THE Procurement LAWYER

ABA AMERICANBARASSOCIATION
Public Contract Law Section

SECTION OF PUBLIC CONTRACT LAW
AMERICAN BAR ASSOCIATION
VOLUME 60, NUMBER 1
FALL 2024

Lowering the King's Ears: Delimiting the Waiver of Sovereign Immunity for Bid Protests after *Percipient.ai*

BY ADAM A. BARTOLONZO

"Political theory has never ceased to be obsessed with the person of the sovereign."[1] This sentiment, expressed by French historian and philosopher Michel Foucault during an interview in 1976, parallels American jurisprudence in the third decade of the 21st century, which arguably has been obsessed with the "person of the executive" in our federal government. But while debates over the scope of judicial review of executive acts continue to make headlines today,[2] the reality is that our legal system has been "obsessed with the person of the sovereign" since the early days of our republic, when, despite having led a successful revolution against an overseas monarchy, the founding generation nonetheless decided to retain the doctrine of sovereign immunity for its newly established form of government.[3] This "ancient doctrine" holds that, because the sovereign is the source of all legal power, the sovereign cannot be sued by its subjects.[4] While it may have made sense in medieval times, the concept of sovereign immunity strikes many as (to borrow Justice Frankfurter's description of it) "an anachronistic survival of monarchical privilege [that] runs counter to [the] democratic notions of the moral responsibility" of our representative form of government to its citizens.[5] So, what can be done to reign in this "monarchical privilege" that is anathema to our republican values? Foucault's recommendation, consistent with his well-known distrust of centralized power, presumably would have been "to cut off the king's head" and eliminate sovereign immunity altogether.[6]

That has yet to happen in American jurisprudence and is unlikely to happen any time soon with the Supreme Court's recent reaffirmation of the need for some executive immunity to ensure the "vigorous" and "energetic" execution of our laws.[7] But while we have been unable entirely to rid our legal system of concepts relating to sovereign immunity, our political system has been capable of developing ways of at least defining the doctrine's application, most notably through congressional consents to waive the doctrine by statute[8] and to manage the doctrine by constitutional amendment.[9] In theory, then, the people have the power (at least indirectly, through their elected representatives) to delimit when

continued on page 16

Adam A. Bartolanzo is counsel in the Government Contracts and White Collar Practice Group at Miles & Stockbridge P.C.'s Washington, DC, office. *The opinions expressed and any legal positions asserted above are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge or its lawyers. This article is not intended to be and should not be taken as legal advice and does not create any attorney-client privilege.*

ISSUE HIGHLIGHTS

continued from page 1

and how their government can be held accountable through judicial review.

By now you may be wondering what any of this discussion of sovereign immunity has to do with procurement law. Everything, actually. Contractors' rights to challenge agencies' procurement decisions in court, even for something as fundamental as a breach of contract, flow from a statutory waiver of sovereign immunity known as the Tucker Act.[10] This statute confers upon the US Court of Federal Claims (COFC), an Article I court of special jurisdiction, the authority to adjudicate claims against the US government sounding in contract and, since 2001, exclusive judicial review of bid protests.[11] Consequently, understanding what the Tucker Act does and does not permit is tantamount to understanding what rights contractors can or should have vis-à-vis the sovereign United States with which they have decided to do business.

So, when a panel from the US Court of Appeals for the Federal Circuit issued its decision in June 2024 in *Percipient.ai, Inc. v. United States*,[12] many in the government contracts community were surprised to learn just how expansively the court of appeals viewed the COFC's bid protest jurisdiction.[13] The Federal Circuit's decision expanded the COFC's bid protest jurisdiction in two distinct ways. First, the Federal Circuit expanded the COFC's jurisdiction over task order protests by narrowing the scope of the statutory bar on such protests[14]—itself a displacement of the Tucker Act's waiver of sovereign immunity—to only challenges of governmental actions in "the direct causal chain sustaining the issuance of a task order."[15] Second, and perhaps more remarkably, the panel's majority decision also recognized, for the first time since bid protest jurisdiction was consolidated before the COFC, the right of a would-be *subcontractor* to protest an agency's *post-award* decision-making as allegedly violating procurement law, even though the protester *never competed for*, and, in fact, *admittedly could not have competed for*, the underlying contract and task order between the government and its prime.[16] The Federal Circuit limited its decision, for now, to the particular facts and violation of procurement law at issue in *Percipient.ai*.[17] But its expansive reading of the Tucker Act's waiver of immunity, which traditionally had been construed narrowly and "strictly in favor of the sovereign,"[18] sets a precedent that prospective subcontractors now can invoke to assert rights under procurement statutes despite not being in direct privity or ever even having a chance of being in direct privity with the government.[19] In other words, while the Federal Circuit may not have cut the doctrine's head off entirely, *Percipient.ai* certainly gave sovereign immunity something akin to a guillotine haircut for what could be a "flood" of protests from potential subcontractors in the wake of that decision.[20]

The purpose of this article is to analyze the potential repercussions of *Percipient.ai* and how they may affect the waiver of statutory immunity from bid protests going forward. To that end, this article examines the history of the statutory waiver, how it was interpreted before *Percipient.ai*, and both the majority and dissenting opinions in that case. This article then considers questions left unanswered by the majority's decision before concluding with a discussion of how these questions could be resolved by the Federal Circuit through reconsideration en banc (which, at the time of this writing, has not been issued).

Statutory History of the Waiver of Sovereign Immunity from Bid Protests

To better understand the Tucker Act's waiver of sovereign immunity from bid protests, one should begin by acknowledging that, as originally enacted, no such waiver was made by that statute. The Tucker Act, when it first became law in 1887, waived sovereign immunity only from monetary claims not sounding in tort based on the Constitution, federal law, or regulation, "or upon any contract, expressed or implied, with the Government of the United States."[21] The statutory text made no mention of what, if any, redress actual or prospective bidders could pursue if the US government violated its own procurement rules when soliciting requirements and making a contract award. In addition, the Supreme Court held as late as 1940 that US procurement law was "not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders."[22]

Beginning in the mid-20th century, however, two developments occurred that made judicial review of bid protests a reality. First, in 1946, Congress passed the Administrative Procedure Act (APA), which waived sovereign immunity by authorizing civil actions by those with standing to challenge administrative action and empowered the judiciary to "hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[23] The APA included a broad standing provision, permitting suit to be brought against the government by any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[24] Interpreting these provisions nearly 25 years after their enactment, the US Court of Appeals for the District of Columbia Circuit ruled in its landmark decision in *Scanwell Laboratories, Inc. v. Shaffer* that "the ancient doctrine of sovereign immunity has no application" to bid protests brought by disappointed bidders in federal district court.[25]

The second development was that, starting in 1956, the US Court of Claims (predecessor to the modern COFC) began carving out for itself bid protest jurisdiction under the Tucker Act's waiver of sovereign

immunity from claims sounding in contract. This theory, first articulated in *Heyer Products Co. v. United States*, held that the US government breaks an implied contract with bidders when it fails to consider their bids fairly and impartially, thereby entitling them to relief in the form of recovery of their bid or proposal preparation costs.[26] Notwithstanding the tenuous logic underlying the Court of Claims' conclusion given the Tucker Act's complete silence as to bid protests, Congress apparently ratified this thinking in 1982 by conferring upon the US Claims Court (as it then became known) jurisdiction to hear bid protests and even to enter injunctive and declaratory relief to resolve protest disputes.[27] In doing so, however, Congress limited its waiver of sovereign immunity to *pre-award* protests.[28] That limitation, in turn, led to a circuit split among Article III courts over whether *Scanwell* jurisdiction still covered both pre-award and post-award protests, or whether Congress had displaced district courts' jurisdiction over pre-award protests by conferring it upon the Claims Court instead.[29]

Meanwhile, the US Government Accountability Office (GAO)—which was created in 1921 as the General Accounting Office and is an independent agency under the legislative branch headed by the US Comptroller General[30]—had begun reviewing bid protests under its "dubious statutory authority" to settle and adjust claims against the government and to certify and revise public accounts.[31] As a legislative branch entity, GAO lacks the authority to order executive branch agencies to take specific actions and therefore can only make *recommendations* as to how agencies should resolve bid protests if GAO finds a violation of procurement law to have occurred.[32] Nevertheless, recognizing it as an (arguably) less formal and less expensive alternative to the courts, Congress formally granted GAO concurrent authority over bid protests with the enactment of the Competition in Contracting Act (CICA) in 1984.[33] CICA, as amended, now authorizes GAO to resolve "protests," which the Act defines as "a written objection by an interested party" to (i) a solicitation, (ii) the cancellation of a solicitation, (iii) an award or proposed award of a contract, (iv) a termination or cancellation of a contract award if based on improprieties concerning the award, or (v) the conversion of a function being performed by federal employees to private sector performance.[34] CICA, as enacted, also included a definition of "interested party" to mean "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."[35]

And so, whereas disappointed offerors had virtually no options to protest a solicitation or award at the start of the 20th century, the jurisdictional landscape had shifted significantly as the 21st century approached, with no fewer than three fora in which actual or prospective offerors could challenge the US government's procurement actions: (1) the US Court of Federal Claims (to which the Claims Court had been renamed in 1992), where pre-award protests could be brought; (2) the federal district courts, where post-award protests could be brought; and (3) GAO, where either could be brought.[36] It was against this backdrop that Congress sought to consolidate judicial review of both pre- and post-award protests as the exclusive province of the COFC, largely because Congress was concerned that balkanized bid protest jurisdiction had "led to forum shopping and the fragmentation of Government contract law."[37] Congress achieved the goal of consolidation with enactment of the Administrative Disputes Resolution Act of 1996 (ADRA), which allowed for concurrent jurisdiction of the full panoply of bid protests between the COFC and the federal district courts until a sunset provision ended the federal district courts' jurisdiction in 2001.[38] Congress left untouched GAO's grant of bid protest jurisdiction under CICA, leaving that forum still available to protesters not wanting to incur the time or expense of formal judicial proceedings.[39]

With ADRA, Congress added a new waiver of sovereign immunity in Section 1491(b)(1) of the Tucker Act, which permits jurisdiction over actions 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."[40] While the statute uses the term "interested party" to refer to who has standing to bring each of these categories of actions—known colloquially as the "three prongs" of the Tucker Act's bid protest jurisdiction—ADRA did not include a definition for the term as CICA had done.[41] Nor did ADRA adopt the same, broad standing language as the APA had done for final agency actions, although ADRA did adopt the APA standard of review to apply to all actions brought under Section 1491(b)(1) of the Tucker Act.[42]

The jurisdictional landscape had shifted significantly as the 21st century approached, with no fewer than three fora in which actual or prospective offerors could challenge the US government's procurement actions.

Such was the shape of the Tucker Act's waiver of sovereign immunity from bid protests when the Federal Circuit was tasked with interpreting it in *Percipient.ai*. But before concluding this statutory history, it is necessary to discuss briefly another significant legal development that

ultimately affected the outcome in that case, which is Congress's enactment of the Federal Acquisition Streamlining Act of 1994 (FASA).[43] FASA introduced two important changes relevant to the dispute in *Percipient.ai*. First, FASA established the task order protest bar, a narrowing of the general waiver of sovereign immunity for bid protests that prohibits protests made "in connection with the issuance or proposed issuance of a task or delivery order" against an indefinite-delivery, indefinite-quantity (IDIQ) contract.[44] The only statutory exceptions to this bar are (1) for protests "on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued," which can be brought before both the COFC and GAO; and (2) protests of task or delivery orders valued in excess of $10 million for civilian contracts and in excess of $25 million for defense contracts, which can only be brought before GAO.[45] Second, FASA established a preference—now codified at 10 U.S.C. § 3453 and 41 U.S.C. § 3307—to procure commercial or nondevelopmental items or services to meet the government's needs. Among other obligations imposed by that preference, agencies now must ensure, "to the maximum extent practicable," that "offerors of commercial services, commercial products, and nondevelopmental items other than commercial products are provided an opportunity to compete in any procurement to fill such requirements."[46]

Caselaw Before *Percipient.ai* Delimiting the Waiver of Sovereign Immunity for Bid Protests

Following the procurement reforms of the mid-1990s, the Federal Circuit and COFC had to determine what kinds of protests could now be brought in response to Congress's amendments of the Tucker Act's waiver of sovereign immunity. This section discusses caselaw before *Percipient.ai* that addressed the scope of bid protest jurisdiction in the aftermath of those amendments. Consistent with the order in which they are addressed in the majority's decision in *Percipient.ai*, this section first examines caselaw on the FASA task order protest bar before examining caselaw regarding "interested party" standing under Section 1491(b)(1) of the Tucker Act.

The FASA Task Order Protest Bar

The Federal Circuit first directly addressed the scope of the FASA task order protest bar in *SRA International, Inc. v. United States*.[47] In that case, SRA lodged a protest at GAO over the issuance of a $365 million task order to an awardee SRA alleged was tainted by several organizational conflicts of interests (OCIs).[48] After the procuring agency issued a waiver of any residual OCIs affecting the task order award that resulted in GAO dismissing the protest as academic, SRA filed a post-award protest before the COFC seeking to enjoin the agency's OCI waiver.[49] After denying the government's motion to dismiss for lack of subject matter jurisdiction, the COFC ruled in the government's favor on the merits, leading SRA to appeal.[50]

On appeal, the Federal Circuit held the COFC erred in exercising jurisdiction over SRA's protest in the first place because SRA's protest fell under the FASA task order protest bar.[51] "The statutory language of FASA is clear," the Federal Circuit said, leaving "the court no room to exercise jurisdiction over claims made 'in connection with the issuance or proposed issuance of a task or delivery order.'"[52] The Federal Circuit found it made no difference that SRA had alleged violations of procurement law under prong three of the Tucker Act (relating to an alleged violation of statute or regulation in connection with a procurement or proposed procurement) because FASA "is somewhat unusual in that it effectively eliminates all judicial review for protests made in connection with a procurement designated as a task order—perhaps even in the event of an agency's egregious, or even criminal, conduct. Yet, Congress's intent to ban protests on the issuance of task orders is clear from FASA's unambiguous language."[53] The Federal Circuit also found it made no difference that the OCI waiver occurred after award. Although "a temporal disconnect may, in some circumstances, help to support the non-application of the FASA bar," the Federal Circuit found that the post-award issuance of the waiver did not cure the jurisdictional defect in SRA's protest because the agency's OCI waiver was "directly and causally connected" to the issuance of its task order.[54] In addition, the Federal Circuit found that the remedy requested by SRA—"i.e., rescission of the task order's issuance"—"[t]hough not necessarily dispositive," nonetheless supported "the conclusion that SRA's protest is actually with the issuance of the task order, rather than the waiver alone."[55]

The Federal Circuit next considered the FASA task order protest bar in *22nd Century Technologies, Inc. v. United States*.[56] In that case, 22nd Century had received a task order that was subsequently terminated as a result of successful size protests before the US Small Business Administration (SBA) resulting in a determination that 22nd Century was other than small for purposes of the task order competition.[57] 22nd Century filed a protest before the COFC challenging the size determination and seeking to enjoin the termination of its task order.[58] After the COFC granted motions to dismiss the protest as a task order protest barred by FASA, 22nd Century appealed. On appeal, the Federal Circuit agreed that the FASA task order protest bar encompassed, and precluded jurisdiction over, 22nd Century's protest. According to the Federal Circuit, "FASA's unambiguous language categorically bars jurisdiction over bid protests, even those involving a challenge to an SBA size determination where the size determination is challenged 'in connection with the issuance of a task or delivery order.'"[59] Because 22nd Century's challenge was "to the alleged failure of the task order to require bidders to recertify as small businesses," the Federal Circuit found that the protest was, in fact, made in connection with the issuance of

its task order.[60] The Federal Circuit rejected 22nd Century's argument that its legal action was "in reality a challenge to the termination of the contract" because 22nd Century would have had to bring any such challenge under the Contract Disputes Act (CDA) instead, which it had failed to do.[61] The Federal Circuit also reaffirmed its holding in *SRA* that the FASA task order protest bar applied to all task order protests brought under Section 1491(b)(1) of the Tucker Act, including those asserted under prong three relating to an alleged violation of statute or regulation in connection with a procurement or proposed procurement.[62]

And so, within the span of a decade, the Federal Circuit had issued two precedential decisions that reaffirmed the expansive scope of FASA's withdrawal of the Tucker Act's waiver of sovereign immunity for task order protests. Yet, despite how expansively those decisions construed FASA's task order protest bar, a number of judges on the COFC still perceived some wiggle room to exercise jurisdiction over protests involving task orders under IDIQ contracts. These cases relied upon the Federal Circuit's use of the phrase "directly and causally connected" in *SRA*,[63] as well as its dicta that a temporal disconnect may support nonapplication of the protest bar,[64] to hold there are certain categories of procurement decisions that may affect task order awards, yet are "logically distinct" enough from the issuance of them to fall outside of the FASA task order protest bar.[65] Thus, these cases recognized that decisions such as the cancellation of a solicitation,[66] conducting a Rule of Two analysis to determine if a procurement should be set aside for small businesses,[67] and whether a procuring agency has satisfied its obligation to consider commercial and nondevelopmental alternatives before selecting a procurement vehicle[68] can be challenged under the COFC's bid protest jurisdiction even if their ultimate outcome is the issuance or proposed issuance of a task order. In other words, rather than closing the door entirely to task order–related protests, it seemed at least to some COFC judges that FASA's withdrawal of the waiver of sovereign immunity over protests of IDIQ task orders, and the Federal Circuit's interpretation of it, still left that door a bit ajar.

"Interested Party" Standing

Prior to *Percipient.ai*, the seminal interpretation of ADRA's amendment of the Tucker Act confining bid protest jurisdiction to actions brought by "interested parties" was established by the Federal Circuit's decision in *American Federation of Government Employees, AFL-CIO v. United States* (*AFGE*).[69] In that case, federal employees and their union representatives challenged the Defense Logistics Agency's decision to award a contract to a private sector contractor in lieu of performing the services in-house by the agency's "Most Efficient Organization" (MEO), as required by OMB Budget Circular A-76.[70] The employees claimed they would be part of the MEO to perform the services in-house but were instead facing displacement as a result of the agency's allegedly erroneous decision to outsource the services to a contractor.[71] The COFC granted the government's and the contractor's motions to dismiss, applying the APA's "adversely affected or aggrieved" party standard to reach its conclusion that the employees lacked standing under Section 1491(b)(1) of the Tucker Act.[72] The employees appealed, arguing they satisfied the requirements for standing under the APA.

On appeal, the Federal Circuit rejected the notion that Congress "intended to give the [COFC] jurisdiction over any contract dispute that could be brought under the APA," including those that might be brought by "parties other than actual or prospective bidders."[73] At the outset of its analysis of the Tucker Act's bid protest jurisdiction, the Federal Circuit acknowledged it is "guided by the principle that waivers of sovereign immunity, such as that set forth in § 1491(b)(1), are to be construed narrowly."[74] The Federal Circuit then proceeded to analyze ADRA's legislative history, observing that Congress's description of the district courts' previous *Scanwell* jurisdiction was framed as permitting "a *contractor* to challenge a Federal contract award."[75] This description, the Federal Circuit found, was consistent with the fact that the "vast majority of cases brought pursuant to *Scanwell* were brought by disappointed bidders."[76] The Federal Circuit further concluded that Congress had declined to adopt "the broad language of the APA" in defining who has standing to file a bid protest under the Tucker Act, instead choosing the term "interested party"—"a term that is used in another statute that applies to government contract disputes, the CICA."[77] While the Federal Circuit noted that CICA, by its own terms, applies only to protests brought before GAO, the Federal Circuit nonetheless concluded that "the fact that Congress used the same term in § 1491(b) as it did in the CICA suggests that Congress intended the same standing requirements that apply to protests brought under the CICA to apply to actions brought under § 1491(b)(1)."[78] Thus, the Federal Circuit decided to construe the term "interested party" as used in the Tucker Act in accordance with how CICA defined the term, holding that "standing under § 1491(b)(1) is limited to 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."[79]

Since deciding *AFGE*, the Federal Circuit has applied its standard for "interested party" standing consistently for over two decades, even in situations where protesters did not submit a bid, by carefully centering its analysis on the question of whether the protester nonetheless *could* have competed for or been awarded a government contract had the US government not allegedly violated procurement law (i.e., a protester's "prospective" offeror status).[80] The COFC likewise consistently has interpreted *AFGE* as recognizing that only actual or prospective offerors have standing under the Tucker Act's waiver of sovereign

immunity to bring bid protests challenging agency procurement decisions.[81] As a result, prior to the *Percipient.ai* decision, it seemed to be settled law that only those with some chance of being in direct privity with the government could sue the sovereign under the Tucker Act's bid protest jurisdiction, as amended by ADRA.[82]

Factual and Procedural Background of *Percipient.ai*

It was against this backdrop and legal history that Percipient.ai, Inc. (Percipient) brought its bid protest action against the US government. Interestingly, the procurement at issue in *Percipient.ai* was not one for which Percipient had competed, but one for which CACI, Inc.–Federal (CACI) had competed and been selected for award. In January 2021, the National Geospatial-Intelligence Agency (NGA) awarded to CACI an IDIQ contract the agency referred to as SAFFIRE.[83] The SAFFIRE contract required CACI to provide (1) an enterprise repository backbone for storing, managing, and disseminating data and (2) a user-facing computer vision (CV) system.[84] Percipient was unable to meet the repository requirement but offered a commercial CV platform, Mirage, that Percipient alleged could meet NGA's CV system requirement.[85] Accordingly, while Percipient did not bid on the SAFFIRE contract, Percipient nonetheless expected to have an opportunity to offer its Mirage system to NGA and CACI sometime during contract performance because of FASA's preference for commercial items.[86] Percipient contacted NGA and CACI about its commercial Mirage system in hopes of securing a spot on the development of the CV system required by the SAFFIRE contract, which NGA directed CACI to begin through the issuance of Task Order 1 under CACI's SAFFIRE IDIQ contract.[87] CACI passed on Percipient's commercial offering, however, and decided to build its own CV system instead.[88] Percipient also demonstrated its Mirage system to NGA representatives and offered a free testing period for NGA to conduct testing of the system with live data, but the testing performed by NGA was limited and, according to Percipient, "subpar." Percipient alleged that the limited testing performed by NGA indicated that NGA had "deliberately failed to evaluate Mirage's ability to meet SAFFIRE's CV system requirements."[89]

After NGA refused to provide Percipient another opportunity to demonstrate the feasibility of its commercial CV solution, Percipient filed a bid protest action in the COFC, seeking to enjoin NGA's alleged violations of FASA's preference for commercial products and services.[90] Both the government and CACI filed motions to dismiss Percipient's complaint, contending both that (i) the COFC lacked subject matter jurisdiction over the protest due to the FASA task order protest bar and (ii) Percipient lacked standing as an "interested party" under the Tucker Act.[91] The COFC, in two separate opinions written by Judge Bruggink, initially declined to grant the motions to dismiss but subsequently granted the motions on reconsideration, dismissing Percipient's protest for lack of jurisdiction under the FASA task order protest bar.[92] Percipient appealed the dismissal to the Federal Circuit.

The Majority's Decision in *Percipient.ai*

The FASA Task Order Protest Bar Did Not Apply to Percipient's Bid Protest

In a 2-1 panel decision (with Judges Stoll and Taranto in the majority and Judge Clevenger dissenting), the Federal Circuit reversed the COFC's decision that the FASA task order protest bar applies to Percipient's protest.[93] The Federal Circuit reviewed each of Percipient's four protest counts and found that none of them were "in connection with the issuance or proposed issuance of a task or delivery order."[94] Most of Percipient's allegations, according to the Federal Circuit, did not "even mention task orders," and when they did, their focus was on NGA's and CACI's actions after the issuance of Task Order 1.[95] In addition, the Federal Circuit noted that Percipient's requested relief (i.e., enjoinment of NGA's alleged violations of FASA's commercial preference) "would not alter NGA's issuance of Task Order 1 to CACI," which the Federal Circuit found provided further support that Percipient's protest was not in connection with the issuance or proposed issuance of that task order.[96] Instead, because "Percipient largely challenges the failure of NGA and its contractor to properly review its Mirage product and thereby conduct the necessary research required by statute before developing the CV system," the Federal Circuit held that the task order protest bar did not apply.[97]

Notably, the Federal Circuit rejected, as "far too broad," the government's position that the task order bar should apply to "all protests that relate to work performed under a task order," such that "whatever results from, i.e., follows or comes after, a task order falls under the task order bar."[98] The US government had based its proffered interpretation on the Federal Circuit's statement in *SRA* that the FASA protest bar applied to all procurement actions "directly and causally" connected to the issuance of a task order.[99] The majority in *Percipient.ai*, however, interpreted that language from *SRA* as intended only "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."[100] Unlike in *SRA*, where the "wrongfulness" of the challenged OCI waiver "would [have] cause[d] the task order's issuance to be improper," Percipient's protest grounds did not challenge the propriety of or seek to upend the award of CACI's task order.[101] Thus, according to the panel majority, Percipient's bid protest was not "directly and causally" connected to CACI's task order so as to fall under the task order protest bar.[102]

Percipient Is an "Interested Party" Under Prong Three of the Tucker Act

Because the lower court had relied upon the FASA task order bar as the basis of its decision to dismiss

Percipient's protest in the proceedings below, much of the attention given to the appeal in *Percipient.ai* focused initially on that aspect of the appeal.[103] During oral argument, however, it became clear the panel judges were keenly interested in an alternative basis to affirm the lower court's decision advanced by the government and CACI: that, as neither an actual nor prospective offeror on the underlying SAFFIRE contract or Task Order 1, Percipient lacked "interested party" standing under the Tucker Act to pursue its protest.[104] Indeed, the panel's pointed questions at oral argument (particularly from Judge Clevenger, who subsequently dissented from the majority's decision) about the implications of recognizing a potential subcontractor like Percipient as an "interested party" with standing to protest led some commentators to remark that "the tables seemed to turn" against the protester "when it came to the issue of Percipient's standing to protest."[105] As a result, it came as a surprise to many when the panel's majority decision not only declined to dismiss on this alternative basis but went a step further by recognizing—for the first time since ADRA's passage—that a party may challenge a violation of procurement law under prong three of the Tucker Act's bid protest jurisdiction relating to an alleged violation of statute or regulation in connection with a procurement or a proposed procurement, *even though the protestor was neither an actual nor prospective bidder on a government contract*.[106]

To arrive at this conclusion, the majority began by acknowledging that prong three of the Tucker Act's bid protest jurisdiction is "very sweeping in scope" in that the phrase "in connection with a procurement or proposed procurement" covers "all stages of the process of acquiring property or services," not just the solicitation (prong one) or award (prong two) phase.[107] Accordingly, prong three provides "interested parties" the right to challenge any alleged violation of law that may occur in a procurement from beginning to end, including up to and including "contract completion and closeout."[108] Because Percipient alleged violations of FASA's commercial preference and related regulations "in connection with" the SAFFIRE procurement, the majority held that Percipient's bid protest fell within the contours of prong three of the Tucker Act's bid protest jurisdiction.[109]

The majority then proceeded to distinguish *AFGE*, which both the government and CACI had relied upon to argue Percipient lacked standing, on the basis that the protest in *AFGE* included challenges to a task order under *both* prongs two *and* three of Section 1491(b)(1).[110] According to the majority, the alleged violations of procurement law (prong three) in *AFGE* overlapped with the challenge of the contract award (prong two) to such an extent that the protesters could not "evade the constraint on standing under the first two prongs."[111] By contrast, Percipient's protest involved a challenge only under prong three—a situation *AFGE* did not address, and one that the majority described as "a crucial distinction" as to why *AFGE* was not controlling.[112] The majority thus declined to apply CICA's definition of "interested party" to Percipient's protest and, in doing so, set forth four rationales as to why a non-bidder like Percipient could bring a purely "prong three" protest alleging violations of FASA's preference for commercial items.[113]

First, the majority held that the third prong of Section 1491(b)(1) "goes beyond the situations considered in CICA," which limits protests by an "interested party" to solicitation defects, cancellations, awards and proposed awards of contracts, and conversions of in-government functions to performance by the private sector.[114] The third prong of the Tucker Act's bid protest jurisdiction, however, "in no way resembles" CICA's itemization of specific categories of procurement actions encompassed by its grant of protest jurisdiction, but "instead is defined by the legal source of wrongfulness (statutory or regulatory violation) across the full range of actions connected with an actual or proposed procurement."[115]

Second, the majority held that the statutory language in prong three requires a broader definition of "interested party" that is not confined to actual or prospective bidders because, on its face, prong three does not require a protester to "challenge either a solicitation for or the award or proposed award of a government contract."[116] Rather, prong three allows plaintiffs to challenge "'*any* alleged violation of statute or regulation *in connection with a procurement or a proposed procurement*,'" which is broader than any of the scenarios governed by CICA.[117] Accordingly, even though CICA contains a definition of "interested party," the phrase "interested party" as used in the Tucker Act must be interpreted "in the context of this broader third prong to give it independent import."[118]

Third, the majority determined that the specific statutory violation invoked by Percipient necessitated a broader interpretation of "interested party" to ensure offerors of commercial products or services have a meaningful opportunity to enforce the statutory preference Congress intended them to enjoy.[119] If offerors of commercial and nondevelopmental items like Percipient were unable to challenge the government's failure to adhere to the statutory preference for commercial products and services and instead had to "rely on an agency to self-regulate and on contractors like CACI to act against their own interest," then the statutory guarantees of FASA's commercial preference "would have minimal bite."[120] Thus, to prevent the statutory commercial preference from becoming "illusory," offerors like Percipient, "who offer significant commercial and nondevelopmental items likely to meet contract requirements but who cannot bid on the entire contract or a task order," need to have standing to enforce the preference.[121]

Fourth, the majority found that the timing of the passage of FASA's commercial item preference in 1994 vis-à-vis ADRA in 1996 supported its view.[122] Given the two-year period of time between these enactments, the majority found it "difficult to conclude that the very next

Congress following passage of FASA would promulgate ADRA with the intention of eliminating any meaningful enforcement of the post-award preferences for commercial items in § 3453."[123]

Consequently, for "all these reasons," the majority held that, in the context of protests alleging violations of FASA's commercial preference without challenging the underlying contract, an "interested party" for purposes of prong three of the Tucker Act's bid protest jurisdiction "includes an offeror of commercial or nondevelopmental services or items whose direct economic interest would be affected by the alleged violation of the statute."[124] Because neither the US government nor CACI disputed Percipient's direct economic interest in NGA's alleged failure to properly evaluate its CV platform Mirage for integration into the SAFFIRE procurement, the majority held Percipient satisfied this standard and thus could proceed with maintaining its protest.[125]

The Dissent

While two of the three panel judges agreed that the COFC had wrongly dismissed Percipient's protest, Judge Clevenger authored a lengthy dissent critiquing the majority's decision.[126] With regard to the FASA task order bid protest bar, Judge Clevenger faulted the majority for sidestepping controlling precedent "to create and apply a significantly different interpretation of the task order bar in this case."[127] In particular, Judge Clevenger viewed Percipient's case "as close to *SRA* as the law school 'on all fours case' can get," given that (i) both cases challenged the continued performance of task orders despite alleged violations of law occurring post-award and (ii) a successful challenge in either case would have upset that continued performance.[128] Because the majority's decision amounted to, in Judge Clevenger's view, an impermissible de facto overruling of *SRA* by a subsequent panel, Judge Clevenger dissented from the majority's reversal of the COFC's dismissal of Percipient's protest under the FASA task order protest bar.[129]

As to "interested party" standing, Judge Clevenger again faulted the majority for deviating from Federal Circuit precedent, noting that "[t]here is no clear daylight between [Percipient's] case and *AFGE* . . . and thus no room for the majority to cast *AFGE* aside and fashion a new, relaxed standing test that allows potential subcontractors, for the first time, to challenge government contracts under § 1491(b)(1)."[130] He emphasized that Percipient could only show an interest in potentially receiving a subcontract from CACI to provide its Mirage software on the SAFFIRE procurement, but that this potential to subcontract did not confer standing upon Percipient, particularly when Congress previously rejected subcontractor standing under the now-repealed Brooks Act, which had allowed bid protests to Automated Data Processing Equipment procurements by an "interested party."[131] As noted in the dissent, Congress rejected subcontractor standing in the Brooks Act due to concerns it would "'establish precedent that privity of contract exists between the government and subcontractors,'" thereby opening the door to cases brought by subcontractors in a host of procurement scenarios.[132] Judge Clevenger also noted how the Court in *AFGE* "extensively relied" on ADRA's legislative history to support adoption of CICA's definition of "interested party," and observed that construing the Tucker Act "more broadly" to permit subcontractors to sue the Government "would violate the sovereign immunity canon."[133]

Turning to what he characterized as the "real reason" for the majority's departure from *AFGE*—namely, that "[u]nless potential subcontractors are allowed to bring § 3453 protests under prong three, . . . the goals of § 3453 will be 'illusory,' and the statute will have 'minimal bite'"—Judge Clevenger noted that the majority cited "no evidence, anecdotal or empirical, that the statute is widely disregarded by agencies or contractors."[134] He further took issue with the majority's apparent skepticism of the incentives for agencies and private parties to enforce the statutory commercial preference themselves, viewing the risk of nonenforcement a lesser concern than the repercussions of adopting a definition of standing that "would open the protest door to potential subcontractors."[135] Judge Clevenger concluded his dissent by emphasizing the potential disruption to the procurement process the majority's decision could invite and by arguing that only the Federal Circuit sitting en banc—not the panel majority—could adopt a relaxed standing for "prong three" protests, given the otherwise controlling precedent of *AFGE*:

> [I]t is fair to expect that potential subcontractors will soon flood the Claims Court with § 1491(b)(1) protests. Think of all the products and services that go into government contracts for a battleship, or airplane, or new headquarters for an agency, and the 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 § 3453's requirements. And further, the majority's driving rationale, i.e., that some laws are so important (here, § 3453) that they require relaxed standing tests to promote compliance, will in time likely apply to alleged violations of other important laws, requiring specially tailored standing requirements. . . . [T]here is no support for the majority's new prong three standing test, and there is ample statutory history evidence that Congress would object to granting potential subcontractors § 1491(b)(1) standing of any kind. As with the task order bar issue in this case, the court sitting en banc might consider additional standing tests for § 1491(b)(1) beyond *AFGE*'s, but this panel cannot.[136]

Open Questions

As the dust starts to settle from this new precedent-setting decision, government contractors and the agencies they serve must come to terms with *Percipient.ai* and what it means for the waiver of sovereign immunity from

bid protests going forward. Some commentators, consistent with the majority's reference to "the context of this case" to describe its holding, have opined that *Percipient.ai* "may prove to be just another anomaly that is limited to its facts, with little practical impact."[137] Nothing forecloses that possibility, at least for now. But if "what's past is prologue,"[138] then *Percipient.ai* could just as well expand the COFC's jurisdiction to hear bid protests in unexpected ways. Whereas the Tucker Act as originally enacted contained no right for disappointed offerors to protest procurement actions, judicial decisions nonetheless found a way to recognize one: first in the Tucker Act itself under an implied contract theory,[139] and then in the APA under *Scanwell* and its progeny.[140] Each time, Congress ratified those waivers of sovereign immunity, including most recently in ADRA.[141] So while the practical effect of *Percipient.ai* could be limited to protests sharing this somewhat narrow set of facts, the majority decision also could marshal in a new era—or "flood," to borrow from Judge Clevenger's dissent[142]—of prospective subcontractor protests previously unthought of in procurement law.

But if the king has gotten closer and closer shaves with each visit to the judicial barbershop, what then should remain of that "anachronistic," "monarchical privilege"[143] that is sovereign immunity? Surely, the havoc to the procurement system of permitting anyone to protest, no matter how remote their interest may be (think, for example, of the chaos that would ensue from recognizing "taxpayer standing"),[144] counsels against resorting to the Foucauldian extreme of cutting off the king's head.[145] But is there a good middle ground that would recognize "the benefits that protests bring, in terms of transparency, education, and protection of the integrity of the US federal acquisition system"?[146] And, more importantly, does *Percipient.ai* stake out just such a middle ground? The answer to that inquiry is not clear because the majority's decision left unresolved a number of other important questions as to how its rationale should be applied in future COFC protests.

First, does *Percipient.ai* create new tension between prong three of the Tucker Act's waiver of sovereign immunity for bid protests and FASA's curtailment of that waiver for task order protests? Both statutes, after all, use the phrase "in connection with" to define the scope of actions to which they apply.[147] But as others in the government contracts bar have noted, "[t]he majority's approach to the phrase 'in connection with' under the third prong of § 1491 stands in stark contrast to its approach to the FASA task order bar."[148] Whereas with FASA the majority defined the phrase narrowly to mean only those protests challenging government action in the "direct causal chain sustaining the issuance of a task order," the majority adopted a more expansive interpretation of the phrase under prong three as applying to "any stage of the federal contracting acquisition process."[149] If waivers of sovereign immunity "are to be construed narrowly,"[150] then how can the broader interpretation of "in connection with" for prong three's grant of bid protest jurisdiction be reconciled with the narrower one adopted by the majority for FASA's jurisdictional bar for most task order protests? Perhaps a future prong three challenge involving a task order procurement will help to resolve this apparent conflict.

Second, how will the Federal Circuit's previous precedential decisions in *AFGE*, *SRA*, and *22nd Century* be applied now that *Percipient.ai* has chipped away at them? For *AFGE*, the *Percipient.ai* majority's decision drew a fine distinction between protests predicated exclusively on prong three claims and those that include claims under prong one or two as well.[151] But as noted in Judge Clevenger's dissent, "[t]here was no question before the *AFGE* court of the plaintiffs' use of prong three 'to evade the constraint on standing under the first two prongs.'"[152] Indeed, the panel in *AFGE* appears not to have considered, much less addressed, the different prongs of the Tucker Act's bid protest jurisdiction *at all*.[153] Yet, the majority's decision seemingly invites prospective subcontractors and their counsel to prepare carefully worded complaints alleging only prong three challenges, lest they find themselves implicated by the constraint on standing imposed under the first two prongs.[154] Similarly, if contractors and their counsel are careful enough to allege counts that do not "even mention task orders,"[155] can they now invoke *Percipient.ai* to survive the FASA task order protest bar even when their protest claims stem from a task order procurement? Granted, the Federal Circuit may have simply adopted the logic of some earlier COFC decisions recognizing the "precise point" that the FASA bar applies only to "those protests 'made in connection with the *issuance or proposed issuance of* a task' order."[156] But if that were the case, then how can protests involving task order procurements, but challenging actions "logically distinct"[157] from the issuance of them, be reconciled with the broad pronouncements in *SRA* and *22nd Century* that FASA "effectively eliminates *all* judicial review for protests made in connection with a procurement designated as a task order"?[158] Perhaps a later case will clarify that language as mere dictum, but until then, there remains a disconnect between what the Federal Circuit said then versus what it said in *Percipient.ai*.

Third, what role, if any, will legislative history play in defining the scope of bid protest jurisdiction going forward? Judge Clevenger's dissent faulted the majority for disregarding the Federal Circuit's analysis of the legislative history of ADRA in AFGE.[159] To its credit, however, the majority did acknowledge that analysis, but nonetheless noted how Congress would not have intended to eliminate "meaningful enforcement" of FASA's commercial preference with the enactment of ADRA "[j]ust two years later."[160] But does this mean COFC judges should consider how close in time a procurement law came into effect in relation to ADRA to decide whether Congress meant for that law to be enforced under

ADRA going forward? While Judge Clevenger's warning that the majority's standard for prong three standing "will in time likely apply to alleged violations of other important laws"[161] may seem hyperbolic at first blush, the directive for the US government to act "to the maximum extent practicable" to enforce some kind of policy preference appears frequently in procurement statutes and regulations.[162] Does each of these preferences require subcontractor standing to enforce? Are they important enough not to trust agencies and large primes to self-regulate their compliance with them? And what about CICA? CICA preceded the passage of ADRA by 12 years, which may seem like a long time but is actually only a small fraction of time compared to what was then the Tucker Act's 109-year existence. Did Congress, in the span of three administrations, really mean to disregard that statute's definition of "interested party" when it used that same term of art in ADRA to apply to all three categories of actions that may be brought under Section 1491(b)?[163] Determining Congress's actual intent in enacting prong three of the Tucker Act's bid protest jurisdiction probably requires continued recourse to legislative history then, at least for the foreseeable future, although how that history will be interpreted in light of *Percipient.ai* remains somewhat of a mystery.

Fourth, if prospective subcontractors like Percipient are to have standing to bring protests under prong three of Section 1491(b)(1), then what harm must they show? This component of standing—requiring protesters to demonstrate that a "direct economic interest" would be affected by the award or failure to award a contract—was not addressed in Percipient.ai because neither the government nor CACI disputed it.[164] Typically, protesters have to show that they would have had "a substantial chance of receiving the contract" but for the government's alleged procurement error,[165] or in the pre-award context, at least "a non-trivial competitive injury which can be redressed by judicial relief."[166] Will prospective subcontractors need to make a similar showing that they would have had a substantial chance of receiving a subcontract from the prime to maintain their standing in post-award protests? What if, rather than deciding to develop the CV platform itself, CACI had chosen to go with another subcontractor's commercial offering instead? Would Percipient have needed to show some kind of error in the award to its competitor to have standing, such as by proving that its competitor's offering was not, in fact, a commercial product or nondevelopmental item? Would the winning subcontractor in this hypothetical have a right to intervene since its award is now at stake? Surely, the winning subcontractor could show entitlement to intervene as a matter of right under COFC Rule 24(a)(2) in that scenario.[167] So does this mean there will be a "flood" of subcontractor intervenors now that prong three actions can be brought by companies passed over for subcontract awards? And how will this work in the pre-award context? Presumably, prospective subcontractors offering commercial products or commercial services will need to challenge solicitation language causing them a "non-trivial competitive injury."[168] Should such firms start scanning SAM.gov now for solicitations requiring noncommercial products or services that, if awarded, would foreclose the possibility of them obtaining a subcontract from an as-yet-to-be-determined prime contractor? The majority's decision did not have to answer these questions, but that does not mean that future protesters, intervenors, and agencies can avoid these questions forever.

Finally, in light of the majority's definition that "procurement" as used in prong three means all "stages between issuance of a contract award and contract completion, i.e., actions after issuance of a contract award,"[169] does that mean any procurement action is protestable now regardless of how far into contract performance it occurs? Students of government contracts (this author included) have long been taught that contract formation disputes are subject to GAO's and the COFC's bid protest jurisdiction,[170] whereas contract administration disputes are subject to the COFC's and the boards of contract appeals' jurisdiction under the CDA.[171] The majority's decision blurs the line between contract formation and contract administration, however. What once was considered a matter of traditional contract administration—i.e., subcontracting—can now be challenged through a prong three bid protest under the Tucker Act. This creates yet another area of tension in the law. Subcontractors, generally lacking any right to assert a CDA claim save for the grace of their primes (in whose name any appeal must be taken),[172] can now sue procuring agencies (with whom they do not stand in privity) by alleging a violation of procurement law at any point during performance, so long as that violation caused some kind of harm to their "direct economic interests."[173] Will prong three bid protest jurisdiction be used as a subterfuge to get around the need of having a prime contractor sponsor a subcontractor's claim under the CDA? Until the Federal Circuit has a chance to weigh in again, the line between what is contract formation versus contract administration will remain fuzzy.

Conclusion

On one hand, *Percipient.ai* should be viewed as a victory for offerors of commercial products and commercial services that have been told far too often that only some highly customizable, developmental item can satisfy the US government's "special" needs. The majority's decision requires more accountability from agencies in their determinations of what is and is not commercially feasible by opening those determinations up to protests by prospective subcontractors, meaning agencies can no longer rely upon self-interested primes to tell them what products and services can and cannot satisfy the US government's needs. But today's protester could be tomorrow's awardee. And while Percipient may be pleased it

can continue its action, one can imagine CACI is none too pleased that its sourcing decisions under its prime contract can now be scrutinized in federal court for compliance with FASA's commercial preference. Nathaniel E. Castellano and Aime J. Joo, in an article for the *Nash & Cibinic Report* about the oral argument in *Percipient.ai*, correctly observed that "[p]rotests and protesters appear in all shapes and sizes, at all stages of the procurement process, involving a wide variety of procurement vehicles and mechanisms. They must all navigate the 'interested party' framework."[174] The same is true of awardees and agencies. They also come in all shapes and sizes and also must navigate who can challenge their procurement decisions under the Tucker Act's waiver of sovereign immunity. Clarity as to the limits of that waiver is therefore essential to everyone involved in the US federal procurement system.

But if that clarity is lacking from *Percipient.ai*, what can be done to fix it? Ideally, this is a task for Congress, as it alone has the power to waive sovereign immunity and to delimit the scope of the waiver it intends to grant.[175] Congress can define "interested party" and other terms used throughout the Tucker Act by enacting a "definitions" section, much like it did with CICA. But just as if men were angels, there would be no need for government,[176] the inherent inability of Congress to enact legislation delimiting every possible set of circumstances for which the government may be sued leaves courts to take up the mantle "to say what the law is."[177] To this end, Judge Solomson, in a special column for the Nash & Cibinic Report on *Percipient.ai*, made the "modest proposition" that "the bench, the bar, agency procurement officials, and industry would benefit" if the Federal Circuit increased "its en banc consideration of Government contract cases" like Percipient.ai that have far-reaching consequences to the procurement system.[178] This author joins in that modest proposal, with one addendum. If the Federal Circuit sitting en banc does decide to reconsider *Percipient.ai*, either on a motion for reconsideration filed in that case or in future litigation, then any en banc decision should be deliberate about outlining the limits of the Tucker Act's waiver of sovereign immunity.

Granted, the majority's decision does make a number of valid points about how ADRA and CICA are not the same in terms of what actions are permitted under them, which in turn should determine who should be allowed to protest under each statute.[179] Nonetheless, the holding in *Percipient.ai* that commercial product and commercial service providers have standing under prong three despite not being actual or prospective bidders suffers from a lack of consistency and predictability. The holding lacks consistency because the majority arrived at its decision only by going to great lengths to distinguish previous Federal Circuit precedent to avoid overruling it (something only the Federal Circuit sitting en banc can do[180]), leaving the scope of that previous precedent less clear. The *Percipient.ai* holding lacks predictability because the majority left many questions unanswered, such as the type of harm that would-be subcontractors need to show to bring prong three challenges alleging violations of FASA's commercial preference, whether other procurement statutes require standing for non-bidders, and if there are any post-award procurement actions safe from protest. Consistency and predictability are the hallmarks of judicial decision-making.[181] Any reconsideration of *Percipient.ai* should keep these goals in mind before lowering the king's ears any further. PL

Endnotes

1. Michel Foucault, *Truth and Power*, *in* 3 Power: Essential Works of Foucault, 1954–1984, 111, 122 (2001).
2. *See, e.g.*, Adam Serwer, *The Supreme Court Puts Trump Above the Law*, The Atlantic (July 1, 2024), https://www.theatlantic.com/politics/archive/2024/07/supreme-court-donald-trump-immunity-decision/678859/.
3. *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 478 (1793) ("[I]n cases of actions against the United States, there is no power which the Courts can call to their aid.").
4. *See* Scanwell Labs. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 1970); *see also* Alden v. Maine, 527 U.S. 706, 767 n.6 (Souter, J., dissenting) (discussing natural law origins of sovereign immunity).
5. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).
6. Foucault, *supra* note 1, at 122.
7. *See* Trump v. United States, 144 S. Ct. 2312, 2329 (2024).
8. *See* United States v. Clarke, 33 U.S. 436, 443 (1834) ("As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction.").
9. *See* U.S. Const. amend. XI.
10. Tucker Act, ch. 359, 24 Stat. 505 (Mar. 3, 1887) (codified as amended in scattered sections of 28 U.S.C.).
11. *See* 28 U.S.C. § 1491(a)(1), (b)(1).
12. 104 F.4th 839 (Fed. Cir. 2024).
13. *See, e.g.*, Hon. Matthew H. Solomson, *Take It to the Banc: A General Plea for Increased Consistency and Clarification*, 38 Nash & Cibinic Rep. ¶ 43 (July 2024).
14. *See* 10 U.S.C. § 3406(f); 41 U.S.C. § 4106(f).
15. *Percipient.ai, Inc.*, 104 F.4th at 850.
16. *See id.* at 851–58.
17. *Id.* at 858.
18. Am. Fed'n of Gov't Emps., AFL-CIO v. United States (*AFGE*), 258 F.3d 1294, 1301 (Fed. Cir. 2001) (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)).
19. *See Percipient.ai, Inc.*, 104 F.4th at 873 (Clevenger, J., dissenting).
20. *Id.* To prepare prisoners for execution during the Reign of Terror, French soldiers cut a prisoner's hair very short to make sure the blade of the guillotine was not impeded as it did its job. This led young Parisians to cut their hair short as a political fashion statement for the victims' balls that came into vogue after the Reign of Terror had ended, giving birth to the "guillotine haircut." *See* Kimberly Chrisman-Campbell, *Hair, Politics, and Power at the Court of Versailles*, *in* The Versailles Effect: Objects, Lives, and Afterlives of the Domain 105 (Mark Ledbury & Robert Wellington eds., 2020).
21. Tucker Act, ch. 359, 24 Stat. 505 (Mar. 3, 1887) (codified as amended at 28 U.S.C. § 1491(a)(1)).
22. Perkins v. Lukens Steel Co., 310 U.S. 113, 126 (1940).
23. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 706(2)(A)).

24. 5 U.S.C. § 702.
25. 424 F.2d 859, 873 (D.C. Cir. 1970).
26. 135 Ct. Cl. 63, 69–70 (1956).
27. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25 (codified at 28 U.S.C. § 1491(a)(3)).
28. *Id.* (conferring jurisdiction over "any contract claim brought before the contract is awarded").
29. *Compare* Price v. U.S. Gen. Servs. Admin., 894 F.2d 323, 324–25 (9th Cir. 1990), *and* Rex Sys., Inc. v. Holiday, 814 F.2d 994, 997–98 (4th Cir. 1987) (holding district courts no longer had jurisdiction over pre-award protests after enactment of the Federal Courts Improvement Act of 1982), *with* Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1057–58 (1st Cir. 1987), *and* Coco Bros. v. Pierce, 741 F.2d 675, 678–79 (3d Cir. 1984) (holding district courts retained their jurisdiction over pre-award protests).
30. Budget and Accounting Act of 1921, ch. 18, § 301, 42 Stat. 20, 23 (currently codified as amended at 31 U.S.C. §§ 701–12).
31. *See* Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 Harv. J. on Legis. 399, 403 (1992). For a detailed history and analysis of CICA and the role GAO plays in hearing bid protests, see Robert Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225. The author wishes to thank Messrs. Metzger and Lyons for their article's thorough history of the bid protest jurisdiction of both the COFC and GAO, which proved invaluable in the preparation of this article.
32. *See* 31 U.S.C. § 3554(b)(1).
33. Competition in Contracting Act of 1984, Pub. L. No. 98-369, tit. VII, sec. 2701, 98 Stat. 1175 (codified as amended in sections of titles 10, 31 & 41 of the U.S. Code); *see* 31 U.S.C. § 3553(a).
34. 31 U.S.C. § 3551(1).
35. *Id.* § 3551(2)(A). CICA also includes a definition of "interested party" that is specific to challenges to conversions of functions being performed in-house by the government to private sector performance, which are known as "A-76" actions after the Office of Management and Budget (OMB) Circular A-76 governing the conversion process. *See id.* § 3551(2)(B).
36. To add to the confusion, CICA also conferred jurisdiction upon the General Services Administration Board of Contract Appeals to hear protests of automatic data processing procurements, until that forum's bid protest jurisdiction was stripped by the Clinger-Cohen Act of 1996. *See* Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. B.J. 243, 251–52 (2009). So, for a time, disappointed offerors had *four* options of where to file a protest.
37. 142 Cong. Rec. S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen).
38. Administrative Disputes Resolution Act, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874–75 (1996); *see* Percipient.ai, Inc. v. United States, 104 F.4th 839, 853 (Fed. Cir. 2024).
39. *See* Metzger & Lyons, *supra* note 31, at 1227.
40. 28 U.S.C. § 1491(b)(1).
41. *See Percipient.ai, Inc.*, 104 F.4th at 853–54.
42. *See* 28 U.S.C. § 1491(b)(4).
43. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered section of 10 U.S.C. & 41 U.S.C.).
44. 10 U.S.C. § 3406(f)(1); 41 U.S.C. § 4106(f)(1).
45. 10 U.S.C. § 3406(f); 41 U.S.C. § 4106(f).
46. 10 U.S.C. § 3453(a)(3); 41 U.S.C. § 3307(b)(3).
47. 766 F.3d 1409 (Fed. Cir. 2014).
48. *Id.* at 1410–11.
49. *Id.*
50. *Id.* at 1412.
51. *Id.* at 1413.
52. *Id.* (quoting 41 U.S.C. § 4106(f)(1)).
53. *Id.*
54. *Id.*
55. *Id.* at 1414.
56. 57 F.4th 993 (Fed. Cir. 2023).
57. *Id.* at 996–97.
58. *Id.*
59. *Id.* at 999.
60. *Id.* at 999–1000.
61. *Id.* at 1000.
62. *Id.* at 999 n.3.
63. SRA Int'l, Inc. v. United States, 766 F.3d 1409, 1413 (Fed. Cir. 2014).
64. *Id.*
65. *See, e.g.*, mLINQS, LLC v. United States, No. 22-1351, 2023 WL 2366654, at *15–16 (Mar. 6, 2023).
66. *See* Tolliver Grp., Inc. v. United States, 151 Fed. Cl. 70, 99 (2020). *Tolliver* also relied upon pre-*SRA* COFC caselaw that had already come to recognize the disconnect between an agency's cancellation decision and the subsequent issuance or proposed issuance of a task order to hold the FASA task order bar does not to apply to protests of an agency's decision to cancel a solicitation. *See id.* at 105 (citing BayFirst Sols., LLC v. United States, 104 Fed. Cl. 493, 499, 507–508 (2012); MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503, 533 (2011)).
67. *See mLINQS, LLC*, 2023 WL 2366654, at *15–16; *Tolliver Grp., Inc.*, 151 Fed. Cl. at 93–94; *see also MORI Assocs., Inc.*, 102 Fed. Cl. at 533–34.
68. *See mLINQS, LLC*, 2023 WL 2366654, at *15–16.
69. 258 F.3d 1294 (Fed. Cir. 2001).
70. *Id.* at 1296–97.
71. *Id.*
72. *Id.* at 1296–98 (citing 5 U.S.C. § 702).
73. *Id.* at 1301–02.
74. *Id.* at 1301.
75. *Id.* at 1301–02 (quoting 142 Cong. Rec. S11848 (statement of Sen. Cohen)) (emphasis in original).
76. *Id.* at 1301.
77. *Id.* at 1302.
78. *Id.*
79. *Id.*
80. *See* SEKRI, Inc. v. United States, 34 F.4th 1063, 1071–73 (Fed. Cir. 2022) (holding that a nonprofit that was qualified as a mandatory source in the AbilityOne program had standing as a "prospective bidder" to protest the agency's failure to designate the nonprofit in the solicitation as a mandatory source); Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1343–45 (Fed. Cir. 2008) (holding contractors that submitted qualifying proposals in response to a request for information had standing as "prospective bidders" to challenge agency's decision to forgo competition and instead have prime contractor subcontract out the work that was contemplated by the request for information).
81. *See, e.g.*, Aero Spray, Inc. v. United States, 156 Fed. Cl. 548, 569 (2021) (holding that awardee of a multiple-award IDIQ contract could not challenge another contractor's award because "an awardee, by definition, is not an actual or prospective offeror"). In his special column on *Pericipient.ai* for the *Nash & Cibinic Report*, Judge Solomson observed that his decision in *Aero Spray, Inc.* reflected the difficulties of applying CICA's definition of "interested party" to Section 1491(b)(1) of the Tucker Act given the differences between the two statutes. *See* Solomson, *supra* note 13. Those difficulties notwithstanding, he found against standing due to "*AFGE*'s focus on disappointed bidders and its rejection of the broader APA *Scanwell* standing rules." *Aero Spray, Inc.*, 156 Fed. Cl. at 570. Despite its shortcomings then, *AFGE* at least provided the COFC with a somewhat clear framework to determine who has standing to pursue a protest under the Tucker Act.
82. *But see* Validata Chem. Servs. v. U.S. Dep't of Energy, 169 F. Supp. 3d 69, 78–89, 91 (D.D.C. 2016) (finding subcontractor's

claims asserting that prime contractor of a government contract had improperly awarded a small business set-aside subcontract to one of its competitors were covered by ADRA and, thus, should be transferred to COFC). *Validata* is noteworthy because the majority in *Percipient.ai* found Judge Moss's analysis of ADRA in that case to be persuasive. Percipient.ai, Inc. v. United States, 104 F.4th 839, 855 (Fed. Cir. 2024). *Validata* was decided by a federal district court, however, and so is not binding on either the Federal Circuit or the COFC. Nonetheless, that the majority favorably mentioned it suggests *Validata* could be relied upon by COFC judges going forward to determine who has protest standing under the Tucker Act.

83. *Percipient.ai, Inc.*, 104 F.4th at 844.
84. *Id.*
85. *Id.*
86. *Id.* at 844–45.
87. *Id.* at 845.
88. *Id.*
89. *Id.*
90. *Id.* at 845–46.
91. *Id.* at 846.
92. *Id.*
93. *Id.* at 847–51.
94. 10 U.S.C. § 3406(f); *see Percipient.ai, Inc.*, 104 F.4th at 847–49.
95. *Percipient.ai, Inc.*, 104 F.4th at 847–49.
96. *Id.* at 851.
97. *Id.*
98. *Id.* at 849.
99. *Id.* at 849–50 (citing SRA Int'l, Inc. v. United States, 766 F.3d 1409, 1413 (Fed. Cir. 2014)).
100. *Id.* at 850.
101. *Id.* at 847, 850–51.
102. *Id.* at 850–51.
103. *See, e.g.*, Daniel Wilson, *Fed Cir. Says No Task Order Bar for Commercial Co. Protest*, Law360 (June 7, 2024), https://www.law360.com/articles/1845508/fed-circ-says-no-task-order-bar-for-commercial-co-protest.
104. *See* Nathaniel E. Castellano & Aime J. Joo, *Bid Protest Jurisdiction and Standing: Percipient.ai Presents Federal Circuit with Critical Questions*, 38 Nash & Cibinic Rep. ¶ 5 (Jan. 2024).
105. *Id.*
106. *See Percipient.ai, Inc.*, 104 F.4th at 851–58; Solomson, *supra* note 13.
107. *Percipient.ai, Inc.*, 104 F.4th at 851.
108. *Id.*
109. *Id.* at 851–52.
110. *Id.* at 853–55.
111. *Id.* at 855.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 856.
117. *Id.* (quoting 28 U.S.C. § 1491(b)(1)) (emphasis in original).
118. *Id.*
119. *Id.* at 856–57.
120. *Id.* at 857.
121. *Id.* at 856–57.
122. *Id.* at 857.
123. *Id.*
124. *Id.* at 858.
125. *Id.* The majority also held Percipient's claims were not untimely challenges to the terms of a solicitation under the waiver rule set forth in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). *Percipient.ai, Inc.*, 104 F.4th at 858–59. The *Blue & Gold* waiver rule is beyond the scope of this article.
126. *Percipient.ai, Inc.*, 104 F.4th at 859–73 (Clevenger, J., dissenting).
127. *Id.* at 863.
128. *Id.* at 862.
129. *Id.* at 862–64.
130. *Id.* at 865.
131. *Id.* at 865–68.
132. *Id.* at 871 (quoting *To Revise and Streamline the Acquisition Laws of the Federal Government, and for Other Purposes: Hearing on S. 1587 Before the S. Comm. on Governmental Affs. and the S. Comm. on Armed Servs.*, 103rd Cong. 293 (1994)).
133. *Id.*
134. *Id.* at 869–70 (quoting majority opinion at 856–57).
135. *Id.* at 870.
136. *Id.* at 873.
137. Michael J. Anstett, Alexander B. Ginsberg & James J. McCullough, *Fed. Cir. Narrows Task Order Protest Bar, Broadens Interested-Party Test*, 66 Gov't Contractor ¶ 171 (June 26, 2024).
138. William Shakespeare, The Tempest act 2, sc. 1.
139. Heyer Prods. Co. v. United States, 135 Ct. Cl. 63, 69–70 (1956).
140. Scanwell Labs. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 2070).
141. *See supra* notes 27 & 38.
142. Percipient.ai, Inc. v. United States, 104 F.4th 839, 873 (Fed. Cir. 2024) (Clevenger, J., dissenting).
143. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).
144. *Cf.* Frothingham v. Mellon, 262 U.S. 447 (1923) (ruling that a taxpayer does not have standing to challenge the constitutionality of a federal statute).
145. Foucault, *supra* note 1, at 122.
146. Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489, 510 (Spring 2013).
147. *See* 10 U.S.C. § 3406(f)(1); 28 U.S.C. § 1491(b)(1).
148. Anstett et al., *supra* note 137.
149. Percipient.ai, Inc. v. United States, 104 F.4th 839, 850–51 (Fed. Cir. 2024).
150. *AFGE*, 258 F.3d 1294, 1301 (Fed. Cir. 2001).
151. *See Percipient.ai, Inc.*, 104 F.4th at 854–55.
152. *Id.* at 867 (Clevenger, J., dissenting).
153. *See generally AFGE*, 258 F.3d at 1298–302.
154. *Percipient.ai, Inc.*, 104 F.4th at 854–55 (majority op.).
155. *Id.* at 849.
156. Solomson, *supra* note 13 (quoting *Percipient.ai, Inc.*, 104 F.4th at 849) (emphasis in original); *see supra* notes 66–68.
157. mLINQS, LLC v. United States, No. 22-1351, 2023 WL 2366654, at *16 (Mar. 6, 2023).
158. SRA Int'l, Inc. v. United States, 766 F.3d 1409, 1413 (Fed. Cir. 2014) (emphasis added); *see also* 22nd Century Techs., Inc. v. United States, 57 F.4th 993, 999 (Fed. Cir. 2023) ("FASA's unambiguous language categorically bars jurisdiction over protests . . . [made] 'in connection with the issuance of a task or delivery order.'") (quoting 10 U.S.C. § 3406(f)(1)).
159. *See Percipient.ai, Inc.*, 104 F.4th at 871 (Clevenger, J., dissenting).
160. *See id.* at 854, 857 (majority op.).
161. *Id.* at 873 (Clevenger, J., dissenting)
162. *See, e.g.*, 15 U.S.C. § 644(e) (requiring agencies, "to the maximum extent practicable," to facilitate small business participation at both the contractor and subcontractor levels when formulating a procurement strategy); DFARS 227.7202-1(a) (requiring agencies, "to the maximum extent practicable," to obtain commercial computer software and commercial computer software documentation on a fixed-price, competitive basis); FAR 17.106-3(a) (requiring agencies, "to the maximum extent practicable," to seek, retain, and promote subcontractor participation in multiyear contracting requirements).

163. *Compare* 31 U.S.C. § 3553(a), *with* 28 U.S.C. § 1491(b)(1).
164. *Percipient.ai, Inc.*, 104 F.4th at 858 (majority op.).
165. Rex Serv. Corp. v. United States, 448 F.3d 1305, 1308 (Fed. Cir. 2008).
166. Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1362 (Fed. Cir. 2009).
167. COFC Rule 24(a) allows a party to intervene as of right if it (1) "is given an unconditional right to intervene by a federal statute" or (2) "claims an interest relating to the property or transaction that is the subject of an action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." R. Ct. Fed. Cl. 24(a). A subcontractor whose subcontract award is imperiled by a protest brought by one of its competitors challenging the award of its subcontract should be able to show an interest in the action and a need to represent its interests that requires intervention as a matter of right under Rule 24(a)(2). *Cf.* Che Consulting, Inc. v. United States, 71 Fed. Cl. 634, 635 (2006) (holding subcontractor's pecuniary interest in the outcome of a pre-award protest was sufficient for it to intervene as a matter of right because plaintiff's protest, if successful, would eliminate requirement for subcontractor's maintenance services).
168. *Weeks Marine, Inc.*, 575 F.3d at 1362.
169. *Percipient.ai, Inc.*, 104 F.4th at 852.
170. *See* John Cibinic Jr. et al., Formation of Government Contracts 15-6 (5th ed. 2023).
171. *See* John Cibinic Jr., James F. Nagle & Ralph C. Nash Jr., Administration of Government Contracts 1131 (5th ed. 2016).
172. *See* Winter v. FloorPro, Inc., 570 F.3d 1367, 1369 n.1, 1371 (Fed. Cir. 2009).
173. *See Percipient.ai, Inc.*, 104 F.4th at 851–58.
174. Castellano & Joo, *supra* note 104.
175. *See* United States v. Clarke, 33 U.S. 436, 443 (1834).
176. The Federalist No. 51 (James Madison).
177. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) (quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)).
178. Solomson, *supra* note 13.
179. *See* Percipient.ai, Inc. v. United States, 104 F.4th 839, 855–56 (Fed. Cir. 2024).
180. *See* Fed. Cir. R. 35(a).
181. *See In re* Owens-Corning Fiberglass Corp., 774 F.2d 1116, 1129 (Fed. Cir. 1985) ("There is a valuable public interest in consistency and predictability in the law.") (Bissell, J., dissenting).