No. 25-428

IN THE

# Supreme Court of the United States

PERCIPIENT.AI, INC.,

*Petitioner,*

*v.*

UNITED STATES, *et al.*

*Respondents.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


PAUL D. CLEMENT
CLEMENT & MURPHY PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

HAMISH P.M. HUME
*Counsel of Record*
SAMUEL C. KAPLAN
BOIES SCHILLER FLEXNER
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727
hhume@bsfllp.com

*Counsel for Petitioner*


131810

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Cited Authorities*

*Page*

**Statutes**

## INTRODUCTION

Percipient's Petition establishes that the *en banc* opinion's understanding of the term "interested party" in 28 U.S.C. § 1491(b)(1) is both grievously wrong and highly consequential. Left uncorrected, the decision will permanently and incorrectly limit who may bring government contracting protests and foreclose enforcement of critical laws enacted by Congress to avoid costly boondoggles and ensure that government procurements take maximum practical advantage of commercial innovation.

Neither the Government nor Intervenor credibly defends the *en banc* opinion's atextual interpretation of the term "interested party." Intervenor scarcely addresses the text while the Government tries but fails to defend the *en banc* majority's misguided claim that CICA is "old soil" that was transplanted "wholesale" to ADRA. CICA is a different statute with different language and a decidedly narrow focus on solicitations and awards for general contracts. Section 1491(b)(1) by contrast allows "interested parties" to challenge a broader array of violations of procurement statutes and regulations some of which protect "interested parties" who are not involved in the general contract solicitation and bidding. Denying their statutory standing based on inapposite "old soil" is atextual and erroneous.

Meanwhile, neither respondent accounts for the commonsense reality that who is an "interested party" depends on what is being challenged. A bid protest challenging a general contract must be brought by a participant in the solicitation or bid process for the

general contract. A complaint about failing to follow the law ensuring that general contractors (and the government) consider commercially available products is logically brought by petitioner. There is no party more directly interested in a violation of the Commercial Item Preference Law than a commercial-product provider like Percipient who is thwarted from offering its product by the Government's violation of the law.

Additionally, neither seriously disputes the case's importance, which has been amply confirmed since the Petition's filing by substantial amicus support from representatives of the technology industry and members of Congress. Amici detail the substantial harms that will result by preventing providers of commercial technology from enforcing a statute enacted by Congress to ensure that federal procurements take advantage of the commercial marketplace "to the maximum extent practicable."

Congress further confirmed the case's importance on December 18th by enacting this year's National Defense Authorization Act. That Act expanded agencies' post-award obligations to ensure that contractors and subcontractors evaluate and acquire commercial products. National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119-60, § 1822, S.1071–529 (2025) ("NDAA FY 2026"). The *en banc* majority's incorrect interpretation of "interested party" would render these provisions unenforceable, along with the provisions on which Percipient relied.

With no credible basis for opposing review, the Government (but not Intervenor) asserts at the end of

its brief that the case "almost certainly" will become moot because SAFFIRE's first task order will expire in January 2026. This is baseless. The Government does not suggest that the SAFFIRE contract will expire or that all SAFFIRE-related Computer Vision development will cease. It therefore cannot claim that it could have no practical effect to grant Percipient the relief it has long sought—a credible evaluation of its product in connection with SAFFIRE. And even if prospective relief were impossible (and the Government has not even remotely shown it is), the case would remain live based on Percipient's claim for bid-preparation costs.

As things stand, the *en banc* Federal Circuit will have the last word on an important and recurring issue of procurement law. As shown by the Petition and four dissenting judges below, that last word is wrong. The Petition should be granted.

## I. THE *EN BANC* DECISION BELOW IS INCORRECT AND WILL BE THE FINAL WORD ON AN IMPORTANT QUESTION UNLESS THIS COURT INTERVENES.

1. The *en banc* court ignored 28 U.S.C. § 1491(b)(1)'s plain text to reach its counterintuitive conclusion that the only parties who can bring a challenge under § 1491(b)(1)'s third prong are those who could bring a challenge under one of its first two prongs. Determining who is "interested" depends on what is being challenged, and there is no party more interested in the violation of the Commercial Item Preference Law than the provider of a commercial product whose ability to offer its product has been thwarted by the violation. To reach its atextual

conclusion, the *en banc* court incorrectly privileged legislative history and a different statute with different language (CICA) over § 1491(b)(1)'s plain text.

The Government downplays the *en banc* court's reliance on legislative history while relying on its atextual conclusion that the definition of "interested party" in § 1491(b)(1) is "old soil" transplanted from CICA. Gov't Opp. 10. The Government claims that the third prong of § 1491(b)(1) is "nearly identical" to CICA's authorization of appeals to the GSA Board by an "interested party" of "'any decision by a contracting officer alleged to violate a statute or regulation' 'in connection with any procurement.'" Gov't Opp. 11.[1]

That is wrong. The "protests" that the section authorized were limited to contract awards and solicitations—*i.e.*, the subject of the first two prongs of § 1491(b)(1), not the third. § 2713(h)(9)(A), 98 Stat. 1183–84 (defining protest as a "a written objection by an interested party to *a solicitation* by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection to *a proposed award or the award of such a contract*" (emphasis added)). CICA contained no analogue to § 1491(b)(1)'s authorization of challenges to "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."[2]

---

1. The section amended the Brooks Act, which involved automatic data processing contracts.

2. The Government also inaccurately suggests the words "in connection with a procurement" appear after the words "any violation of a statute or regulation" in the section it quotes.

The Government relatedly ignores that section expressly defines "interested party" "*with respect to* a contract or proposed contract described in" the definition of "protest." *See* § 2713(9)(B), 98 Stat. 1184 (emphasis added); *see also* Pet. 29 (discussing 31 U.S.C. § 3551(A) & (C)). That language made sense in the context of CICA, but is absent from § 1491(b)(1) which is not limited to contracts and solicitations and instead contains the broader third prong encompassing violations of statutes and regulations that protect the interests of companies, like Petitioner, that have a better private-sector alternative for only part of the general contract.

The Government ignores the "with respect to" language in CICA's definition and the Petition's discussion of it. Pet. 29–30. It even omits the language when purporting to quote CICA's definition of "interested party." *See* Gov't Opp. 10. The only conclusion is that the Government has no answer for it. It cannot credibly claim that ADRA simply transplanted "old soil" while failing to accurately describe the soil's full contents.

Nor does the Government address the fact that, as a matter of plain text and common sense, determining who is "interested" in a particular action depends on what the action is. Pet. 27–29. It is fundamentally atextual to hold that the universe of interested parties who may bring a third-prong challenge to "any violation of statute or regulation in connection with a procurement or a

---

Those words actually appeared in an introductory clause ("Upon request of an interested party in connection with any procurement conducted under the authority of this section . . .") that preceded (by more than 30 words) the words "any violation of a statute or regulation." § 2713(h)(1), 98 Stat. 1182–83.

proposed procurement" must be confined to those who may challenge a solicitation or contract award under the first two prongs of § 1491(b)(1).

The Government also ignores ADRA's purpose which was not to reduce the universe of parties who previously could bring procurement-related challenges, including under the APA; rather, it was designed to consolidate them in the CFC. Pet. 6–7, 30–32. The APA avoids the anomaly created by the decision below by broadly allowing a challenge by any person aggrieved without artificially limiting statutory standing to a subset of aggrieved parties without reference to the action challenged. The Government asserts that the APA's words cannot inform the meaning of "interested party" because Congress used a different term. But the terms are not materially different, and regardless, the Government misses the point that in using the term "interested party" to describe who could challenge contracts, solicitations, *and* "any violation of statute or regulation in connection with a procurement or proposed procurement," Congress intended to capture the full range of procurement-related actions that could have been brought before the law in both the CFC *and in the district courts under the APA*.

Congress also used a term that read naturally, depends on what is being challenged to determine who is "interested." It makes no more sense to measure the term "interested party" without reference to what is being challenged than it would for the APA's words "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." When an agency denies a person a right protected by statute or regulation, that person is aggrieved and interested.

2. The question presented is important. It is undisputed that the Federal Circuit's exclusive jurisdiction over this issue will prevent further percolation. Absent this Court's review, the *en banc* decision will be the final word, and that final word is wrong.

The Government asserts that the Court does not grant certiorari for every Federal Circuit *en banc* decision. That ignores that the Court frequently reviews Federal Circuit *en banc* decisions where (as here) there is a substantial basis for believing they are wrong, including 20 since 1995. The importance of review is further underscored by (i) the deep division reflected in the 7-4 split (which was not present in any case cited by the Government denying review), (ii) the dissent's identification of this case as of great importance to the government contracting community, and (iii) the fact that the Government believed the issue was important enough to seek *en banc* review.

The Government and Intervenor also have no effective answer to the fact that the decision will eviscerate enforcement of the Commercial Item Preference Law. Both assert that it is enough that protesters could challenge the solicitation as improperly bundled or partner with a contractor who could perform the other work and submit a joint bid. Further, the Government asserts that Percipient's reliance on *Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018), "proves as much" because Palantir successfully brought a pre-award challenge. Gov't Opp. 16.

But there is no good reason a party interested in having a fair shot at providing its product as part of a general contract (as expressly guaranteed by statute)

should have to file a premature or inapt challenge to the general contract or partner with someone else. Congress expressly imposed requirements that apply both pre-award *and* post-award because (as here and as will frequently be the case with long-term contracts), the decision to develop often is not made until after award. Pet. 33–35. Congress also enacted more post-award obligations on December 18. *See supra 2* (citing NDAA FY 2026 § 1822). The *en banc* court's decision immunizes post-award violations from review *and* provides a roadmap for the Government to evade enforcement of the pre-award provisions by deferring decisions to develop until after award. Pet. 34–35.

Further demonstrating the importance of review is the substantial amicus support from members of Congress and various representatives of commercial technology interests, *including* Palantir Technologies. These filings further show that the decision was wrong and detail how it would undermine the Commercial Item Preference Law and harm American competitiveness. The Government and Intervenor ignore these filings.

The Government is left to argue that the Government might choose to prefer commercial products on its own. This sort of argument would apply to any statute that limits the Government, and would appeal only to the Government. The entire point of the Commercial Item Preference Law is that left to its own devices, the Government often will allow wasteful development in lieu of procurement of existing products. This was true of the Army intelligence system at issue in *Palantir*. Pet. 35–36. And it is true of the geospatial-intelligence system that the Government is allowing Intervenor to develop with no

meaningful evaluation of commercial alternatives, to the detriment of American competitiveness and security. If not reviewed, the *en banc* court's opinion will immunize such post-award decisions to develop from review and incentivize the Government to ensure that future decisions to develop are made post-award.

## II. THE CASE IS NOT MOOT.

The Government (but not Intervenor) argues that the case will "almost certainly" become moot during the period for decision because the first task order will expire in January 2026. Gov't Opp. 9.

If the Government really believed this case was on the verge of mootness, it would have opened its brief with this jurisdictional argument. It also surely would have alerted the *en banc* court to the issue rather than put it through the exercise of reaching a judgment that if the case were really to become moot on appeal, would require vacatur under this Court's precedent.

Regardless, the argument is not just half-hearted but demonstrably wrong.

First, Percipient's request to recover bid-preparation costs would prevent the case from becoming moot even assuming that it could no longer obtain prospective relief after January 2026. *See Mitchco Int'l, Inc. v. United States*, 26 F.4th 1373, 1379 (Fed. Cir. 2022); *see also Pacificorp Cap., Inc. v. United States*, 852 F.2d 549, 550 (Fed. Cir. 1988).

Here, Percipient alleged that it "spent over $1 million of time and resources in negotiating and implementing

an agreement whose stated purpose was to allow NGA 'to test and evaluate Mirage platform Geospatial Module (GSM) capabilities.'" JA-101 ¶ 187. It further alleged that "NGA's promises proved to be a bait and switch, with NGA admitting months later that it had not evaluated 'Mirage as an Analytic tool.'" *Id.* Under CFC precedent, Percipient's request for "such other relief as the Court deems just and proper" (JA-102), is sufficient to allow the recovery of bid-preparation costs, especially where the extent of the costs is addressed in the complaint. *See CMS Cont. Mgmt. Servs. v. United States*, 123 Fed. Cl. 534, 537 (2015); *CSE Const. Co. v. United States*, 58 Fed. Cl. 230, 263 (2003); *Dynacs Eng'g Co. v. United States*, 48 Fed. Cl. 614, 615 n.5 (2001).

Second, the Government fails to establish that Percipient's request for prospective relief will become moot in January 2026. Percipient's claim is not based on or limited to a task order. Pet.App.62a (panel majority). Instead, Percipient claims that the Government is violating the law by failing to ensure evaluation and procurement of commercial technology in connection with the SAFFIRE contract. Pet.App.66a–67a (panel majority). The Government does not claim, much less show, that the SAFFIRE contract will be terminated in January 2026 or that all SAFFIRE-related CV development will cease. Absent substantiated averments along those lines, the Government cannot claim that an injunction requiring evaluation of Percipient's product could have "no practical effect."[3]

---

3. Intervenor (but not the Government) argues that the case is a "poor vehicle" because the Court would have to consider the applicability of the so-called task order bar set forth in 10 U.S.C. § 3406(f). Interv. Opp. 29. The panel majority rejected the applicability of § 3406(f) based on its recognition that this section

Third, the dispute is capable of repetition, yet evading review. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). The Government asserts that *Kingdomware*'s exception does not apply because the "task order was ultimately in effect for five years." Gov't Opp. 18 n.3. But even assuming this is the relevant metric, the task order was a "short-term" contract with a one-year base period and four one-year options. JA-470. This Court has held that contracts of two years qualify for the mootness exception. *See Kingdomware*, 579 U.S. at 170.

Further, even for longer-term contracts, this case shows how the Government can substantially delay the filing of suit by falsely claiming it intends to evaluate commercial products while allowing its contractor to develop and taking advantage of limited public visibility into the procurement. As detailed in the complaint, it did so here by stringing Percipient along with various false assurances and tactics.[4]

---

only bars challenges "in connection with the *issuance* or proposed issuance of a task order" and that Percipient's protest "does not assert the wrongfulness of, or seek to set aside, any task order." Pet.App.59a. The *en banc* court did not even deign to review that obviously correct conclusion. Pet.App.48a. There is accordingly no vehicle problem here, and absent this Court's review, there will be no future vehicle to review this issue. The *en banc* decision will be the last word, despite being deeply flawed.

4. The Government misleadingly asserts that Percipient "waited nearly two years before filing suit." Gov't Opp. 18 n.3. In reality, Percipient offered its product upon award of SAFFIRE and brought suit when the Government confirmed it would not evaluate Percipient's product for SAFFIRE. JA-68 ¶ 82, JA-71–JA-88 ¶¶ 89–146. The "delay" was 100% the result of the Government's false assurances. *Id.*

## III. IF THE CASE WERE MOOT, VACATUR WOULD BE THE APPROPRIATE REMEDY.

Finally, if the Government were correct that this case is moot or would become moot before this Court can dispose of it, the appropriate remedy would be vacatur under this Court's precedent. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Vacatur is the "ordinary practice" other than where mootness results from "voluntary forfeiture of a legal remedy." *See Alvarez v. Smith*, 558 U.S. 87, 97 (2009). Percipient obviously did not voluntarily forfeit any remedy. Instead, it has consistently pursued its legal remedies in the face of the Government and Intervenor's attempts to avoid review.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

PAUL D. CLEMENT
CLEMENT & MURPHY PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

HAMISH P.M. HUME
*Counsel of Record*
SAMUEL C. KAPLAN
BOIES SCHILLER FLEXNER
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727
hhume@bsfllp.com

*Counsel for Petitioner*