal Claims' ability to oversee bid protests in *Percipient.ai, Inc. v. United States*.

This case arose out of a bid protest to an Award task order. The National Geospatial-Intelligence Agency (NGA) put forth a solicitation (under its SAFFIRE program) that required all bidders to meet particular system requirements. Simultaneously, the NGA published the first task order under the solicitation, which sought, among other things, an artificial intelligence Computer Vision (CV) system.

Percipient.ai, Inc. (Percipient) could not satisfy all of the system requirements for the solicitation, so it did not submit a proposal. However, Percipient claims that it did have a commercial platform that could meet the task order CV system requirements. Because it had the ability to provide a sufficient CV system, Percipient contacted NGA and CACI, Inc. (CACI)—the entity that was awarded the SAFFIRE contract—seeking to provide the CV system in response to the task order.

Both NGA and CACI rebuffed Percipient's offer, and CACI instead endeavored to create its own CV system. Percipient then filed a bid protest in the Court of Federal Claims, claiming that NGA and CACI were required to consider its CV system under 10 U.S.C. § 3453, which necessitates that agencies give preference to available commercial products and services. NGA and CACI filed motions to dismiss the protest, arguing that:

1. The Court of Federal Claims lacked subject matter jurisdiction under the FASA (Federal Acquisition Streamlining Act) task order bar (which disallows protests on task orders under \$10 million for civilian contracts, and \$25 million under defense contracts) and the Tucker Act;
2. Percipient lacked standing; and
3. Percipient did not file a timely complaint.

The Court of Federal Claims granted the motions to dismiss for lack of subject matter jurisdiction under the FASA task order bar.

Federal Circuit Decision

On appeal, the Federal Circuit reversed the trial court's dismissal, allowing Percipient's claims to proceed. The Federal Circuit also responded to each of NGA and CACI's arguments.

First, the Federal Circuit asserted that the Court of Federal Claims has subject matter jurisdiction over the bid protest under the FASA task order bar and Tucker Act. The Federal Circuit reasoned that the FASA task order bar blocks a protest "if it challenges the issuance of the task order directly or...[challenges] a governmental action...whose wrongfulness would cause the task order's issuance to be improper." Because Percipient's allegations—that NGA and CACI did not properly conduct market research and review Percipient's commercially-available CV System product as required by statute—did not "assert the wrongfulness of, or seek to set aside, any task order," the protest was not barred. Additionally, the Federal Circuit determined that the protest fell within the scope of the Tucker Act because Percipient alleged a statutory violation of 10 U.S.C. § 3453 in connection with the SAFFIRE procurement. Here, the Federal Circuit held that an alleged violation is in connection with a procurement even if the violation occurred after the issuance of a contract award, as it did in Percipient's claim.

Second, the Federal Circuit held that Percipient had standing to sue under 10 U.S.C. § 3453. The



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Federal Circuit decided that an interested party is more than an actual or prospective bidder when the allegation does not challenge a contract between an agency and its contractor. Instead, in this situation, an interested party was one that “offer[s] a commercial product that had a substantial chance of being acquired to meet the needs of the agency had the violations not occurred.” Percipient met the latter definition and thus had standing.

Third, the Federal Circuit held that Percipient timely filed suit. Because Percipient’s challenge involved post-award delegations—as opposed to defects in the solicitation—Percipient could protest after the bidding process closed.

Importance

Overall, this decision provides potentially new opportunities and avenues for companies to pursue bid protests, albeit under limited circumstances. Specifically, a company that lacks the qualifications to even submit a bid/proposal may nevertheless file a bid protest alleging a statutory or regulatory violation during a contract’s performance (or perhaps the time leading up to the start of that performance). This broad interpretation of the standing requirements to file a protest before the Court of Federal Claims opens the door to parties that previously may have missed out on the opportunity to protest a solicitation or award. While it is not yet clear how far the Court of Federal Claims will push this new-found jurisdiction, the industry is likely to feel the shockwaves of this decision for years to come as this case starts to erode FASA’s task order protest limitations.

This article was written with the assistance of Christina Casey, a 2024 summer associate in the firm's Washington, D.C. office.