FEDERAL CIRCUIT WARNS CONTRACTING OFFICERS: MEET YOUR NEEDS WITH COMMERCIAL ITEMS FIRST

In 1994, the Congress passed the Federal Acquisition Streamlining Act ("FASA"), Pub. L. No. 103-355, and included, codified as amended at 10 U.S.C. § 2377, a requirement that federal agencies, to the maximum extent practical, procure commercially available items and technology to meet their needs. A recent case, *Palantir USG, Inc. v. United States,* No. 2017-1465 (Fed. Cir. 2018), 2018 WL 4356686 emphasizes the importance of agency adherence to this strong preference for the consideration of commercial items, if they are available. *Palantir* concludes that even though the Army was on notice that Palantir's product might be a commercial item that could satisfy its requirements for software for a "Distributed Common Ground System," the Army did not use its market research results rationally, and excluded commercial items from consideration in a conclusory and unlawful fashion.

10 U.S.C. § 2377 states the preference as follows:

> to the maximum extent practicable [agency] requirements [shall be] defined so that commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items may be procured to fulfill such requirements….

Section 2377(c) requires agencies to conduct market research concerning the availability of commercial items before developing new specifications, soliciting offers or awarding orders in excess of the simplified acquisition threshold.

The preference for commercial items is reflected in Federal Acquisition Regulation ("FAR") 7.102, which states that:

> Agencies shall perform acquisition planning and conduct market research (see part 10) for all acquisitions in order to promote and provide for [a]cquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 3307)….

The FAR requires agencies to conduct "market research appropriate to the circumstances" before developing new specifications, soliciting offers or awarding orders in excess of the simplified acquisition threshold. FAR 10.001(a)(2).

In 2014, the MITRE Corporation conducted a market study which recommended a hybrid approach for the Distributed Common Ground System using both an Enterprise Cloud Platform and a Turn-Key platform, which would use commercial off-the-shelf foundation components. The Army the issued three requests for information ("RFI") to elicit industry feedback. Palantir responded to two of these RFI's, asking the Army if it would use existing commercial software, or would attempt to build a platform itself.

In July 2015, the Army conducted a "Trade Space Analysis" that concluded that a hybrid commercial off the shelf product would be best. Shortly thereafter, the Army issued a Market research Report indicating that the Distributed Common Ground System effort could not be procured as a commercial product, but the report included no explanation, analysis or support for the conclusion. Soon thereafter the Army issued a draft performance work statement to develop a new platform, and Palantir responded that the Army could buy its platform without development. Nevertheless, the Army's solicitation, issued on December 23, 2015, required development of new data platform as well as integration.

Palantir protested the solicitation, alleging that the Army violated the Federal Acquisition Streaminling Act FASA and the relevant FAR sections by refusing to solicit the data management platform as a commercial item. After losing at the Government Accountability Office ("GAO"), the Court of Federal Claims granted judgment in Palantir's favor, concluding that the Army failed to determine whether commercial items met or could be modified to meet the Army's needs, and by doing so, had acted in an arbitrary and capricious manner in violation of 10 U.S.C. § 2377.

The Federal Circuit concluded that the Army was on notice from its analyses and market studies of the possibility that commercial items could satisfy its needs for portions of the Distributed Common Ground System. Palantir had also put the Army on notice of its capabilities to provide a commercial item through the RFI process. Despite repeated notice that commercial products might well be available and could be modified to meet Army's needs, the Army concluded that the Distributed Common Ground System could not be procured as a commercial product with hardly any explanation. The Army's ultimate determination regarding its market research excluded commercial items in a conclusory, arbitrary and capricious fashion. The Army failed to use its market research as required by law and regulation. The Court held in favor of Palantir, affirming the decision of the Court of Federal Claims, and directed the Army to comply with 10 U.S.C. § 2377 before proceeding to award a contract for the Distributed Common Ground System.

Takeaway: Contracting Officers must seriously consider commercial items, or commercial off the shelf items, that can meet all or part of their requirements. Unsupported conclusions from market research are not sufficient. The reasoning behind a decision to reject a potential commercial item must be clear and based on analysis of facts.

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