

## CLIENT UPDATE

### Forcing the Agency To Buy Commercial Items: The Federal Circuit's Protest Decision in *Palantir USG, Inc. v. United States*

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In *Palantir USG, Inc. v. United States*, No. 2017-1465 (Fed. Cir. Sept. 13, 2018), the Federal Circuit recently affirmed a successful bid protest under a twenty-four-year old statute — the Federal Acquisition Streamlining Act of 1994 (FASA), codified in part at 10 U.S.C. 2377. Importantly, the decision marks a potential new route for contractors to challenge agency decisions regarding the use of commercial items.

Congress enacted FASA in response to burdensome regulatory requirements that precluded many companies from competing for government contracts. FASA requires agencies to purchase commercial items to the maximum extent practicable. This includes defining requirements in such a way that commercial services and supplies could be procured, surveying the market to determine whether commercial items could satisfy its requirements, and providing offerors of commercial items and non-developmental items the opportunity to compete in any procurement for such requirements.

FAR Part 12 implements the statutory preference for the acquisition of commercial items. The definition of “commercial item” is contained in FAR 2.101. It includes “any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than Governmental purposes, and — (i) Has been sold, leased, or licensed to the general public; or, (ii) Has been offered for sale, lease, or license to the general public.” It also includes “any item that would satisfy [that] criterion . . . but for — (i) Modifications of a type customarily available in the commercial marketplace; or (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.”

When acceptable commercial items are found, then the agency conducts the procurement under the streamlined procedures, terms and conditions found in FAR Part 12.

In *Palantir*, the Army sought to modernize its Distributed Common Ground System (DCGS-A) comprised of integrated intelligence software and hardware. After much study, the Army concluded that a DCGS-A upgrade could not be procured as a commercial product and issued a solicitation on a non-commercial-item basis.

Palantir USG, Inc. (Palantir) filed a pre-award bid protest at the Government Accountability Office (GAO) challenging the Army's solicitation. Palantir claimed that it could meet the solicitation requirements with its products that qualified as commercial items, so the Army's determination that such products were unavailable in the commercial market had been arbitrary, capricious, and in violation of FASA under 10 U.S.C. § 2377(c). GAO denied the protest. Unrelenting, Palantir then filed its protest at the Court of Federal Claims — and prevailed when the court agreed with Palantir and issued a permanent injunction barring the Army from issuing a contract under the solicitation. The Army then appealed to the Federal Circuit.

The Federal Circuit affirmed that the Army had violated FASA by failing to adequately determine (i) whether commercial items that could meet the agency's needs; (ii) whether commercial items could be modified to meet the Army's needs; or (iii) whether the Army's requirements could have been modified so that commercial items could be used. The Court explained that the administrative record contained several instances where the Army had notice of the possibility that commercial items could satisfy portions of the DCGS-A upgrade. This included the Army's knowledge of Palantir's products through the Request for Information process.

Key to this decision is the Court's finding that "the Army's procurement efforts were focused on a developmental approach," and that this mindset had blinded the Army to the feasibility of Palantir's commercial product, with minor modifications, meeting its requirements. *Palantir*, No. 2017-1465, slip. op. at 25.

The *Palantir* decision provides a playbook for commercial companies wishing to sell more products and services to Federal buyers. Palantir bluntly told the Army that its commercial product could meet the stated requirements, and those comments were part of the administrative record for the procurement. By creating the record that a commercial option exists, Palantir planted the seed for a protest when the Army ignored that information. And Palantir was then relentless in enforcing the FASA when the Army was myopic in pursuing and defending its preferred developmental approach.

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