THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

JULY 2024 | VOLUME 38 | ISSUE 7

¶ 43 TAKE IT TO THE *BANC*: A General Plea For Increased Consistency And Clarification

A special column by the Hon. Matthew H. Solomson, Judge, U.S. Court of Federal Claims. Judge Solomson has served on the Court since 2020. He previously practiced Government contracts law in private practice, at the U.S. Department of Justice, and in-house. He is the author of Court of Federal Claims: Jurisdiction, Practice, and Procedure, *a legal treatise published by Bloomberg BNA in 2016.*

Variety may be the spice of life, but in the law—and for trial courts, litigators, and anyone having to comply with particular legal rules—we crave uniformity, consistency, and predictability. Judges also try their best to get the correct outcome, although at least one party is almost certain to disagree that such goal has been achieved in any particular case. Since 2006, I have been on a journey to get the "interested party" standing question right. This is a threshold issue in so-called "bid protests" before our court. But my effort to understand and apply the law, as of late, has resulted in what one might call judicial whiplash. If you're guessing that my most recent source of neck pain is *Percipient.ai, Inc. v. U.S.*, ___ F.4th ___, 2024 WL 2873163 (Fed. Cir. June 7, 2024), you're right. The winding road to our jurisprudential destination—*and where are we, precisely?*—is worth retracing as it illustrates the uncertainty the bench and bar often face when a U.S. Court of Appeals for the Federal Circuit panel decision breaks new ground or heads off in an unexpected direction.

Statutory Background

Before we delve into the case law, we must mark several critical statutory signposts.

The Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, div. B, tit. VII, § 2701, 98 Stat. 494, 1175, governs the bid protest jurisdiction of the Government Accountability Office (GAO), see 31 USCA §§ 3551–3556, and defines both "interested party" and "protest." For example, the term "interested party" "*with respect to a contract* or a solicitation or other request for offers *described in paragraph (1)*, means 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[.]" 31 USCA § 3551(2) (emphasis added). Paragraph (1) of that same statutory provision—referenced in the definition of "interested party"— defines the term "protest" as, among other things, "a written

objection by an interested party to any of the following: (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services[;] (B) The cancellation of such a solicitation or other request[;] (C) *An award or proposed award of such a contract*." 31 USCA § 3551(1) (emphasis added).

The Tucker Act, 28 USCA § 1491(b), as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874, provides the U.S. Court of Federal Claims (COFC) with exclusive "*jurisdiction* to render judgment on an *action* by an *interested party* objecting [1] to a solicitation by a Federal agency for bids or proposals for a proposed contract or [2] to a proposed award or [3] the award of a contract or [4] *any alleged violation of statute or regulation in connection with a procurement or a proposed procurement*." 28 USCA § 1491(b)(1) (emphasis added). (ADRA originally provided the district courts with such jurisdiction as well, but it was sunset on January 1, 2001. Pub. L. No. 104-320, § 12(d).) Section 1491(b) neither mentions the word "protest" nor defines the term "interested party."

Prior to ADRA, the district courts possessed Administrative Procedure Act (APA) jurisdiction over challenges to agency procurement decisions. See 5 USCA § 706. Such jurisdiction was referred to as "*Scanwell* jurisdiction," named after the case recognizing it. See *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C. Cir. 1970). ADRA did not address what remains of *Scanwell* jurisdiction following ADRA's January 1, 2001, sunset date foreclosing 28 USCA § 1491(b) actions in district court.

Who Is An "Interested Party" Under The Tucker Act?

In *American Federation of Government Employees v. U.S.*, 258 F.3d 1294, 1302 (Fed. Cir. 2001), 43 GC ¶ 292 (*AFGE*), the U.S. Court of Appeals for the Federal Circuit first interpreted the term "interested party" in 28 USCA § 1491(b) to match CICA's definition of that statutory term. The Federal Circuit acknowledged that part of the difficulty in defining the term "interested party" for purposes of the Tucker Act arises not only from the lack of statutory text but also from the murkiness of the legislative history. While ADRA's legislative history reflects an intent to transfer *Scanwell* jurisdiction to the COFC, the scope of the *Scanwell* doctrine is also uncertain. *AFGE*, 258 F.3d at 1301. The Federal Circuit thus considered:

> (1) whether Congress intended to limit ADRA's coverage to claims "brought by disappointed bidders" challenging the solicitation or award of a federal contract—because such claims constituted "[t]he vast majority of cases brought pursuant to *Scanwell*"; or (2) whether Congress "intended to give the Court of Federal Claims jurisdiction over any contract dispute that could be brought under the APA"—because "*Scanwell* itself [wa]s based on the APA." The Federal Circuit went with the former, and accordingly "interpret[ed] the references in [ADRA's] legislative history to the '*Scanwell* jurisdiction' of the district courts as references to [their] jurisdiction over bid protest cases brought under the APA *by disappointed bidders*, like the plaintiff in *Scanwell*."

Aero Spray, Inc. v. U.S., 156 Fed. Cl. 548, 560 (2021), 63 GC ¶ 338 (internal citations omitted) (quoting *AFGE*, 258 F.3d 1301–02).

Almost 20 years ago, when I was a junior associate, I co-authored a Briefing Paper with Arnold & Porter partner Jeffrey Handwerker on the scope of the term "interested party" in the Tucker Act. We posited that, notwithstanding the Federal Circuit's importation of CICA's "interested party" into 28 USCA § 1491(b), the statutory text in the latter could be read to provide standing to subcontractors in procurement challenges. See Matthew H. Solomson & Jeffrey L. Handwerker, *Subcontractor Challenges to Federal Agency Procurement Actions*, 06-3 Briefing Papers 1 (Feb. 2006)

(discussing *Eagle Design & Management, Inc. v. U.S.*, 62 Fed. Cl. 106, 108 (2004), 46 GC ¶ 380). We pointed out that "*AFGE* did not deal 'squarely' with the full range of actions over which the COFC has jurisdiction, and therefore jurisdiction over subcontractor protests could remain as a viable proposition." *Id.* Our interpretive hypothesis was this:

> In the context of an action that alleges a violation of a procurement statute or regulation, the CICA definition of "interested party" does not appear to fit. The *AFGE* case…that established the CICA definition of "interested party" as controlling did not involve a "violation of statute or regulation in connection with a procurement or a proposed procurement[.]"…
>
> The problem that arises when the CICA definition of "interested party" is applied in "violation of statute or regulation in connection with a procurement or a proposed procurement" cases is that, while the CICA definition is concerned with whether the plaintiff is "affected by the award of the contract or by failure to award the contract," the Federal Circuit has made clear that a *RAMCOR*-type action may be brought independent of whether the plaintiff objects to the actual contract procurement. CICA's definition of "protest" is more limited than the scope of actions described by the Tucker Act and does not include an independent "violation of statute or regulation in connection with a procurement or a proposed procurement" prong[.]

Id. (footnotes omitted) (discussing *RAMCOR Services Group, Inc. v. U.S.*, 185 F.3d 1286, 1289 (Fed. Cir. 1999), 41 GC ¶ 361). (In *RAMCOR*, the Federal Circuit held that the COFC has jurisdiction pursuant to 28 USCA § 1491(b) to decide actions challenging an agency's so-called CICA-stay override, where the underlying procurement is not at issue before the trial court. The GAO, in contrast, has disclaimed such jurisdiction.)

With respect to APA claims that look like bid protests—*i.e.*, *Scanwell* actions—we also pointed out that ADRA only sunset such jurisdiction with respect to proper 28 USCA § 1491(b) actions, which include only those brought by an "interested party." In other words, a district court's jurisdiction to decide procurement-related actions may vary inversely with the scope of the "interested party" definition applied in the COFC. The broader the scope of "interested party," the greater the COFC's exclusive jurisdiction following ADRA's sunset date. Conversely, we posited, the district court may have jurisdiction over procurement challenges brought by a plaintiff that does not qualify as an "interested party." See, e.g., *City of Albuquerque v. U.S. Department of the Interior,* 379 F.3d 901, 911 (10th Cir. 2004):

> [T]he legislative history of [ADRA] does not lead to the conclusion Congress intended to leave parties who were not actual or prospective bidders without a remedy. [The agency] has not provided, nor have we found, any piece of legislative history suggesting parties who had some avenue available to seek redress before the passage of the [ADRA] would be left without an avenue for relief after the Act became effective.

That would mean even if a subcontractor could not bring a Tucker Act bid protest-type action as an "interested party" pursuant to the CICA definition, perhaps a subcontractor could maintain a *Scanwell* claim under the APA.

Ten years after our Briefing Paper was published, the district court in *Validata Chemical Services v. U.S. Department of Energy*, 169 F. Supp. 3d 69, 84 (D.D.C. 2016), cited us and similarly concluded that "any arguable parallel between CICA and ADRA breaks down…where the plaintiff's cause of action falls under the third prong of ADRA"—or under the fourth prong, depending on one's count—"which does not require that the plaintiff object to a federal contract solicitation or award." The district court held that the plaintiff, Validata—a would-be subcontractor—qualified as "an 'interested party' within the meaning of ADRA." 169 F. Supp. 3d at 87. The district court thus

transferred the case to the COFC, where the Government promptly argued that our court lacked jurisdiction because Validata was not an "interested party" pursuant to the CICA definition the Federal Circuit adopted in *AFGE*.

Difficulties In Applying CICA Definitions To The Tucker Act

Since joining the bench, I have had several opportunities to address the scope and import of the "interested party" statutory language. In *Aero Spray Inc, v. U.S.*, 156 Fed. Cl. 548 (2021), for example, I noted that employing "CICA's definition of 'interested party' naturally begs yet further questions, particularly in the context of 28 U.S.C. § 1491(b)[,]" including:

> What are the parameters of an "actual or prospective bidder"? How does the definition of "interested party" apply in a pre-award challenge to a solicitation, as compared to in a post-award challenge to the award of a contract? Of particular import in this case, does "interested party" include a contract awardee that nevertheless objects to some other aspect of the government's procurement process? Does the definition need to be adjusted for an action challenging "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," which need not involve an underlying attack on a solicitation or contract award? What constitutes a "direct economic interest"? Finally, what effect did ADRA's sunset provision have on the district courts' *Scanwell* jurisdiction (*i.e.*, may non-interested parties with APA standing still maintain procurement-related actions in a district court)?

Aero Spray, 156 Fed. Cl. at 561 (footnotes omitted). In that case, I agreed with the GAO that in a multiple-award indefinite delivery, indefinite quantity (IDIQ) procurement, an awardee could not challenge another contractor's award because "an awardee, by definition, is not an actual or prospective offeror" and that "the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract." 156 Fed. Cl. at 569 (quoting *Aegis Defense Services, LLC*, Comp. Gen. Dec. B-412755, 2016 CPD ¶ 98, 2016 WL 1237962, at *2 & n.5). I further concluded that while an "economic interest in the issuance of future task orders" may be sufficient under APA's more lenient standing test, such an interest "is too speculative" to constitute a "direct economic interest" under Federal Circuit's precedent for standing and prejudice purposes in § 1491(b) actions. 156 Fed. Cl. at 569. This outcome was dictated, I reasoned, by "*AFGE's* focus on disappointed bidders and its rejection of the broader APA *Scanwell* standing rules." 156 Fed. Cl. at 570.

In yet an earlier case, *Tolliver Group, Inc. v. U.S.*, 151 Fed. Cl. 70 (2020)—and of direct relevance to *Percipient*—I addressed the limits of comparing CICA and the Tucker Act in the context of the task order protest bar contained in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 324. The FASA task order protest bar provides that "[a] *protest* is not authorized *in connection with* the *issuance* or *proposed issuance* of a task or delivery order...." 41 USCA § 4106(f)(1) (emphasis added). I concluded that the operative terms "protest" and "issuance or proposed issuance of a task or delivery order," 41 USCA § 4106(f)(1), "considerably narrow the FASA's jurisdictional bar." *Tolliver*, 151 Fed. Cl. at 95.

I explained that the FASA task order bar, by its terms, applies only to "protest[s]." But does an agency's alleged violation of the Rule of Two—by not setting aside a procurement for small business—constitute a "protest"? Everyone describes § 1491(b) actions colloquially as protests, but I reasoned that we need to focus on the language that Congress actually enacted in its statutes. See *Azar v. Allina Health Services*, 587 U.S. 566, 574, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attached different meanings to the same term in…related statutes."). Neither the FASA task order protest bar provision nor the Tucker Act defines the term "protest," and thus the question of what that term includes is not straightforward.

CICA defines "protest," but it simply does not cover the entire scope of actions the Tucker Act contemplates. *Tolliver* compared the two statutes as follows:

> Focusing on CICA's definition of the word "protest," a Tucker Act cause of action may be "in connection with" the issuance (or proposed issuance) of a task order, but not subject to the FASA task order protest bar because the cause of action simply does not qualify as a "protest." As a more obvious practical analogy demonstrating the accuracy of that conclusion, the government could not contend that a Contract Disputes Act ("CDA") claim qualifies as a "protest" subject to the FASA task order protest bar. *Kellogg Brown & Root Servs., Inc. v. United States*, 117 Fed. Cl. 764, 770 (2014) (holding that "this matter is not within our bid protest jurisdiction, but instead involves questions of contract administration that must be brought under the CDA"); *Itility, LLC v. United States*, 124 Fed. Cl. 452, 458 (2015) (noting that "a long line of our cases has held that the 'interested party' standing to bring a bid protest does not extend to the complaints of contractors concerning the administration of contracts they have been awarded and performing"); *Digital Techs., Inc. v. United States*, 89 Fed. Cl. 711, 722, 728–29 (2009) ("By its terms, the FASA prohibition on bid protests does not apply to a breach of contract case" or CDA claims).
>
> A further comparison of the FASA task order protest bar to the Tucker Act language (and *RAMCOR*'s interpretation of the latter) is instructive and demonstrates that not all § 1491(b)(1) claims qualify as a "protest." For starters, the Tucker Act nowhere employs the term "protest" but rather refers repeatedly to "an action" (or "any action"). 28 U.S.C. § 1491(b).…[T]he fourth prong of § 1491(b)(1)—pursuant to which a plaintiff may allege a "violation of statute or regulation in connection with a procurement or a proposed procurement"—is ***not*** necessarily a "protest," at least as that term is defined in CICA. Indeed, although "ADRA covers *primarily* pre- and post-award bid protests," the Federal Circuit in *RAMCOR* explicitly reversed [the COFC's] determination "that a [plaintiff] could only invoke § 1491(b)(1) jurisdiction by including in its action an attack on the merits of the underlying contract award" or the solicitation. *RAMCOR*, 185 F.3d at 1289 (emphasis added).

Tolliver, 151 Fed. Cl. at 96–97 (footnotes omitted).

In sum, I concluded that because "binding Federal Circuit precedent requires us to apply CICA's definition of 'interested party' to § 1491(b)," and both "interested party" and "protest" are defined in the very same statutory provision, "[t]here is no plausible justification for applying CICA's definition of "interested party" to § 1491(b), while ignoring CICA's definition of "protest" in interpreting a jurisdictional limit on § 1491(b)." *Tolliver*, 151 Fed. Cl. at 98.

I further held that the FASA bar does not apply to the Rule of Two claims at issue in *Tolliver* because the phrase "*issuance or proposed issuance of a task... order*" in the FASA task order bar further limits its scope "insofar as it virtually mirrors *only* the second and third prongs of § 1491(b)(1)—*i.e.*, 'a proposed award or the award of a contract'—but with FASA replacing the Tucker Act's reference to 'award' and 'contract' with, respectively, 'issuance' and 'task order.' " *Tolliver*, 151 Fed. Cl. at 101. The second and third prongs of § 1491(b)(1), properly understood, include challenges to the results or merits of a procurement—an award or proposed award of a contract—but do not cover solicitation protests, which is a distinct cause of action under both the Tucker Act, as amended by ADRA, and CICA's definition of "protest." "Accordingly, just as a challenge to a solicitation is distinct from the challenge to a proposed award of contract, so too a challenge to the selection (or planned selection) of a particular (task order) contracting vehicle does not equate to the 'proposed issuance' of a task order." 151 Fed. Cl. at 101.

Subsequently, however, a Federal Circuit panel in a precedential decision expressly rejected at least part of *Tolliver*'s rationale:

> Relying on a recent [COFC] decision, *Tolliver Group, Inc. v. United States*, 151 Fed. Cl. 70 (2020), 22nd Century argues that FASA does not necessarily reach bid protests brought under the third prong of

> § 1491(b)(1), relating to "action[s]…objecting to…any alleged violation of statute or regulation in connection with a procurement or proposed procurement." *This argument is foreclosed by SRA International*, which held that FASA reached protests brought under § 1491(b)(1)—including those brought under the final prong—as long as the protests are "in connection with the issuance or proposed issuance of a task or delivery order." *See* [*SRA Int'l, Inc. v. United States*, 766 F.3d 1409, 1413 (Fed. Cir. 2014)]. Indeed, the contractor's challenge in *SRA International* was brought under the third prong of § 1491(b)(1), and throughout the opinion we described the challenge as a "protest" for both purposes of § 1491(b)(1) and FASA. *See id.* at 1411–14.

22nd Century Technologies, Inc. v. U.S., 57 F.4th 993, 1000 n.3 (Fed. Cir. 2023), 65 GC ¶ 50 (emphasis added). (While critical of *Tolliver*, the Federal Circuit in *22nd Century* did not address my textual analysis generally, or the phrase "the *issuance or proposed issuance of a task…order*...." in particular.)

Just a few months ago, in *FYI – For Your Information, Inc. v. U.S.*, 170 Fed. Cl. 601 (2024), 66 GC ¶ 116, the plaintiff urged me to follow *Tolliver—22nd Century* notwithstanding—and hold that the FASA task order bar did not apply to its case: a challenge to the Government's refusal to recognize the plaintiff's putative woman-owned small business status. Although I ruled for the Government on several grounds, I stood by my textual analysis in *Tolliver*:

> The precise scope of the FASA task order protest bar is muddled. In *Tolliver Group, Inc. v. United States*, 151 Fed. Cl. 70, 93–101 (2020), this Court explained that FASA's task order protest bar cannot possibly apply to all actions brought pursuant to 28 U.S.C. § 1491(b). The textual analysis behind that conclusion remains sound. FASA's task order protest bar addresses, as its name suggests, "protests." 41 U.S.C. § 4106(f). That is a term of art employed to parallel GAO's jurisdictional statute, the Competition in Contracting Act ("CICA"), 31 U.S.C. Subchapter V ("Procurement Protest System"), §§ 3551–57. But while the term "protest" is defined in 31 U.S.C. § 3551(1), that term does not appear in this Court's primary jurisdictional statute, the Tucker Act, as amended by [ADRA]. And while 28 U.S.C. § 1491(b)(1) *does* provide for a number of actions commonly, but somewhat imprecisely, called bid protests—and that a frustrated offeror may instead file with the GAO in the first instance—this Court also has jurisdiction to decide an "action…objecting to…any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). That latter prong of § 1491(b)(1) encompasses actions that are *not* "protests" and does *not* have an analog at GAO. GAO therefore lacks jurisdiction to decide such actions.
>
> The classic example of an action under the latter prong of § 1491(b)(1) is the Federal Circuit's decision in *RAMCOR*, which involved a challenge not to a solicitation or the outcome of a procurement, but to the government's override of the automatic CICA stay, 31 U.S.C. § 3553(c)(1), typically triggered by the timely filing of a GAO protest. *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)…. But the GAO itself has recognized that it "does not have jurisdiction over *RAMCOR*-type actions brought pursuant to the final prong of 28 U.S.C. § 1491(b)(1)." *Tolliver*, 151 Fed. Cl. at 99–100 & n.41….

170 Fed. Cl. at 613–14 (footnote omitted).

Because "the scope of this Court's jurisdiction to decide certain 'actions' pursuant to the Tucker Act, as amended by ADRA, is not coterminous with GAO's jurisdiction to decide 'protests[,]' " it remained clear to me that FASA's task order protest bar could "*only* deprive the [COFC] of jurisdiction over GAO *protests*, but not of jurisdiction over all *actions* pursuant to 28 U.S.C. § 1491(b)(1)." 170 Fed. Cl. at 614.

Bound by Federal Circuit precedential decisions, however, I recognized in *FYI* that the Federal Circuit in *22nd Century* squarely rejected at least part of *Tolliver*:

> *Unless this issue is revisited by the Federal Circuit en banc, however, all that analysis is academic, as our appellate court has—at least for now—squarely rejected it. 22nd Century Techs., Inc. v. United States*, 57

> F.4th 993, 1000 n.3 (Fed. Cir. 2023)….*Despite FYI's invitation to do otherwise, this Court has no intention of ignoring the Federal Circuit's unambiguous directive*.

170 Fed. Cl. at 613–14 (emphasis added).

The Federal Circuit's *Percipient.ai* Decision

This brings us to the Federal Circuit's decision in June 2024 in *Percipient*. Percipient had asked the COFC to enjoin the Government's alleged violation of its obligations under 10 USCA § 3453 ("Preference for commercial products and commercial services"), which requires agency heads to ensure their contractors conduct market research to determine if commercial or nondevelopmental items are available that can meet the agency's procurement requirements. While Judge Bruggink initially denied a motion to dismiss for lack of jurisdiction, *Percipient,* 165 Fed. Cl. 331, 340 (2023), he later vacated that opinion and, after additional briefing, held that the FASA task order bar precluded jurisdiction. *Percipient*, 2023 WL 3563093, at *3 (Fed. Cl. May 17, 2023).

Percipient appealed and the Federal Circuit, much to everyone's surprise—including Judge Clevenger, who dissented—essentially adopted the logic of *Tolliver* in two important respects.

First, like *Tolliver*, the Federal Circuit reasoned that "the Government's interpretation [of the FASA protest bar] gives no meaning to the words 'issuance or proposed issuance.' " *Percipient*, 2024 WL 2873163, at *6. "Specifically, the Government reads the statute as if it broadly bars all protests made in connection with a task order—including work performed by a proper awardee after issuance of a proper task order—rather than just those protests made 'in connection with the *issuance or proposed issuance of* a task' order." *Percipient* 2024 WL 2873163, at *6. *Tolliver* made this precise point. *Tolliver*, 151 Fed. Cl. at 103 ("The government's interpretive approach would rewrite the FASA task order protest bar as applying 'in connection with a task order' generally or 'in connection with a task order procurement or proposed procurement.' Congress' selection of the phrase '*issuance or proposed issuance*,' however, must be given meaning.").

Second, and more importantly, the Federal Circuit finally acknowledged important textual differences between CICA and the Tucker Act:

> CICA defines an "interested party" as "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." 31 U.S.C. § 3551(2)(A). Notably, CICA's scope of protests does not include the third prong of § 1491(b)(1) ("alleged violation of statute or regulation in connection with a procurement or proposed procurement").

Percipient, 2024 WL 2873163, at *9. Expressly following *Validata*, the Federal Circuit at long last distinguished between "protests" defined in CICA and the Tucker Act's causes of action in § 1491(b):

> [Section] 1491(b)(1) goes beyond the situations considered in CICA. As noted above, CICA limits protests by an interested party to written objections to solicitations, awards or proposed awards of a contract, cancellation of a solicitation, termination, or cancelation of an award, and "[c]onversion of a function that is being performed by Federal employees to private sector performance." The [last] prong of § 1491(b)(1), covering a challenge to "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," in no way resembles CICA; it is not defined with reference to the foregoing specific types of government action, 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. *Compare* 31 U.S.C. § 3551(1), *with* 28 U.S.C. § 1491(b)(1).

Percipient, 2024 WL 2873163, at *10 (citing *RAMCOR*, 185 F.3d at 1289).

Accordingly, the Federal Circuit reasoned that "[t]his lack of correspondence" between CICA and

the Tucker Act "demonstrates that the definition of 'interested party' in CICA is not fairly borrowed to apply to everything that comes under the [last] prong [of Section 1491(b)(1)]—and specifically not for conduct challengeable only under the [last] prong." *Percipient*, 2024 WL 2873163, at *10.

Recognizing that it could not disregard its precedent, the Federal Circuit majority in *Percipient* attempted to thread the needle this way:

> We have not previously addressed the meaning of "interested party" in such circumstances, when the protest actually presented is, and must be, based solely on the third prong—"any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." In other words, we have not previously considered whether a prospective offeror … may file an action raising procurement-related illegalities … where [they] do not challenge the contract between the Government and its contractor (either the award or proposed award of or a solicitation for such a contract). In *AFGE*, the [plaintiff] *did* challenge the contract award, and the third prong could not properly be applied to evade the constraint on standing under the first two prongs. The present case involves no such overlap or potential evasion, and *AFGE* does not address this situation. *This is a crucial distinction* in identifying why *AFGE* does not control here, and one that answers the contention of the dissent that *AFGE* controls this case.

Percipient, 2024 WL 2873163, at *10 (emphasis added).

Judge Clevenger forcefully dissented:

> This case is as close to *SRA* as the law school "on all fours case" can get. In both cases, no challenge is made to any aspect of the task order in any count of the complaint, or otherwise; the relationship between the issuance of the task order and the alleged violation of law is that performance of the task order is allowed to proceed notwithstanding violations of law by the agency following issuance of the task order; and the task order would be upset if the plaintiff prevailed on the merits. The same interpretation of the task order bar that the majority here adopts was presented to and not adopted by the *SRA* court. Indeed, if the majority's interpretation of the task order bar is correct, *SRA* was wrongly decided, and is overruled, and a legion of cases has been wrongly decided by the Claims Court—cases like this one and *SRA*, in which the protest raised no allegation of error with regard to the task order and only challenged subsequent agency action resulting from the issuance of the task order.
>
> Given this court's rule that a later panel is bound by preceding precedent, it is fair to ask how the majority can sidestep away from *SRA* to create and apply a significantly different interpretation of the task order bar in this case.

Percipient, 2024 WL 2873163, at *16 (footnote omitted). (Federal Circuit Local Rule 35(a)(1) provides that "only the court en banc may overrule a binding precedent.")

In a fascinating twist—at least to me—Judge Clevenger's dissent cites my recent decision in *FYI* for the propositions that "[s]ince this court's 2014 decision in *SRA*, the Claims Court has consistently read *SRA* as the binding precedent on the interpretation of § 3406(f)(1) and § 4106(f)(1)" and that "any change to the *SRA* test would have to come from an en banc decision by this court." *Percipient*, 2024 WL 2873163, at *16 n.5. That's a fair summary of my conclusion in *FYI* in light of *22nd Century*. But what Judge Clevenger does *not* mention is that *FYI* stands behind the statutory analysis in *Tolliver* at least in theory; I backed away from it as a practical matter only because of the Federal Circuit's criticism in *22nd Century*.

In any event, the huge wave of law firm client alerts discussing the implications of *Percipient* would seem to support Judge Clevenger's conclusion that the decision "will come as a surprise to the Claims Court and the government contract bar." *Percipient*, 2024 WL 2873163, at *16 n.5.

And now that we have *Percipient*, is *Tolliver* correct? If so, what are we to do about the *22nd*

Century footnote criticizing *Tolliver*? And what does this mean for *AeroSpray*? Does the precise definition of "interested party" depend on what type of § 1491(b) action is at issue? Will we now see a wave of litigation surrounding what *Percipient* means by "overlap or potential evasion" (*i.e.*, in terms of the different prongs of a particular § 1491(b) action)? Don't look at me for answers—I have no idea.

The "interested party" statutory phrase also has jurisdictional implications — another issue regarding which the Federal Circuit recently reversed course, but alas only in a panel decision. See *CACI, Inc.-Federal v. U.S.,* 67 F.4th 1145 (Fed. Cir. 2023), 65 GC ¶ 138. In *Superior Waste Management LLC v. U.S.*, I discussed *CACI* at length, explained why the Supreme Court precedent the Federal Circuit invoked did not require overturning well-established precedent, and asked: "Can the *CACI* panel legitimately claim to have overturned Federal Circuit precedent by invoking a years-old Supreme Court decision?" 169 Fed. Cl. 239, 271 (2024). As I noted in *Superior*, there are several trial court decisions (from the COFC and others) that followed earlier appellate precedent on the grounds that a later panel decision cannot overturn an earlier one. See 169 Fed. Cl. at 271. See also *Entergy Nuclear FitzPatrick, LLC v. U.S.,* 101 Fed. Cl. 464, 473 (2011) (noting that "this Court is in the unenviable position wherein it finds that a panel decision of its appellate body contradicts an earlier decision of that same court"), *aff'd*, 711 F.3d 1382 (Fed. Cir. 2013); *ARRA Energy Co. I v. U.S.*, 97 Fed. Cl. 12, 26 n.8 (2011), 53 GC ¶ 76 ("[T]o the extent that *Rick's Mushroom* [*Serv., Inc. v. U.S.*, 521 F.3d 1338 (Fed. Cir. 2008)] is inconsistent with the Federal Circuit's earlier pronouncements on that issue, those earlier cases are controlling.").

Similar to *CACI*—on the question of standing—the Federal Circuit in *Columbus Regional Hospital v. U.S.,* 990 F.3d 1330 (Fed. Cir. 2021), 63 GC ¶ 87, disregarded a long line of its precedent addressing the concept of jurisdictional facts. As I discussed in *Superior*, 169 Fed. Cl. at 262 n.17, "while the Federal Circuit treated Judge Hertling's dismissal pursuant to RCFC 12(b)(1) as having improperly decided the question on 'subject-matter jurisdiction' grounds,…his decision was clearly based on standing considerations." Judge Hertling relied on three precedential Federal Circuit cases, none of which the Federal Circuit addressed in reviewing his decision.

A Modest Proposition

Almost 15 years ago, these pages lamented the consequences of the Federal Circuit's granting "so few" petitions for *en banc* review. Robert K. Huffman, *Federal Circuit Decisions on Government Contracts: Insights From the Roundtable*, 24 N&CR ¶ 7 (Feb. 2010). While Federal Rule of Appellate Procedure 35(a) provides that "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered[,]" Judge Reyna, dissenting from the Federal Circuit's denial of a petition for rehearing *en banc*, has explained that such review is appropriate to overrule panel precedent, including for the purpose of securing uniformity in the court's jurisprudence:

> [T]hese [court] rules establish reasons for which *en banc* action should be taken, including the necessity of securing or maintaining uniformity of decisions; involvement of a question of exceptional importance; necessity of overruling a prior holding of this or a predecessor court expressed in an opinion having precedential status; or the initiation, continuation, or resolution of a conflict with another circuit.

Aatrix Software, Inc. v. Green Shades Software, Inc., 890 F.3d 1354, 1362 n.2 (Fed. Cir. 2018).

Taking cases *en banc* to clarify and settle the law would seem particularly appropriate given that "it makes sense to consider the Federal Circuit as the Supreme Court of government contracts for all practical purposes." Jayna Marie Rust, *How To Win Friends and Influence Government Contracts*

Law: Improving the Use of Amicus Briefs at the Federal Circuit, 42 PUB. CONT. L.J. 185, 200 (2012). See also James F. Nagle, *A Primer on Prime-Subcontractor Disputes Under Federal Contracts*, CONSTR. LAW., Winter 2009, at 39, 41 (commenting that the Federal Circuit is "essentially the supreme court of government contracts"); James J. McCullough, Michael J. Anstett & Brian M. Stanford, *Observations on the Federal Circuit's Impact on Bid Protest Litigation Since ADRA*, 42 PUB. CONT. L.J. 91, 93 (2012) (describing the Federal Circuit as the "the de facto supreme court for bid protest cases" (footnote omitted)). And, indeed, the Federal Circuit has decided cases *en banc* in the patent context simply "to apply the governing law, and to maintain our fidelity to the Supreme Court's" precedent. *Apple Inc. v. Samsung Electronics Co.*, 839 F.3d 1034, 1039 (Fed. Cir. 2016).

Nor is Judge Clevenger alone in criticizing his court for failing to decide issues *en banc*. More than 10 years ago, several commentators took the Federal Circuit to task for its *en banc* practices (or lack thereof):

> The Federal Circuit's local rules make clear that an en banc panel must convene in order to overrule precedent, which includes Court of Claims cases. However, it appears that in the specialized area of government contracts, the Federal Circuit has not adhered consistently to the en banc requirement.

James J. Gallagher, David J. Ginsberg & Keith M. Byers, *En Banc Consideration of Contract Issues at the U.S. Court of Appeals for the Federal Circuit*, 42 PUB. CONT. L.J. 107, 119 (2012). See also Daniel P. Graham et al., *Federal Circuit Year-in-Review 2011: Certainty and Uncertainty in Federal Government Contracts Law*, 41 PUB. CONT. L.J. 473, 525 (2012) (noting the Federal Circuit's "abrupt and significant departure from what many practitioners previously regarded as the applicable law").

Let me be clear: I am not commenting on whether the majority in *Percipient* is correct on the merits—although readers may infer what they will from my various decisions—or whether Judge Clevenger is correct that *Percipient* improperly attempts to overrule binding precedent without an *en banc* proceeding. My claim is far more modest: the bench, the bar, agency procurement officials, and industry would benefit from the Federal Circuit's generally increasing its *en banc* consideration of Government contract cases. Even arguably inconsistent panel decisions drive up costs for industry and the Government and introduce substantial uncertainty into the trial court's work, which in turn increases costs yet further.

The Federal Circuit's library tracks *en banc* decisions and I reviewed the recently updated data. Since 2000, by my count, the Federal Circuit has issued only four *en banc* decisions where a primary issue concerned Government contracts law. Indeed, there seems to have been no new *en banc* Government contracts decision since Judge Reyna and Nathaniel Castellano last counted such cases eight years ago. See Jimmie V. Reyna & Nathaniel E. Castellano, *Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context Is Key*, 46 PUB. CONT. L.J. 209, 214 n.11 (2016). The last such decision appears to have been in 2012—*Zoltek Corp. v. U.S.*, 672 F.3d 1309 (Fed. Cir. 2012), 54 GC ¶ 101—and that case still involved patent law.

In their 2016 article, Judge Reyna and Mr. Castellano observed:

> These statistics suggest that the Federal Circuit has relatively few opportunities to issue precedential opinions that can meaningfully contribute to and shape the contours of government contracts law. They also suggest that there are not enough government contracts cases appealed to the Federal Circuit for the judges, much less their clerks, to develop and maintain a high level of working knowledge in all aspects of the law of government contracting.

46 PUB. CONT. L.J. at 209–10. This thesis has aged well. And my guess is that not a single member of the Government contracts bar or colleague thinks that is a good thing. *The Hon. Matthew H. Solomson, Judge, U.S. Court of Federal Claims*