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Assessing Percipient.ai After Loper Bright Enterprises – Potentially a New Trajectory in Government Procurement Law

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¶ 221 FEATURE COMMENT: Assessing *Percipient.ai* After *Loper Bright Enterprises*—Potentially A New Trajectory In Government Procurement Law

On June 7, 2024, the U.S. Court of Appeals for the Federal Circuit issued its decision in ***Percipient.ai, Inc. v. U.S***, 104 F.4th 839 (Fed. Cir. 2024). Michael Anstett, Alexander Ginsberg and James McCullough then prepared a very thoughtful analysis of the *Percipient* decision, in Practitioner's Comment, "Federal Circuit Narrows Task Order Protest Bar, Broadens Interested-Party Test," 66 GC ¶ 171. The *Percipient* decision was, as they (and the dissenting judge) pointed out, noteworthy primarily because it seemed at odds with established precedents. But a few days later, on June 28, 2024, the Supreme Court issued its landmark decision in ***Loper Bright Enters. v. Raimondo***, 144 S.Ct. 2244 (2024), in which the Court departed from a 40-year practice of judicial deference under *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Suddenly the approach taken in *Percipient* took on a new cast: the *Percipient* decision, like *Loper Bright*, emphasized the courts' primacy in interpreting the law, and so *Percipient* may turn out to have been one of the first decisions which follows *Loper Bright*'s trajectory and opens new lines of challenge to agency procurement decisions, grounded in the courts' prerogative to define what the law is.

The earlier commentary on the *Percipient* decision from Anstett, Ginsberg and McCullough described the decision carefully and well. *Percipient* was a bid protest without a bidder—Percipient never bid, but was a prospective subcontractor frustrated because the agency allegedly failed, through its prime contractor, in its statutory obligation to entertain Percipient's commercial solution. And it was a protest about a task order contract without a task order—Percipient could not bid on task orders under the prime contract because it was never a party to the master contract, and so (the Federal Circuit held) the statutory bar against task order protests did not apply. The Federal Circuit ruled for Percipient by interpreting, among other statutory provisions, the Tucker Act's expansive language which permits a protest of "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

The earlier commentary concluded that the *Percipient* court's holding that Percipient had standing was "quite narrow and essentially limited to its facts," as it was tied closely to an alleged violation of the statute which called for consideration of commercial technologies, 10 USCA § 3453. Although Judge Clevenger's dissent argued that the *Percipient* decision broke with Federal Circuit precedent by giving standing to a prospective *subcontractor,* the commentators wrote that under the *Percipient* decision there "are many stars that must align for prospective

subcontractors" to have standing to sue. The decision in *Percipient*, the commentators said, "may prove to be just another anomaly that is limited to its facts, with little practical impact."

All that, however, was before the Supreme Court's decision in *Loper Bright Enterprises*. In *Loper Bright* the Supreme Court flatly rejected the deference traditionally afforded agency interpretations of law. "*Chevron* is overruled," Chief Justice Roberts wrote for the Court, and so courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." The courts, Chief Justice Roberts stressed in his majority opinion, should not defer to agency interpretations of ambiguous statutory provisions. See, e.g., Castellano, "After *Chevron*: How Might *Loper Bright* Impact Procurement Law?," 38 Nash & Cibinic Rep. NL ¶ 49; Christopher Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference,* Notice & Comment—Yale Journal on Regulation (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/; see also Castellano & Schabes, "Deference to Agency Interpretations of Procurement Regulations: Restraining Government Contracts Exceptionalism," 37 Nash & Cibinic Rep. NL ¶ 47 (discussing convergence of administrative law and Government procurement law).

Viewed through the *Loper Bright* lens, the *Percipient.ai* decision takes on a different cast. *Loper Bright* is at its heart a decision about the judiciary's primacy in deciding "what the law is" (in the words of *Marbury v. Madison*), especially when the agency seems to steer off course. Taken in this light, *Percipient* may be seen as a post-*Chevron* decision—potentially the first of other cases after *Loper Bright* in which the courts apply a firmer hand, in cases which could present a common pattern:

- **Alleged Failures in the Agencies**: As with other procurement decisions in which the courts have refused to defer to agencies (see, for example, the Supreme Court's decision in *Kingdomware Techs., Inc. v. U.S.,* 136 S. Ct. 1969 (2016); 58 GC ¶ 227, which turned on the Department of Veterans Affairs' refusal to extend a procurement preference to service-disabled veterans), the *Percipient* case presented a thorny policy question: how to ensure maximum use of commercially available technology (as the statute requires) by an agency that may have been bogged down by its own procurement procedures? The policy question in *Percipient* arguably went to the heart of the battle over *Chevron*—how to deal with the perceived failures of an administrative state grown large and (in the view of some) unresponsive. See, e.g., Neil Gorsuch & Janie Nitze*, Over Ruled: The Human Toll of Too Much Law,* ch. 3, "Bureaucracy Unbound" (Harper 2024).

- **Vigorous Reading of the Law**: To reach the policy question, the *Percipient* court construed the applicable statutes quite vigorously—much as the Supreme Court did in *Loper Bright Enterprises*. The Supreme Court did the same thing in *Kingdomware*, when Justice Thomas, writing for an 8-0 Court, concluded that task and delivery orders were "contracts" subject to a statutory set-aside for contracts, and so essentially ignored years of decisions and guidance saying otherwise. See, e.g., Specht & Plymale, Feature Comment: "*Kingdomware*: Broader Than SCOTUS Intended?," 58 GC ¶ 239. Kenneth Starr had anticipated this in a 1986 article on *Chevron*—he foresaw that courts that sought to address policy issues would apply rules of statutory construction forcefully to conclude that a statute unambiguously supported the courts' approach, without deference to agency interpretations. See Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. Reg. 283, 295 (1986).

- **Decision May Spawn More Challenges and Reinforce the Courts' Central Role in Defining Procurement Law**: The *Percipient* decision read the Tucker Act broadly and so made it easier for protesters to show standing so long as they can show "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." But (as a recent presen-

tation at the August 2024 ABA Public Contract Law Section's Chicago meeting made clear) the *Percipient* decision left open many questions. For example, would any violation of statute at any time constitute grounds for a protest under the Tucker Act, or would only violations of the statute at issue in *Percipient* qualify? This kind of uncertainty may have a practical effect on agency rulemaking, for if agencies could face challenges from more quarters, agencies may be reluctant to interpret their authority expansively. At the very least, because the decision in *Loper Bright* made clear the courts' primacy in saying "what the law is," if *Percipient* does indeed spawn more challenges (including protests) it will be the courts that have final say over the broader array of legal issues presented by those challenges—not the agencies.

Thus, while *Percipient* was not, strictly speaking, decided under *Chevron* (or under *Loper Bright*, which was decided several weeks later), the *Percipient* decision may offer a framework for understanding Government procurement cases decided after the Supreme Court's decision in *Loper Bright*. *Percipient,* like *Loper Bright*, highlighted the courts' primacy in "saying what the law is" in response to alleged breakdowns in the agencies—even if that approach opens new avenues in the legal landscape. In procurement, as in administrative law more broadly, *Loper Bright Enterprises* thus may define a new trajectory in private parties' disputes with the Government, and *Percipient* may help us predict the arc of that trajectory as courts address novel issues in public procurement law.

This Feature Comment was written by **Christopher Yukins*****, Lynn David Research Professor in Government Procurement Law at George Washington University Law School. It is excerpted from a background paper produced for a webinar on*** **Loper Bright Enterprises** ***held by GW Law School's Government Procurement Law Program on July 8, 2024; full program materials are available at https://publicprocurementinternational.com/webinar-after-chevron/. An in-depth analysis of the impact of the*** **Loper Bright** ***decision on government procurement law, co-authored by Chris Yukins, Kristen Ittig and Nicole Williamson, will appear in a forthcoming edition of West's Briefing Papers.***