No. ____

IN THE

Supreme Court of the United States

PERCIPIENT.AI.

Petitioner,

v.

UNITED STATES, CACI, INC.-FEDERAL

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has provided the Court of Federal Claims with exclusive jurisdiction to hear claims brought by "an interested party objecting to" 1) "a solicitation by a Federal agency for bids or proposals for a proposed contract or"; 2) "to 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." 28 U.S.C. § 1491(b)(1).

In the decision below, a 7-4 majority of the *en banc* Federal Circuit limited the universe of "interested parties" who could vindicate the statutes and regulations referenced in the third prong to the participants in the solicitation and award processes who qualify as "interested parties" to challenge solicitations and contract awards under the first two prongs. As the dissenting judges pointed out, that reading ignores the plain text of § 1491(b)(1) and vitiates statutory provisions that apply only after the prime-contract award and are specifically designed to ensure that parties who do not bid on a prime contract, but have a superior commercial product that satisfies a portion of the prime contract, are evaluated and employed. 10 U.S.C. § 3453(b)(2) & (c)(5). Because the Federal Circuit acted *en banc*, its misguided rule will prevail unless this Court intervenes.

Did the *en banc* Federal Circuit err in holding that a person must meet the requirements for challenging a solicitation or contract award under the first two prongs of 28 U.S.C. § 1491(b)(1) to qualify as an "interested party" who can challenge violations under the broader third prong?

PARTIES TO THE PROCEEDING

Petitioner percipient.ai ("Percipient" or "Petitioner") is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Santa Clara, California, and an office in Reston, Virginia. Petitioner was the plaintiff in the Court of Federal Claims ("CFC") proceedings below.

Respondent United States is the government of the United States, acting in this case through the National Geospatial-Intelligence Agency ("NGA"). The United States was a defendant in the CFC case below.

Respondent CACI, Inc.-Federal ("CACI") is a corporation incorporated under the laws of Delaware with its principal place of business in Reston, Virginia. CACI was an intervenor-defendant in the CFC case below.

RULE 29.6 STATEMENT

Petitioner Percipient has no parent corporation, and no publicly held company owes 10 percent or more of their stock.

RELATED PROCEEDINGS

There are no related proceedings and the decisions below are listed in the Opinions Below section.

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INTRODUCTION

Congress gave the Court of Federal Claims ("CFC") exclusive jurisdiction "to render judgment on an action by an interested party objecting to" either (1) a solicitation, (2) a contract award, "**or**" (3) "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis added).

For claims brought under prongs (1) or (2), the Federal Circuit has for many years sensibly limited who qualifies as an "interested party" to "actual or prospective bidders" who plan to bid on the solicitation they are challenging or who actually did bid on the contract whose award they are challenging. In the decision below, however, a majority of the *en banc* court nonsensically extended that limitation to claims brought *solely* under the third prong and thereby held that a party who was directly injured by an agency's violation of law "in connection with a procurement" was somehow not an "interested party." This violates the plain text of the provision as a whole, as the third prong, on its face, provides for claims independent of those brought under the first two prongs.

The decision also blocks the enforcement of a critical law Congress enacted to ensure that agencies maximize their use of commercial products generated from private sector innovation, rather than defaulting to having a prime contractor reinvent wheels that are already available in the market, an all too common practice that virtually guarantees lengthy delays, cost overruns, and poor performance. That law contains

provisions that apply only *after* a prime contract has been awarded, and that require the procuring government agency to "ensure" that the prime contractor does not ignore the availability of commercial products that can meet portions of the procurement needs the prime is managing, but instead follows the statutory command to procure such commercial products whenever practicable. 10 U.S.C. § 3453(b)(2) & (c)(5). When those legal provisions are violated, the most directly injured party is the would-be subcontractor that would have offered its commercial product but for the violation. Yet the Federal Circuit has now held that person is not an interested party unless it bid on the *prime* contract—which it would have had no reason to do.

The plaintiff in this case, Percipient, did not bid on the prime contract solicited by NGA because it called for multiple procurements, only one portion of which would be satisfied by Percipient's commercial product. Percipient therefore relied on the statutory assurance that NGA would ensure that Percipient's product would be evaluated by the prime contractor for later procurement. But the agency dropped the ball. Instead of abiding by the statute, the agency allowed its prime contractor, CACI, to launch its own long-term development contract in a costly and inefficient effort to reinvent a capability that Percipient's cutting-edge product already provides at a state-of-the-art level and a market-determined price. That is precisely the kind of conduct Congress sought to prohibit when it enacted the Commercial Item Preference Law referenced above. 10 U.S.C. § 3453(b)(2) & (c)(5). Percipient was directly injured by the violation of that law's requirements, which do not

even kick in until after the solicitation and bidding process for the prime contract has ended. Yet the Federal Circuit held Percipient was not an "interested party" who could challenge that post-award statutory violation on the perverse ground that Percipient did not bid on the *prime* contract—even though that is not the basis for Percipient's challenge.

This decision was profoundly wrong and fails to give effect to the plain text of 28 U.S.C. § 1491(b)(1) as a whole, sharply limiting the third prong to the kind of bid protests with which the Federal Circuit is most familiar while ignoring the third prong's broader scope. It is critically important for this Court to review and reverse the decision. First, the decision conflicts with this Court's repeated admonitions on giving effect to the plain text of a statute. The majority instead dove into an extensive discussion of legislative history and the evolution of the bid-protest process before considering and largely ignoring the statutory text. Second, it eviscerates enforcement of provisions of federal procurement law that are not directed to the solicitation and award of prime contracts, but kick in after the prime-contract award and are designed to prevent costly boondoggles and to ensure that government agencies take full advantage of private sector innovation. These provisions are more important than ever because the fast pace of cutting-edge technology like artificial intelligence means there are products available in the marketplace from smaller, competitive innovators that are well beyond the ken of the prime contractors who may be expert in bidding on and managing typical general contracts, but have no expertise in cutting-edge technology. The decision below guts this critical statutory protection

and consigns the government to costly developmental efforts that take years to pursue and result in outcomes far inferior to what is available right now to the private sector and our adversaries on the open market.

Further, because the decision below is the product of a divided *en banc* court, it is the final word unless this Court intervenes to reaffirm the primacy of statutory text and to ensure that critical statutory protections are not rendered nugatory by a misguided view of who is an "interested party."

OPINIONS BELOW

The *en banc* opinion of the Federal Circuit reversing the original panel (Pet.App.A) is unreported. The original panel opinion of the Federal Circuit reversing the judgment of the CFC (Pet.App.C) is reported at 104 F.4th 839. The Opinion of the CFC granting the motion to dismiss (Pet.App.D) is unreported.

JURISDICTION

The Court of Appeals issued its *en banc* opinion and judgment on August 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition presents a question under 28 U.S.C. § 1491(b)(1), reproduced in the Appendix (Pet.App.G).

STATEMENT OF THE CASE

A. Statutory Background

1. The Administrative Dispute Resolution Act of 1996.

Before 1996, both the Court of Federal Claims and federal district courts exercised jurisdiction over challenges to government procurement actions (sometimes colloquially referred to as "bid protests"). The Court of Federal Claims exercised jurisdiction over certain protests by deeming the government agency to have entered into an implied-in-fact contract with the bidders for fair treatment. *See Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1132 n.5 (Fed. Cir. 1998). The district courts exercised jurisdiction over protests under the Administrative Procedure Act ("APA"). Pet.App.C; *Am. Fed'n of Gov't Emps., AFL–CIO v. United States*, 258 F.3d 1294, 1298 (Fed. Cir. 2001) ("*AFGE*"). Under this pre-1996 system, the district courts exercised APA jurisdiction over all claims by persons "aggrieved" by the challenged agency action. 5 U.S.C. § 702; *see Scanwell Lab'ys, Inc. v. Shaffer*, 424 F.2d 859, 865–66 (D.C. Cir. 1970) (describing the basis for such pre-1996 review under the APA).

Congress amended this system by enacting the Administrative Dispute Resolution Act of 1996 ("ADRA"), which vested full jurisdiction over all bid protests in both the CFC and the district courts, but with district court jurisdiction set to sunset after five years. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874–

76 (codified at 28 U.S.C. § 1491 note). ADRA amended the Tucker Act to provide that the CFC:

> shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 U.S.C. § 1491(b)(1).

The above language initially conferred jurisdiction on both the CFC and district courts before the sunset of district court jurisdiction after five years, thus reaffirming the close connection between ADRA's "interested party" language and the APA concept of a person "aggrieved." *See* 28 Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996) (codified at 28 U.S.C. § 1491 note). ADRA further underscores the close connection between review under 28 U.S.C. §1491 and the APA by expressly making the APA standard of review the applicable standard of review for all such cases whether brought in the CFC or in district court before the sunset provision took effect. 28 U.S.C. § 1491(b)(4); *AFGE*, 258 F.3d at 1300.

The legislative history to ADRA states that, initially, both the CFC and the district courts "would exercise jurisdiction over *the full range* of bid protest cases previously subject to review in either system," and then after the five-year sunset provision, the CFC

would have "exclusive judicial jurisdiction" over *all* such cases. 142 Cong. Rec. S11848-01, S11849–50 (Sept. 30, 1996) (statement of Sen. Carl Levin); *AFGE*, 258 F.3d at 1300.

ADRA does not define "interested party," though given the breadth of what may be challenged under the third prong and Congress's intent to capture all procurement-related cases that previously could have been brought in district court under the APA, that phrase presumably was intended to be no more restrictive than the APA's "person … aggrieved by agency action" language. The Competition in Contracting Act ("CICA") (enacted more than a decade earlier, in 1984), which provided for administrative challenges to be brought in the GAO, has a definition of "interested party" that is expressly limited as being solely "with respect to a contract or a solicitation or other request for offers." 31 U.S.C. § 3551(2)(A). But that limited definition follows directly from the fact that CICA only provided for such administrative claims to be brought as objections to either a "solicitation" for a contract or to an "award or proposed award of such a contract." 31 U.S.C. § 3551(1)(A) & (C). Unlike the APA, CICA has no analog to the broad third category of ADRA challenges, i.e., "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," and therefore had no reason to define "interested party" for such claims.

2. The Commercial Item Preference Law.

The law that provides the substantive basis for Percipient's claims was enacted just two years before

ADRA as part of the Federal Acquisition Streamlining Act of 1994 ("FASA"). It requires all federal agencies to acquire "commercial products" or "nondevelopmental items" to meet their procurement needs "to the maximum extent practicable." 10 U.S.C. § 3453(b) (applicable to Department of Defense agencies), 41 U.S.C. § 3307(c)(1) (applicable to all executive agencies other than DOD agencies) (10 U.S.C. § 3453 and 41 U.S.C. § 3307 together referred to herein as "Commercial Item Preference Law").[1]

The purpose of this Commercial Item Preference Law was to address the waste, inefficiencies, and uncertainties inherent in long-term, developmental contracts that government agencies (especially in the defense sector) have historically employed. S. Rep. No. 103-259, at 5 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2598. Such developmental contracts lead to cost overruns, wasted resources, unnecessary delay, and use of inferior and outdated technology. *Id.* This is particularly a problem for long-term contracts where the prime contractor has every incentive to engage in a profitable "cost-plus" development contract rather than look for cutting-edge private sector products that can be deployed immediately at less cost.

The Senate Committee on Governmental Affairs found that the "purchase of proven products such as commercial and nondevelopmental items can eliminate the need for research and development, minimize acquisition leadtime, and reduce the need for detailed

[1] Since this case involves a Department of Defense agency, citations herein will be only to 10 U.S.C. § 3453 (previously codified at 10 U.S.C. § 2377).

design specifications or expensive product testing." S. Rep. No. 103-258, at 5 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2566. Likewise, the House Committee on Government Operations stated that "the Federal Government must stop 're-inventing the wheel' and learn to depend on the wide array of products and services sold to the general public on a routine basis." H.R. Rep. No. 103-545(I), at 21–22 (1994).

Among other provisions designed to further these goals, the Commercial Item Preference Law imposes obligations on federal agencies that apply only *after* a contract has been awarded to a prime contractor—specifically recognizing the problem that while prime contractors may be good at managing a large sprawling project, they will typically not be specialized and innovative providers of state-of-the-art commercial components necessary to fulfill portions of the overall contract. Further, they will frequently have an economic incentive to favor launching their own cost-plus development project over acquiring someone else's commercial product. Accordingly, 10 U.S.C. § 3453(b)(2) provides that agency heads "shall ensure that procurement officials in that agency, to the maximum extent practicable…require prime contractors and subcontractors at all levels under the agency contracts to incorporate commercial services, commercial products, or nondevelopmental items other than commercial products as components of items supplied to the agency." To support that requirement in subsection (b)(2), § 3453(c)(5) provides:

> The head of an agency shall take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) in an

> amount in excess of $5,000,000 for the procurement of products other than commercial products or services other than commercial services engages in such market research as may be necessary to carry out the requirements of subsection (b)(2) before making purchases for or on behalf of the Department of Defense.

Thus, after a government agency awards a contract to a prime contractor, subsections (c)(5) and (b)(2) *require* government agencies to *ensure* that the prime contractor conducts market research into the availability of commercial items that meet the component needs of the procurement they are handling, and then use such commercial items to meet those component needs.

In 2008, Congress reinforced the requirements of the Commercial Item Preference Law in the areas of computer software by requiring defense agencies (including NGA) to identify and evaluate "opportunities for the use of commercial computer software and other non-developmental software." National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417, § 803(a), 122 Stat. 4519 (2008) ("NDAA FY 2009"). This duty applies "at all stages of the acquisition process (including concept refinement, concept decision, and technology development)." *Id.*; *see also* 48 CFR § 212.212(1) (implementing regulation).

The CFC and Federal Circuit first enforced the requirements of the Commercial Item Preference Law by invalidating an Army solicitation for a software developmental project in *Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018), *aff'g*, 129 Fed. Cl.

218 (2016). Following the Federal Circuit's decision in *Palantir*, the Army field-tested commercial alternatives to development, including Palantir's product. The Army ultimately decided to procure Palantir's commercial product to meet its needs, illustrating the benefits the law confers on government procurements. *See* Shane Harris, *Palantir Wins Competition to Build Army Intelligence System*, The Washington Post, Mar. 26, 2019.

B. Factual Background

In 2020, NGA issued a solicitation for a project called "SAFFIRE."[2] JA-57. SAFFIRE sought to satisfy two general NGA needs. JA-57–58. First, NGA sought to improve its production, analysis, and storage of data through what it calls "Structured Observation Management" ("SOM"), and through the construction and operation of an "SOM Enterprise Repository," or "SER," which will be the enterprise backbone for storing, disseminating, and regulating access to data. JA-58. Second, NGA sought a user-facing computer vision technology for use by its personnel. *Id.* "Computer Vision" ("CV") is a type of artificial intelligence technology that trains and uses computers to interpret visual data. JA-57. For example, CV technology can rapidly review videos from surveillance cameras and online photographs to determine in real time the identity of persons who appeared in certain locations at certain times. JA-57–58; JA-61–64.

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[2] References to the Joint Appendix filed in the Federal Circuit are indicated as JA-__. *See* Non-Confidential Joint Appendix, *Percipient.ai, Inc. v. United States*, No. 23-1970 (Fed. Cir. Aug. 21, 2023), ECF No. 30.

Percipient has a fully-developed and proven commercial product that meets NGA's CV needs as set forth in the SAFFIRE solicitation. JA-59–65. Percipient's entire corporate mission since its founding in 2017 has been to develop the world's leading CV platform, employing state-of-the-art technology and expertise to meet precisely the CV needs that NGA is seeking to fulfill. *Id.* Percipient's CV product, Mirage, has been purchased by leading corporations as well as defense and intelligence agencies. JA-65.

In issuing the SAFFIRE solicitation, NGA solicited bids for a prime contractor to manage the combined SER and CV procurement. Percipient could meet the CV System requirements but did not have the capabilities to meet the SER requirement. JA-43–44. At the same time, NGA also assured Percipient both before and after award that it intended to incorporate commercial products into the procurement. JA-68; JA-73–76; JA-78–80. For example, an NGA senior analyst told Percipient that SAFFIRE was "plug and play" designed, and that "Mirage might be asked to be integrated into the larger SAFFIRE construct." JA-68.

The solicitation also required the contractor to procure commercial products "to the maximum extent practicable," and the Task Order attached to the solicitation called for the eventual awardee to utilize commercial technology to leverage "*the rapidly maturing commercial computer vision technology*." *See* JA-68–69 (emphasis added).

For these reasons, Percipient could not and did not bid on or protest the SAFFIRE contract. Instead, it awaited the market research phase where it could demonstrate the ability of its Mirage product to meet NGA's CV needs.

Unfortunately, that market research never occurred. After NGA awarded the prime contract to CACI in January 2021, Percipient repeatedly made efforts to demonstrate the capabilities of its commercial CV product. JA-73–76; JA-78–80. NGA conducted some initial evaluations that confirmed Mirage "meets all of NGA's analytic transformation requirements," JA-80, and that "Percipient's commercial capability performed as described in meetings, correspondence, and in the documentation provided to support the assessment," JA-85–86. Nevertheless, CACI refused to seriously consider Percipient's product, and never conducted the formal market research needed to determine the ability of Percipient's product to meet NGA's CV needs. JA-77–78.

Once it became clear that NGA was going to allow CACI to launch its own developmental project to try to create a new CV System rather than evaluating or acquiring Percipient's product, Percipient filed this action in the CFC on January 9, 2023, alleging that NGA had violated the requirements of 10 U.S.C. § 3453 by (among other things) (a) failing to ensure that its prime contractor conduct the market research to determine if a commercial CV product could meet the CV needs of SAFFIRE, as required by § 3453(c)(5), and (b) failing to require its prime contractor to use commercial

products to meet NGA's procurement needs, as required by § 3453(b)(2).

C. CFC Decision

The government and intervenor-defendant CACI moved to dismiss Percipient's complaint on multiple grounds, which the CFC initially denied. Pet.App.147. It ruled that it had subject matter jurisdiction under prong three of 28 U.S.C. § 1491(b)(1) because Percipient had properly alleged a violation of law "in connection with a procurement." Pet.App.137–144.

On the issue of statutory standing under § 1491(b)(1), the CFC held that Percipient had standing as an "interested party." Pet.App.144. It recognized that the term "interested party" under the Tucker Act generally refers to "'actual or prospective bidders' who have a 'direct economic interest' in the award of the contract." Pet.App.138 (citing and quoting *AFGE*, 258 F.3d at 1302). Regarding whether Percipient was an "actual or prospective bidder," the CFC first noted that Percipient "could not" bid on the SAFFIRE contract (since its product satisfies only the CV portion, not the SER portion of the procurement). *Id.* Nevertheless, relying on several decisions of the CFC and the Federal Circuit, the CFC found that "the requirement that a protestor have submitted a bid for it to be an interested party is anything but absolute." Pet.App.139. It then went on to analyze the requirements of 10 U.S.C. § 3453, and found that a violation of § 3453 "denies these commercial product owners an opportunity to compete that is guaranteed to them by the statute," and that its "guarantee would

become illusory if offerors of commercial products could not sue under § 3453." Pet.App.140 (citations omitted). Further, the CFC recognized that § 3453 "imposes an obligation on agencies to incorporate commercial products that continues beyond the contract's award," and therefore, since an agency can violate § 3453 *after* the contract award, "it is irrelevant whether the commercial product offeror bid on the prime contract." Pet.App.141. The CFC held that "the appropriate question in this context is whether the protestor was prepared to offer its commercial product to the agency if the agency had complied with the statute." Pet.App.142. Percipient's actions showed that "it was willing and ready to offer its commercial software." *Id.*

The CFC rejected the defendants' argument that Percipient's complaint was untimely or barred by the doctrine of laches. Pet.App.146.

Finally, the CFC initially rejected CACI's argument that Percipient's complaint was barred by 10 U.S.C. § 3406(f)(1), which provides that a "protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order," unless it satisfied one of two exceptions. Pet.App.137. However, in response to a motion for reconsideration, the CFC agreed with the defendants that § 3406(f) barred Percipient's claim, and dismissed the complaint on that basis. Pet.App.D. Percipient appealed.

D. Federal Circuit Panel Decision

On June 7, 2024, a panel of the Federal Circuit reversed the CFC's dismissal. Pet.App.C. It rejected

the lower court's sole reason for dismissing Percipient's complaint. It held instead that "none of Percipient's counts is 'in connection with the issuance or proposed issuance of a task or delivery order,'" that "Percipient does not challenge the issuance of Task Order 1 to CACI," and that "no allegation asserts that the language of Task Order 1 was deficient or forced the alleged statutory violations to occur." Pet.App.62. Accordingly, Percipient's protest was not barred by § 3406(f)(1). Pet.App.67.

The panel majority also rejected Defendants' arguments for alternative grounds to affirm the CFC's dismissal. Like the CFC, the panel found that it had jurisdiction under the third prong of 28 U.S.C. § 1491(b)(1) since Percipient's protest properly alleged a legal violation "in connection with a procurement or proposed procurement." Pet.App.69.

The panel majority also rejected the argument that Percipient was not an "interested party" under 28 U.S.C. § 1491(b)(1). Pet.App.69–83. In an extensive analysis, the panel majority discussed the Federal Circuit's prior precedents on the meaning of "interested party," and recognized that no case had previously addressed the meaning of that term where the protestor invoked *only* the third prong of § 1491(b)(1) – i.e., it alleged a violation of law "in connection with a procurement or proposed procurement," without challenging any solicitation, award, or proposed award. Pet.App.79. In this context of a "third prong" only claim, the panel majority held that "an interested party includes an offeror of commercial or nondevelopmental items whose direct economic interest would be affected by the alleged

violation of the statute." Pet.App.83. Accordingly, "the plaintiff is an interested party if it is an offeror of a commercial product or commercial service that had a substantial chance of being acquired to meet the needs of the agency had the violation not occurred." Pet.App.76.

One member of the panel dissented from the majority's rulings on the task order bar and the "interested party" test, noting that "[t]he decision in this case will have an enormous impact on government procurements." Pet.App.117 (Clevenger, J., dissenting).

E. Federal Circuit *en banc* Decision

On November 22, 2024, the Federal Circuit granted the Government's petition for rehearing, vacated the panel's decision, and ordered an *en banc* rehearing solely on the issue of "[w]ho can be 'an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement' under 28 U.S.C. § 1491(b)(1)?" Pet.App.6. The order expressly said the Federal Circuit "will not revisit" the other issues addressed in the CFC and panel decisions. *Id*.

After briefing and oral argument, on August 28, 2025, the Federal Circuit issued its *en banc* decision, in which the majority held that Percipient was not an "interested party" under §1491(b). Pet.App.35. The majority did not disagree that Percipient could and would have offered its commercial CV product (Mirage)

to meet the SAFFIRE CV procurement needs had NGA complied with its obligations under § 3453. Nor did it find that any other party was more directly injured by NGA's alleged violations of § 3453. It nonetheless found Percipient was not an "interested party" because it did not participate in the solicitation or bidding process for the prime contract awarded to CACI.

Before it addressed the statutory text, the majority decision set forth a lengthy, eight-page discussion of the history of procurement protests, the case law that predated ADRA, and the legislative and statutory history leading up to ADRA. Pet.App.6–15. Once it finally reached the statutory text, the majority gave two reasons for its conclusion. First, it posited that the term "interested party" must have the same scope for each of the three prongs of § 1491(b)(1). Pet.App.18. Second, it held that while Congress did not define the term "interested party" in ADRA in 1996, the definition in CICA enacted in 1984 should be treated as "old soil" that was "transplanted" by Congress into § 1491(b)(1). Consistent with the narrow GAO challenges to the solicitation and bidding process that CICA authorized, it defined "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." Pet.App.12 (citations omitted). The majority ignored the narrow range of challenges CICA authorized and that CICA has no analogue to the

third prong of § 1491(b)(1) and pre-dated the Commercial Item Preference Law by a decade.

Four Judges dissented. Labeling the case a "straight-forward statutory interpretation case with significant implications on the government contracting community," the dissent explained that the majority defined "interested party" with no regard for the plain text of the third prong of § 1491(b)(1), and thereby failed to give effect to that plain text. Pet.App.45. The dissent reasoned that "[t]o determine whether a party is an 'interested party,' the court must consider the subject of that party's interest." Pet.App.38. After all: "Without consideration of the subject of interest, how would the court know whether a party is interested?" Pet.App.38 n.1.

The dissent rejected the view that Percipient was advocating for a different definition of "interested party" depending on which prong of § 1491(b)(1) was invoked. Instead, the common definition throughout § 1491(b)(1) is that "'interested party' must have a 'direct economic interest [that] would be affected by the [challenged § 1491(b)(1) action].'" Pet.App.39. But applying this single concept to each of the three different classes of challenges that can be brought under § 1491(b)(1) obviously calls for a different inquiry to ensure the plaintiff has the requisite interest. "Under prong (1), an interested party is a party with an interest in a solicitation by a federal agency. Under prong (2), an interested party is a party with an interest in a proposed or actual award of a

contract. Under prong (3), an interested party is a party with an interest in any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement." Pet.App.38.

The dissent thus concluded that the majority had erred "by prioritizing legislative history of various statutes and ignoring the language of § 1491(b)(1)." Pet.App.42–43. The dissent also opined that "the legislative history of § 1491(b)(1) supports a broader interpretation of 'interested party' here." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below is dead wrong as a matter of statutory construction and highly consequential. Rather than start with the statutory text and end there because it is clear, the decision below starts with the history of bid protests and inapposite statutes. The text of §1491(b) is clear that an "interested party" can sue to vindicate "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." That broad language plainly encompasses a suit by a would-be commercial product supplier that a prime contractor must consider under the Commercial Item Preference Law. Dismissing such a suit simply because the would-be commercial supplier would not be an "interested party" under the first two prongs of §1491(b) ignores both that §1491(b) has a (decidedly broader) third prong and basic rules of statutory construction.

The decision is highly consequential because it eviscerates the Commercial Item Preference Law. Critical provisions of that law only kick in *after* the prime contract is awarded and are specifically designed to require the agency to force the prime contractor to consider commercially available products that satisfy one component of the prime contract. This Commercial Item Preference Law has never been more important.[3] A prime contractor may know a lot about the process of managing a sprawling prime contract, but the chances they are expert in cutting edge technology like AI is exactly nil. They also will be economically incentivized to prefer their own developmental efforts over acquiring someone else's fully-developed commercial product. Thus, by gutting the ability to enforce the Commercial Item Preference law, the decision below consigns the government to watch as prime contractors take years to reinvent technology that is already on the marketplace (and available to our adversaries). One might hope that contracting agencies would want to avoid such inefficiencies, but the *raison d'etre* of the commercial preference law was that the cozy relationships between contracting agencies and prime contractors was costing the nation billions in wasteful spending on inferior outcomes. Thus, by artificially narrowing §1491(b), the decision below

[3] This increasing importance of the law is illustrated by recent Executive Orders emphasizing the need to prioritize procurement of commercial products. *See* Exec. Order No. 14271, 90 FR 16433 (Apr. 16, 2025) (strengthening 10 U.S.C. § 3453's requirements and mandating greater oversight); Exec. Order No. 14275, 90 FR 16447 (Apr. 15, 2025) (mandating the removal of regulations that pose a barrier to commercial suppliers).

eviscerates a critical statute and undermines our competitiveness. The Federal Circuit recognized that these issues were important enough to merit *en banc* review, but then got matters badly wrong. Only this Court can set things right.

I. THE FEDERAL CIRCUIT FAILED TO FOLLOW THE PLAIN STATUTORY TEXT ON AN ISSUE OF PROFOUND IMPORTANCE TO GOVERNMENT PROCUREMENT LAW AND TO THE VIABILITY OF THE COMMERCIAL ITEM PREFERENCE LAW.

The CFC has exclusive jurisdiction to hear procurement-related claims under 28 U.S.C. § 1491(b)(1), and the Federal Circuit has exclusive jurisdiction to hear appeals from such cases, 28 U.S.C. § 1295(a)(3). Thus, there can be no "percolation" of other courts addressing the legal issue presented in this petition. Absent review by this Court, the Federal Circuit's majority decision shall forever govern all cases that raise the issue presented here.

That is a serious problem. First, as shown in section I(A), the Federal Circuit's decision is profoundly wrong and contrary to the statutory text. If not corrected, it will sharply constrict the scope of the jurisdiction Congress conferred in § 1491(b)(1). And this is no ordinary error. By artificially limiting the scope of "interested" parties to those interested in the solicitation or award of prime contracts, the decision below negates the import of statutes and regulations designed to protect parties interested in

later phases of the procurement process. *See* Pet.App.45 (dissent appropriately characterizing majority decision as a "judicial narrowing of Congress' intent, stated clearly in the statutory language it chose," that would have a "significant impact on the government contracting community"). Second, as shown in Section I(B), the decision nullifies the ability of private entities to enforce critical provisions of the Commercial Item Preference Law, effectively giving government agencies a roadmap for circumventing the law entirely. That law is more critical now than ever as private sector technological innovation is accelerating; gutting the law will lead to disastrous procurement practices that favor incumbent prime contractors embarking on wasteful cost-plus development projects, rather than taking advantage of commercial products with cutting-edge technology.

U.S. government agencies procure over $700 billion in goods and services each year. [4] The procurement laws at issue here are critical to ensuring the integrity, efficiency, and quality of those procurements. Thwarting those laws by ignoring a plain reading of statutory text cries out for this Court's review.

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[4] U.S. Government Accountability Office, *A Snapshot of Government-Wide Contracting for FY 2023 (Interactive Dashboard)*, GAO (June 25, 2024), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2023-interactive-dashboard.

A. The Federal Circuit Has Sharply Constricted the Jurisdiction Congress Conferred By Failing To Apply The Plain Text Of § 1491(b)(1).

The Tucker Act, as amended by ADRA, provides the CFC with exclusive jurisdiction to decide cases brought by an "interested party objecting to" any one of the following three things:

(1) "a solicitation by a Federal agency for bids or proposals for a proposed contract **or**"

(2) "to 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."

28 U.S.C. § 1491(b)(1) (emphases added).

The Federal Circuit held that the only person who can be an "interested party" with standing to bring a claim under prong three of § 1491(b)(1) is "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." Pet.App.35. According to the Federal Circuit, Percipient did not meet that definition because it did not submit a bid on the SAFFIRE prime contract. Pet.App.29 n.10. The Federal Circuit ignored the fact that Percipient was obviously a "prospective bidder" on any future subcontract (or direct contract) to

procure a CV system—i.e., the contract that would have been sought had NGA complied with its obligations under the Commercial Item Preference Law, but that will never be sought given NGA's violation of those obligations.

That result makes no sense and is irreconcilable with the plain text of § 1491(b)(1). Percipient was directly injured by a "violation of statute or regulation in connection with a procurement," and would have been able to offer its commercial product to meet the agency's procurement needs "but for" that violation. That is the very definition of a party that is "interested" in the violation of law being challenged. No one could be more interested. Yet the Federal Circuit held that Percipient could not bring its challenge because it did not bid on the prime contract whose award it is *not* challenging. That is illogical and bears no relation to the plain text of the statute.

The plain text of § 1491(b)(1) unambiguously allows a claim that is brought solely under prong three—i.e., that solely challenges "a violation of statute or regulation in connection with a procurement"—without challenging any solicitation or contract award. Yet the upshot of the Federal Circuit's decision is that the only parties that can bring claims under that prong three are those who could also bring a claim under either prongs one or two—i.e., someone who is eligible to challenge a solicitation or contract award. That is not what the text says. It says an "interested party" can bring a claim solely under prong three—full stop. Nothing in the text can be read to require a person who is

bringing a claim solely under prong three to show they would also have qualified to bring a claim under prongs one or two.

The majority below evaded that obvious plain text conclusion only by beginning its analysis with everything but the text. This Court has stated again and again (and again) that statutory construction begins with the text and ends with the text whenever that text is clear. *E.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history . . . ."). The majority, by contrast, begins with what it refers to as "the relevant history underlying § 1491(b)(1)," followed by eight pages of legislative history. Pet.App.6–15. The text of the relevant statutory provision does not even appear until the 14th page of the Court's opinion. Pet.App.14.

When the Court finally gets to the text, the reason for the majority's delay in reaching it becomes apparent—i.e., it has no answer to it. Instead, it says that (a) the inquiry of who is an "interested party" must be rigidly identical under all three prongs of § 1491(b)(1), and (b) that inquiry must come from a *different* statute that defined "interested party" only with respect to the kinds of administrative claims that the other statute allowed—i.e., the types of claims described in prongs one and two—because that is the "old soil" that was "transplanted" by Congress into § 1491(b)(1). Pet.App.35. Both of these points are obviously wrong, and both flunk any notion of what it means to apply the plain text. Pet.App.36–45 (dissent).

First, for the term "interested party" to have "the same meaning" for all three prongs in § 1491(b)(1), it must apply the same concept to each of the three different kinds of claims in a way that takes into account the different kinds of claims being brought. The central concept is whether a party is "interested"—i.e., does it have a "direct economic interest" in the agency action it is challenging. A party bringing a claim under prong one must be "interested" *in the solicitation*—i.e., a person who plans to bid on the solicitation, or would bid on it if its challenged terms were fixed. A party bringing a claim under prong two must be "interested" *in the actual or potential contract award*—i.e., they must have submitted a bid in an effort to win the contract whose actual or potential award they are challenging. Likewise, a party bringing a claim under prong three must be "interested" *in the "alleged violation of statute or regulation in connection with a procurement"* they are challenging—i.e., they must show that "but for" that violation, they would be able to offer their goods or services to meet government procurement needs. *See* Pet.App.38 n.1 (dissent) ("Without consideration of the subject of interest, how could the court know whether a party is interested?").

This is both common sense and rooted in the text. The reason that only those involved in the solicitation process are interested parties for prong one is textual. That prong is limited to rules governing the solicitation. The reason that those involved in the contract bidding and award process are interested parties for prong two is equally textual. Prong two is limited to rules governing the contract award. But there is *no* textual basis for limiting

interested parties under prong three to those who can challenge a solicitation or contract award. The plain text of prong three makes any entity protected by a statute or regulation governing the overall procurement process an interested party who can sue to prevent a violation of those statutes and regulations. Nothing about the text ties a plaintiff bringing a claim under prong three to also bring a claim (or being eligible to bring a claim) under prongs one or two. To the contrary, the universe of potentially interested parties for a prong three claim is necessarily broader than those who can bring claims under prongs one or two because the text of prong three is broader.

The Government effectively admitted that the nature of the claim matters to the "interested party" inquiry when it "conceded that the group of people who would qualify as an 'interested party' would differ for a challenge brought under prong (1) versus prong (2)." Pet.App.39. Just as the context matters in shaping the inquiry as between prongs one and two, it likewise must matter when applying the inquiry to prong three. Taking these contextual differences into account does not mean the basic meaning of "interested party" is "different" for each prong; it simply illustrates that applying the same central concept of what it means to be "interested" needs to take into account the object of the interest, which differs depending upon which of the three different kinds of claims is being brought under § 1491(b)(1). *Id.*

Second, the majority's "old soil" analysis, in which it borrowed the definition of "interested party" from CICA as the governing definition for ADRA, was

also dead wrong. The "old soil" doctrine applies when Congress uses terms with well-established common-law meanings like "fraud" or "cause." *See, e.g.*, *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 187 (2016); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014).

The "old soil" doctrine is not an excuse to import legislative history or statutory definitions from inapposite statutes into statutory analysis so as to override the plain text. As the dissent explains, the substantive scope of CICA was different in ways that made its definition of "interested party" inapposite to the third prong of § 1491(b)(1). The administrative claims provided for in CICA did not include claims analogous to those covered by the third prong of § 1491(b)(1), and thus CICA had no reason to define "interested party" in a manner that covered those with a sufficient interest to bring such claims. Pet. App.40. Instead, CICA only provided for claims that objected to either "[a] solicitation" for a contract or to "[a]n award or proposed award of such a contract." 31 U.S.C. § 3551(1)(A) & (C). It therefore expressly limited its definition of "interested party" as being solely "*with respect to a contract or solicitation or other request for offers described in paragraph (1)…*" 31 U.S.C. § 3551(2) (emphasis added). Thus, the dissent correctly recognized that there is "nothing to borrow from CICA" with respect to who is an "interested party" for claims brought solely under prong three. Pet.App.41.[5] If anything, the majority *ignores* the

[5] The same is true for the now-repealed provisions of the Brooks Act invoked by the majority. *See* 40 U.S.C. § 759(f)(9)(A) (repealed 1996) (defining "protest" solely as an objection to "[a]

"old soil" by taking part of the definition while casting aside the words "with respect to" which expressly limit the definition's scope.

And if any "old soil" were relevant in determining who is an interested party with standing to challenge the broader range of actions contemplated by the third prong, it would not be the scope of "interested party" under CICA (which had no third prong), but the scope of a "person…aggrieved" under the APA. After all, Congress used the term "interested party" to capture "the full range of bid protest cases" that could have been brought in either the CFC or in district court under the APA. It then used that term to authorize district court actions for five more years. And it made the connection to the APA explicit by applying the APA standard of review to suits in both forums. 28 U.S.C. § 1491(b)(4); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331–33 (Fed. Cir. 2001). Someone in Percipient's position would plainly qualify as a "person … aggrieved" for APA purposes. Equally important, no one thinks that the universe of "persons … aggrieved" by agency action has to be exactly the same without regard to the nature of the agency action being challenged. There is no more reason to say that "interested party" must have exactly the same scope for all three prongs of §1491(b) than there is to say that "person aggrieved" means the same thing when challenging an action of the Federal

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solicitation" for a contract or to "[a]n award or proposed award of such a contract"); 40 U.S.C. § 759(f)(9)(B) (defining "interested party" only "with respect to a contract or proposed contract described in subparagraph (A)").

Election Commission as when challenging a decision of the Social Security Administration.

While the majority tried to argue that *Scanwell* cases typically involved disappointed bidders challenging a contract award to others, Pet.App.30, *Scanwell* jurisdiction was in no way limited to such challenges. Pet.App.43–44 (dissent). On its face, *Scanwell* jurisdiction covered the full scope of APA challenges to "final agency action" that related to procurements. 424 F.2d at 865. Moreover, before ADRA, various cases applying *Scanwell* held that parties could challenge subcontractor awards where the government agency was itself "intimately involved" in the subcontractor award decision. *See Amdahl Corp. v. Baldridge*, 617 F. Supp. 501, 504–506 (D.D.C. 1985) (applying the "zone of interest" test and listing factors for determining whether agency was involved); *Contractors Eng'rs, Inc. v. U.S. Dep't of Veterans Affs.*, 947 F.2d 1298, 1300–1301 (5th Cir. 1991) (applying *Amdahl* factors). Percipient's claim is functionally analogous to those.

The majority argued that these were "isolated cases" that "focused on the closeness of the relationship between the government and the prime contractor." Pet.App.31. But the majority ignores that Percipient invokes provisions of the Commercial Item Preference Law that require exactly that "closeness" by mandating agencies to ensure its prime contractor research, evaluate, and procure commercial products wherever practicable. 10 U.S.C. § 3453(b)(2) & (c)(5). Rather than address that point, the majority *never*

even mentions those statutory provisions that form the centerpiece of Percipient's claim.[6]

In short, the Federal Circuit has overridden the plain text of a statute by virtually eliminating the claims that can be brought under prong three of 28 U.S.C. § 1491(b)(1). Its reasons for doing so cannot survive scrutiny. Since there is no other court to address these claims, this Court should grant the petition and reverse the decision. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (reversing divided Federal Circuit panel on issue of statutory interpretation for procurement provision).

B. The Federal Circuit's Decision Improperly Thwarts Enforcement Of The Commercial Item Preference Law.

The *en banc* court's misguided definition of "interested party" not only misconstrues a critical procedural statute (i.e., §1491(b)), it also eviscerates critical substantive provisions of the Commercial Item Preference Law. As discussed above, these provisions require government agencies to determine whether commercial products can meet procurement needs before issuing solicitations and awarding contracts calling for development. 10 U.S.C. § 3453(b) & (c). Further, they require agencies to ensure "to the maximum extent practicable" that prime contractors and subcontractors incorporate commercial products

[6] To be clear, nothing about Percipient's position here (or the dissent's opinion) would open the doors to any and all subcontractor standing because it requires the plaintiff to have a *direct* interest in the alleged procurement violation, not one that is derivative of an injury to a putative prime.

as "components of items" supplied to the agency. *Id.* § 3453(b)(2). For procurements exceeding $5 million, government agencies must ensure that their prime contractors engage "in such market research" as may be required to determine whether commercial products exist that can meet the procurement needs covered by their prime contract. *Id.* § 3453(c)(5).

The *en banc* majority's definition of "interested party" will thwart enforcement of these provisions by preventing the party that is actually injured by their violation from suing to redress the violation. Where agencies fail to comply with these provisions, the party who is "interested" is the party that, but for the violation, would have been able to offer its product to meet the agency's procurement needs covered by the prime contract. Such a party is the functional equivalent of a disappointed bidder challenging a contract award who, but for the alleged wrongdoing leading to the award, would have had a substantial chance of winning the contract. However, under the majority's mistaken decision, the thwarted offeror is barred from bringing a protest. As a result, government agencies will be free to allow their prime contractors to launch wasteful development projects to meet requirements that can be met by existing commercial products—no matter how long the development takes, no matter how important the procurement, no matter how much it will cost, and no matter how ill-considered or arbitrary the decision.

That is precisely the conduct Congress sought to prevent when it enacted the Commercial Item Preference Law, and thus the Federal Circuit's decision directly thwarts Congressional intent. By

enacting provisions that apply *after* a contract's award, Congress necessarily recognized that decisions as to whether to procure commercial products in lieu of development often will not be made before the award of a prime contract, but instead will occur over the course of a long-term procurement. Further, Congress necessarily recognized that in such situations prime contractors will be incentivized to prefer launching their own developmental efforts (for which they will be paid) over procuring someone else's commercial product (for which they will not). Additionally, Congress recognized that without the requirements of the Commercial Item Preference Law, contracting officials will lack adequate incentive or ability to police contractors' development decisions, whether from inertia, industry capture, lack of expertise or exposure to private sector innovation, or some combination of the foregoing.

While the decision below theoretically still allows some challenges to § 3453 violations that occur before the award of a prime contract, that is insufficient. First, the decision over whether to launch needless developmental projects will often be made only after the award of a prime contract. Second, under the Federal Circuit's decision, government agencies now have a roadmap for avoiding judicial scrutiny by simply postponing any decision as to whether to procure a commercial product or launch a development project until after the award of the prime contract. Such agencies could then claim that (a) pre-award challenges by commercial product offerors are unripe, while (b) challenges to a post-award decision to launch a developmental project (and ignore

commercial products) are blocked by the Federal Circuit's definition of "interested party."[7]

Accordingly, if not corrected, the majority's definition of "interested party" will deprive the country of a critical tool for preventing government waste and for ensuring the Government avails itself of the best available technology for meeting Government requirements. Congress has recognized that these requirements are of particular importance in the specific areas at issue in this case—software development and artificial intelligence. *See, e.g.*, NDAA FY 2009 § 803(a). Regulations implementing that legislation specifically require defense agencies (like NGA) to identify and evaluate "opportunities for the use of commercial computer software and other non-developmental software," and to do so "at all stages of the acquisition process (including concept refinement, concept decision, and technology development)." 48 CFR § 212.212(1).

The importance of the Commercial Item Preference Law is illustrated by the first case that enforced it. In *Palantir*, the Federal Circuit upheld an injunction invalidating a solicitation seeking to

[7] This is not speculative. Recently, the Government opposed a bid protest based on the civilian Commercial Item Preference Law on grounds that it was premature because the agency had not yet made a decision to develop. *See IntelliBridge v. United States*, No. 24-1204 (Fed. Cl. Feb. 18, 2025), at Dkt. 29 at 21–23, Dkt. 39 at 13 n.2, Dkt. 55 at 7–8. Under the Federal Circuit's decision, the agency would be able to immunize a subsequent decision by a prime contractor to launch a development effort on grounds that the excluded commercial product offeror was not an "interested party."

develop a new data management system for national security intelligence. 904 F.3d at 983. The Army had developed the first version, and it was a costly failure. *See id.* at 985.

The Army then solicited proposals to throw good money after bad by developing the next version of the system. In doing so, the Army ignored and failed to evaluate Palantir's fully-developed commercial product. The CFC enjoined the procurement based on its determination, which the Federal Circuit affirmed, that the "Army failed in its obligation" under 10 U.S.C. § 3453 (then codified at 10 U.S.C. § 2377) to "determine whether a commercial item could meet or be modified to meet the Army's procurement requirements." *Id.* at 993.

Just as important was what happened next. After evaluating Palantir's product in accordance with the injunction, the Army chose to procure it. Thus, the enforcement of § 3453 against the Army resulted in the Army ultimately procuring a state-of-the-art product it otherwise would have ignored in favor of a costly and dubious development project.

The *Palantir* case demonstrates the importance of granting the petition. Percipient alleges precisely what Palantir alleged—that the Government is developing a critical artificial intelligence system without adequately evaluating what private sector innovation has created. And Percipient is just as directly "interested" in challenging the violation of § 3453 as Palantir was—i.e., if the agency complied with the law, it would be able to offer its commercial product to meet the agency's needs.

II. GIVEN THE *EN BANC* FEDERAL CIRCUIT HAS SPLIT ON THIS IMPORTANT ISSUE, ONLY THIS COURT CAN CORRECT THE CONSEQUENTIAL ERROR IN THE DECISION BELOW.

While the Federal Circuit recognized the importance of this issue by addressing it *en banc*, its judges split 7-4, with the majority looking at the case through the lens of more familiar bid protests and the dissenters applying this Court's direction to interpret the plain text of the statute. Since the Federal Circuit has exclusive jurisdiction over the issue, no further percolation is possible.

The integrity of the government procurement system depends in part upon the availability of procurement litigation. The Federal Circuit last granted *en banc* review for a bid protest case in *United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362 (Fed. Cir. 1983), and that review did not produce a closely divided split like this one. As shown above, this split decision substantially undercuts Congressional intent in enacting both ADRA and the Commercial Item Preference Law, two statutes of central importance to the hundreds of billions of dollars in government procurements that occur every year. To support the integrity of those procurements and compliance with Congressional intent, this Court should grant review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED AUGUST 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1970

PERCIPIENT.AI, INC.,

Plaintiff-Appellant,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00028-EGB, Senior Judge Eric G. Bruggink.

Decided August 28, 2025

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

Opinion for the court filed by *Circuit Judge* HUGHES, in which *Circuit Judges* DYK, PROST, REYNA, CHEN, CUNNINGHAM, and STARK join.

1. Circuit Judge Newman did not participate.

Appendix A

Dissenting Opinion filed by *Circuit Judge* STOLL, in which *Chief Judge* MOORE and *Circuit Judges* LOURIE and TARANTO join.

HUGHES, *Circuit Judge*.

This en banc proceeding asks us to resolve the question of who can be an "interested party" objecting to any alleged violation of statute or regulation in connection with a procurement or a proposed procurement under 28 U.S.C. § 1491(b)(1). Because we hold that an interested party is 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, regardless of the type of challenge brought, we affirm the Court of Federal Claims' dismissal of Percipient.ai's protest for lack of standing.

I

A

In 2020, the National Geospatial-Intelligence Agency (NGA) issued the SAFFIRE[2] solicitation seeking to improve its collection, interpretation, and storage of visual intelligence data. J.A. 57.[3] The solicitation sought

2. SAFFIRE stands for the Structured Observation Management, Automation, Augmentation and Artificial Intelligence Framework for Integrated Reporting and Exploitation. J.A. 38.

3. Because this case was dismissed by the trial court at the motion to dismiss stage, we assume all undisputed facts in the complaint are true and draw all reasonable inferences in the non-movant, Percipient's, favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016).

bids to build and operate a "[Structured Observation Management] Enterprise Repository" (SER) to store, disseminate, and regulate access to data. J.A. 58. NGA also sought "Computer Vision" (CV) capabilities; CV is a type of artificial intelligence technology that trains and uses computers to derive geospatial intelligence data from imagery. J.A. 56.

NGA awarded the SAFFIRE contract to CACI, Inc.-Federal in January 2021. J.A. 70. The contract was a single-award indefinite delivery/indefinite quantity contract that defined a general procurement goal and contemplated the issuance of multiple task orders and the use of subcontractors to handle specific tasks related to the goal. J.A. 38. The contract also incorporated the clause found in the Federal Acquisition Regulation (FAR) at section 52.244-6, which required CACI to use commercial or non-developmental items to the maximum extent practicable in executing its contractual obligations. J.A. 38, 857. NGA simultaneously issued Task Order 1 under the SAFFIRE contract, which directed CACI to develop and deliver the CV systems described in the solicitation. J.A. 24.

Percipient offers a commercial CV platform that it contends could have met NGA's CV requirements. Appellant's Opening Br. 7-8; J.A. 59-60. But Percipient did not have the capabilities to meet the SER component of the solicitation. Appellant's Opening Br. 7; J.A. 43. Percipient states that, for this reason, it "could not and did not bid on the SAFFIRE contract." Appellant's Opening Br. 8. Percipient also does not allege that it attempted to team up with another company to submit an offer. Percipient

states that it instead "awaited the market research where it could demonstrate its ability to meet NGA's CV needs." *Id.*

After the contract was awarded to CACI, Percipient reached out to NGA and asked for an evaluation of Percipient's commercial CV product for the SAFFIRE contract. J.A. 71. NGA directed Percipient to contact CACI. J.A. 72. After Percipient's initial demonstration of its CV product and much back and forth between NGA, CACI, and Percipient, CACI did not follow up regarding further evaluation. *See* J.A. 130. Percipient then reached out to NGA, and NGA entered into a bailment agreement with Percipient to evaluate Percipient's product's capabilities. J.A. 80. Percipient alleges that NGA only tested Percipient's product as a machine learning platform, but not as an analytical tool—which is what the SAFFIRE contract required. J.A. 85. Percipient concluded that NGA "deliberately failed" to evaluate Percipient's product to meet the SAFFIRE CV system requirements. *Id.*; Appellant's Opening Br. 12. NGA then communicated that there would be no further evaluation of Percipient's product. J.A. 85.

Percipient contacted NGA and "ask[ed] that NGA comply with its obligations under [10 U.S.C.] § 3453," J.A. 88, which is entitled "Preference for commercial products and commercial services" and requires agency heads to "acquire commercial services, commercial products, or nondevelopmental items other than commercial products to meet the needs of the agency" "to the maximum extent practicable," 10 U.S.C. § 3453(b)(1). Percipient states that

NGA's response "ignored the substance of Percipient's allegations." Appellant's Opening Br. 13.

In January 2023, Percipient filed its bid protest in the Court of Federal Claims contending, as relevant to this en banc proceeding, that NGA had violated its obligations under § 3453. J.A. 94. Percipient alleged that the trial court had jurisdiction over this challenge to the ongoing SAFFIRE procurement under § 1491(b)(1). J.A. 46. The government and intervenor-defendant CACI moved to dismiss Percipient's complaint on multiple grounds, including for lack of subject matter jurisdiction and lack of standing. J.A. 152-73, 175-99. The trial court initially denied the motion to dismiss, *Percipient.ai, Inc. v. United States*, 165 Fed. Cl. 331, 340 (2023), but then granted the appellees' motion for reconsideration and dismissed the case,[4] *Percipient.ai, Inc. v. United States*, No. 23-28C, 2023 U.S. Claims LEXIS 962, 2023 WL 3563093, at *3 (Fed. Cl. May 17, 2023). Percipient appealed.

A panel of this court reversed and remanded to the trial court with a dissent by Judge Clevenger arguing that the panel's holding as to 28 U.S.C. § 1491(b)(1) was inconsistent with the text, history, and purpose of the

4. The trial court granted the motion to dismiss because it determined that the Federal Acquisition Streamlining Act of 1994 (FASA) task order bar, 10 U.S.C. § 3406(f)(1), applied to Percipient's protest and removed the case from coverage by the Tucker Act. This task order bar ruling exceeds the scope of the rehearing that was granted, and we accordingly do not address it in this opinion. *See Percipient.ai, Inc. v. United States.*, 121 F.4th 1311, 1312 (Fed. Cir. 2024).

statute. *Percipient.ai, Inc. v. United States*, 104 F.4th 839 (Fed. Cir.), *reh'g en banc granted, opinion vacated*, 121 F.4th 1311 (Fed. Cir. 2024). The government petitioned for rehearing en banc, and we invited a response to the petition from Percipient. *Percipient.ai, Inc*, 121 F.4th at 1312. We granted the government's petition and ordered briefing and argument on the following standing issue: "Who can be 'an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement' under 28 U.S.C. § 1491(b)(1)?"[5] *Id.* We received two amicus briefs and heard oral argument on June 9, 2025. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

B

We begin with a review of the relevant history underlying § 1491(b)(1). Our predecessor court, the United States Court of Claims,[6] first recognized a type of bid

5. We noted that we would "not revisit [or] . . . require additional briefing on the issues of task bar under the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 3406(f); subject matter jurisdiction under 28 U.S.C. § 1491(b)(1); and timeliness of claims under *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007)." *Percipient.ai*, 121 F.4th at 1312.

6. When Congress enacted the Federal Courts Improvement Act of 1982, Congress abolished the Court of Claims and the Court of Customs and Patent Appeals and replaced them with our court, the United States Court of Appeals for the Federal Circuit, which inherited the appellate jurisdiction of the predecessor courts, and the United States Claims Court (later renamed the United States Court of Federal Claims) which inherited the trial jurisdiction of the Court of Claims. Matthew H. Solomson, *Court of Federal Claims:*

protest cause of action in *Heyer Products Co. v. United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (Ct. Cl. 1956). In that case, the plaintiff, Heyer, had submitted a bid on a government contract, but the government awarded the contract to a different bidder who had submitted a higher bid. Heyer believed that the government's failure to award the contract to Heyer was the result of deliberate retaliation against Heyer. The government moved to dismiss the petition for lack of standing. The Court of Claims acknowledged that the law at the time recognized no cause of action in bid protest cases, stating:

> It has been settled beyond controversy that most statutes governing the awarding of bids by governmental agencies are enacted for the benefit of the public who are served by these agencies, and not for the benefit of the bidders, and, therefore, that bidders have no right to sue on the ground that the provisions of such an Act have been violated, in that the contract had not been let to the lowest bidder. . . . [I]t is only the public who has a cause for complaint, and not an unsuccessful bidder.

Id. at 412 (collecting cases). But the court nonetheless recognized a cause of action arising out of an implied contract theory, over which it has jurisdiction pursuant to the Tucker Act. *Id.* at 412-13; 28 U.S.C. § 1491(a). The

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Jurisdiction, Practice, and Procedure ch. 1, § VII (2022) (ebook). The holdings of the Court of Claims and the Court of Customs and Patent Appeals are binding as precedent on this court. *S. Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

court explained that "[i]t was an implied condition of the request for offers that each of them would be honestly considered, and that that offer which in the honest opinion of the contracting officer was most advantageous to the Government would be accepted." *Heyer*, 140 F. Supp. at 412. Because the implied contract was broken, Heyer could maintain an action for damages for its breach. *Id.* at 413.

The Court of Claims imposed certain restrictions on this type of cause of action, limiting recovery to instances in which there was clear and convincing proof that there had been a fraudulent inducement for bids and that the government intended to disregard all the bids except from the parties to which it had intended to give the contract. *Id.* at 414. Essentially, a plaintiff had to show that the bids "were not invited in good faith." *Id.*

A cause of action in the district courts was first recognized in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 137 U.S. App. D.C. 371 (D.C. Cir. 1970). There, the United States Court of Appeals for the District of Columbia Circuit considered, as a matter of first impression, "[w]hether a frustrated bidder for a government contract has standing to sue, alleging illegality in the manner in which the contract was let." *Id.* at 861. The court examined early landmark federal standing cases and determined that Congress had legislatively reversed the Supreme Court's decision in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940), "in which the Public Contracts Act was interpreted to be an enactment for the protection of the government rather than for those contracting with the government," with the enactment of

the Administrative Procedure Act. *Scanwell*, 424 F.2d at 866-67. The court held that "one who makes a prima facie showing alleging [arbitrary or capricious abuses of discretion] on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act." *Id.* at 869.

Soon thereafter, the Court of Claims similarly expanded its own interpretation of its bid protest jurisdiction in *Keco Industries, Inc. v. United States*, 428 F.2d 1233, 192 Ct. Cl. 773 (Ct. Cl. 1970). The court stated: "[A]s a result of *Scanwell* a party, who can make a prima facie showing of arbitrary and capricious action on the part of the Government in the handling of a bid situation, does have standing to sue." *Id.* at 779. The court also determined that *Heyer* was not limited to instances where "there was strong evidence of bad faith and intentional fraud on the part of the Government;" instead, it stated a "broad general rule which is that every bidder has the right to have his bid honestly considered by the Government, and if this obligation is breached, then the injured party has the right to come into court to try and prove his cause of action." *Id.* at 779-80.

In 1982, Congress enacted the Federal Courts Improvement Act (FCIA), which amended the Tucker Act and gave the Court of Federal Claims the statutory authority to decide certain bid protest matters. Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982) (codified before repeal at 28 U.S.C. § 1491(a)(3)), *repealed by* Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, sec. 12, 110 Stat. 3870, 3874-76.

Specifically, "[t]o afford complete relief on any contract claim brought *before the contract is awarded*," the Court of Federal Claims was granted "*exclusive jurisdiction* to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief." *Id.* (emphases added). But FCIA did not alter jurisdiction in the district courts to hear post-award challenges. The House Committee Report stated: "It is not the intent of the Committee to change existing caselaw as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action." H.R. Rep. No. 97-312, at 43 (1981).

This was the state of bid protest standing before the enactment of § 1491(b)(1). In the Court of Federal Claims, "disappointed bidders or their equivalents," *Motorola, Inc. v. United States*, 988 F.2d 113, 115 (Fed. Cir. 1993), in the "zone of active consideration," *C.A.C.I., Inc.-Fed. v. United States*, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983), had standing to bring a bid protest in the pre-award context under an implied-in-contract theory, *Am. Fed'n. of Gov't. Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1297-98 (Fed. Cir. 2001) (AFGE). In the federal district courts, "disappointed bidders could . . . challenge contract awards . . . for alleged violations of procurement laws or regulations, or for lack of rationality" in the post-award context under the APA. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331 (Fed. Cir. 2001); *see also, e.g., Diebold v. United States*, 947 F.2d 787, 790 (6th Cir. 1991); *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987).

Appendix A

The disparate procedural pathways between the Court of Federal Claims and the district courts created jurisdictional non-uniformity in bid protests. In 1990, Congress directed the Department of Defense to establish an advisory panel and evaluate the acquisition laws applicable to the Department of Defense. National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, Title VIII, sec. 800, 104 Stat. 1485, 1587 (1990) (codified before repeal at 10 U.S.C. § 2301), *repealed by* Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, Title I, § 1501(a), 108 Stat. 3243, 3296. The resulting panel report and recommendations stated that "protests in the Court of Federal Claims have been enmeshed in an endless web of jurisdictional issues." Streamlining Defense Acquisition Laws, Report of the Acquisition Law Advisory Panel to the United States Congress, at 1-258 (1993) (Panel Report). The Panel Report highlighted two problems: (1) "whether the Court of Federal Claims has exclusive jurisdiction over pre-award bid protests or whether its pre-award jurisdiction is concurrent with the district courts"; and (2) "whether the Court of Federal Claims has jurisdiction over the type of agency wrongdoing for which the [Government Accountability Office (GAO)] and the [General Services Administration Board of Contract Appeals (GSBCA)] customarily grant relief." *Id.* As to the first issue, the Panel Report noted that there were "unresolved conflicts between the courts in different parts of the country on whether the Court of Federal Claims is the exclusive judicial forum to consider pre-award bid protests." *Id.* As to the second issue, the GAO and GSBCA were two other venues that could hear bid protests, and it was unclear whether the Court of

Federal Claims had concurrent jurisdiction to consider the types of cases heard by these forums too. *Id.* at 1-259.

The Competition in Contracting Act of 1984 (CICA) authorized an "interested party" to file some bid protests before the GSBCA (i.e., those under the Brooks Act) that challenged "any decision by a contracting officer alleged to violate a statute or regulation" "in connection with any procurement." Pub. L. No. 98-369, tit. VII, sec. 2713, 98 Stat. 1175, 1182-84 (amending the Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965)) (codified with other amendments before repeal at 40 U.S.C. § 759(f)(1), definitions of "protest" and "interested party" codified at § 759(9)(A), (9)(B)), *repealed by* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, sec. 5101, 110 Stat. 186, 680. CICA expressly defined "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." *Id.* sec. 2713, 98 Stat. at 1183-84.

CICA also provided that an "interested party" could file protests with the GAO, and the Comptroller General had authority to decide "[a] protest concerning an alleged violation of a procurement statute or regulation." *Id.* sec. 2741, 98 Stat. at 1199-203 (codified at 31 U.S.C. §§ 3551-56). Here too, "interested party" was defined 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." *Id.*

The Panel Report noted that it was unclear whether the Court of Federal Claims had subject matter

jurisdiction to consider the types of agency wrongdoing that the GSBCA and GAO could grant relief for. *See* Panel Report at 1-259. It also noted that the jurisdiction of the Court of Federal Claims was "severely limited by the need to find that the Government breached [an] implied contract." *Id.* Because the implied contract arose only when bids or proposals were submitted, the Panel Report stated that many protests that were considered by other forums could not be heard by the Court of Federal Claims. *Id.* In an effort to reduce the complexities and delays arising out of having disparate judicial systems, the Panel Report recommended that the "[t]he Court of Federal Claims should be the single judicial forum with jurisdiction to consider all bid protests that can now be considered by any of the district courts or by the Court of Federal Claims." *Id.* at 1-261 (emphasis omitted). The Panel Report also recommended that the Court of Federal Claims' "jurisdiction should, as much as possible, parallel that of the GAO and the GSBCA in order to avoid both the forum shopping and type of confusion that has occurred in the past." *Id.* at 1-265. The Panel Report specifically recommended that "[t]he statute should be amended to provide that only interested parties, as defined by [CICA], can file protests." *Id.* at 1-266.

In 1996, Congress, aware of the Panel Report's recommendations, amended the Tucker Act again with the enactment of ADRA. Pub. L. No. 104-320, sec. 12, 110 Stat. at 3874; *see AFGE*, 258 F.3d at 1300. As part of the amendment, Congress enacted § 1491(b), which gave the Court of Federal Claims a new independent jurisdictional grant specifically for bid protest claims. ADRA sec. 12(a), 110 Stat. at 3874 (provision titled "Bid

Protests"). ADRA provided the Court of Federal Claims and the district courts with concurrent jurisdiction over bid protest actions, *id.* sec. 12(a), § 1491(b)(1), 110 Stat. at 3874, but included a sunset provision so that the district courts' jurisdiction over bid protests would terminate on January 1, 2001, *id.* sec. 12(d), 110 Stat. at 3875. *See Impresa Construzioni*, 238 F.3d at 1332. It also eliminated the pre- and post-award dichotomy between the Court of Federal Claims and the district courts by extending the Court of Federal Claims' jurisdiction "without regard to whether suit is instituted before or after the contract is awarded." ADRA, sec. 12(a), § 1491(b)(1), 110 Stat. at 3874.

Much of the language within § 1491(b) tracked the language in CICA, specifically allowing an "interested party" to challenge "a solicitation" or "a proposed award or the award of" a contract, CICA, sec. 2713, 98 Stat. at 1183-84, and mirroring the type of review available to the GSBCA and GAO, *id.* secs. 2713, 2741(a), 98 Stat. at 1183-84, 1199. Further, at the time of ADRA's enactment, the Brooks Act included language giving the GSBCA the authority to review "any decision by a contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of procurement authority," which is similarly reflected in the language of § 1491(b). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, sec. 1432, 108 Stat. 3243, 3291 (codified before repeal at 40 U.S.C. § 759), *repealed by* National Defense Authorization Act for Fiscal Year 1996, sec. 5101, 110 Stat. at 680.

Senator Cohen, who offered the amendment, stated that the goal of the provision was to "expand the bid

protest jurisdiction of the Court of Federal Claims," with a sunset provision allowing concurrent jurisdiction for a limited period, in order to remedy the "overlapping authority" issue between the Court of Federal Claims and the district courts that "led to forum shopping and . . . resulted in unnecessary and wasteful litigation over jurisdictional issues." 142 Cong. Rec. S11848-49 (daily ed. Sept. 30, 1996) (statement of Sen. William Cohen). He also quoted the recommendations from the Panel Report that urged adoption of one judicial system to consider bid protests. *Id.* at S11849. The goal of the amendment was therefore, in essence, to close a procedural loophole and consolidate both pre- and post- award bid protests into one forum—the Court of Federal Claims.

II

We review the "Court of Federal Claims' decisions *de novo* for errors of law, and for clear error on findings of fact." *Anaheim Gardens v. United States.*, 444 F.3d 1309, 1314 (Fed. Cir. 2006). Dismissals, both for lack of subject matter jurisdiction and for failure to state a claim, are reviewed de novo. *Taylor v. United States*, 959 F.3d 1081, 1086 (Fed. Cir. 2020). We can affirm a dismissal "on any ground supported by the record." *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392, 1397 (Fed. Cir. 2017). "Whether a party has standing to sue is [also] a question that this court reviews *de novo*." *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1376 (Fed. Cir. 2000).

III

"In construing a statute or regulation, we begin by reviewing its language to ascertain its plain meaning." *Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1299 (Fed. Cir. 2008). Section 1491(b)(1) reads:

> Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by *an interested party* objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1) (emphasis added).[7]

We have long held that the term "interested party" for bid protests should be limited to actual or prospective

7. The sunset provision provided that "[t]he jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress." ADRA, sec. 12(d), 110 Stat. at 3874-75.

bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract. In *AFGE*, we explained that, in enacting ADRA, "Congress intended to extend the jurisdiction of the Court of Federal Claims to include post-award bid protest cases brought under the APA by *disappointed bidders*." 258 F.3d at 1302 (emphasis added). We see no reason to depart from this settled interpretation.

Even Percipient does not contend that "interested party" should be reinterpreted for § 1491(b) as a whole, but only for a part of the provision. Percipient argues that this statutory provision should be read as containing three "prongs" which each provide an independent basis for objection, namely: (i) a solicitation by a federal agency for bids or proposals for a proposed contract, (ii) a proposed award or the award of a contract, and (iii) any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Appellant's Opening Br. 25. Percipient contends that the definition of "interested party" should change based on the "prong" under which a party brings a challenge. *See id.* at 30-31, 34-35.

We disagree that the definition of "interested party" should change in this way. We see no statutory support for assigning a different meaning to this single term depending on how a claimant chooses to style or bring its claim. Section 1491(b) is not written with multiple interested party provisions; it has one singular interested party. Percipient's construction would have the same term

mean different things in the same sentence. That is not the way statutory construction is done. Our definition is supported by the plain text, statutory history, and longstanding interpretation of this term within the judicial system.

A plain reading counsels that a single term carries the same meaning throughout a single sentence. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute . . . ."). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barry v. McDonough*, 101 F.4th 1348, 1356 (Fed. Cir. 2024) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). Congress could have indicated that "interested party" should be read differently and have different meanings throughout this single statutory sentence. But it did not. Without express guidance from Congress, it contradicts the plain text of the statute to alter the meaning of a single antecedent term within a single sentence in the way Percipient proposes.

Further, despite Percipient's wish to divide the statute into three "prongs," there is no indication that the statute is separable in this manner—especially since § 1491(b)(1) is not so divided. Congress used a single, unbroken, and undivided sentence. Dividing this single sentence and imparting different definitions for a single term within

each artificial division contravenes the plain text of the statute. Additionally, Percipient's proposed interpretation is not supported by the statutory history.

IV

"Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 596 U.S. 740, 746, 142 S. Ct. 1953, 213 L. Ed. 2d 265 (2022) (cleaned up). "Congress was not writing on a blank slate when it enacted § 1491(b)(1)," Government's Response Br. 25, but against the backdrop of decades of government contract law developed by the Court of Federal Claims or its predecessor, the district courts, and relevant government agencies. The term "interested party" carries the context imparted by the history of bid protest cases and prior statutes.

In *AFGE*, we interpreted § 1491(b) and considered "whether Congress intended to expand the class of parties who can bring bid protest actions in the Court of Federal Claims," 258 F.3d at 1300, and determined that "interested party" carried forward the definition from CICA and is therefore 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." *Id.* at 1302; *see id.* at 1301-02.

Indeed, the now-repealed Brooks Act, which was in effect while § 1491(b) was being drafted, gave the GSBCA jurisdiction over bid protests related to automated data

processing equipment procurements by "an interested party in connection with any procurement . . . subject to this section," 40 U.S.C. § 759(f)(1) (repealed 1996), and included the same definition for "interested party" as in CICA, *compare id.* § 759(f)(9)(B) (repealed 1996) (defining "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."), *with* CICA, sec. 2741(a), § 3551(2), 98 Stat. at 1199 (same definition for purposes of bid protests before the GAO). This evinces a consistent usage of the term "interested party" throughout the statutory scheme as to the Court of Federal Claims and its predecessor the Court of Claims and indicates that the context of the term "interested party" had a specific understood meaning in the procurements sphere at the time that § 1491(b) was drafted. The usage of the CICA definition of "interested party" in the Brooks Act reinforces that Congress understood and intentionally brought that specific definition into the Court of Federal Claims' jurisdiction. This is especially so in light of the Brooks Act's authorization for the GSBCA to "review . . . any decision by a contracting officer that is alleged to violate a statute [or] regulation" "in connection with any procurement that is subject to this section," 40 U.S.C. § 759(f)(1) (repealed 1996), which mirrors the language Congress used in the third part of § 1491(b)(1). This continuity shows that Congress had already permitted an "interested party," in at least one other statutory context, to challenge the violation of another statute or regulation in connection with a procurement—a decision they chose to make again in § 1491(b)(1). Absent any indication of

alternative Congressional intent, the old term of art still means something, and this understood meaning should be conserved and carried forward into ADRA.[8] *See, e.g., United States v. Davis*, 588 U.S. 445, 458, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning."); *Azar v. Allina Health Servs.*, 587 U.S. 566, 574, 139 S. Ct. 1804, 204 L. Ed. 2d 139 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes.").

There is no indication that Congress, in enacting ADRA, intended to expand the types of *parties* who could bring a bid protest in the Court of Federal Claims. Instead, the history, *see supra* Section I.B, shows that there was jurisdictional confusion in where to bring a bid protest because of the different procedural pathways and pre- and post-award separation between the Court of Federal Claims and the district courts. There was a clear interest in consolidating *procedural* pathways—namely, to allow for post-award bid protest challenges in the Court of Federal Claims.

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8. Moreover, the dissent suggests that we "ignore" statutory language in so-called prong 3 by not extending the definition of "interested party" beyond its historical meaning. Dissent at 6-7. Not so. As we demonstrate above, that language (which mirrors Brooks Act language) provides different grounds to challenge procurement decisions. The dissent would conclude that even though Congress used the same statutory term, "interested party," coupled with almost identical language about statutory challenges lifted from the Brooks Act, that Congress sub silentio intended to change the long-standing definition of that term.

In fact, the statutory history indicates that Congress considered and rejected including subcontractors as interested parties in both CICA and the Brooks Act. With respect to CICA, Congress initially contemplated a broader definition of who could protest as an interested party, specifically "a person whose direct economic interest would be affected as contractor or *subcontractor*." H.R. 5184, 98th Cong. § 204(g)(2) (1984) (emphasis added). But ultimately, CICA as enacted did not include this language. *See* 40 U.S.C. § 759(f)(9)(B) (repealed 1996); *US W. Commc'ns Servs., Inc. v. United States*, 940 F.2d 622, 628 (Fed. Cir. 1991) ("CICA, as enacted, provided for protest 'to a solicitation by a Federal agency' and all references that would have permitted subcontractors to protest were deleted.").

Similarly, regarding the Brooks Act, it is particularly compelling that Congress specifically considered more expansive language that would align with Percipient's proposed definition and expressly rejected the expansion. In particular, the House of Representatives proposed amending the definition of "interested party" to permit protests by subcontractors because "[t]he Committee [on Government Operations] ha[d] become concerned in recent years that restrictive specifications may sometimes go unchallenged, especially in [certain] procurements, when prospective prime contractors have no incentive to protest." H.R. Rep. No. 102-364, at 32 (1991). The proposed language would have added the following to the definition of "interested party": "a prospective subcontractor whose economic interest would be affected, as determined by the [GSBCA], by specifications in any solicitation or

other request for bids, proposals, or offers subject to this section that are alleged to be restrictive of competition." *Id.* at 12; *see also id.* at 48 (observing that the proposed amendment would change the requirement that a party have a "direct economic interest" to the requirement that a party have an "'economic interest' that, 'as determined by the [GSBCA],' would be affected by (1) any action that could be the subject of a protest or (2) any relief that the Board could order, including, for example, resolicitation, in connection with a protest"). The House Report expressly noted that, under this expanded definition, "[a] vendor that is a prospective subcontractor would be an 'interested party' only if protesting restrictive specifications." *Id.* But the House Report also noted "concern[s] about the expansion of the definition of 'interested party' contained in the proposed amendments to the definitional section of the Brooks Act." *Id.* at 80. This portion of the report recognized that "increasing the number of possible protestors . . . would further complicate. . . procurements and . . . increase the opportunity for delay . . . because the legislation would grant a greater number of firms a legally recognized interest in any given . . . procurement." *Id.* It further noted that this "proposed expansion of the definition of 'interested party' would also *be inconsistent with existing procurement law*." *Id.* (emphasis added). And it concluded by stating that "the grant of such a right is wholly unnecessary, given that current law authorizes the filing of a protest by 'an actual or prospective bidder or offeror.'" *Id.* at 80-81 (quoting 40 U.S.C. § 759(f)(9)(B)).

The statutory history of these other provisions provides additional context as to Congress' intentions

in enacting ADRA.[9] Congress had already considered, and rejected, the notion of allowing subcontractors to have standing in bid protests at the Court of Federal Claims and its predecessor court. Congress specifically chose to incorporate the term "interested party," which had a settled meaning within the government contracts space. And there is no indication in the statutory history of ADRA that Congress reversed course and decided to markedly expand the identities of the parties who could sue under its provisions. Indeed, it supports the conclusion that "interested party" carries not only the same meaning throughout the statutory sentence, but throughout an entire statutory scheme covering the jurisdiction of the Court of Federal Claims and its predecessor court.

Finally, Congress specifically chose to use the term "interested party" when defining the category of persons who have standing, which as demonstrated above, had a well-known meaning in procurement law. If Congress had intended to expand standing in the procurement context, it could have invoked the broad language of the APA and extended standing to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. But Congress did not. Instead, Congress explicitly invoked the APA

9. The dissent attempts to distinguish the extensive statutory history here regarding "interested party" and repeatedly emphasizes that "interested party," as used in CICA and the Brooks Act, only applied to contractors or proposed contracts. Dissent at 5. But that only reinforces our point. Congress enacted ADRA in the backdrop of a rich history, including the history of CICA and the Brooks Act, and repeatedly chose *not* to expand jurisdiction to subcontractors.

only in defining ADRA's standard of review, but not for its party standing requirements. *See AFGE*, 258 F.3d at 1302 (quoting 28 U.S.C. § 1491(b)(4)) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in [APA] section 706 . . . .").

V

The definition set forth by Percipient, which largely tracks the broader APA standard, is that the term "interested party" must include any directly injured party who could have offered its product or service to meet the needs of the agency but for that agency's alleged legal violation. Appellant's Opening Br. 25-26. That interpretation is countertextual, unsupported by the statutory history, and contravenes our long-standing precedent as to the Court of Federal Claims and its predecessor court.

A

Despite Percipient's contention that a definition of "interested party" that limits standing to actual or prospective bidders or offerors "render[s] the third prong superfluous in violation of basic canons of statutory construction," Appellant's Opening Br. 30, many cases show that the socalled "third prong" has independent force.

The addition of the third part of the statutory sentence clarified that bid protest jurisdiction extends beyond

challenges to just the solicitation and the award. *See OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005) ("[T]he first two categories of this court's bid-protest jurisdiction, a pre-award protest or a post-award protest, are well recognized and relatively standard proceedings. The third category of this court's bid-protest jurisdiction is more amorphous and indefinite . . . ."). This court and the Court of Federal Claims have noted repeatedly that the third part permits bid protests to challenges of statutes and regulations that do not fit neatly within the solicitation or award boxes of the first two parts. For instance, in *RAMCOR Services Group, Inc. v. United States* , we recognized that the third part provided jurisdiction to consider challenges to GAO override decisions, because "[a]s long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction" under the third part. 185 F.3d 1286, 1289 (Fed. Cir. 1999) (further discussing that "[the override statute] fits comfortably in that broad category."). In *OTI*, the Court of Federal Claims stated that the third part of § 1491(b)(1) "is not limited to override cases." 68 Fed. Cl. at 114.

Similarly, we have recognized jurisdiction in protests involving challenges brought solely under the third part of the statutory sentence. For example, in *Distributed Solutions, Inc. v. United States*, we considered whether the contractors involved had standing to challenge the government's decision "to for[]go the direct competitive procurement process." 539 F.3d 1340, 1345 (Fed. Cir. 2008). The contractors alleged violations of CICA, the Small Business Act, 15 U.S.C. § 631(j)(3), and various

Federal Acquisition Regulations. *Id.* Even though there was no solicitation to challenge, we concluded that "[t]here is no question that the contractors here are interested parties and not mere 'disappointed subcontractors' without standing" because the contractors were prospective bidders and "prepared to submit bids" in response to the anticipated request for quotation or proposal. *Id.* at 1344-45.

Indeed, there are many other cases where courts have applied the CICA definition of interested party standing to bid protests involving alleged regulatory or statutory violations. *See Acetris Health, LLC v. United States*, 949 F.3d 719, 727 (Fed. Cir. 2020) (discussing that "[the contractor] has standing because the government has taken a definitive position as to the interpretation of the [Trade Agreements Act of 1979] and the [Federal Acquisition Regulation] that would exclude [the contractor] from future procurements for other products on which it is a likely bidder"); *Oak Grove Techs., LLC v. United States*, 116 F.4th 1364, 1372-73, 1376 (Fed. Cir. 2024) (involving a challenge to an agency's resolution of an alleged Procurement Integrity Act violation or organizational conflict of interest determination); *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1357-58 (Fed. Cir. 2018) (involving a pre-award challenge to a sole-source determination based on an alleged violation of CICA); *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1381-82 (Fed. Cir. 2012) (involving a challenge to the scope of an agency's corrective action based on "alleged violations of statutes and regulations governing the procurement process"); *Land Shark Shredding, LLC*

v. United States, 842 F. App'x 589, 592 (Fed. Cir. 2021) (involving a challenge to the cancellation of a procurement based on an alleged violation of the Rule of Two under 38 U.S.C. § 8127(d)); *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 148, 152-54 (D.D.C. 2004) (involving a challenge to agency decision to convert services to in-house personnel alleging a violation of Department of Defense procurement regulations and discussing that the clause in the third part of § 1491(b)(1) is broad and sweeping in scope); *Advanced Sys. Tech., Inc. v. Barrito*, No. CIV.A. 05-2080ESH, 2005 U.S. Dist. LEXIS 39703, 2005 WL 3211394, at *6 (D.D.C. Nov. 1, 2005) (involving a challenge to Small Business Administration code designation that prevented contractor from bidding for two Army solicitations and finding that "APA jurisdiction over bid protests no longer exists and find[ing] that this case falls within the broad parameters of Court of Federal Claims jurisdiction established by the ADRA with respect to procurement disputes").

These cases demonstrate that the third part of § 1491(b) has independent force under the existing understood definition of who is an "interested party." Thus, there is no risk of superfluity in reinforcing that the definition of "interested party" remains consistent throughout the statutory sentence.

B

Percipient argues, however, that the amendments to § 1491 were designed to give the Court of Federal Claims the same jurisdiction as the district courts enjoyed under

the *Scanwell* line of cases, and that those cases recognize subcontractor jurisdiction.

As discussed earlier, we recognize that there is a longstanding understanding that Congress legislates against the backdrop of preexisting law, unless the statute otherwise dictates. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992). But contrary to Percipient's suggestion that the district courts' former *Scanwell* jurisdiction under the APA was broad enough to encompass its claim, s*ee* Appellant's Opening Br. 6-7 ("Nothing suggests that the [Court of Federal Claims'] jurisdiction would be in any way narrower than the jurisdiction previously exercised by the district courts under the APA."), the *Scanwell* line of cases does not support reading subcontractor standing into § 1491(b)(1).[10] And to the extent that *Scanwell* could be interpreted to carry a broader interpretation, the extensive history described above is a strong indication that Congress did not intend to adopt the broader APA standard for standing.

Scanwell framed the pertinent legal question it addressed as "[w]hether a *frustrated bidder* for a government contract has standing to sue, alleging illegality in the manner in which the contract was let." *Scanwell*,

10. Percipient also makes the argument that "nothing about [its] challenge would require it to be a subcontractor." Appellant's Opening Br. 42. But Percipient acknowledges that it did not bid on the SAFFIRE contract. Therefore, even if it is not a "subcontractor," Percipient is also not an actual or prospective bidder or offeror and consequently does not have standing.

424 F.2d at 861 (emphasis added). There, the Federal Aviation Administration invited bids for the installation of instrument landing systems at airports. *Id.* at 860. The appellant, who was a contractor, had the second-lowest bid, and alleged that the contractor who had the lowest bid, and was subsequently awarded the contract, did not meet the requirements laid out in the procurement. *Id* at 860-61. The district court determined that the appellant had standing under the APA standard, even though it noted that "[t]he law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing to challenge the legality of the action." *Id.* at 873. Furthermore, *Scanwell* only recognized that a *frustrated bidder* had standing, not that mere *disappointed subcontractors* had standing.

And the line of cases in the district courts and regional circuits relying on *Scanwell* did not involve, or even discuss, disappointed subcontractors either. *See B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 718 (2d Cir. 1983) (referencing *Scanwell*'s discussion of the "pertinent legislative history of the APA which supported a frustrated bidder's standing to seek judicial review"); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1291, 1305, 147 U.S. App. D.C. 221 (D.C. Cir. 1971) (reversing the district court's permanent injunction preventing the agency from awarding a contract to any bidder other than the appellant contractor, but noting that "[w]e do not recede from our expression in *Scanwell* of the beneficial purposes served by frustrated bidders who, as 'private attorney generals,' can aid in furthering the public interest in the integrity of the procurement process"); *Mgmt. Sci. Am., Inc. v.*

Pierce, 598 F. Supp. 223, 228-30 (N.D. Ga. 1984), *aff'd sub nom. Mgmt. Sci. v. Pierce*, 778 F.2d 792 (11th Cir. 1985) (discussing the line of "frustrated bidder" cases and differentiating them from causes of action involving a government contractor and stating that "the jurisdiction of the district courts which Congress explicitly avoided disturbing in the FCIA extends only to frustrated bidder cases under *Scanwell*"); *Dial One Franklynn Pest Control Co. Inc. v. U.S. Dep't of Navy*, No. CIV. A. 92-3223, 1993 U.S. Dist. LEXIS 5851, 1993 WL 139430 at *4 (E.D. La. Apr. 28, 1993) (describing this case as a "frustrated bidder" case and noting that the plaintiff attempted to invoke the jurisdiction "limited to that exercised in the *Scanwell* line of cases regarding 'frustrated or disappointed bidders'"); *Env't. Tectonics Corp. v. Robinson*, 401 F. Supp. 814, 815 (D.D.C. 1975) (describing *Scanwell* as holding that "a frustrated bidder had standing to petition and the court to declare a contract null and void"); *Info. Sys. & Networks Corp. v. U.S. Dep't of Health & Hum. Servs.*, 970 F. Supp. 1, 6 (D.D.C. 1997) (differentiating the case at hand, which involved a plaintiff complaining of wrongful termination of its own contract, from "disappointed" or "frustrated" bidder actions involving contractors seeking to void the award of a contract to another).

To the extent that there are isolated cases in which subcontractors brought challenges to bid protests in district court, the courts' analysis focused on the closeness of the relationship between the government and the prime contractor and relied primarily on the consideration that the prime contractor was essentially an agent of the government, not that a subcontractor lacking privity

with the government independently had standing to sue. *See, e.g., Lombard Corp. v. Resor*, 321 F. Supp. 687, 690 (D.D.C. 1970) (focusing primarily on the fact that Chamberlain, the prime contractor, was "something more" than an independent contractor, and evidence suggesting that "Chamberlain considered itself an agent for at least some purposes while making the procurement"); *Am. Dist. Tel. v. Dep't of Energy*, 555 F. Supp. 1244, 1244 (D.D.C. 1983) (describing defendant Morrison-Knudsen Company as the agent of the Department of Energy and characterizing plaintiff American District Telegraph as a "disappointed bidder"); *see also Bayou State Sec. Servs., Inc. v. Dravo Util. Constructors, Inc.*, 674 F.2d 325, 328-29 (5th Cir. 1982) (declining to address the subcontractor standing issue because the plaintiff's challenge was not meritorious).

There is no definitive authority that subcontractors could bring actions to challenge procurement decisions absent an agency-like relationship between the prime contractor and the government or greater government involvement in the selection of the subcontractor, such that the subcontractor was essentially acting like a prime. *See Amdahl Corp. v. Baldrige*, 617 F. Supp. 501, 505 (D.D.C. 1985) (adopting a test from the Comptroller General's opinion that subcontractor protests are only permitted in five situations: "(i) when the contractor acted as a purchasing agent of the government; (ii) where the government has caused or controlled the rejection or selection of a potential subcontractor; (iii) where agency bad faith or fraud in the approval of a subcontractor is demonstrated; (iv) where a contract was made 'for' the

government; or (v) where the agency is entitled to an advance decision" and determining that the subcontractor involved did not have standing) (citing *Optimum Sys., Inc.*, 54 Comp. Gen. 767, 773-74 (Mar. 19, 1975)); *Rubber Millers, Inc. v. United States*, 596 F. Supp. 210, 213 (D.D.C. 1984) (finding no subcontractor standing because Rubber Millers was a "subcontractor [who] has never submitted a bid to the Navy," and all "[t]he statutory provisions cited by the plaintiff are directed exclusively at 'contractors' and bidders," not subcontractors); *Contractors Eng'rs, Int'l v. Dep't of Veterans Affs.*, 947 F.2d 1298, 1300-02 (5th Cir. 1991) (determining that the subcontractor did not have standing under the *Amdahl* test); *Info. Sys. & Networks Corp*, 970 F. Supp. at 8 (finding no standing for the subcontractor under *Ahmdahl*, and stating that "subcontractors are not intended for protection under CICA"); *see also Free Air Corp. v. F.C.C.*, 130 F.3d 447, 450, 327 U.S. App. D.C. 218 (D.C. Cir. 1997) (describing *Scanwell* and other cases as holding that "sufficiently viable runners-up in a procurement process have standing to allege that an illegality in the process caused the contract to go to someone else"). Subcontractors had no independent standing to bring bid protests in district court under *Scanwell*; subcontractor standing was recognized in limited circumstances where there was an agency-like relationship between the contractor and the government or more direct government involvement.

Further, even if *Scanwell* could be read so broadly, the relevant statutory history strongly demonstrates that Congress intended interested parties to be defined more narrowly. *See supra* Section IV. And the history of both

CICA and the Brooks Act also supports that Congress explicitly considered expanding standing to encompass subcontractors and expressly declined to do so. Congress was aware of how to invoke the APA standard, as it did for the standard of review. But Congress specifically chose the term "interested party" to define party standing. With that selection of a well-known term, we should not presume that Congress sub silentio intended to adopt the broader APA standard just because in § 1491(b) it merged the district court's prior *Scanwell* jurisdiction with that of the Court of Federal Claims.

C

Even if we were mistaken as to the scope of district court jurisdiction under the APA as reflected in the *Scanwell* line of cases, that would at most suggest that subcontractors could have an APA claim in district court to enforce § 3453, not an action in the Court of Federal Claims under § 1491. Percipient argues that such a district court action would defeat the Congressional purpose to place all bid protest jurisdiction in the Court of Federal Claims. While that may be a powerful argument as to why there is not district court APA jurisdiction as to subcontractors, such a policy argument does not support expanding the jurisdiction of the Court of Federal Claims beyond that provided by Congress.

In a related argument, Percipient contends that denying both district courts and the Court of Federal Claims jurisdiction to enforce § 3453 would leave subcontractors no remedy to enforce § 3453, and that

just as prime contractors have a remedy to enforce that statute, *see Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018), so should subcontractors. This is again not a persuasive argument for expanding the jurisdiction of the Court of Federal Claims beyond what Congress has prescribed, and it is not for us to decide whether district courts have jurisdiction over an APA cause of action by subcontractors to enforce § 3453. We note only that there are other mechanisms for enforcing the statute as to subcontractors, such as through protests by prime contractors or joint bids with other subcontractors so that one would be the prime contractor, and the language of § 3453 does not compel a construction that subcontractors can enforce the statute.

VI

We conclude that an "interested party" who has standing to bring a bid protest under § 1491(b) is 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, regardless of the type of challenge brought. We therefore affirm the Court of Federal Claims' dismissal of Percipient's protest for lack of standing.

AFFIRMED

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1970

PERCIPIENT.AI, INC.,

Plaintiff-Appellant,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00028-EGB, Senior Judge Eric G. Bruggink.

STOLL, *Circuit Judge*, with whom MOORE, *Chief Judge*, and LOURIE and TARANTO, *Circuit Judges*, join, dissenting.

The question before the en banc court is simple: "Who can be 'an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement'" under the Tucker Act, 28 U.S.C. § 1491(b)(1)? *Percipient.ai, Inc. v. United States*, 121 F.4th 1311, 1312 (Fed. Cir. 2024) (omission in original). The majority holds that an "interested party" is limited to an actual or prospective bidder regardless of the subject matter of interest. Instead of considering who can be an interested party "objecting to . . . any alleged violation of statute or

regulation in connection with a procurement or a proposed procurement," the majority borrows a definition of interested party that Congress included in a different statute, the Competition in Contracting Act ("CICA"). But that statute does not even include the subject matter of interest at issue here. Given this difference in scope between CICA and the Tucker Act, it is not surprising that Congress did not adopt that definition when enacting the Tucker Act. Respectfully, ignoring statutory language and adopting a definition that Congress chose not to adopt cannot be the proper statutory analysis.

Section 1491(b)(1) provides that the Court of Federal Claims has jurisdiction over an action 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." 28 U.S.C. § 1491(b)(1). Section 1491(b)(1) thus sets forth three types of objections by an "interested party" over which the Court of Federal Claims has bid protest jurisdiction, and it does not define the phrase "interested party."

Our precedent supports interpreting "interested party" the same for all three types of objections; an "interested party" is one with a "direct economic interest [that] would be affected by the [challenged § 1491(b)(1) action]." *See Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("*AFGE*"). The majority admits that it defines "interested party" with no regard for the statutory language "objecting to . . . any

alleged violation of statute or regulation in connection with a procurement or a proposed procurement." But this important contextual language should not be ignored. By not asking who qualifies as "*interested*" in "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," the majority fails to adequately consider and give meaning to the statutory language Congress purposefully chose.

Surely everyone can agree that context matters when interpreting statutes, *see Tyler v. Cain*, 533 U.S. 656, 662, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001), especially one containing an undefined phrase like "interested party." To determine whether a party is an "interested party," the court must consider the subject of that party's interest.[1] *See Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 277-78, 144 S. Ct. 1414, 219 L. Ed. 2d 41 (2024); *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 172-73, 77 S. Ct. 763, 1 L. Ed. 2d 726 (1957). Under prong (1), an interested party is a party with an interest in a solicitation by a federal agency. Under prong (2), an interested party is a party with an interest in a proposed or actual award of a contract. Under prong (3), an interested party is a party with an interest in any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement. Logically, an interested party under one prong of § 1491(b)(1) might not qualify as an interested party under another prong.

1. Without consideration of the subject of interest, how would the court know whether a party is interested?

The majority takes issue with this logical conclusion. Maj. Op. at 15. But even the Government agrees that who qualifies as an interested party depends on the type of objection made under § 1491(b)(1). The Government conceded that the group of people who would qualify as an "interested party" would differ for a challenge brought under prong (1) versus prong (2), for example. Oral Arg. at 48:19-49:31, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1970_06092025.mp3 (the Government agreeing that more people could object to a solicitation than to an award). Indeed, if the challenged agency action is one specified in prong (1) ("a solicitation by a Federal agency for bids or proposals for a proposed contract") then an "interested party" is a would-be bidder. But if the challenged agency action is one specified in prong (2) ("a proposed award or the award of a contract") then an "interested party" is an actual bidder. The Government's concession directly contradicts the majority's one-size-fits-all definition of "interested party." Maj. Op. at 2 (defining "interested party" as "an actual or prospective bidder or offeror . . . *regardless of* the type of challenge brought" (emphasis added)).

Our court has previously addressed the level of interest required to be an "interested party," and there is no dispute here regarding that requirement. We have held that an "interested party" must have a "direct economic interest [that] would be affected by the [challenged § 1491(b)(1) action]." *See AFGE*, 258 F.3d at 1302. As explained in *AFGE*, where a party challenges a solicitation or contract award, an "interested party" is 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." *Id.* That definition in that context makes sense. First, in challenges to a solicitation, proposed award, or award, only a would-be or actual bidder could have the requisite direct economic interest. Second, given that prongs (1) and (2) are transplants from CICA, CICA's definition of "interested party" ("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)) is applicable for challenges to those agency actions.

The majority errs in this case, however, by borrowing CICA's definition of "interested party" for *all three* types of § 1491(b)(1) challenges, thereby limiting "interested party" for *all* circumstances to would-be bidders or would-be contractors. Not only did Congress not adopt that definition when enacting § 1491(b)(1), but that definition on its face does not apply to the full scope of challenges authorized by prong (3).

When Congress enacted the Administrative Disputes Resolution Act of 1996 (ADRA), CICA did not, and it still does not, contain an actual-or-prospective-bidder definition for all agency actions that violate a statute or regulation in connection with a procurement or proposed procurement—the scope of prong (3). CICA's "interested party" definition expressly confines its application to—*i.e.*, the definition states it is "with respect to"—"a contract or a solicitation or other request for offers," 31 U.S.C. § 3551(2)(A), and thus is limited on its face to less than the class of challenges authorized by prong (3). *See*

also 31 U.S.C. § 3551(1), (2) (1994 ed.) ("with respect to a contract or proposed contract described in paragraph (1)").[2] So, for the general category of agency actions that are covered only by prong (3), there was—and still is—nothing to borrow from CICA. Indeed, applying CICA's definition of "interested party" in challenges that can be made under just prong (3) would be incompatible with the evident breadth of the language of prong (3). This is critically important, as it effectively eliminates judicial review of alleged violations of the statutory provisions invoked by Percipient here, enacted by Congress just two years before ADRA. The majority's holding improperly reads the language from prongs (1) and (2) into prong (3). Had Congress intended for only a bidder or prospective bidder to be an interested party under prong (3), Congress could have written prong (3) to say something like "any alleged violation of statute or regulation *in connection with a proposed award or award of a contract*." Instead, it wrote prong (3) more broadly to include "any alleged violation of statute or regulation *in connection with a procurement or a proposed procurement*." 28 U.S.C. § 1491(b)(1) (emphasis added).

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2. The majority asserts that the use of CICA's definition of "interested party" in the now-repealed Brooks Act (40 U.S.C. § 759 (repealed 1996)) reinforces that Congress intentionally brought that definition into ADRA. Maj. Op. at 17-18. We disagree. The Brooks Act defined "interested party" *only* "with respect to a contract or proposed contract." 40 U.S.C. § 759(f)(9)(A)-(B). Accordingly, as is true for CICA, the Brooks Act did not define who can be an "interested party" to bring all the claims authorized under prong (3) of § 1491(b)(1).

Under the plain language of § 1491(b)(1), an agency action that is not a solicitation for bids or a proposed or actual contract award may be challenged under prong (3) as a "violation of statute or regulation in connection with a procurement or a proposed procurement." *Id.* Where that is so, the aforementioned justifications for limiting an "interested party" to an actual or would-be bidder do not apply. The language for prong (3) is not tied to a solicitation or contract, and thus an "interested party" for the third type of challenge under § 1491(b)(1) should not be limited to parties who would bid on a solicitation or be awarded the contract. Accordingly, for prong (3) cases like this one, instead of asking whether a party has a direct economic interest in a solicitation, proposed award, or award, the court must ask whether a party has a direct economic interest in the agency's violation of a statute or regulation in connection with a procurement or proposed procurement. Consistently defining "interested party" as someone with a "direct economic interest [that] would be affected by the [challenged § 1491(b)(1) action]," *see AFGE*, 258 F.3d at 1302, gives real and consistent meaning to the entire statutory phrase in § 1491(b)(1), not just prongs (1) and (2).[3]

The majority further errs by prioritizing legislative history of various statutes and ignoring the language

3. We agree with the majority that a single term generally carries the same meaning throughout a single sentence. Maj. Op. at 16. Here, the phrase "interested party" has one meaning—having a direct economic interest that would be affected by the challenged § 1491(b)(1) action. This definition properly recognizes that what constitutes such a direct interest differs according to what precise agency action is challenged.

of § 1491(b)(1). *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history . . . ."). Even so, the legislative history of § 1491(b)(1) supports a broader interpretation of "interested party" here.

Before ADRA, the Court of Federal Claims and federal district courts shared jurisdiction over bid protests, with the former having jurisdiction over pre-award protests and the latter having jurisdiction over post-award protests. "It [was] the intention of [ADRA's] Managers to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims." H.R. Conf. Rep. No. 104-841, at 10 (1996). As explained in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869, 137 U.S. App. D.C. 371 (D.C. Cir. 1970), the district courts assessed statutory standing under the Administrative Procedure Act (APA). The *Scanwell* court held that "one who makes a prima facie showing alleging [arbitrary or capricious] action on the part of an agency or contracting officer has standing to sue under [the APA]." *Id.*

We acknowledge that the vast majority of cases brought under *Scanwell* were by disappointed bidders. But ADRA, which gave the Court of Federal Claims exclusive jurisdiction over the *full range* of procurement protest cases, "cannot reasonably be construed to have wholly abolished APA procurement claims that might otherwise have been brought under *Scanwell*." *Validata Chem. Servs. v. U.S. Dep't of Energy*, 169 F. Supp. 3d 69,

84-85 (D.D.C. 2016) ("It is . . . a mistake to equate the 'vast majority of cases brought pursuant to *Scanwell*,' with all *Scanwell* cases."). Congress intended for ADRA to "consolidate[] federal court jurisdiction for procurement protest cases," not eliminate part of it. H.R. Conf. Rep. No. 104-841, at 9 (1996). Congress is presumed to be aware of *Scanwell* and its progeny when it enacted ADRA, *see Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010), and Congress chose not to adopt the limited definition of "interested party" from CICA when it enacted § 1491(b)(1), even though it knew how to do so. *See Simmons v. Himmelreich*, 578 U.S. 621, 627, 136 S. Ct. 1843, 195 L. Ed. 2d 106 (2016) ("[W]e presume Congress says what it means and means what it says.").[4]

It is telling that Congress chose not to include CICA's definition for "interested party" in § 1491(b)(1). That choice reflects the broader scope of § 1491(b)(1) due to its inclusion of prong (3), and the goal of expanding the Court of Federal Claims' jurisdiction to include the district courts' jurisdiction under the APA.[5] That choice permits

4. Indeed, in 2008 when Congress added § 1491(b)(5), it defined interested party by expressly referencing CICA: "an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in [this type of] action." 28 U.S.C. § 1491(b)(5). Had Congress intended to incorporate CICA's definition of "interested party" into ADRA, it would have used similar language to expressly do so.

5. The inclusion of prong (3) challenges in § 1491(b)(1) opens the door to new types of challengers having the requisite interest in those challenges. *Contra* Maj. Op. at 18-19.

interpreting "interested party" in § 1491(b)(1) the same as in CICA where the object of interest is the same (awards, proposed awards, and solicitations, as in *AFGE*). But that choice leaves interpretation of "interested party" in prong (3) situations, which are not covered by CICA, to include parties who have a direct economic interest that would be affected by the alleged "violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

Because the parallelism between CICA and ADRA breaks down where a plaintiff's protest falls under only prong (3), CICA's definition of "interested party" should not apply to prong (3) challenges like Percipient's. The majority errs in holding otherwise.

This is a straight-forward statutory interpretation case with significant impact on the government contracting community. We respectfully dissent from the judicial narrowing of Congress' intent, stated clearly in the statutory language it chose.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED NOVEMBER 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1970

PERCIPIENT.AI, INC.,

Plaintiff-Appellant,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00028-EGB, Senior Judge Eric G. Bruggink.

ON PETITION FOR REHEARING EN BANC

Before Moore, *Chief Judge*, Lourie, Dyk, Prost, Reyna, Taranto, Chen, Hughes, Stoll, Cunningham, and Stark, *Circuit Judges*.[1]

1. Circuit Judge Newman did not participate.

Appendix B

ORDER

PER CURIAM.

Appellee, The United States, filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Appellant Percipient.ai, Inc. ("Percipient"). The petition and response were considered and thereafter referred to the circuit judges in regular active service. A poll was requested and taken, and the court decided that the appeal warrants en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) The combined petition for panel rehearing and rehearing en banc is granted. This case will be reheard en banc under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified, as well as any senior circuit judge who participated in the panel decision and elects to participate as a member of the court en banc, in accordance with the provisions of 28 U.S.C. § 46(c).

(2) The panel opinion in *Percipient.ai, Inc., v. United States*, 104 F.4th 839 (Fed. Cir. 2024), is vacated, and the appeal is reinstated.

(3) The parties are requested to file new briefs, which shall be limited to standing under 28 U.S.C. § 1491(b)(1) and address the following question: Who can be "an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement" under 28 U.S.C. § 1491(b)(1)?

(4) The court will not revisit and does not require additional briefing on the issues of task bar under the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 3406(f); subject matter jurisdiction under 28 U.S.C. § 1491(b)(1); and timeliness of claims under *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007).

(5) Percipient's en banc opening brief is due 60 days from the date of this order. The United States' en banc response is due within 45 days of service of Percipient's en banc opening brief, and Percipient's reply brief within 30 days of service of the response brief. The parties may file a supplemental appendix, if necessary to cite additional material, within 7 days after service of the reply brief. The court requires 30 paper copies of all briefs and any appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).

(6) The court invites the views of amicus curiae. Any amicus briefs may be filed without consent and leave of the court. Any amicus brief supporting Percipient's position or supporting neither position must be filed within 14 days after service of Percipient's en banc opening brief.

Any amicus brief supporting the United States' position must be filed within 14 days after service of the United States' response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(7) This case will be heard en banc on the basis of the briefing ordered herein and oral argument.

(8) Oral argument will be held at a time and date to be announced later.

November 22, 2024
Date

FOR THE COURT

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED JUNE 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1970

PERCIPIENT.AI, INC.,

Plaintiff-Appellant,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00028-EGB, Senior Judge Eric G. Bruggink.

Decided June 7, 2024

Before TARANTO, CLEVENGER, and STOLL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* STOLL.

Dissenting opinion filed by *Circuit Judge* CLEVENGER.

STOLL, *Circuit Judge*.

This case principally involves the question of whether a prospective offeror of commercial items to a government

contractor may bring an action against the Government for alleged procurement-related statutory violations under the Tucker Act, 28 U.S.C. § 1491(b)(1) (allowing suit by "interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or a proposed procurement"), where the allegations do not challenge a contract, proposed contract, or solicitation for a contract between the Government and its contractor or the issuance of a task order under such a contract. Percipient.ai, Inc. appeals the decision of the United States Court of Federal Claims granting the Government's and intervenor CACI, Inc.-Federal's (collectively, "Defendants") motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of the U.S. Court of Federal Claims. The trial court erred in holding that the Federal Acquisition Streamlining Act of 1994 (FASA) task order bar, 10 U.S.C. § 3406(f)(1), applies to Percipient's protest, thereby removing the case from coverage by the Tucker Act. Separately, we reject Defendants' alternative arguments for affirming the trial court, which are based on the Tucker Act itself, standing, and timeliness. We thus reverse and remand.

BACKGROUND

The National Geospatial-Intelligence Agency (NGA) provides intelligence data to the federal government by analyzing images and geospatial information. NGA issued a solicitation, referred to as SAFFIRE, to sustain and improve its processes for obtaining and storing visual intelligence data, and integrating those capabilities with

computer vision (CV), a form of artificial intelligence.[1] Percipient's complaint sets forth the relevant facts.

SAFFIRE sought a single award Indefinite Delivery, Indefinite Quantity (IDIQ) contract. This type of contract "allows an agency to issue a broad solicitation for a general procurement goal and then more detailed solicitations for individual task orders as specific needs arise." *See, e.g., 22nd Century Techs., Inc. v. United States*, 57 F.4th 993, 996 (Fed. Cir. 2023). The SAFFIRE solicitation required, broadly, (1) "an enterprise repository backbone for storing, managing, and disseminating data," known as "SOM Enterprise Repository" or "SER"; and (2) a user-facing CV System. J.A. 38-39 ¶ 6. Task Order 1, solicited simultaneously with the SAFFIRE solicitation, directed the contractor to, among other things, develop and deliver the CV suite of systems. The NGA awarded both the SAFFIRE contract and the Task Order 1 to CACI.

Percipient offers a commercial CV platform, "Mirage," that could meet NGA's CV System requirements. But Percipient was unable to meet the SER component of the SAFFIRE solicitation. It also expected NGA and CACI to comply with 10 U.S.C. § 3453, which establishes a preference for commercial services, and consider Mirage for the CV System. With these expectations, Percipient did not bid for the SAFFIRE contract or challenge the SAFFIRE solicitation or award.

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1. The facts are largely taken from Percipient's complaint. When a party moves to dismiss for lack of subject matter jurisdiction, the court assumes that the undisputed facts in the complaint are true and draws reasonable inferences in the plaintiff's favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016).

Percipient contacted NGA and explained that "in addition to being legally required [to consider commercial products under § 3453], using commercial software [like Mirage] would save hundreds of millions of dollars[and] allow immediate mission impact potentially years ahead of government developed software." J.A. 71-72 ¶ 91. It also requested a meeting to discuss why NGA "appeared to be pursuing the development of government software without a thorough test and evaluation process of commercially available software." *Id.* NGA informed Percipient that if it wanted to take part in SAFFIRE, it could contact CACI. At the resulting meeting, Percipient asked CACI to evaluate Mirage for SAFFIRE and CACI responded: "That ship has sailed." J.A. 72 ¶ 93. Percipient then asked NGA to independently evaluate Mirage as a commercial solution for SAFFIRE's CV System. NGA confirmed that commercial products would be evaluated once CACI finished reviewing NGA's legacy system and that the "that ship has sailed" statement was an "unfortunate miscommunication." J.A. 74 ¶¶ 98-100.

About two months later, Percipient demonstrated Mirage to CACI, received positive feedback, and was told that CACI should do a more technical "deep dive" into Mirage—an analysis that never occurred. J.A. 76-77 ¶¶ 107-09. Instead, five months passed, and Percipient learned, at the 2021 GEOINT Symposium, that CACI intended to build its own software to meet SAFFIRE's requirements.

Percipient then approached NGA, sharing its concern about whether CACI could objectively evaluate Mirage's CV capabilities (given its stated intention to develop

software itself) and requesting the opportunity to demonstrate Mirage's capabilities to NGA directly. NGA agreed to set up a demonstration, stated the agency's intent to evaluate commercial alternatives before building software inhouse, and asked that Percipient "ease up on the legal pressure." J.A. 79 ¶¶ 117-18.

In December 2021, Percipient demonstrated Mirage to NGA representatives, one of whom stated after the demonstration that Mirage "meets all of NGA's analytic transformation requirements." J.A. 79-80 ¶¶ 119-20. Over several months NGA and Percipient worked to reach an agreement for NGA to test Mirage with live data, which Percipient agreed to do for free. After some back-and-forth about whether to use live data at all, NGA relented and finally finished its testing in October 2022.

But the testing, according to Percipient's complaint, was subpar—with NGA running only four searches on Mirage over a twelve-week testing period. Percipient offered, free-of-charge, to extend the testing period. But a month later NGA explained that it evaluated Mirage as a "Machine Learning (ML) Platform" rather than an "Analytical tool," which Percipient took as confirmation that NGA had "deliberately failed to evaluate Mirage's ability to meet SAFFIRE's CV System requirements," and thus failed to evaluate whether Mirage could be an alternative to CACI's development of SAFFIRE's CV System inhouse. J.A. 85 ¶ 137. NGA confirmed that there would be no broader evaluation of Mirage. Percipient then filed an action in the Court of Federal Claims under what is commonly called the "bid protest" provision of the Tucker Act, 28 U.S.C. § 1491(b)(1).

Appendix C

In its complaint, Percipient asked the court to enjoin NGA's alleged violation of its obligations under 10 U.S.C. § 3453, titled "Preference for commercial products and commercial services," which requires heads of agencies to ensure their contractors conduct market research to determine if commercial or nondevelopmental items are available that can meet the agency's procurement requirements. This procurement statute requires, "to the maximum extent practicable," a preference for commercial or nondevelopmental items or services. *See* 10 U.S.C. § 3453(a).

The Government and CACI filed motions to dismiss Percipient's complaint, arguing that (1) the Court of Federal Claims lacked subject matter jurisdiction based on the FASA task order bar and, separately, the Tucker Act; (2) Percipient lacked standing; and (3) Percipient's complaint was untimely.

The Tucker Act, in pertinent part, provides the Court of Federal Claims with jurisdiction:

> to render judgment on an action 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*.

28 U.S.C. § 1491(b)(1) (emphases added). Percipient asserted that it was an interested party and that the Court of Federal Claims had jurisdiction under the third prong of the Tucker Act provision.

Appendix C

The FASA task order bar provides that:

> (1) A protest is not authorized *in connection with the issuance or proposed issuance of a task or delivery order* except for — . . . .
>
> . . . .
>
> (B) a protest of an order valued in excess of $25,000,000.
>
> (2) . . . [T]he Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

10 U.S.C. § 3406(f) (emphasis added).[2]

While the trial court initially denied the motions to dismiss, *Percipient.ai, Inc. v. United States*, 165 Fed. Cl. 331, 340 (2023), it later vacated its opinion.[3] After additional briefing, the court held that the FASA task order bar applied and granted the motions to dismiss for

2. There is a FASA task order bar that applies to public contracts generally, 41 U.S.C. § 4106(f)(1), and one that applies to the Department of Defense in particular, 10 U.S.C. § 3406(f)(1). The text of the two provisions is similar, except for the different monetary thresholds over which task order protests may be heard by the Comptroller General. Here, 10 U.S.C. § 3406(f)(1) is applicable because NGA operates under the oversight of the Department of Defense.

3. The trial court's vacated opinion addressed subject matter jurisdiction, standing, and timeliness.

lack of subject matter jurisdiction. *Percipient.ai, Inc. v. United States*, No. 23-28C, 2023 U.S. Claims LEXIS 962, 2023 WL 3563093, at *3 (Fed. Cl. May 17, 2023).

Percipient appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

"We review a decision by the [Court of Federal Claims] to dismiss a case for lack of subject matter jurisdiction de novo." *Diversified Grp. Inc. v. United States*, 841 F.3d 975, 980 (Fed. Cir. 2016). We may affirm the court's judgment on any ground supported by the record. *El-Sheikh v. United States*, 177 F.3d 1321, 1326 (Fed. Cir. 1999). And we assume all facts alleged in a complaint as true and draw all reasonable inferences in favor of the plaintiff. *Henke v. United States*, 60 F.3d 795, 797, 799 (Fed. Cir. 1995).

Percipient argues that its protest is not "in connection with the issuance or proposed issuance of a task or delivery order" and thus falls outside the FASA task order bar. *See* Appellant's Br. 28-48. Defendants disagree, arguing that the trial court correctly determined that the FASA task order bar divests the Court of Federal Claims of jurisdiction over Percipient's protest. *See* Government's Br. 13-28; CACI's Br. 23-38. Defendants also assert alternative grounds for affirmance, including that the trial court lacks subject matter jurisdiction because Percipient's protest is not "in connection with a procurement or a proposed procurement," a requirement under the third prong of the Tucker Act. *See* Government's Br. 30-33; CACI's Br. 50-52.

The Government also alternatively argues that we should affirm the trial court's dismissal because Percipient lacks standing and, separately, argues that one of Percipient's claims challenges terms of the SAFFIRE solicitation and is thus untimely. *See* Government's Br. 34-38. We address each issue in turn.

I

First, we turn to subject matter jurisdiction. For the Court of Federal Claims to have jurisdiction, Percipient's protest must be outside the FASA task order bar and within the jurisdictional limits of the Tucker Act. For the reasons below, we hold that the Court of Federal Claims has subject matter jurisdiction over Percipient's protest.

A

We begin by addressing the FASA task order bar and whether the Court of Federal Claims erred by dismissing Percipient's complaint for raising claims in connection with the issuance of a task order. FASA provides that a "protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order." 10 U.S.C. § 3406(f)(1). Consistent with the statutory focus on "issuance" and this court's decision in *SRA International, Inc. v. United States*, 766 F.3d 1409, 1413 (Fed. Cir. 2014), we interpret this language to mean that a protest is barred if it challenges the issuance of the task order directly or by challenging a government action (*e.g.*, waiver of an organizational conflict of interest) whose wrongfulness would cause the task order's issuance to be improper. To

determine whether the Court of Federal Claims erred in dismissing Percipient's complaint, we analyze each of the claims in the complaint. In doing so it becomes clear that the FASA task order bar does not preclude the Court of Federal Claims from exercising jurisdiction over Percipient's protest, which does not assert the wrongfulness of, or seek to set aside, any task order.

In Count One, Percipient alleges that NGA violated, and will continue to violate, 10 U.S.C. § 3453 and related regulations by refusing to ensure that its contractor for the ongoing SAFFIRE procurement incorporates commercial or nondevelopmental items "to the maximum extent practicable." J.A. 94-96. There is no mention of—or challenge to—the issuance of the task order. Rather, drawing all reasonable inferences in favor of Percipient, *Henke*, 60 F.3d at 799, we conclude that the claim is directed to NGA's violation of § 3453 and related regulations after issuance of the task order. In particular, the claim asserts that "Percipient has specifically requested on several occasions that NGA and SAFFIRE's contractor evaluate Mirage for integration into the SAFFIRE procurement, but both have refused to do so in favor of launching a developmental effort . . . . NGA therefore has failed to meet its obligation[s]" under § 3453. J.A. 95 ¶ 165. Continuing, the claim asserts that "[i]f NGA complies with its legal obligations and conducts a full and fair evaluation of Mirage's capabilities, it and its contractor will conclude—or at a minimum are substantially likely to conclude—that Mirage can meet their CV System needs for SAFFIRE and should be incorporated into the SAFFIRE procurement." J.A. 96 ¶ 167. In Count One,

Percipient thus seeks NGA's compliance with § 3453 and related regulations to ensure that NGA's contractor incorporates commercial or nondevelopmental items "to the maximum extent practicable," without challenging the issuance of Task Order 1 to CACI.

Count Two likewise involves allegations that "NGA is violating 10 U.S.C. § 3453 and related regulations by refusing to take steps to require its contractor to engage in market research and make determinations as to whether its needs could be met by commercial or nondevelopmental items." J.A. 96-98 (cleaned up). Percipient cites § 3453(c)(1)(C) and (c)(5), which require the agency head to "conduct market research . . . before awarding a task order," and "take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) . . . engages in such market research as may be necessary to carry out the requirements of subsection (b)(2)"—*i.e.*, "to incorporate commercial services . . . or nondevelopmental items" to the "maximum extent practicable." 10 U.S.C. § 3453(b)(2). The phrase "task order" is present in Count Two. And the language "conduct market research . . . before awarding a task order or delivery order" could in some cases be interpreted as "in connection with the issuance or proposed issuance of a task or delivery order." But that's not the allegation here.

Rather, Percipient's allegation is that NGA violated 10 U.S.C. § 3453 because of its failure to require CACI, its contractor, to engage in market research. The claim states: "NGA's contractor failed to conduct the necessary market research before proceeding to launch an effort to

develop the CV system . . . .” J.A. 97 ¶ 173. This alleged inaction is not in connection with NGA’s issuance or proposed issuance of the task order.[4] Rather, the focus is on CACI’s actions after issuance of Task Order 1 and its failure to evaluate Mirage for integration into the SAFFIRE’s CV system.

In Count Three, Percipient alleges that “NGA improperly delegated inherently governmental authority” by allowing its contractor to build software to meet SAFFIRE’s computer vision software requirements before conducting market research. J.A. 98-99 (cleaned up). Specifically, Percipient alleges that NGA improperly allowed CACI to decide agency policy for developing artificial intelligence technology. J.A. 99 ¶¶ 179-80. Again, Percipient does not challenge the Government’s issuance of Task Order 1 to CACI. Task Order 1 is not mentioned; nor does this allegation more broadly relate to NGA’s issuance of Task Order 1.

Lastly, Percipient alleges in Count Four that “NGA engaged in arbitrary, capricious, and unlawful conduct by resisting innovation, by insisting on the wasteful approach of software development, and by engaging in bad faith conduct.” J.A. 99-101 (cleaned up). Specifically, Percipient alleges that while NGA knows that Mirage meets the CV

4. *See also* Oral Arg. at 2:30-3:16 (Percipient’s attorney stating that “[t]here may be an allusion in our complaint” to insufficient market research prior to the issuance of the task order, “but our complaint, our claims don’t depend on that” insufficient market research), https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1970_11082023.mp3.

System requirements, it "is deliberately failing to conduct whatever additional evaluation it claims to be necessary to confirm Mirage's ability to meet SAFFIRE's CV System requirements." J.A. 100 ¶ 185. And Percipient details the related representations and actions by NGA that it alleges are evidence of "malicious, bad faith conduct toward Percipient." J.A. 100-01. None of these allegations relates to the issuance of a task order, or even mention task orders.

In sum, none of Percipient's counts is "in connection with the issuance or proposed issuance of a task or delivery order." 10 U.S.C. § 3406(f)(1). Percipient does not challenge the issuance of Task Order 1 to CACI. Moreover, no allegation asserts that the language of Task Order 1 was deficient or forced the alleged statutory violations to occur. Only one Count mentions the phrase "task order," but no allegation deals with how NGA worded, issued, or proposed to issue its task order. *See also* Oral Arg. at 0:30-0:58 (Percipient's attorney saying, "We do not challenge the task or delivery order. We do not seek to set aside a task or delivery order that's been issued. We do not challenge an action that directly or immediately led to a task or delivery order. We do not challenge an action on which the validity of a task or delivery order depends . . . .").

The Government disagrees because it interprets the language "in connection with" in § 3406(f) to bar all protests that relate to work performed under a task order. *See* Government's Br. 16. It argues that whatever results from, i.e., follows or comes after, a task order falls under

the task order bar. *Id.* To support its interpretation, the Government relies on a sentence in *SRA*, 766 F.3d at 1413, which described the challenged waiver of an organizational conflict of interest as an action that was "directly and causally connected to issuance of [a task order]" in holding that the challenge to that waiver (which if accepted would have undermined the task order) came within the task order bar and therefore was outside the Court of Federal Claims' jurisdiction. *See* Government's Br. 14, 21-22. The dissent agrees with the Government, asserting that "in connection with the issuance or proposed issuance of a task or delivery order" means anything that stems from, is tied to, or results from the issuance of a task order, including challenges to work performed under Task Order 1. We are unpersuaded.

We find the Government's interpretation far too broad. The statutory language refers to protests "in connection with the issuance or proposed issuance" of a task order. As Percipient notes, the Government's interpretation gives no meaning to the words "issuance or proposed issuance." 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. Reply Br. 6 (citing 10 U.S.C. § 3406(f)) (emphasis added). This flouts the well-established principle that "we should construe the statute, if at all possible, to give effect and meaning to all the terms." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1367 (Fed. Cir. 1998). In our view, the

plain meaning of § 3406(f) precludes the Government's interpretation, which casts a far larger net than what the statute prescribes.

We also find the Government's interpretation unsupported by precedent. The *SRA* opinion cited by the Government and the dissent does not support the Government's broad interpretation.[5] The "directly and causally connected to issuance of [a task order]" language in *SRA* is narrower than the interpretation sought by the Government and, moreover, must be understood in light of the facts at issue there. *See, e.g., Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) ("Chief Justice Marshall[] sage[ly] observ[ed] that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" (citation omitted)); *R.A.V. v. St. Paul*, 505 U.S. 377, 386-87 n.5, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned."). Read in context, we understand *SRA's* reference to "directly and

5. The dissent misunderstands our language here. We do not "see[] the 'directly and causally connected to issuance' test as 'far too broad,'" generally. Dissent Op. at 10. Rather, as is clear from our language, it is our position that the Government's and dissent's interpretation of the "directly and causally connected to issuance" language in *SRA* is far too broad.

causally connected to issuance of [a task order]" 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.

SRA filed a bid protest in the Court of Federal Claims alleging that the General Services Administration (GSA) violated various laws when it waived an organizational conflict of interest (OCI) after awarding a task order to Computer Sciences Corporation (CSC). *SRA*, 766 F.3d at 1410-11. There, unlike here, SRA asked the Court of Federal Claims to set aside the issuance of the task order to CSC because of CSC's OCI. This is a significant difference. Here, Percipient does not challenge the issuance of Task Order 1 to CACI.

Notwithstanding its specific challenge to the issuance of the task order to CSC, SRA asserted that the task order bar did not apply. SRA's principal argument against the application of the task order bar was a temporal one. SRA acknowledged that had GSA waived the alleged OCI *before* issuance of the task order, the task order bar would apply. *Id.* at 1413. But because GSA executed the waiver *after* issuing the task order, SRA argued that the task order bar did not apply because the alleged violation was "temporally separated" from issuance of the task order. *Id.* at 1412. Addressing SRA's argument on appeal, we held that "the OCI waiver was directly and causally connected to issuance of [the task order], despite being executed after issuance" because "GSA issued the waiver in order to go forward with CSC on [the task order]." *Id.* at 1413. We explained that "although a temporal disconnect may, in

some circumstances, help to support the non-application of the FASA bar, it does not help SRA here." *Id.* We further explained that GSA's delay in executing the waiver was "inconsequential" since (1) the delay occurred because GSA was unaware of the organizational conflict earlier; (2) GSA "could have executed a waiver prior to awarding [the task order]"; and (3) "SRA acknowledges that, had GSA waived the alleged OCI prior to issuance, FASA would have barred its protest." *Id.* Read in context, the court's statement that the OCI waiver was "directly and causally connected to issuance" does not broadly refer to work performed under, or events caused by the task order as asserted by the Government here. Indeed, if the Government's view of the *SRA* language were right, the court would have found the before-after distinction not even worth the trouble of explaining away as it did. Instead, the language refers to an actual challenge to the issuance of the task order regardless of whether the alleged violation occurred after issuance of the task order.[6]

Here, Percipient does not challenge the issuance or proposed issuance of a task order. Percipient's requested relief would not alter NGA's issuance of Task Order 1 to CACI. Rather, Percipient largely challenges the failure of NGA and its contractor to properly review its Mirage

6. Our decision in *22nd Century Technologies, Inc. v. United States*, 57 F.4th 993 (Fed. Cir. 2003), is consistent. There, we affirmed the Court of Federal Claim's holding that the task order bar applied "because 22nd Century's challenge is to the alleged failure of the task order to require bidders to recertify as small businesses." *22nd Century*, 57 F.4th at 999-1000. The challenge was to the language of the task order itself.

product and thereby conduct the necessary research required by statute before developing the CV system. We thus reverse the trial court's decision that the FASA task order bar applies.

B

Next, we turn to whether the statutory and regulatory violations alleged by Percipient fall within the Court of Federal Claims' jurisdiction under the Tucker Act. Percipient asserted jurisdiction under the third prong of the Tucker Act: "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). We hold that Percipient's protest—alleging a violation of 10 U.S.C. § 3453 and related regulations, which establish a preference for commercial services—is in connection with the SAFFIRE procurement, and thus falls within the Court of Federal Claims' jurisdiction.

Defendants argue that Percipient's protest falls outside the third prong because it is not "in connection with a procurement or a proposed procurement." Government's Br. 30-33; CACI's Br. 50-52. To this end, they characterize Percipient's protest as challenging contract performance and administrative activities. Specifically, the Government argues that the only "procurement" actions after the issuance of an IDIQ contract are "the issuance of a task order and the acquisition-related decisions that are connected to the issuance of that task order." Government's Br. 33. Everything else is contract administration or performance. *Id.* And because the IDIQ

contract incorporates Federal Acquisition Regulation (FAR) 52.244-6, J.A. 857, which mirrors 10 U.S.C. § 3453, Defendants also argue that Percipient's complaint is about CACI's adherence to the contract terms, i.e., its performance. *See* Government's Br. 33; CACI's Br. 52. We are not persuaded.

We have held that "in connection with a procurement or proposed procurement" involves "a connection with any stage of the federal contracting acquisition process, including 'the process for determining a need for property or services.'" *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008). As we have previously explained, "in connection with" is "very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). And "procurement" encompasses "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Sols.*, 539 F.3d at 1345-46 (quoting 41 U.S.C. § 403(2))[7]. Naturally, the definition includes stages between issuance of a contract award and contract completion, i.e., actions *after* issuance of a contract award. Accordingly, "in connection with a procurement or proposed procurement" encompasses more than "the issuance of a task order and the acquisition-related decisions that are connected to the issuance of that task order," the narrowed subset Defendants would like us to adopt. This is important in the context of § 3453, whose requirements to maximize acquisition of commercial items suitable to meet the agency's needs continue and can be violated well after

7. In 2011, 41 U.S.C. § 403(2) was recodified at 41 U.S.C. § 111.

the contract's award. Defendants' argument would allow agencies to ignore § 3453 by deferring decisions about commercial products until after the contract award.

We also reject Defendants' argument that because the SAFFIRE contract incorporates FAR 52.244-6, which mirrors § 3453, Percipient's protest is tethered to contract performance and excludes Tucker Act jurisdiction. The Tucker Act allows for "*any* alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis added). Percipient alleges a violation of 10 U.S.C. § 3453, a statute, in connection with the SAFFIRE procurement. This directly conforms with the stated requirements of the third prong of the Tucker Act. We decline Defendants' invitation to carve limitations untethered to the statute's plain text into 28 U.S.C. § 1491(b)(1).

In sum, Percipient's protest is "in connection with a procurement" because Percipient alleges NGA violated 10 U.S.C. § 3453 and related regulations, which establish a preference for commercial services, in connection with the SAFFIRE procurement's CV System. We thus hold that Percipient's protest falls within the jurisdiction of the Court of Federal Claims under the Tucker Act.

II

We now turn to standing under 28 U.S.C. § 1491(b)(1). To have standing under the statute, a plaintiff must be an "interested party."[8] As discussed above, an "interested

8. This requirement is a matter of statutory standing, and thus not jurisdictional. *See CACI, Inc.-Fed. v. United States*, 67 F.4th 1145, 1151 (Fed. Cir. 2023).

party" can challenge: (1) a solicitation by a federal agency; (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 proposed procurement. *See* 28 U.S.C. § 1491(b)(1). Our court has defined "interested party" when the alleged harm-causing government action is a solicitation, an award, or a proposed award—i.e., when the challenge is to a solicitation or award under prongs one and/or two (with or without an additional prong three challenge to the solicitation or award). *See, e.g., Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1356, 1359-60 (Fed. Cir. 2009) (challenged harm-causing action was the solicitation); *Am. Fed'n of Gov't Emps., AFL-CIO v. United States (AFGE)*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (challenged harm-causing action was a contract award).

This case presents the different question of who qualifies as an "interested party" only under prong three, where the challenged harm-causing action is *not* the solicitation, the award, or the proposed award of a contract. More specifically, this case addresses whether a prospective offeror of commercial items may assert procurement-related illegalities where the assertions do *not* challenge a contract or proposed contract between the Government and its contractor or a solicitation for such a contract. We hold that, in the context of this case involving alleged violations of 10 U.S.C. § 3453, an interested party includes an offeror of commercial or nondevelopmental items whose direct economic interest would be affected by the alleged violation of the statute. Specifically, we hold that where a plaintiff, invoking only prong three of the jurisdiction under 28 U.S.C. § 1491(b)(1),

asserts a violation of 10 U.S.C. § 3453 without directly or indirectly challenging a solicitation for or actual or proposed award of a government contract, the plaintiff is an interested party if it is an offeror of a commercial product or commercial service that had a substantial chance of being acquired to meet the needs of the agency had the violation not occurred.

A brief history of the statute is instructive. Section 1491(b) was enacted as part of the Administrative Disputes Resolution Act of 1996 (ADRA). P.L. No. 104-320, § 12, 110 Stat. 3870, 3874-75 (1996). Before ADRA, the Court of Federal Claims had jurisdiction over *pre*-award protests and federal district courts had jurisdiction over *post*-award protests. *See AFGE*, 258 F.3d at 1300. The district courts' review, as explained in *Scanwell Laboratories, Inc. v. Shaffer*, was conducted under the Administrative Procedure Act (APA). *See Scanwell*, 424 F.2d 859, 865-66, 137 U.S. App. D.C. 371 (D.C. Cir. 1970). In § 1491(b), ADRA sought to invest the Court of Federal Claims with the exclusive jurisdiction to review government contract protest actions, allowing for concurrent jurisdiction with federal district courts to hear "the full range of bid protest cases previously subject to review in either system," before a sunset provision ended the federal district court's jurisdiction. *See Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1081 (Fed. Cir. 2001) (quoting 142 Cong. Rec. S11849 (daily ed. Sept. 30, 1996) (statement of Sen. Levin)); *see also Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1243 (Fed. Cir. 2010). ADRA also expressly made the APA standard of review applicable for all actions under § 1491(b). *See* 28

U.S.C. § 1491(b)(4). It did not similarly define the standard for standing.

This court first construed "interested party," and thus delineated a standard for standing, in *AFGE*. There, federal employees brought a protest challenging the award of the contract under both prongs two and three of § 1491(b). Specifically, appellants there filed suit to challenge the decision to award a contract to EG&G Logistics, Inc., a private company, instead of using government facilities and personnel. *AFGE*, 258 F.3d at 1297. In determining whether the federal employees had standing, we held that "interested party" should be construed according to the definition of that same term in a related statute, the Competition in Contracting Act (CICA). *Id.* at 1299. 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"). Rather, CICA limits protests to written objection to:

> (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.
>
> (D) A termination or cancellation of an *award* of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
>
> (E) Conversion of a function that is being performed by Federal employees to private sector performance.

31 U.S.C. § 3551(1) (emphases added).

In so construing "interested party" in 28 U.S.C. § 1491(b)(1), we recognized that the issue was difficult. The statue's plain language did not resolve the issue. *AFGE*, 258 F.3d at 1299-1300. Indeed, unlike in CICA, Congress did not define the term "interested party" in ADRA. And the legislative history does not reveal whether Congress sought to limit ADRA's claims to those "brought by disappointed bidders"—most cases brought in district courts pursuant to *Scanwell*—or any contract claim that could be brought in district court under the APA. *AFGE*, 258 F.3d at 1300-02. The latter, given the APA's broad language, would allow parties other than actual or prospective bidders to bring suit. *Id.* at 1301.

Our court identified three reasons for adopting the definition in CICA and thereby limiting the term

"interested party" to disappointed bidders and offerors in *AFGE*. First, we observed the principle that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *See id.* at 1301 (quoting *McMahon v. United States*, 342 U.S. 25, 27, 72 S. Ct. 17, 96 L. Ed. 26 (1951)). Second, legislative history described *Scanwell* as allowing a "contractor" to challenge a contract award. *Id.* at 1301-02 (quoting 142 Cong. Rec. S11848 (statement of Sen. Cohen)). Relatedly, the court noted that courts have "narrow[ly]" read standing under *Scanwell*. *Id.* at 1302. And third, that the language used by Congress ("interested party") does not mirror the broad APA language, but rather a term that is used in another government contract disputes statute, CICA. *Id.* at 1302.

The Government relies on *AFGE*'s interpretation of "interested party" to argue in this case that Percipient lacks standing. Government's Br. 34-37 (citing, e.g., *CACI, Inc.-Federal*, 67 F.4th at 1151). Percipient admits that it did not, nor could it, submit a bid on the SAFFIRE contract. Appellant's Br. 10. And this, the Government argues, is fatal because it means that Percipient is not an "actual or prospective bidder or offeror" as required under *AFGE*'s "interested party" standard. Government's Br. 35-36. Percipient responds that it is an interested party with a direct economic interest that is affected by the Government's failure to comply with 10 U.S.C. § 3453 because Percipient is a prospective offeror of a commercial product that satisfies SAFFIRE's CV System requirements and, had the Government complied with the statute, Percipient would have been a subcontractor. As support, Percipient cites the reasoning in the Court

of Federal Claims' now-vacated decision holding that Percipient has standing. There, the trial court held that offerors of commercial products need not bid on the prime contract to have § 3453 standing. Percipient also identifies various cases that it describes as recognizing that "parties need not have submitted a bid in all circumstances to qualify as an actual or prospective offeror," including *SEKRI v. United States*, 34 F.4th 1063, 1071-73 (Fed. Cir. 2022), and *Distributed Solutions*, 539 F.3d at 1343-44. Appellant's Reply Br. 29.

AFGE is controlling law for what it covers, but this case presents a different scenario than *AFGE*. Specifically, unlike the plaintiffs in *AFGE*, Percipient does not challenge a solicitation for or an award or proposed award of a government contract, so its claim could not come within the first two prongs of § 1491(b)(1).[9] 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 of commercial items may file an

9. For similar reasons, this case is distinguishable from other cases cited by the Government, including *Weeks Marine* and *SEKRI*. In both cases, the challenged mechanism of harm was the solicitation. *Weeks Marine*, 575 F.3d at 1354, 1356 (challenging that a solicitation violated 10 U.S.C. § 2304(a)(2)); *SEKRI*, 34 F.4th at 1069, 1071 (challenging an agency's procurement of ATAP through a competitive solicitation rather than through SEKRI, a qualified, mandatory source of ATAP).

action raising procurement-related illegalities under § 3453 where the asserted illegalities 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 challenge made under the third prong of § 1491(b)(1) *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.

We hold that, under the facts here, *AFGE*'s standing requirements do not control. Said otherwise, on these facts, "an interested party" is not limited to "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." Rather, for this case involving only the third prong of § 1491(b)(1) and allegations of violations of 10 U.S.C. § 3453 that do not challenge the solicitation or contract, we hold that Percipient is an interested party because it offered a commercial product that had a substantial chance of being acquired to meet the needs of the agency had the violations not occurred. We hold so for at least four reasons, and we find persuasive Judge Moss's analysis of 28 U.S.C. § 1491(b)(1) in *Validata Chemical Services v. United States Department of Energy*, 169 F. Supp. 3d 69, 82 (D.D.C. 2016).

First, the third prong of § 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 third 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). *See RAMCOR*, 185 F.3d at 1289. This lack of correspondence demonstrates that the definition of "interested party" in CICA is not fairly borrowed to apply to everything that comes under the third prong—and specifically not for conduct challengeable only under the third prong.

Second, the statutory language in prong three defines an "interested party" as more than actual or prospective bidders. The term "interested party" must be understood in context of the language of the third prong of 28 U.S.C. § 1491(b)(1), which imposes a broader scope for standing. The third prong gives the Court of Federal Claims jurisdiction in cases filed "by an interested party objecting to . . . *any* alleged violation of statute or regulation *in connection with a procurement*

or a proposed procurement." *See* 28 U.S.C. § 1491(b)(1) (emphases added). On its face, this statutory language provides for an independent cause of action; that is, a plaintiff need not challenge either a solicitation for or the award or proposed award of a government contract. A procurement, as already explained, is a broad term and includes "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111. As such, the third prong covers actions that are necessarily broader than the solicitation or the award of a contract stage, the first two Tucker Act prongs. It is also broader than any of CICA's five categories. We are obliged to interpret the term "interested party" in the context of this broader third prong to give it independent import. *See, e.g., Bausch*, 138 F.3d at 1367 (explaining that we must construe a statute, if possible, to give meaning and effect to all its terms). Stated differently, the phrase "interested party"—which appears in other federal statutes and regulations without a standard meaning—ought to be interpreted based on the relevant statutory context of prong three. *See Validata*, 169 F. Supp. 3d at 82 (citing various statutes, rules, and regulations, with the phrase "interested party").

Third, our analysis must be tailored to the specific facts here: an alleged violation of 10 U.S.C. § 3453 and related regulations, which establish the preference for commercial products and commercial services for agency procurements. In the Article III context, the Supreme Court has explained that "a plaintiff must demonstrate standing for each claim he seeks to press." *Daimler*

Chrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). The same should be true for statutory standing. And here the statutory guarantees under § 3453 could become illusory were parties like Percipient, under these facts, unable to protest. As the Court of Federal Claims recognized in its now-vacated decision, "the interested party requirements have . . . been relaxed when their rigid application would make statutory guarantees illusory." *Percipient*, 165 Fed. Cl. at 337-38 (discussing cases like *SEKRI*, where we declined to treat mandatory sources of commodities the same as other potential interested parties based on, in part, Congress's intent behind a statute, *see SEKRI*, 34 F.4th at 1072-73).

Here, § 3453 provides, in part, that the "head of an agency shall ensure" 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" of the agency with respect to procurement of supplies or services "to the maximum extent practicable." 10 U.S.C. § 3453(a)(1), (3). The statutory text does not limit this requirement to the award of the entire contract, but rather the statute's obligations apply even to "components of items supplied to the agency." *Id.* § 3453(b)(2). Section 3453(b)(2) provides that agencies must "require prime contractors and subcontractors . . . to incorporate commercial services [and] commercial products . . . as components of items supplied to the agency." *Id.* By its express terms, the statute is meant to ensure that, "to the maximum extent practicable," agencies provide offerors of commercial services an opportunity to compete in

procurements, and to give a preference for commercial products and commercial services. *Id.* § 3453(a). If parties 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, are unable to challenge statutory violations in connection with procurements, the statute would have minimal bite—it would rely on an agency to self-regulate and on contractors like CACI to act against their own interest.

Lastly, the relative timing of the passage of FASA, codified in part in 10 U.S.C. § 3453, and ADRA, codified in part in 28 U.S.C. § 1491, supports our view. FASA was passed in 1994 and required each executive agency head to procure commercial items to meet agency needs. *See* P.L. No. 103-355, §§ 8001, 8104, 8203, 108 Stat. 3243, 3390-91, 3394-96 (1994) (defining "commercial item" broadly and adding "[p]reference for acquisition of commercial items"). This prominent legislation had significant impact on government procurement, imposing duties on "contractors and subcontractors at all levels under the agency contracts" to incorporate commercial items to meet the needs of the agency even after award of a contract.[10] *See, e.g.*, 10 U.S.C. § 3453(b)(2). Just two years later, Congress passed ADRA—seeking to consolidate bid

10. *See* 140 Cong. Rec. 24864, 24865 (1994) ("This legislation makes sweeping reforms to the Federal Procurement System."); *id.* at 24869 ("Purchasing commercial products should abolish the current practice of buying expensive, specially designed products, when off-the-shell, less expensive commercial products would suffice.").

protest jurisdiction in the Court of Federal Claims. *See* P.L. No. 104-320, 110 Stat. 3870 (1996). We find 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.

In addition, we note that this is not the first time this court has modified the general standing test adopted in *AFGE* to address factual circumstances not present there. In *Weeks Marine*, we modified the general standing test to address standing in solicitation protests (i.e., under prong one). Relying on the specific language in prong one, we held that the appropriate standing test in pre-award solicitation protests is "whether [a plaintiff] has demonstrated a 'non-trivial competitive injury which can be addressed by judicial relief" and that "in some cases the injury stemming from a facially illegal solicitation may in and of itself be enough to establish standing." *Weeks Marine*, 575 F.3d at 1362. Thus, contrary to the dissent's suggestion, our precedent supports interpreting "interested party" in light of the different prongs in 28 U.S.C. § 1491(b)(1).

The dissent's reliance on the legislative history of other statutes does not persuade us otherwise. The dissent does not cite legislative history for the statute at issue, 28 U.S.C. § 1491(b)(1). And the dissent's reliance on the legislative history of CICA—including that Congress initially sought to include subcontractors as interested parties in CICA—is not helpful. First, as noted above, any parallel between CICA and ADRA breaks down

where a plaintiff's protest falls under prong three of ADRA without objecting to a solicitation or award, and thus any rationale for adopting CICA's definition of "interested party"—or relying on the legislative history of CICA—does not apply to prong three. CICA is a different statute governing the bid-protest jurisdiction of the U.S. Government Accountability Office and does not include prong three.

Furthermore, the legislative history of the now-repealed Brooks Act cited by the dissent indicates that Congress was concerned that establishing a subcontractor's right to protest in the now-repealed Brooks Act would "establish precedent that privity of contract exists between the government and subcontractors." *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. & the S. Comm. On Armed Servs.*, 103rd Cong. 293 (1994). This legislative history confirms the connection between privity and the general unavailability of standing for would-be subcontractors when the subject of a challenge *is a contract* (or proposed contract or solicitation for a contract) between the Government and a prime contractor. Here, there is no challenge to a contract (or proposed contract or solicitation for a contract) between the Government and a prime contractor. The subject of the challenge is an alleged violation of statute in connection with a procurement. The concern with to respect privity does not apply to cases like this one because Plaintiff's allegation of procurement related illegalities, i.e., a prong three case, does not suggest that privity of contract

exists between the Government and subcontractors. By contrast, prong one and prong two cases challenge a contract (or proposed contract or solicitation for a contract) between the Government and a prime contractor, so granting standing to a subcontractor might be viewed to suggest that subcontractors would have privity with the Government.

For all these reasons, we hold that, in the context of this case involving alleged violations of 10 U.S.C. § 3453 without challenging the contract, an interested party includes an offeror of commercial or nondevelopmental services or items whose direct economic interest would be affected by the alleged violation of the statute. Here, Defendants do not dispute Percipient's direct economic interest. Percipient offers a commercial product that is plausibly alleged to satisfy the agency's needs, has plausibly alleged *inter alia* that the agency violated the requirements of § 3453 by not evaluating its product for integration into the SAFFIRE procurement, has plausibly alleged that but for this violation of the statute its Mirage product would be incorporated into the SAFFIRE procurement, and has offered NGA and CACI its product. Under these facts, we hold that Percipient has standing to challenge the agency's alleged violation of § 3453.

III

Lastly, we address timeliness of Percipient's claim that NGA unlawfully delegated government authority to its contractor, Count Three in Percipient's complaint. We have held that "a party who has the opportunity

to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently." *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The Government argues that, to the extent Percipient alleges NGA "permitted CACI to determine whether to utilize commercial or developmental products to create the SAFFIRE solution, and, in doing so, unlawfully delegated inherently governmental functions," such a claim is untimely under *Blue & Gold*. Government's Br. 37 (citing J.A. 98-99). But the plaintiff in *Blue & Gold* was challenging the terms of the solicitation. Percipient is not.

Percipient's complaint focuses on post-award delegations, not defects in the solicitation. *See* J.A. 98-99; Reply Br. 30. *Compare* J.A. 99 ¶ 179 (alleging that NGA delegated inherently government authority by "allow[ing] its contractor to develop computer vision software . . . without requiring adherence to 10 U.S.C. § 3453"), *with* Government's Br. 38 (the SAFFIRE solicitation, requiring offerors to submit as part of their proposal "a process to identify, evaluate and implement opportunities from the Government and commercial industry as part of each planning increment to satisfy requirements faster, reduce or avoid cost and increase system performance" (quoting J.A. 844)). Said otherwise, the solicitation allows for NGA to adhere to the statutory obligations in § 3453 and thus there is no "patent error" in the solicitation. Accordingly, Percipient did not have to protest before the close of the bidding process and did not waive its ability to protest.

Appendix C

CONCLUSION

We have considered Defendants' remaining arguments and find them unpersuasive. For the reasons above, we reverse the trial court's dismissal and hold that it has subject matter jurisdiction over Percipient's protest. We also hold that Percipient has standing, and its claims are timely. We thus reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

Costs

No costs.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1970

PERCIPIENT.AI, INC.,

Plaintiff-Appellant,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00028-EGB, Senior Judge Eric G. Bruggink.

CLEVENGER , *Circuit Judge*, dissenting.

This is a very important government contract case. In conflict with binding authority,[1] and even absent that authority, the majority errs in significantly narrowing the existing scope of the task order bar in 10 U.S.C. § 3406 (f)(1), by reinterpreting the statute to bar only protests focused on a task order, not protests more broadly made in connection with the issuance of a task order. It also likewise errs in significantly broadening the existing

1. "In this Circuit, a later panel is bound by the determinations of a prior panel, unless relieved of that obligation by an en banc order of the court or a decision of the Supreme Court." *Deckers Corp. v. United States*, 752 F.3d 949, 959 (Fed. Cir. 2014).

scope of "interested party" statutory standing in 28 U.S.C. § 1491(b)(1) by permitting potential subcontractors for the first time to bring suit under § 1491(b)(1). For the reasons set forth below, I respectfully dissent.

The SAFFIRE contract has two interrelated parts, one of which is a CV System. Percipient alleges that its Mirage product satisfies the requirements for the CV System but admits that it cannot supply the other component. Consequently, Percipient is not qualified to bid on the SAFFIRE contract. At most, Percipient is a wishful potential subcontractor hoping that CACI, on its own or by direction of NGA, will subcontract with it to purchase its Mirage product.

The government must comply with 10 U.S.C. § 3453,[2] which requires government contracting agencies "to the maximum extent practicable" to ensure that government contracts use existing products, rather than products to be developed under a contract, and to that end, requires the government and actual contractors to conduct market research to determine if commercial products are available.

NGA solicited the base SAFFIRE contract and Task Order 1 together and awarded both to CACI at the same time in January 2021. Task Order 1 authorized CACI to begin performance on the CV System portion of the contract. For two years after the issuance of Task Order

2. This statute covers military procurements. Its counterpart for public contracts is 41 U.S.C. § 3307.

1, both CACI and NGA, fully aware of and exercising their various § 3453 responsibilities, conducted extensive tests of Percipient's Mirage product, and ultimately concluded that Mirage was not suitable. Dissatisfied with NGA's assessment of Mirage, Percipient on January 9, 2023, filed suit in the United States Court of Federal Claims ("Claims Court") under 28 U.S.C. § 1491(b)(1), alleging violation of § 3453 by NGA for failing to police § 3453 properly after issuance of Task Order 1.

The Task Order Bar

The relevant statute, 10 U.S.C. § 3406(f)(1), provides that a "protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order," thus depriving the Claims Court of jurisdiction over an otherwise proper 28 U.S.C. § 1491(b)(1) complaint.[3] The statute is commonly called the "task order bar."

In this case, the Claims Court dismissed Percipient's complaint under the task order bar. In doing so, the Claims Court applied what it understood to be the interpretation of the task order bar set forth in our previous decision in *SRA International, Inc. v. United States*, 766 F.3d 1409, 1413-14 (Fed. Cir. 2014): the task order bar is satisfied when the alleged violation is "directly and causally connected to issuance" of a task order. The Claims Court found as a matter of fact that Percipient's alleged violation

3. As the majority notes, *see* Majority Op. at 7 n.2, the task order bar of 41 U.S.C. § 4106(f)(1) for public contracts is essentially the same, for statutory interpretation purposes, as 10 U.S.C. § 3406(f)(1) for Department of Defense contracts. The majority's interpretation of § 3406(f)(1) no doubt will apply to 41 U.S.C. § 4106(f)(1) cases.

of 10 U.S.C. § 3453 is "directly and causally related to the agency's issuance of Task Order 1" because the alleged violation occurred after issuance of "Task Order 1, which directed CACI to develop and deliver a [CV] system" and "without the task order, the work that Percipient is challenging would not be taking place and Percipient could not allege this § 3453 violation." *Percipient.ai, Inc. v. United States*, No. 23-28C, 2023 U.S. Claims LEXIS 962, 2023 WL 3563093, at *3 (Fed. Cl. May 17, 2023). Because the alleged violation of § 3453 is directly and causally related to the issuance of Task Order 1, the Claims Court opined that were Percipient to prevail on the merits, the court would be required to partially suspend or discontinue performance under the task order even though Percipient did not ask to have Task Order 1 withdrawn. *Id.*

The majority holds that the interpretation of the task order bar applied by the Claims Court is incorrect, and that the correct interpretation is that the bar is only invoked if a protest "challenges the issuance of the task order directly or by challenging a government action (*e.g.*, waiver of an organizational conflict of interest) whose wrongfulness would cause the task order's issuance to be improper." Majority Op. at 9. The majority applies its interpretation of the task order bar by examination of the contents of Percipient's complaint. The question is whether the majority fails to apply *SRA* correctly, and in any event whether the majority's interpretation of the statute is correct. The majority errs in both regards.[4]

4. If the Claims Court read the decision in *SRA* correctly, the majority does not disagree with the Claims Court's findings of fact that Percipient's complaint is task order barred.

Appendix C

SRA involved a contract, like the one in this case, to be performed through issuance of task orders. The government issued the ISC-3 task order procurement to a competitor of SRA, and SRA protested on the ground that its competitor should have been disqualified due to an organizational conflict of interest. The government resolved the matter by issuing a waiver of the organizational conflict of interest, thus permitting the competitor to proceed with performance of the contract. SRA filed a protest in the Claims Court, arguing that the grant of the waiver violated various laws. The Claims Court rejected the government's invocation of the task order bar for two reasons: first, because the waiver was granted after the issuance of the task order, thus creating a "temporal disconnect" between the issuance of the task order and the alleged violation; and second, because the grant of the waiver was a discretionary act by the agency. The Claims Court thus held that there was no "direct, causal relationship" of the allegedly illegal grant of the conflict of interest waiver to the issuance of the task order. *SRA Int'l, Inc. v. United States*, 114 Fed. Cl. 247, 256 (2014) (quoting *MORI Assocs., Inc. v. United States*, 113 Fed. Cl. 33, 38 (2013)).

On appeal to this court, SRA and the government disagreed on the correct interpretation of the task order bar. Like Percipient in this case, and the majority, SRA interpreted the statute to bar only protests that challenge the task order itself, arguing that:

> [A]ll of the alleged violations of statute and regulation were in connection with the ISC-

> 3 procurement, but none were in connection with the issuance (or proposed issuance) of the ISC-3 task order. Thus, the [Claims Court] had jurisdiction over all of SRA's Complaint. . . . None [of SRA's five counts] concern the already-concluded issuance of the ISC-3 task order and therefore none are excluded by FASA.

Brief for Plaintiff-Appellant at 28-29, *SRA Int'l, Inc. v. United States*, 766 F.3d 1409 (Fed. Cir. 2014), 2014 WL 1319680, at *28-29.

The government strongly disagreed with SRA's interpretation of the task order bar, instead invoking the interpretation set forth by the Claims Court in *DataMill, Inc. v. United States*, 91 Fed. Cl. 740, 756 (2010), that the statute bars protests that have a direct and causal relationship to the issuance or proposed issuance of a task order. Brief for Defendant-Appellee United States at 16, *SRA Int'l, Inc. v. United States*, 766 F.3d 1409 (Fed. Cir. 2014), 2014 WL 1882366, at *16. The analysis and interpretation from *DataMill* proposed to the *SRA* court by the government specifies:

> Turning to the phrase "in connection with," the court notes that "in" means "[w]ith the aim or purpose of." *American Heritage Dictionary* 698 (4th ed.2004). A "connection" is defined as "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is

> bound up with, or involved in, another." *Oxford English Dictionary* 747 (2d ed.1989); *see also American Heritage Dictionary, supra*, at 303 (defining "connection" as "[a]n association or relationship"). The word "with" means "[i]n relationship to." *American Heritage Dictionary, supra*, at 1574. Taken together, the phrase "in connection with" references something designed to possess a logical or sequential relationship to or be bound up with or directly involved in something else. In other words, the phrase "in connection with" means that there is a direct and causal relationship between two things that are mutually dependent. It is therefore apparent that the phrase "in connection with" encompasses those occurrences that have a direct and causal relationship to the "issuance" or "proposed issuance" of a delivery order.

DataMill, 91 Fed. Cl. at 756.

In response, SRA disagreed with the government's broader interpretation of the statute, asserting again that "[o]n the question of jurisdiction, Defendants' position fails because SRA does not challenge the 'issuance or proposed issuance' of a task order but the separate and distinct Government actions that violate statutes and regulations." Reply Brief for Plaintiff-Appellant at 3-4, *SRA Int'l, Inc. v. United States*, 766 F.3d 1409 (Fed. Cir. 2014), 2014 WL 2175563, at *3-4.

Appendix C

Our decision in *SRA* held that "neither the discretionary nature of the OCI waiver nor the temporal disconnect between it and the issuance of ISC 3 removes it from FASA's purview," 766 F.3d at 1413, and held that SRA's protest fell within the task order bar because it was "directly and causally connected to issuance of ISC 3 . . . ." *Id.* In *SRA*, as in this case, the protest had nothing to do with any alleged flaws in the task order, and the only connection between issuance of the task order and the alleged violation was that the task order permitted SRA's competitor to continue performance of the contract notwithstanding the agency's alleged violation of law. SRA's protest was that its competitor was allowed to enjoy performance of a government contract in the face of an alleged violation of law that should have prevented the competitor from performing the contract.

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.[5]

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.

As justification, the majority asserts that:

> Read in context, the court's statement that the OCI waiver was "directly and causally connected to issuance" does not broadly refer to work performed under, or events caused by the task order as asserted by the Government here.

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5. *See, e.g., Unison Software, Inc. v. United States*, 168 Fed. Cl. 160 (2023); *MORI Assocs., Inc. v. United States*, 113 Fed. Cl. 33 (2013); *DataMill, Inc. v. United States*, 91 Fed. Cl. 740 (2010); *A & D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126 (2006). Since 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)—that the task order bar applies if a protest is directly and causally connected to the issuance or proposed issuance of a task order—including most recently in *FYI - For Your Info., Inc. v. United States*, 170 Fed. Cl. 601, 614 (2024) (noting, in response to plaintiff's attempt to avoid *SRA*'s "directly and causally connected to issuance" task order bar test, that any change to the *SRA* test would have to come from an en banc decision by this court). The majority's holding that the task order bar is limited to challenges focused on a task order will come as a surprise to the Claims Court and the government contract bar.

> Indeed, if the Government's view of the *SRA* language were right, the court would have found the before-after distinction not even worth the trouble of explaining away as it did. Instead, the language refers to an actual challenge to the issuance of the task order regardless of whether the alleged violation occurred after issuance of the task order.

Majority Op. at 15.

This justification for the majority's sidestep away from *SRA* lacks merit. The "directly and causally connected to issuance" words in *SRA* do not refer to any "actual challenge to the issuance of the task order," because there was no challenge to the issuance of the task order in *SRA*, and the events caused by the task order, i.e., work performed under the task order despite alleged violations of law after issuance of the task order, is the basis for the connection between the protest and the issuance of the ISC-3 task order. In sum, the majority's claim that the "'directly and causally connected to issuance of [a task order]' language in *SRA* is narrower than the interpretation sought by the Government and, moreover, must be understood in light of the facts at issue there," Majority Op. at 13, is undone by the facts in *SRA*, as I have demonstrated.

As a matter of statutory construction (assuming the majority is free to reinterpret the task order bar), the majority argues that the government's interpretation gives no meaning to the words "issuance or proposed issuance,"

because the government's view bars protests concerning "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." Majority Op. at 13. But the majority overlooks that allegedly illegal conduct under the "directly and causally connected to" test can stem from, be tied to, and result from the issuance (or proposed issuance) of a task order. "Directly and causally connected to" does not read "issuance or proposed issuance" out of § 3406(f)(1). By reading the statute to bar only protests focused on a task order itself, the majority effectively reads the full meaning of "in connection with" out of the statute.

If Congress intended the reach of § 3406(f)(1) to be limited to protests involving deficiencies in a task order, as proposed or issued, it would not have included the language "in connection with," and instead would have barred only protests challenging the task order.[6] Instead, Congress clearly meant the task order bar to reach beyond protests focused on the task order.

The majority sees the "directly and causally connected to issuance" test as "far too broad." Majority Op. at 13. The majority overlooks that *SRA* expressly confronted and resolved the policy implications of its broad interpretation of the statute:

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6. *See DataMill*, 91 Fed. Cl. at 756 ("If Congress intended to bar protests involving the actual 'issuance' or 'proposed issuance' of a delivery order, then it could have drafted the FASA accordingly. It did not."). *DataMill* involved a delivery order.

> Even if the protestor points to an alleged violation of statute or regulation, as SRA does here, the court still has no jurisdiction to hear the case if the protest is in connection with the issuance of a task order. We acknowledge that this statute 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.

SRA, 766 F.3d at 1413.

In footnote 5, the majority suggests two versions of the "directly and causally connected to issuance" test. First, the "far too broad" one that the government and the dissent refer to, and a second and narrower version: "We do not see[] the 'directly and causally connected to issuance' test as 'far too broad,' generally." Majority Op. at 13 n.5 (cleaned up). The "directly and causally connected to issuance" test which the majority finds "far too broad" was presented to the court by the government in *SRA* as an alternative to the test proposed by SRA, which would have limited the scope of the task order bar to protests focused on the task order itself, i.e., the test the majority now interprets as defining the entire scope of the task order bar. Nothing in the words of the *SRA* decision support the view that the court applied a less broad version of the test than actually proposed by the government, and

the court's explanation of the consequences of the breadth of its decision, quoted above, belies any thought that the court actually applied a less broad version of the test.

Since *SRA*, this court has repeated that "FASA's unambiguous language categorically bars jurisdiction over bid 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." *22nd Century Techs., Inc. v. United States*, 57 F.4th 993, 999 (Fed. Cir. 2023) (internal quotes omitted and citation omitted).

In sum, this court in binding precedent has already held that the unambiguous language of § 3406(f)(1) bars a protest that is directly and causally connected to the issuance of a task order. The majority's contention that the plain meaning of the statute only bars protests focused on a task order is incorrect, both as a matter of failure to follow binding precedent and as a matter of initial statutory interpretation.

The judgment of the Claims Court dismissing Percipient's complaint as barred by § 3406(f)(1) should be affirmed.

28 U.S.C. § 1491(b)(1)

As the majority states, 28 U.S.C. § 1491(b)(1) provides the Claims Court with 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, (2) to a proposed award or the award of a contract, or (3) to any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. [7]

We have interpreted "interested party" to "limit standing under § 1491(b)(1)" 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." *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("*AFGE*").

The majority appreciates that as a potential subcontractor Percipient cannot meet the *AFGE* standing test, and it understands that it is bound by *AFGE*. But the majority says that *AFGE* does not apply because this case "presents a different scenario than *AFGE*." Majority Op. at 22. The difference, according to the majority, is that unlike the scenario in *AFGE*, where the plaintiffs raised prong two and prong three protests, Percipient raises only a prong three protest. Considering itself free to disregard *AFGE* entirely, and in the interest of promoting compliance with § 3453, the majority creates a standing test exclusively for potential subcontractor § 1491(b)(1) prong three protests alleging a violation of § 3453:

> Specifically, we hold that where a plaintiff, invoking only prong three of the jurisdiction

7. The majority and I refer to the statute as having three prongs, each relating to defined stages of the procurement process.

> under 28 U.S.C. § 1491(b)(1), asserts a violation of 10 U.S.C. § 3453 without directly or indirectly challenging a solicitation for or actual or proposed award of a government contract, the plaintiff is an interested party if it is an offeror of a commercial product or commercial service that had a substantial chance of being acquired to meet the needs of the agency had the violation not occurred.

Majority Op. at 19.

As I explain below, the majority's sidestep away from *AFGE* is as incorrect as its sidestep away from *SRA* on application of the task order bar to this case. It may be true that this court has not faced a § 1491(b)(1) case presenting only a prong three protest, but we have ruled on a § 1491(b)(1) case presenting a prong three protest along with a prong two protest. And in that case, we necessarily dismissed both protests on the ground that the plaintiffs failed to meet the "actual or prospective bidder" standing test, producing a binding precedent that the "actual or prospective bidder" standing test applies to prong three protests. That case is *AFGE*.

There is no clear daylight between this case and *AFGE*, as the majority contends, 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). But if this panel were free to adopt a special standing test for prong three protests, for the reasons set

forth below I would not interpret "interested party" to include potential subcontractors.

Under *AFGE*, Percipient should be denied standing under § 1491(b)(1), assuming it could escape from the task order bar of § 3406(f)(1).

AFGE

The plaintiffs in *AFGE* were government agency employees (and their union representatives) who alleged violation of laws by their employer agency in connection with the agency's procurement of services from a private entity. The statute and regulations at issue in *AFGE* were the Federal Activities Inventory Reform Act of 1998 ("FAIR") and OMB Circular No. A-76. The statute required agencies to identify activities that are not inherently governmental services. When an agency considered contracting with a private sector source for performance of an identified activity, FAIR required the agency to select a source using a competitive process that includes a realistic and fair cost comparison to identify the government and private sector costs to perform the activity. OMB Circular A-76 provided the relevant cost comparison process.

The majority recognizes that *AFGE* involved challenges to the procurement under prongs two and three, but it fails to appreciate that the primary thrust of the case was the prong three allegation of error by misapplication of the OMB Circular A-76 cost evaluation standards. Plaintiffs' complaint and briefs in the case

focused almost entirely on the alleged regulatory violations, asserting only in passing as an adjunct that the award of the contract was illegal because of the regulatory violations. In particular, the plaintiffs' briefs to this court argued that the "violation of statute or regulation" jurisdiction prong of § 1491(b)(1) is "wholly separate and independent from the contract award prong," Brief for Plaintiffs-Appellants at 20-21, *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294 (Fed. Cir. 2001), 2000 WL 34401893, at *20-21, and emphasized multiple times that the plaintiffs "were clearly 'interested parties' objecting to an 'alleged violation of statute or regulation in connection with a procurement.'" 258 F.3d 1294, *Id.* at 12-23 (citing the language of prong three). While the plaintiffs did object to the award of the contract, their prong three allegation of regulatory violations dominated their case.[8]

Our decision in *AFGE* explained that the purpose of the Administrative Disputes Resolution Act of 1996 ("ADRA") was to vest the Claims Court with exclusive jurisdiction over the full range of procurement protest cases, and ADRA did so though § 1491(b)(1). Before ADRA, the Claims Court had jurisdiction over pre-award protest cases, and the United States District Courts had jurisdiction over post-award cases, the latter described as a group as "*Scanwell*" cases. As the *AFGE* decision explains, the vast majority of pre-ADRA *Scanwell* cases were brought by disappointed bidders, and the Court

8. The opening brief in *AFGE*, including the complaint, is publicly available for any reader needing assurance that *AFGE* presents an independent prong three protest. *See* 258 F.3d 1294, 2000 WL 34401893. For the government's brief, *see* 2000 WL 34401354; for the plaintiffs' reply brief, *see* 2000 WL 34401355.

of Appeals for the District of Columbia Circuit had understood standing in *Scanwell* cases to be limited to disappointed bidders. But, as the *AFGE* decision further explained, because the *Scanwell* cases were based on the Administrative Procedure Act ("APA"), Congress in writing § 1491(b)(1) "could have intended to give the Court of Federal Claims jurisdiction over any contract dispute that could be brought under the APA." *AFGE*, 258 F.3d at 1301. And because the standing test in the APA[9] is quite broad, the *AFGE* decision surmised that "parties other than actual or prospective bidders" might be able to bring suit as interested parties under § 1491(b)(1). *Id.*

In *AFGE*, the government argued for the disappointed bidder test for "interested party," offering a specifically worded test taken from a related statute, the Competition in Contracting Act, 31 U.S.C. §§ 3551-56 ("CICA"): "interested party . . . means an actual or prospective bidder or of-feror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

The issue before the *AFGE* court was the choice between the CICA test and the broader APA standing test, and *AFGE* clearly chose the narrower standard of actual or prospective bidders. *Id.* at 1302.

Congress had the APA on its mind when it promulgated § 1491(b), because it borrowed the APA standard of review

9. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" has APA standing. 5 U.S.C. § 702.

for § 1491(b)(1) cases, *see* 28 U.S.C. § 1491(b)(1)(4), but it did not adopt the APA standing test for such cases. Congress instead adopted the "interested party" term from CICA, which restricted government contract challenges to actual or prospective bidders. These facts of legislative history are overlooked by the majority, but these facts convinced the court in *AFGE* that the "interested party" in § 1491 (b)(1) is the same "interested party" as in CICA. *AFGE*, 258 F.3d at 1302.

The majority understands that it is bound by *AFGE* but argues that the standing test of *AFGE* is inapplicable here because "this case presents a different scenario than *AFGE*." Majority Op. at 22. The only material difference between this case and *AFGE* is that *AFGE* included a prong two protest as an adjunct to its primary prong three protest and this case presents only a prong three protest. But in order to dismiss the complaint in *AFGE*, the court had to find that plaintiffs lacked standing for their independent prong three protest, as well as their prong two protest. The *AFGE* decision clearly applies the CICA standing test to both protests raised by the plaintiffs. The majority does not challenge that the decision in *AFGE* dismissed the prong three protest as well as the adjunct prong two protest under the CICA standing test. As for the "crucial distinction in identifying why *AFGE* does not control here, and one that answers the contention of the dissent that *AFGE* controls" here, the majority states:

> In *AFGE* , the challenge made under the third prong of § 1491(b)(1) *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.

Majority Op. at 23.

This attempt to justify the majority's refusal to follow *AFGE* lacks merit. First, the majority errs in assuming the plaintiffs mixed the prong two and prong three challenges, rather than asserting the challenges independently—as the plaintiffs clearly did. There 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." Before the decision in *AFGE*, there was no constraint on standing under the first two prongs to evade. What the majority seems to be saying is that in another future case a potential subcontractor might protest a procurement under all three prongs, and in *that* case, the potential subcontractor should not be able to evade the constraint of *AFGE* on the prong one and two issues by gaining standing under prong three. Such a situation did not exist in *AFGE* or in this case. The majority's "crucial distinction" reason for thinking "*AFGE* does not control here" is unsuccessful. *Id.* Thus, we have already held that a prong three protest is governed by the "actual or prospective bidder" interpretation of "interested party."

There is more in our case law to the same effect. The now repealed Brooks Act (40 U.S.C. § 759 (repealed 1996)) previously allowed bid protests related to Automated Data Processing Equipment (ADP) procurements by "an interested party." The Brooks Act included the same

statutory definition for an "interested party" as in CICA. In 1989, this court held that this "interested party" definition excludes subcontractors in the Brooks Act context. *See MCI Telecomms. Corp. v. United States*, 878 F.2d 362, 365 (Fed. Cir. 1989). Subsequently in *Rex*, this court held that "in light of the interrelatedness between . . . CICA and section 1491(b)(1) of the Tucker Act, as established by *AFGE*, and *MCI* and its progeny, the definition of 'interested party' in the Brooks Act applies to the Tucker Act with equal force." *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). To be clear: subcontractors were denied "interested party" standing under the Brooks Act, and this court held that the Brooks Act definition of "interested party" applies with equal force to § 1491(b)(1). This court's observation that "mere 'disappointed subcontractors'" are not "interested parties" for § 1491(b)(1) surely is correct. *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008).

The majority's attempt to distinguish *AFGE* lacks merit, and Percipient has no standing under *AFGE*.[10]

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10. The majority errs in thinking that our decision in *Weeks Marine, Inc. v. United States*, 575 F.3d 1352 (Fed. Cir. 2009) supports its unwillingness to apply the *AFGE* standing test to Percipient's prong three protest. *Weeks Marine* involved a pre-award challenge to a contract, brought by a prospective bidder who could not show a likelihood of winning the contract at the solicitation stage, and hence could not meet the "direct economic interest" component of the *AFGE* standing test. *Weeks Marine* held that in that instance "direct economic interest" can be shown by a "non-trivial competitive injury which can be redressed by judicial relief." *Id.* at 1362. *Weeks Marine* only modified the "direct economic interest" component.

Appendix C

The Majority's Rationales

The majority cannot point to any statute or regulation, or case law authority, that compels or supports creation of an additional standing test within § 1491(b)(1) for a limited subcontractor class of § 1491(b)(1) protest cases. Instead, it offers four insufficient reasons to justify granting statutory standing to potential subcontractors alleging a violation of § 3453 under prong three of § 1491(b)(1).

The majority's first reason is that prong three adds jurisdiction for protests that would not lie under CICA, i.e., allegations of law violations occurring during the life of a government contract after the solicitation and award stages. But any challenge to a solicitation or award is based on some alleged error in law or regulation: a "legal source of wrongfulness," Majority Op. at 24, underlies any CICA protest and any protest under prongs one and two of § 1491(b)(1), and the various protests overlap and correspond because each depends on some allegation of legal error. The various protests differ materially only in that they attack various stages of a government contract and from case to case will raise different sources of wrongfulness. That a protest will focus on a different stage of a contract is hardly a reason to have differing standing tests for differing stages of a contract.

The majority's second reason is a restatement of its first reason: prong three "covers actions that are

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It did not alter the requirement that standing requires a bidder or prospective bidder. *Weeks Marine* is not support for rejecting the bidder or prospective bidder standing test and replacing it with a potential subcontractor standing test.

necessarily broader than the solicitation or the award of a contract stage, the first two Tucker act prongs." Majority Op. at 25. What makes a prong three challenge "broader" than a prong one or two challenge? A prong three challenge need not raise substantially broader issues than would be raised under prongs one and two. A prong three protest is only broader in that it will reach beyond the early stages of a contract.

The majority's first two reasons are facially unpersuasive. The majority can point to no genuine difference in substance between prong one/two and prong three protests. Surely protests to solicitations are invaluable for the government contract process because it is during the solicitation stage that the specifics of a contract are tested and improved. This observation has been acknowledged by this court. *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1314 (Fed. Cir. 2007). If there are errors in a solicitation, having them called out before performance begins benefits all concerned, and the same is true with protests of proposed or actual contract awards. Equally surely, calling out errors in the later stages of contract performance is important for all concerned, although it could be argued that calling out error at the earlier stages is preferable, as remedy for error later on in a contract's life may be more costly than remedy for error earlier caught, and will significantly delay receipt by the government of the product or services for which it contracted.

The majority's attempt to use statutory construction in its first two reasons is unconvincing. Unlike our decision in

AFGE, which used conventional statutory interpretation tools to find that Congress limited "interested party" in § 1491(b)(1) to bidders or prospective bidders, the majority has no such interpretative analysis to support its belief that Congress in ADRA carved out a special standing test solely for protests brought by potential subcontractors specifically alleging § 3453 violations under the third prong of the statute. Furthermore, the majority is mistaken when it asserts that the phrase "interested party" appears in other federal statutes without a standard meaning, Majority Op. at 25, thus giving it license to fashion different meanings for "interested party" within § 1491(b)(1). The Brooks Act and CICA, the two most relevant statutes, use "interested party" as the standing test, and under both statutes "interested party" excludes subcontractors.

The majority's third reason for its failure to follow *AFGE* is its real reason, and likely the reason that underpins its unwillingness to follow *SRA* and enforce the task order bar against Percipient. The real reason is § 3453, which importantly establishes and seeks to enforce the preference for commercial products and services in agency procurements across the entire landscape of government contracts. Unless potential subcontractors are allowed to bring § 3453 protests under prong three, the majority predicts that the goals of § 3453 will be "illusory," Majority Op. at 26, and the statute will have "minimal bite" because contractors (like CACI) will not "act against their own interest," and the government cannot be trusted to enforce the law. Majority Op. at 26.

Prospective and disappointed actual bidders clearly have a significant interest to police possible violations of § 3453 by the party which won a contract, as they might succeed in achieving cancelation and resolicitation of the contract on the ground that full compliance by the contract winner and agency is lacking. Our precedent already confirms that prospective bidders are capable of enforcing compliance with § 3453. *See CGI Federal, Inc. v. United States*, 779 F.3d 1346, 1349, 1354 (Fed. Cir. 2015) (prospective bidder's protest under § 1491(b)(1) successfully challenges compliance with § 3453's sister statute, 41 U.S.C. § 3307). The majority has no factual support for its dispositive worry that § 3453's goals are illusory, and that the statute cannot be properly enforced unless potential subcontractors are granted standing to bring § 3453 prong three protests. It points to no evidence, anecdotal or empirical, that the statute is widely disregarded by agencies or contractors, and Percipient makes no such charge. The majority cannot deny that prospective and disappointed bidders have real motives to bring § 3453 protests, as indeed has happened. I, like Congress, am not so doubting in the interest of private parties and of agencies to enforce compliance with §§ 3453 and 3307 that I would open the protest door to potential subcontractors.

As the relevant statutory history of CICA and the Brooks Act described below shows, Congress twice has measured the pros (more would-be law enforcers) and cons (disruption of the procurement process) of giving standing to potential subcontractors to protest procurements, and has even given explicit consideration to granting such standing, only to deny protest standing to subcontractors.

The majority's fourth reason invokes legislative history, arguing that having enacted § 3453 as part of FASA with its "significant impact on government procurement," it is "difficult to conclude" that Congress, two years later, would have promulgated ADRA "with the intention of eliminating any meaningful enforcement" of § 3453 by excluding potential subcontractors from the definition of "interested party" in § 1491(b)(1). Majority Op. at 27. The majority overlooks that in promulgating CICA, and in promulgating FASA, Congress actually looked at the question of providing subcontractors with standing to protest procurements and decided to deny them such standing. Nothing in ADRA's legislative history suggests that Congress was concerned with inadequate enforcement of § 3453 and a need for potential subcontractor standing to enforce § 3453. A comprehensive view of the relevant statutory history undermines the majority's fourth rationale, and argues forcefully against potential subcontractor standing under all three prongs of § 1491(b)(1).

First, Congress initially sought to include subcontractors as interested parties in CICA. *See* H.R. 5184, 98th Cong. § 204(g)(2) (1984) ("the term 'interested party' means a person whose direct economic interest would be affected as contractor or *subcontractor* by the award or nonaward of the contract." (emphasis added)). In the end, Congress excluded subcontractors as interested parties. *See US W. Commc'ns Servs., Inc. v. United States*, 940 F.2d 622, 628 (Fed. Cir. 1991) ("the CICA, as enacted, provided for protest 'to a solicitation by a Federal agency' and all references that would have permitted subcontractors to protest were deleted.").

Next, in 1991 proposed amendments to the Brooks Act, which included the same "actual or prospective bidder" CICA definition of "interested party," Congress expressly considered and rejected the proposition of giving subcontractors standing to challenge ADP procurements. Specifically, the House of Representatives proposed amending the definition of "interested party" in the Brooks Act to permit "[p]rotests by subcontractors" because of concerns that "restrictive specifications may sometimes go unchallenged . . . when prospective prime contractors have no incentive to protest. . . . A potential subcontractor . . . would be harmed by the restrictive specification, but, under current law, would not have standing to protest." H.R. Rep. No. 102-364, at 32 (1991). However, the report also recognized that "[b]y increasing the number of possible protestors, [the bill] would further complicate ADP procurements, and in all likelihood, increase the opportunity for delay." H.R. Rep. No. 102-364, at 80. The report further explained that "the proposed definition of 'interested party' would allow potential subcontractors . . . to challenge an agency's procurement decisions[, and w]e believe that the grant of such a right is wholly unnecessary, given that current law authorizes the filing of a protest by 'an actual or prospective bidder or offeror.'" H.R. Rep. No. 102-364, at 80-81.

Congress's consideration of possible Brooks Act amendments occurred at the same time Congress considered draft statutes for a "Preference for Acquisition of Commercial Items" and associated "Market Research" which were later incorporated in FASA, resulting in § 3453. H.R. Rep. No. 102-364, at 6. Certain Brooks Act

possible amendments that would have opened the door to Brooks Act protests by subcontractors were rejected, and the reasons for excluding subcontractor standing were recognized in hearings on S. 1587, the final version of FASA, including § 3453. For example, these hearings noted that "[e]stablishing a subcontractor's right to protest would greatly expand the number of protests and, consequently the delays in the procurement process[, and i]t would also establish precedent that privity of contract exists between the government and subcontractors, thereby opening the possibility for direct subcontractor claims under the Contract Disputes Act." *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).

Regarding the legislative history of ADRA, this court in *AFGE* extensively relied on the statute's legislative history to support adoption of CICA's standing test for § 1491(b)(1). *See AFGE*, 258 F.3d at 1299-1302. Rather than quote four pages of the *AFGE* opinion, it is enough here to note that the legislative history confirmed that contractors (not potential subcontractors) should have § 1491(b)(1) standing and that to construe the statute more broadly would violate the sovereign immunity canon. ADRA consolidated pre-award and post-award contract litigation in the Claims Court and created a contractor standing test for the new statute. Congress did its ADRA work fully aware of its experience in enacting CICA and the Brooks Act, in which it created a contractor standing test that expressly excluded potential subcontractors from

standing. To use the majority's test, isn't it difficult to conclude that Congress in ADRA meant to open the door to protests by potential subcontractors in § 1491(b)(1) when it knowingly closed that door in CICA and the Brooks Act, especially when there's no evidence that Congress was concerned with lax enforcement of § 3453 when enacting ADRA?

The majority's reference to the legislative history of the now repealed Brooks Act deserves comment. The majority references the part of the legislative history that I have highlighted, in which Congress pointed out that granting standing to subcontractors under the Brooks Act might be viewed to suggest that subcontractors would have privity with the government for direct subcontractor claims under the Contract Disputes Act—despite the general view that such privity is required to sue the government under the Tucker Act. *See Merritt v. United States*, 267 U.S. 338, 340-41, 45 S. Ct. 278, 69 L. Ed. 643, 61 Ct. Cl. 1019 (1925).

Privity is a matter of fact, and under our precedent actual subcontractors are absolutely denied standing to sue the government under the Contract Disputes Act . *See Winter v. Floorpro, Inc.*, 570 F.3d 1367 (Fed. Cir. 2009). Actual subcontractors are also denied standing under 28 U.S.C. § 1491(a) unless the subcontractor can establish that it is a third-party beneficiary to the underlying prime contract with the government. *See G4S Tech. LLC v. United States*, 779 F.3d 1337 (Fed. Cir. 2015).

Thus, it is not surprising that Congress was concerned that granting standing to subcontractors to protest under

the Brooks Act would allow a nonparty to a contract to sue the government and thus create a false privity of contract where none exists. Interestingly, the majority sees this legislative history as supporting denial of standing to potential subcontractors for protests under prongs one and two of § 1491(b)(1), while at the same time having no effect on standing for potential subcontractor protests under prong three of the statute. Majority Op. at 28-29. The majority reasons that because prong one and two protests by potential subcontractors challenge a contract, proposed contract or solicitation, it makes sense to insist on privity and thus deny potential subcontractor standing under prongs one and two. But because prong three protests do not directly challenge terms of a contract, proposed contract or solicitation, and instead challenge unlawful conduct arising in performance of a contract, the majority argues that privity concerns evaporate. This does not make sense. The requirement of privity does not care about the nature of the challenge a nonparty wishes to bring against the government on one of its contracts. Privity in government contract law exists to prevent nonparties from challenging the government regarding the contracts it forms with parties. A challenge to performance of a contract is no less a challenge to a contract than a specific challenge to a particular line item in a solicitation. Suits brought under the CDA and § 1491(a) challenge performance under a contract, and privity of contract bars actual subcontractor standing to sue under those provisions. The majority's attempt to argue that privity concerns are neutral for potential subcontractor standing under prong three while prohibiting standing under prongs one and two is unconvincing.

It is clear that Percipient, as a potential subcontractor, is not in privity of contract with the government. The parties have not argued that we need to consider privity of contract to decide Percipient's standing under § 1491(b)(1), but to the extent that privity concerns lurk in the background, those concerns clearly suggest that Percipient should be denied standing under all three prongs of the statute.

In sum, Congress considered the legislation resulting in § 1491(b)(1) in the light of its previous experience in enacting CICA, the Brooks Act, and FASA. Congress understood the benefits and detriments of subcontractor standing and considered subcontractor standing "wholly unnecessary, given that current law authorizes the filing of a protest by 'an actual or prospective bidder or offeror.'" H.R. Rep. No. 102-364, at 80-81. Congress enacted ADRA's "interested party" standing test knowing it had already used the same "interested party" standing test in CICA and the Brooks Act, in each instance with the intention of barring subcontractor standing. The majority points to no evidence that Congress, in enacting ADRA, meant to allow standing for potential subcontractors specifically to bring § 3453 prong three protests, while barring standing for other potential subcontractor protests under prongs one and two.

Other than its unfounded prediction that the goals of § 3453 are illusory and that the statute will be unenforced unless potential subcontractors are granted standing to bring prong three protests, the majority has no reason to sidestep away from *AFGE* and create potential

subcontractor standing for prong three § 3453 protests. Were Percipient to survive the task order bar, the court should apply the *AFGE* standing test to this case and deny Percipient statutory standing for its complaint.

CONCLUSION

The decision in this case will have an enormous impact on government procurements.

For government contracts implemented through issuance of task or delivery orders, the decision significantly narrows the existing reach of the task order bar, which defeats Tucker Act jurisdiction for otherwise permissible § 1491(b)(1) protests. The majority interprets the task order bar to be limited to protests that allege legal flaws in the task order, but does so by discarding the binding decision in *SRA*, which interpreted the task order bar to reach broader alleged violations of law arising in connection with the issuance of a task order. Whether the *SRA* interpretation of the scope of the task order bar is "far too broad" as a policy matter, as the majority asserts, can be addressed by the court sitting en banc, but this panel is bound by *SRA*, and under its test, Percipient's protest is task order barred.

For protests under § 1491(b)(1), the majority grants potential subcontractors standing to protest for the first time in Tucker Act history. That the majority limits potential subcontractor standing to prong three protests involving alleged violations of § 3453 may suggest to some that the decision is not a big deal. But § 3453 and

its sister statute 41 U.S.C. § 3307 apply to all government contracts for products and services, so it 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. The majority accomplishes its goal of enhancing vigilance for § 3453 by discarding the *AFGE* precedent as irrelevant to this case. As I have demonstrated above, *AFGE* binds this panel, and Percipient lacks standing under § 1491(b)(1). And as a matter of independent consideration, there 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.

For the many reasons set forth above, I respectfully dissent.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED MAY 17, 2023

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 23-28C

PERCIPIENT.AI, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

CACI, INC. - FEDERAL,

Intervenor.

(Filed: May 17, 2023)
(Re-filed: May 19, 2023)

OPINION

This is a post-award bid protest of the National Geospatial-Intelligence Agency's alleged violation of 10 U.S.C. § 3453, a statute that requires agencies to procure commercial or non-developmental products "to the maximum extent practicable." Both the United States and the intervenor, CACI, Inc. — Federal, move to dismiss

the protest for lack of subject-matter jurisdiction. For the reasons below, we grant the motions to dismiss.

BACKGROUND[1]

The National Geospatial-Intelligence Agency (NGA) obtains and analyzes images and other geospatial information to provide the federal government with intelligence data. Supplying this kind of intelligence on a global scale is a burdensome analytical task and cannot be done effectively without the help of advanced computer technology. One of those advanced technologies is computer vision, a form of artificial intelligence that "trains and uses computers to interpret the visual world." Compl. ¶ 55. With computer vision, users can more efficiently compile and analyze geospatial intelligence.

Hoping to benefit from this technology, NGA, more than three years ago, issued the SAFFIRE solicitation—which was for an indefinite delivery, indefinite quantity contract containing two parts. The first was a data repository, which would store and disseminate geospatial intelligence "across various large organizations." Compl. ¶ 60. The second, which is at the heart of this dispute, would integrate a computer vision system to enhance the agency's ability to produce, review, and classify intelligence from "millions" of images. Compl. ¶ 58.

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1. When a party moves to dismiss for lack of subject matter jurisdiction, the court assumes that the undisputed facts in the complaint are true and draws reasonable inferences in the plaintiff's favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016). These undisputed facts are drawn from the complaint, the attached materials, and the administrative record.

Appendix D

The plaintiff, Percipient, is a technology company that developed a computer vision software called "Mirage." Mirage is an open architecture software that works alongside other computer systems and can detect equipment, vehicles, and faces—each of which is a critical aspect of geospatial intelligence. More than that, though, Mirage's tools also allow users to narrow the computer's focus to specific objects, patterns, or geographical areas, and it can even learn to anticipate its users' needs over time. Despite these features and capabilities, Percipient did not bid on the SAFFIRE contract because its software could only fulfill SAFFIRE's computer vision requirements. For that reason, Percipient relied on what it viewed as the agency's statutory obligation to consider incorporating commercial products and hoped to be part of NGA's SAFFIRE efforts.

In January 2021, NGA simultaneously awarded the SAFFIRE contract to CACI and issued Task Order 1, which directed CACI, among other things, to "develop and deliver the Computer Vision (CV) suite of systems." AR 3030. The agency then informed Percipient that, if it wanted to participate in SAFFIRE, it needed to speak with CACI. This eventually led to a meeting between Percipient and CACI in March 2021. At this meeting, CACI expressed significant interest in partnering with Percipient on future projects, but explained that, as for working together on SAFFIRE, "that ship" had already "sailed." Compl. ¶ 93.

Alarmed by this revelation, Percipient asked NGA if it would independently evaluate Mirage as a possible commercial solution for SAFFIRE's computer

vision system. NGA responded several weeks later and reassured Percipient of its commitment to using commercial products. NGA further explained that CACI's "ship has sailed" statement was an "unfortunate miscommunication," which did not reflect the agency's position. Compl. ¶ 100. Instead, the agency had not yet decided whether it needed to incorporate a commercial product because CACI was still reviewing NGA's legacy systems. NGA confirmed that commercial products would be evaluated once CACI finished.

Another two months went by before Percipient finally secured a meeting with CACI to demonstrate Mirage, although CACI's Program Manager—the individual largely responsible for deciding whether to incorporate a commercial product—left the meeting after only 20 minutes. Still, Mirage received positive feedback, and CACI promised to evaluate Mirage more fully. This "deep dive" into Mirage never happened, however. Compl. ¶ 108.

Several months later, Percipient learned at the 2021 GEOINT Symposium that CACI would be developing a computer vision system for SAFFIRE when CACI employees visited Percipient's symposium booth. Surprised by the news, and no longer believing that CACI could fairly evaluate Mirage, Percipient met with NGA and asked to set up a demonstration. NGA agreed but requested that Percipient "ease up on the legal pressure." Compl. ¶ 118. Percipient then demonstrated Mirage's abilities to several NGA representatives in December 2021, at the end of which NGA concluded that Percipient's software met "all of NGA's analytical transformation requirements." Compl. ¶ 120.

Over the next several months, the parties worked to reach an agreement that would allow NGA to test Mirage with live data, something that Percipient agreed to do at no cost. Just before signing an agreement to that effect, however, NGA changed its tune. Citing legal and security complexities, NGA would no longer use live data and would instead use previously released and publicly available images. Percipient pushed back, claiming that these images would not allow NGA to test Mirage's geospatial module or some of its unique features, such as its ability to alert changes over time. After significant delay, NGA relented and allowed the use of live data.

NGA completed its testing of Mirage in October 2022. Based on the results, Percipient suspected that NGA was not assessing Mirage as a possible commercial solution for SAFFIRE's computer vision requirements because, among other reasons, Percipient could only identify four NGA searches over the 12-week testing period. Thus, Percipient offered to extend the testing period, again at no cost, so NGA could more fully evaluate Mirage as a computer vision system. Percipient's suspicions appeared to be confirmed, though, when NGA explained one month later that it had evaluated Mirage as "an enterprise Machine Learning Platform," and not "as an Analytical tool." Compl. ¶ 137.

After Percipient's efforts to be incorporated into SAFFIRE proved unfruitful, it filed this protest. In its complaint, Percipient alleges that the agency violated its statutory and regulatory obligations by wastefully pursuing a development solution when a possible commercial solution existed. It also alleges that the agency

unlawfully delegated inherent government authority when it allowed its contractor, CACI, to determine agency policy on commercial technology. Finally, Percipient believes that the agency arbitrarily handled the SAFFIRE project. In response, the government and CACI have moved to dismiss for lack of subject matter jurisdiction, arguing that Percipient's protest is barred by the Federal Acquisition Streamlining Act's (FASA) task order bar.

DISCUSSION

Like all federal courts, we possess limited jurisdiction, with ours being defined mainly by the Tucker Act. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Under the Tucker Act, we have jurisdiction over bid protests that allege a "violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

Even if a protest falls within the Tucker Act's jurisdictional grant, it may still be barred by FASA. Through FASA, Congress effectively eliminate[d] all judicial review for protests made in connection with a procurement designated as a task order." *22nd Cent. Techs., Inc. v. United States*, 57 F.4th 993, 999 (Fed. Cir. 2023). In particular, FASA excludes from our jurisdiction any protest "in connection with the issuance or proposed issuance of a task or delivery order." 10 U.S.C. § 3406(f)(1). An agency's challenged action is "in connection with the issuance" of a task order if there is a direct and causal relationship between the two. *SRA Int'l v. United States*, 766 F.3d 1409, 1413 (Fed. Cir. 2014).

Here, Percipient's protest is directly and causally related to the agency's issuance of Task Order 1. Specifically, Percipient alleges that—*after* the agency issued Task Order 1, which directed CACI to develop and deliver a computer vision system—the agency violated §3453 because it failed to consider whether Percipient's product could meet those same requirements. That challenge is barred by FASA.

First, it is unclear whether §3453 requires an agency to consider commercial products after it issues a task order—an issue we need not decide. But even if it does, that task order would be the "direct and immediate cause" of the agency's statutory obligation to consider those commercial products. *See Mission Essential Pers. v. United States*, 104 Fed. Cl. 170, 178 (2012) (holding that FASA barred a protest because an agency's challenged action was the "direct and immediate cause" of the issued task order). In other words, without the task order, the work that Percipient is challenging would not be taking place and Percipient could not allege this §3453 violation. Second, the agency's alleged procurement decision not to consider commercial products is not "logically distinct" from its decision to procure that same computer system through a task order. *See 22nd Cent. Techs., Inc. v. United States*, 157 Fed. Cl. 152, 157 (2021) (holding that FASA applies unless a procurement decision is "logically distinct" from the issuance of a task order). Instead, that decision would be in direct response to the task order that the agency had already issued.

In short, the protest cannot be abstracted away from CACI's performance under a task order. And certainly,

if Percipient prevailed on the merits, any meaningful relief would require this court to partially suspend or discontinue performance under that task order, which further evidences the connection between the challenge and the task order. *See SRA*, 766 F.3d at 1414 (explaining that a protestor's requested relief can support the application of FASA's task order bar). We hold that Percipient's protest is "in connection with the issuance" of a task order and is therefore barred by FASA from being brought in this court.

CONCLUSION

In sum, we lack subject matter jurisdiction over Percipient's protest. Its challenge to the agency's actions under §3453 is "in connection with the issuance of a task order" and is barred by FASA. Thus, the motions to dismiss for lack of subject matter jurisdiction are granted. The Clerk of Court is directed to enter judgment accordingly. No costs.

/s/ Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

APPENDIX E — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED MAY 18, 2023

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 23-28 C

PERCIPIENT.AI, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

CACI, INC. - FEDERAL,

Defendant-Intervenor.

Filed: May 18, 2023

JUDGMENT

Pursuant to the court's Opinion, filed May 17, 2023, granting defendant's and defendant-intervenor's motions to dismiss,

IT IS ORDERED AND ADJUDGED this date, that plaintiff's complaint is dismissed for lack of subject-matter jurisdiction. No costs.

Appendix E

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $505.00.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED APRIL 7, 2023

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 23-28C

PERCIPIENT.AI, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

CACI, INC. – FEDERAL,

Intervenor.

(Filed: March 31, 2023)
(Re-filed: April 7, 2023)[1]

OPINION

This is a post-award bid protest of the National Geospatial-Intelligence Agency's alleged violation of 10 U.S.C. § 3453, a statute that requires agencies to procure commercial or non-developmental products "to the maximum extent practicable." Both the United States

1. This opinion was originally issued under seal to give the parties an opportunity to propose redactions. Because the parties agreed that none were necessary, the opinion appears in full.

and the intervenor, CACI, Inc. – Federal, move to dismiss the protest for lack of subject-matter jurisdiction.

The matter is fully briefed, and oral argument was held on March 6, 2023. We denied the motions to dismiss in an order issued on March 9, 2023. This opinion more fully explains our reasoning.

BACKGROUND[2]

The National Geospatial-Intelligence Agency (NGA) obtains and analyzes images and other geospatial information to provide the federal government with intelligence data. Supplying this kind of intelligence on a global scale is a burdensome analytical task and cannot be done effectively without the help of advanced computer technology. One of those advanced technologies is computer vision, a form of artificial intelligence that "trains and uses computers to interpret the visual world." Compl. ¶ 55. With computer vision, users can more efficiently compile and analyze geospatial intelligence.

Hoping to benefit from this technology, NGA, more than three years ago, issued the SAFFIRE solicitation—which was an indefinite delivery, indefinite quantity contract containing two parts. The first was a data

2. When a party moves to dismiss for lack of subject matter jurisdiction, the court assumes that the undisputed facts in the complaint are true and draws reasonable inferences in the plaintiff's favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016). These undisputed facts are drawn from the complaint, the attached materials, and the administrative record.

repository that would store and disseminate geospatial intelligence "across various large organizations." Compl. ¶ 60. The second, which is at the heart of this dispute, would integrate a computer vision system to enhance the agency's ability to produce, review, and classify intelligence from "millions" of images. Compl. ¶ 58.

The plaintiff, Percipient, is a technology company that developed a computer vision software called "Mirage." Mirage is an open architecture software that works alongside other computer systems and can detect equipment, vehicles, and faces—each of which is a critical aspect of geospatial intelligence. More than that, though, Mirage's tools also allow users to narrow the computer's focus to specific objects, patterns, or geographical areas, and it can even learn to anticipate its users' needs over time. Despite these features and capabilities, Percipient did not bid on the SAFFIRE contract because its software could only fulfill SAFFIRE's computer vision requirements, not the entire contract. For that reason, Percipient relied on what it viewed as the agency's statutory obligation to consider incorporating commercial products and hoped to be part of NGA's SAFFIRE efforts.

In January 2021, NGA awarded the SAFFIRE contract to CACI and informed Percipient that if it wanted to participate in SAFFIRE, it needed to speak with CACI. This eventually led to a meeting between Percipient and CACI in March 2021. At this meeting, CACI expressed significant interest in partnering with Percipient on future projects, but explained that, as for working together on SAFFIRE, "that ship" had already "sailed." Compl. ¶ 93.

Alarmed by this revelation, Percipient asked NGA if it would independently evaluate Mirage as a possible commercial solution for SAFFIRE's computer vision system. NGA responded several weeks later and reassured Percipient of its commitment to using commercial products. NGA further explained that CACI's "ship has sailed" statement was an "unfortunate miscommunication" that did not reflect the agency's position. Compl. ¶ 100. Instead, the agency had not yet decided whether it needed to incorporate a commercial product because CACI was still reviewing NGA's legacy systems. NGA confirmed that commercial products would be evaluated once CACI finished.

Another two months went by before Percipient finally secured a meeting with CACI to demonstrate Mirage, although CACI's Program Manager—the individual largely responsible for deciding whether to incorporate a commercial product—left the meeting after only 20 minutes. Still, Mirage received positive feedback, and CACI promised to evaluate Mirage more fully. This "deep dive" into Mirage never happened, however. Compl. ¶ 108.

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abilities to several NGA representatives in December 2021, at the end of which NGA concluded that Percipient's software met "all of NGA's analytical transformation requirements." Compl. ¶ 120.

Over the next several months, the parties worked to reach an agreement that would allow NGA to test Mirage with live data, something that Percipient agreed to do at no cost. Just before signing an agreement to that effect, however, NGA changed its tune. Citing legal and security complexities, NGA would no longer use live data and would instead use previously released and publicly available images. Percipient pushed back, claiming that these images would not allow NGA to test Mirage's geospatial module or some of its unique features, like its ability to alert changes over time. After significant delay, NGA relented and allowed the use of live data.

NGA completed its testing of Mirage in October 2022. Based on the results, Percipient suspected that NGA was not assessing Mirage as a possible commercial solution for SAFFIRE's computer vision requirements because, among other reasons, Percipient could only identify four NGA searches over the 12-week testing period. Thus, Percipient offered to extend the testing period, again at no cost, so NGA could more fully evaluate Mirage as a computer vision system. Percipient's suspicions appeared to be confirmed, though, when NGA explained one month later that it had evaluated Mirage as "an enterprise Machine Learning Platform," and not "as an Analytical tool." Compl. ¶ 137.

After Percipient's efforts to be incorporated into SAFFIRE proved unfruitful, it filed this protest. In its complaint, Percipient alleges that the agency violated its statutory and regulatory obligations by wastefully pursuing a development solution when a possible commercial solution existed. It also alleges that the agency unlawfully delegated inherent government authority when it allowed its contractor, CACI, to determine agency policy on commercial technology. Finally, Percipient believes that the agency acted arbitrarily in handling the SAFFIRE project. In response, the government and CACI have moved to dismiss for lack of subject matter jurisdiction.

DISCUSSION

I. Subject Matter Jurisdiction

Like all federal courts, we possess limited jurisdiction, with ours being defined mainly by the Tucker Act. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Under the Tucker Act, we have jurisdiction over non-frivolous allegations of statutory or regulatory violations "in connection with a procurement or a proposed procurement." *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008).

First, Percipient has alleged a non-frivolous violation of 10 U.S.C. § 3453, which provides, in short, that defense agencies and their contractors must acquire "commercial products" "to the maximum extent practicable." § 3453(b)(1)-(2). To that end, the statute requires agencies to conduct market research throughout the procurement

process—including before each task order award—to identify commercial products that (1) "meet the agency's requirements," (2) "could be modified to meet the agency's requirements," or (3) "could meet the agency's requirements if those requirements were modified to a reasonable extent." § 3453(c)(1)-(2). In addition, offerors of commercial products must be given an opportunity to compete. § 3453(a)(3).

While the parties may dispute the merits of Percipient's claim, no party has argued Percipient's allegations are frivolous. Indeed, Percipient alleges specific facts that, if true, may violate §3453. Percipient alleges that it owns a commercial product that could fulfill NGA's computer vision requirements and that NGA ignored whether a commercial solution existed before it allowed CACI to develop a solution.[3]

Second, to invoke our bid-protest jurisdiction, a protestor must allege a "violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (2018). The statute's "operative phrase 'in connection with' is very sweeping in scope." *RAMCOR Servs. Group v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). The phrase encompasses any statutory violation connected to a procurement, and a procurement includes "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending

3. On the current record, we know that CACI will at least develop portions of the computer vision system, but it has not decided yet whether it will develop the entire system. Tr. 25:6–15.

with contract completion and closeout." *Distributed Sols.*, 539 F.3d at 1345 (quoting 41 U.S.C. § 111).

With this in view, NGA's alleged violation of §3453 has a connection to a procurement. That is because §3453 is itself a procurement statute and establishes a preference for commercial products and services. A violation of a statute that sets out what an agency can lawfully acquire has a connection to a procurement. *RAMCOR*, 185 F.3d at 1289 (holding that a violation has a connection with a procurement when an agency's actions under that statute affect the award or performance of the contract).

The government disagrees and argues that Percipient's protest is not in connection with a procurement and is instead a challenge to NGA's administration of the SAFFIRE contract. In reaching that conclusion, the government reasons that Percipient's protest cannot be in connection with a procurement because it alleges a post-award statutory violation that relates to NGA's oversight of CACI's performance.

We reject the government's characterization of Percipient's protest. A protest does not become a contract administration dispute simply because the agency's statutory violation occurs after the contract award. Indeed, the Tucker Act "does not require an objection to the actual contract procurement"—only an objection to a statutory violation with a connection to a procurement. *RAMCOR*, 185 F.3d at 1289. Nothing in the Tucker Act suggests that those violations must occur before the contract award for the court to have jurisdiction.

Next, as a matter of statutory construction, the government invokes sovereign immunity to argue that we should narrowly construe the Tucker Act's jurisdictional grant to exclude post-award procurement violations. But the "sovereign immunity canon is just that—a canon of construction." *Richlin Sec. Serv. v. Chertoff*, 553 U.S. 571, 589 (2008). It does not "displace[] the other traditional tools of statutory construction" and, like all canons of construction, applies only when ambiguity exists. *See id.* at 590. No ambiguity exists here, however, as we simply apply the Federal Circuit's interpretation of the Tucker Act in this protest. *Distributed Sols.*, 539 F.3d at 1345.

Finally, CACI turns to the Federal Acquisition Streamlining Act's (FASA) task order bar, which excludes from our jurisdiction any protest "in connection with the issuance or proposed issuance of a task or delivery order." 10 U.S.C. § 3406(f)(1). It argues that we lack jurisdiction over Percipient's protest because its development of a computer vision system is being performed under a task order and therefore falls outside this court's jurisdiction. All of that may be true, but FASA's task order bar will not apply when, as here, a task order exceeds $25,000,000. § 3406(f)(1)(B). Thus, we conclude that we have subject matter jurisdiction over Percipient's protest, which alleges a non-frivolous violation of a statute "in connection with a procurement."

II. Standing

Even though we may have subject matter jurisdiction, we can only exercise our jurisdiction when a plaintiff has established that it has standing to bring its claim. *Myers*

Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002). Standing ensures that plaintiffs who seek review in federal court have a sufficient "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Although we are an Article I court, we apply Article III standing requirements. *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

When it comes to bid protests, a plaintiff must do more than establish Article III standing. That is because Congress, through the Tucker Act, provided that only an "interested party" has standing to challenge a procurement. 28 U.S.C. § 1491(b)(1) (2018). The phrase "interested party" "imposes more stringent standing requirements than Article III," *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009), and limits claims "to actual or prospective bidders" who have a "direct economic interest" in the award of the contract, *Am. Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

The government mostly disputes the first standing requirement, which requires a protestor to be an actual or prospective bidder. As all the parties agree, Percipient did not (and could not) bid on the SAFFIRE contract. That failure, in the government's view, is fatal to Percipient's protest and reveals that Percipient is simply a "disappointed subcontractor" without standing.

Normally, a protestor is an actual or prospective bidder if it either submitted a proposal in response to

a solicitation, or it is "expecting to submit an offer" before the solicitation closes. *MCI Telecomm. Corp. v. United States*, 878 F.2d 362, 365 (Fed. Cir. 1989) (emphasis omitted). But the requirement that a protestor have submitted a bid for it to be an interested party is anything but absolute. For example, *SEKRI v. United States* refused to apply the actual or prospective bidder requirement to a challenge brought under a mandatory source statute because doing so would thwart Congress's intent behind the statute. 34 F.4th 1063, 1072–73 (Fed. Cir. 2022). *Distributed Solutions* allowed contractors to challenge an agency's noncompetitive procurement vehicle without bidding because they "were prepared to submit bids" if the agency had solicited them. 539 F.3d at 1345. *Elmendorf Support Services v. United States* held that an incumbent contractor need not be a bidder for it to challenge an agency's in-sourcing decision because it had an obvious interest in "maintaining its incumbency." 105 Fed. Cl. 203, 208–09 (2012). *Electra-Med Corporation v. United States* determined that contractors can be interested parties without bidding when they challenge an agency action that denies them the opportunity to compete. 140 Fed. Cl. 94, 103 (2018); *see also McAfee, Inc. v. United States*, 111 Fed. Cl. 696, 708–09 (2013). And finally, the interested party requirements have even been relaxed when their rigid application would make statutory guarantees illusory. *See Navarro Rsch. & Eng'g v. United States*, 94 Fed. Cl. 224, 230 (2010).

What these cases make clear is that the "judicial review of procurement methods should not be thwarted through the wooden application of standing requirements."

CCL, Inc. v. United States, 39 Fed. Cl. 780, 790 (1997). In other words, those requirements should be sensitive to a protestor's specific claim and should not deny standing to those who otherwise have a sufficient "personal stake in the outcome of the controversy." *Baker*, 369 U.S. at 204.

With that in mind, we turn to the statute at issue. Under §3453, the critical issue is whether offerors of commercial products have standing. We conclude that they do and that §3453 does not require an offeror of a commercial product to have bid on the prime contract.

First, unlike most procurement statutes, §3453 contemplates that offerors of commercial products have rights under the statute. Specifically, §3453 provides that agencies must give offerors of commercial products "an opportunity to compete in any procurement to fill [the agency's] requirements." § 3453(a)(3). And this clause guarantees more than just a right to compete by bidding on the contract because the statute expressly distinguishes between bidders and offerors of commercial products. § 3453(b)(4) (requiring agencies to state their specifications "in terms that enable and encourage bidders *and offerors* to supply commercial services or commercial products" (emphasis added)); *see also Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) ("[D]ifferences in language . . . convey differences in meaning."). A violation of §3453 therefore denies these commercial product owners an opportunity to compete that is guaranteed to them by the statute, *see Electra-Med*, 140 Fed. Cl. at 103; *cf. Distrib. Sols.*, 539 F.3d at 1345, and that guarantee would become illusory if offerors of commercial products could not sue under §3453, *Navarro Rsch. & Eng'g*, 94 Fed. Cl. at 230.

Second, §3453 imposes an obligation on agencies to incorporate commercial products that continues beyond the contract's award. For example, agencies must conduct market research even before "awarding a task order or delivery order." § 3453(c)(1)(C). They must then use the results of that research to identify any commercial products that (1) "meet the agency's requirements," (2) "could be modified to meet the agency's requirements," or (3) "could meet the agency's requirements if those requirements were modified to a reasonable extent." § 3453(c)(2). So, putting this all together, an agency must conduct market research even after the contract award and then, depending on the results, need to incorporate a commercial product. This means that an agency can still violate §3453 after the contract award and is why—unlike most other protests—it is irrelevant whether the commercial product offeror bid on the prime contract.

The government emphasizes Percipient's inability to perform the entire contract and appears to suggest that standing under §3453 is limited to those offerors whose commercial product can meet every requirement in a solicitation. But the statutory text does not support this conclusion as it provides in at least one part that agencies must "require prime contractors and subcontractors . . . to incorporate commercial services [and] commercial products . . . as *components of items supplied* to the agency." § 3453(b)(2) (emphasis added). The word "component" means a "part or element of a larger whole" and contradicts a requirement that commercial products satisfy every agency requirement. New Oxford American Dictionary (3d ed. 2010).

Because the text's meaning is plain, we could stop there. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). But relevant caselaw further suggests that this ability of a commercial product to meet every agency requirement is unnecessary for standing under §3453. In *Palantir USG v. United States*, the Federal Circuit held that the Army violated §3453 when it failed to use market research results to identify possible commercial solutions, but it reached that conclusion without deciding whether Palantir's product could satisfy every Army requirement. *See* 904 F.3d 980, 990–91, 993 (Fed. Cir. 2018).

Third, the statute uniquely expresses a significant preference for commercial products. That preference manifests itself throughout the statute by imposing obligations that require agencies to consider commercial products at nearly every stage of the procurement. This preference then culminates in Congress encouraging agencies to sacrifice their own requirements if doing so would allow the agency to incorporate a commercial product or service. § 3453(b)(3), (c)(2)(C). It would thwart Congress's intent behind §3453 if offerors of commercial products could not bring challenges under the statute. *SEKRI*, 34 F.4th at 1072–73.

We thus hold that offerors of commercial products need not bid on the prime contract to have §3453 standing. Instead, the appropriate question in this context is whether the protestor was prepared to offer its commercial product to the agency if the agency had complied with the statute. In this case, Percipient's actions over the last two years make clear that it was willing and ready to offer its commercial software.

On a different note, CACI contends that offerors of commercial products do not have §3453 standing because procurement violations, like the one alleged here, can be prevented through congressional oversight. No doubt, Congress has the power to oversee federal procurements, yet Congress vested this court with exclusive bid protest jurisdiction and surely had in mind that we would remedy procurement violations. And again, *Palantir* upheld a protestor's §3453 challenge even though Congress had taken some remedial steps of its own. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 113, 220 (2016).

The government's final salvo is to once again argue that offerors of commercial products cannot challenge a post-award violation of §3453 because these disputes become challenges to the government's contract administration. Just as we rejected this argument as a jurisdictional defense, we reject it here too. For one thing, requiring these challenges to be brought before contract award makes little sense when §3453's requirements continue beyond the contract's award and can still be violated afterward. But for another, that limitation would also allow agencies to ignore §3453 with impunity as long as they defer decisions about commercial products until after the contract award. That result would be untenable, especially when Congress enacted this statute to stem wasteful and inefficient agency spending.[4]

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4. *See, e.g.*, *Formula for Action: A Report to the President on Defense Acquisition by the President's Blue Ribbon Commission on Defense Management* at 23–24 (April 1986); H.R. Rep. No. 103-545, at 21 (1994); S. Rep. No. 103-258, at 6 (1994); H.R. Rep. No.

Finally, the parties do not seriously dispute Percipient's economic interest. A protestor has a direct economic interest if, "but for the alleged error in the procurement process," it would have received an award. *Info. Tech. & Applications v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003). The only argument advanced against Percipient's economic interest is its failure to bid on the SAFFIRE contract. But Percipient is an offeror of a commercial product under §3453 and is prepared to offer NGA its product. Viewed in that light, Percipient has an economic interest in that opportunity. Thus, Percipient has standing to challenge the agency's alleged violation of §3453.

III. Timeliness

The government and CACI assert two timeliness defenses, both of which we reject. First, the government invokes *Blue & Gold Fleet v. United States*, which held that a protestor waives its right to protest if it "has the opportunity to object to the terms of a government

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103-712, at 233 (1994) (Conf. Rep.); S. Rep. No. 112-173, at 162–63 (2012); *Hearing to Receive Testimony on the Current Readiness of U.S. Forces in Review of the Defense Authorization Request for Fiscal Year 2014 and the Future Years Defense Program: Hearings Before the Subcomm. on Readiness and Management Support, Comm. on Armed Services*, 113th Cong., 1st Sess. 24–27 (2013) (statement of Sen. McCaskill); *Hearing to Receive Testimony in Review of the Defense Authorization Request for Fiscal Year 2016 and the Future Years Defense Program: Before the Subcomm. on Airland of the S. Comm. on Armed Servs.*, 114th Cong. 60–62 (2015) (statement of Sen. Cotton).

solicitation containing a patent error and fails to do so prior to the close of the bidding process." 492 F.3d 1308, 1313 (Fed. Cir. 2007). In the government's view, Percipient's protest is essentially a challenge to the solicitation and is therefore waived under *Blue & Gold*.

We disagree: In the limited record we have, nothing in the solicitation appears to violate §3453. The solicitation was flexible enough to allow for a development solution, but it did not require one. And that approach is entirely consistent with §3453, which allows for development solutions when a commercial one is impracticable or nonexistent. Likewise, NGA's actions here only confirm that the solicitation did not require a development solution as NGA repeatedly explained to Percipient that there would be opportunities for Percipient to offer its commercial product. Thus, Percipient's protest is not barred by *Blue & Gold*.

Second, CACI argues that Percipient's complaint is barred by the doctrine of laches. In essence, laches is "a defense developed by courts of equity to protect defendants against unreasonable, prejudicial delay in commencing suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 580 U.S. 328, 333 (2017). CACI maintains that laches applies because Percipient's protest should have been brought in March 2021 when, according to CACI, Percipient first learned of a potential §3453 violation.

We cannot apply the doctrine of laches to defeat Percipient's cause of action on a motion to dismiss. Of

course, a party's delay in suit is relevant when deciding whether to grant a permanent injunction, which requires us to consider, among other things, "whether the balance of hardships leans in the plaintiff's favor." *Fed. Acquisition Servs. Team v. United States*, 124 Fed. Cl. 690, 708 (2016). But the Supreme Court has long held that laches is not an affirmative defense when a statute of limitations exists. *United States v. Mack*, 295 U.S. 480, 489 (1935). A statute of limitations is a "congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted." *SCA Hygiene*, 580 U.S. at 334–35. Thus, applying laches to a claim brought within the statute of limitations violates "separation-of-powers principles" because it would "give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *Id.* at 335 (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680 (2014)).

In this case, Congress has established a six-year statute of limitations for any claim in this court, 28 U.S.C. § 2501, and we "are not at liberty to jettison Congress' judgment on the timeliness of suit," *SCA Hygiene*, 580 U.S. at 335. Therefore, because Percipient's suit was brought within six years, its claim is timely, and laches is no defense.

Appendix F

CONCLUSION

In sum, we have subject matter jurisdiction over Percipient's non-frivolous allegation of a statutory violation in connection with the SAFFIRE procurement. In addition, Percipient, as an offeror of a commercial product, has standing under §3453 because it was prepared to offer its product to NGA, and it had a direct economic interest in that opportunity. Therefore, the motions to dismiss for lack of subject matter jurisdiction are denied.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

APPENDIX G — STATUTORY PROVISION INVOLVED

28 U.S. Code § 1491 — Claims against United States generally; actions involving Tennessee Valley Authority

(b)(1)

Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.