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The Federal Circuit Addresses Commercial Item Contracting: *Palantir & K-Con*

*By Nathaniel Castellano, Charles Blanchard, Dominique Casimir, and Eric Valle**

It is no secret that the speed of technological innovation has outpaced Government acquisition cycles, and a significant amount of modern innovation is occurring in commercial markets by companies that are not dependent on the Federal Government for revenue. It is imperative that federal agencies have reliable and administratively manageable means to do business with the most innovative commercial firms, and that the federal acquisition system does not impose compliance obligations that deter the most innovative commercial firms from doing business with the Government.

Congress attempted to address this issue through a wave of reform in the early 1990s, most notably the Federal Acquisition Streamlining Act of 1994 (FASA).[1] Through FASA, Congress mandates that agencies prioritize acquisition of commercial solutions. In theory, use of commercial item acquisition reduces the administrative and compliance burdens associated with such purchases. In the past 24 years since Congress enacted FASA, however, the administrative and compliance obligations imposed on commercial item acquisitions have multiplied. Moreover, despite FASA's mandate, agencies often persist in using noncommercial item acquisition techniques to acquire solutions readily available in the commercial market.

In late 2018, the U.S. Court of Appeals for the Federal Circuit issued its first two significant decisions addressing commercial item acquisition. The first, *Palantir USG, Inc. v. United States*,[2] affirms agencies' statutory obligation to maximize the acquisition of commercial solutions. The second, *K-Con, Inc. v. Secretary of the Army*,[3] is a reminder that, even when agencies use commercial item acquisition procedures, the resulting contracts are nevertheless subject to unique legal principles of federal common law that often diverge from the law applicable to contracts between private parties. Any agency or private party utilizing commercial item acquisition should heed the lessons of both *Palantir* and *K-Con*.

After a brief introduction to commercial item acquisition, this BRIEFING PAPER

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analyzes *Palantir* and *K-Con*, concluding with guidelines addressing the lessons learned from these decisions.

Commercial Item Acquisition

Commercial item acquisition has old roots, with Congress and the Department of Defense (DOD) urging greater utilization of the commercial marketplace since at least the early 1970s. In 1990, responding to concerns that the mandatory contract clauses and compliance obligations associated with the federal acquisition system were discouraging commercial companies from competing in the federal procurement market, Congress directed the DOD to establish an advisory panel to recommend measures to streamline and recodify procurement laws and regulations.[4] In 1993, the so-called "Section 800 Panel" released a nine-volume report recommending numerous reforms for the acquisition of commercial items,[5] many of which were codified in FASA in 1994.[6] Many of the current commercial item acquisition processes are rooted in FASA and are implemented by the Federal Acquisition Regulation (FAR), principally FAR Part 12. "Acquisition of Commercial Items."

The Commercial Item Preference

FASA and FAR Part 12 create a preference for commercial item acquisition, mandating that agencies, to the maximum extent practicable, structure acquisitions to accommodate commercial and nondevelopmental solutions. Specifically, FASA directs that agencies "shall ensure that, to the maximum extent practicable . . . requirements are defined so that commercial items . . . may be procured to fulfill such requirements."[7]

Agencies also "shall ensure that procurement officials in that agency, to the maximum extent practicable . . . modify requirements in appropriate cases to ensure that the requirements can be met by commercial items, . . . state specifications in terms that enable and encourage bidders and offerors to supply commercial items . . . [, and] revise the agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items."[8] These provisions lie at the heart of the Federal Circuit's decision in *Palantir*.

Broad Definition Of Commercial Item

The FAR defines the term "commercial item" broadly. This permits broad application of the simplified acquisition procedures[9] and favorable terms associated with commercial item contracting. In short, FAR 2.101 defines "commercial item" to include an item that is "*of a type* customarily used by the general public or by non-governmental entities" (emphasis added). If taken to the extreme, just about anything can be described as "of a type" used by the general public, except for perhaps certain military and intelligence solutions.[10]

The definition of the term "commercial *item*" does not distinguish between commercial products and commercial services. In August 2018, Congress took action to resolve this ambiguity by enacting § 836 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019.[11] As a result, the FAR definition of "commercial item" will be amended to reflect separate definitions for "commercial product" and "commercial service." Both include catchall provisions for commercial products that are "*of a type* customarily combined and sold in combination to the general public," and commercial services that are "*of a type* offered and sold competitively, in substantial quantities, in the commercial marketplace." By retaining these catchall, "of a type" provisions, the revised definitions continue to permit broad application of commercial item acquisition.

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Commercial Item Acquisition Procedures And Reduced Compliance Burdens

The use of commercial item acquisition procedures is beneficial to both the Government and the contractor.

Agencies have discretion to use simplified procedures for acquisition of commercial items, which releases them from the relatively strict rules applicable to negotiated acquisitions under FAR Part 15. For example, the formalities of competitive range determinations, discussions, and evaluation factors set forth in FAR Part 15 are not obligatory for commercial item acquisitions. Notwithstanding this flexibility, it is common for agencies conducting commercial item acquisitions to rely on procedures similar to the formalities described in FAR Part 15.

Commercial item acquisition relieves agencies and contractors of several other complexities associated with noncommercial procurements. For example, avoiding the difficulties of cost-reimbursement contracting, FAR 12.207 requires commercial item contracts to be awarded on firm-fixed-price or fixed-price with economic price adjustment basis, subject to limited exceptions. The FAR also prohibits Contracting Officers from requiring submission of certified cost or pricing data when acquiring commercial items, although some have been known to nevertheless request similar information under the banner of "other than certified cost or pricing data."[12] Commercial item acquisition also provides relief with respect to intellectual property rights. Instead of the standard FAR and Defense FAR Supplement (DFARS) clauses for allocation of rights in technical data and computer software, commercial item contracts carry more favorable license terms.[13]

With respect to terms and conditions, FAR 12.301 states that commercial item contracts "shall, to the maximum extent practicable, include only those clauses—(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice." The standard terms and conditions for commercial item contracts are incorporated into FAR 52.212-4, and, in some cases, provide contractors more favorable risk allocation than noncommercial contracts. For example, unlike noncommercial item contracts, where the Government has broad authority to issue unilateral changes within the scope of the original contract, changes to commercial item contracts "may be made only by written agreement of the parties."[14] Yet, as in all procurement contracts, and completely inconsistent with commercial practice, the FAR provides the Government the right to terminate a commercial item contract for convenience (*i.e.*, unilaterally, without cause).[15]

Commercial item contracts are exempt from many, but not all, compliance obligations associated with noncommercial contracts. The standard clause at FAR 52.212-5 provides a list of "contract terms and conditions required to implement statutes or executive orders." As of July 2018, five of those clauses are automatically incorporated into every commercial item contract, the most recent of which is the "Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities" clause at FAR 52.204–23.[16] The next several pages of the FAR are filled with a list of several dozen standard clauses that, according to FAR, the contractor need only comply with if the Contracting Officer indicates that they are "incorporated in this contract by reference to implement provisions of law or Executive orders applicable to the acquisitions of commercial items."[17] As demonstrated in *K-Con*, however, some obligations may be incorporated into a contract by operation of law, even where the Contracting Officer does not designate that clause as being incorporated into the contract.

Effectiveness Of Commercial Item Acquisition

The commercial item acquisition regime described above undoubtedly allows the Federal Government better access to the commercial marketplace than would otherwise be the case. Nevertheless, the Federal Government still needs more effective means to acquire commercial goods and services from leading commercial vendors. The Section 809 Panel—a congressionally mandated advisory panel on defense acquisition reform, similar to the 800 Panel[18]—recently made this point in its Volume I report to Congress, which recommended significant reforms to the commercial item acquisition process:

> Despite [congressional and DoD] efforts, commercial buying has not become as widespread in DoD as Congress had hoped. Only 18 percent of DoD's total obligations in FY 2017 were for the acquisition of commercial items, and commercial item spending actually declined by 29 percent between FY 2012 and FY 2017. Congress has continued to enact changes to commercial policies, and DoD has continued to evolve its policies, training, and tools; however, the commercial marketplace is evolving at a much faster rate. DoD's commercial buying practices require a comprehensive reevaluation to fulfill the promise offered by FASA 24 years ago.
>
> DoD's commercial buying has stagnated for multiple

> reasons. The acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services, and determining that prices are fair and reasonable. . . .
>
> The FAR has been amended more than 100 times to address various aspects of commercial buying, making commercial buying policies more difficult to navigate. . . . Since FASA was implemented, the numbers of DoD-related commercial buying provisions and clauses has increased by 188 percent, and the number of commercial clauses that may be flowed down has increased five-fold. In 1995, the FAR and DFARS contained a combined total of 57 government clauses applicable to commercial items. Today there are 165 clauses, with 122 originating in statute, 20 originating in executive orders, and 23 originating in agency-level policies.[19]

After conducting a thorough review of litigation stemming from commercial item acquisitions, Professor Nash recently concluded that, notwithstanding the good intentions behind the creation of streamlined standard terms and conditions for commercial item contracts, companies receiving such contracts are often not able to understand or comply with the supposedly simplified rules that apply:

> The idea that a short set of terms and conditions would help commercial vendors must have seemed like a good idea in 1995 but all of this litigation demonstrates that it has done more harm than good. The shrunken provisions do not contain all of the rules—resulting in excessive litigation regarding the termination provisions. The incorporation of some terms by reference forces the contractor to learn how to deal with the FAR—resulting in a lack of understanding of how to submit a claim under the disputes provision. In all the goal of inducing commercial companies to deal with the Government would be better served by a clause containing more detailed provisions telling these contractors how their contract was going to be administered.[20]

While the commercial item acquisition framework may have been in a state of relatively constant flux due to changes in statute, regulation, and executive order, in the 24 years since Congress passed FASA, commercial item acquisition evolved without much participation from the Federal Circuit. That changed in late 2018, when the Federal Circuit decided *Palantir* and *K-Con.*

Palantir

Background

Palantir concerned the U.S. Army's Distributed Common Ground System (DCGS-A)—pronounced "dee-sigs." DCGS-A is the Army's primary system for processing and disseminating multi-sensor intelligence and weather information.[21] The Army intended to procure a system that combines all intelligence software and hardware capabilities into one program with the ability to access and be accessed by, not only Army intelligence and command components, but also other members of the broader distributed common ground and surface system.[22]

A principal element of DCGS-A is its data management architecture. Palantir sells a commercial data management architecture called Gotham, which is successfully used in commercial and DOD markets.[23]

There are, thus far, two increments of DCGS-A. The Army has already attempted to procure and field the first increment, referred to as DCGS-A1. In doing so, the Army adopted a developmental approach, which lasted nearly two decades, cost over $6 billion, and generated significant stakeholder complaints. Congressional scrutiny and criticism were plentiful, particularly regarding the Army's insistence on continued use of a developmental approach, despite cost overruns, performance problems, schedule delays, and strong end-user support for commercial options such as Palantir's Gotham platform.[24]

When the Army began to conduct market research and gather industry input to support its acquisition of the second increment of DCGS-A, referred to as DCGS-A2, Palantir encouraged the Army to procure its Gotham platform on a firm-fixed-price, commercial item basis, with additional modifications as needed to meet the full DCGS-A2 requirements. However, the Army's Requests for Information (RFIs) and other industry outreach suggested that the Army was once again only interested in a developmental approach to DCGS-A2, procured on a cost-plus basis. Despite Palantir's repeated assertions that a commercial-item approach would be preferable, the Army issued a DCGS-A2 solicitation that called for developmental solutions on a cost-plus basis.[25]

Prior Proceedings

Palantir filed a preaward bid protest at the Government Accountability Office (GAO) challenging the terms of the DCGS-A2 solicitation. Palantir's primary argument was that the Army failed to comply with its obligations under 10 U.S.C.A. § 2377, "Preference for acquisition of commercial items," enacted as part of FASA, to conduct market research into and maximize use of commercial item and nondevelopmental solutions. The GAO denied the protest, deferring to the Army's decision to adopt a developmental approach.[26]

Palantir filed a protest at the U.S. Court of Federal Claims. Judge Horn held that the Army failed to meet its obligations under 10 U.S.C.A. § 2377 and permanently enjoined any award under the solicitation.[27] Recognizing that it was presented with an issue of first impression,[28] the court carefully explored the statutory text, emphasizing the phrase "maximum extent practicable."[29] After a detailed review of the administrative record, supplemented by expert testimony from both parties, the court determined that, even though there is no formal documentation requirement associated with § 2377, the Army's documented market research was insufficient. The court stated that it was not requiring the Army to procure a commercial item,[30] but only holding that the Army "failed in its obligation under 10 U.S.C. § 2377 to *fully investigate* if Palantir, or any other potential offeror, could meet the requirements of the Army's procurement needs on a commercial basis, in part or in full."[31]

The court emphasized that Palantir had repeatedly notified the Army that commercial items could meet its needs, yet the Army's market research appeared to be limited to developmental approaches, as if the Army had already decided that the DCGS-A2 solicitation would require a developmental solution. The court also found that there was no indication the Army considered how commercial items could be modified to meet the DCGS-A2 requirements, or how those requirements could be reasonably modified to allow a commercial solution.[32]

The Government appealed the Court of Federal Claims' decision to the Federal Circuit, framing this as a case of first impression.[33]

The Federal Circuit's Decision

In a unanimous decision authored by Judge Stoll, and joined by Judges Newman and Mayer, the Federal Circuit affirmed the Court of Federal Claims' judgment. The Circuit declined to read the Court of Federal Claims' decision as unduly expanding FASA's mandate, and confirmed, after *de novo* review, that the Circuit reached the same conclusion that the Government failed to satisfy FASA:

> The government first argues that the trial court erroneously added requirements to [10 U.S.C.A.] § 2377, including that the Army was required to "fully investigate," "fully explore," "examine," and "evaluate" whether all or part of its requirements could be satisfied by commercially available items, such as Palantir's product. We are not persuaded that the Court of Federal Claims imposed additional requirements beyond those required by the statute. FASA requires an agency to use the results of market research to "determine" whether there are commercial items that "meet the agency's requirements; could be modified to meet the agency's requirements; or could meet the agency's requirements if those requirements were modified to a reasonable extent." [10 U.S.C.A.] § 2377(c)(2). While the trial court's thorough opinion sometimes uses words other than "determine," we conclude that, read in context, those words were intended to be synonymous with "determine." In any event, we need not devote significant discussion to this argument, as we "sit to review judgments, not opinions," and our de novo review leads us to the same conclusion as the one reached by the Court of Federal Claims.[34]

After conducting a thorough analysis of the record evidence regarding the Army's market research, the Federal Circuit concluded that the record could not support a determination that the Army satisfied its obligations under FASA:

> On this record, we agree with the trial court that the Army failed in its obligation under [10 U.S.C.A.] § 2377 to determine whether a commercial item could meet or be modified to meet the Army's procurement requirements. We acknowledge that there is no statutory or regulatory requirement for agencies to document their determinations pertaining to § 2377 and FAR Part 10. Nevertheless, the record must be sufficient to permit meaningful judicial review consistent with the Administrative Procedure Act, 5 USC § 706. . . . Here, the administrative record plainly shows that the Army was on notice that Palantir's product might be a commercial item that would satisfy its requirements, whether as-is or with modifications. Despite that notice, the Army's ultimate determination regarding its market research excluded commercial items from consideration in a conclusory fashion. On this record, we conclude that the Army did not rationally use its market research results to determine whether there are available commercial items that: "(A) meet the agency's requirements; (B) could be modified to meet the agency's requirements; or (C) could meet the agency's requirements if those requirements were modified to a reasonable extent." [10 U.S.C.A.] § 2377(c); FAR 10.001(a)(3)(ii).[35]

The Circuit rejected the Government's argument that the Court of Federal Claims failed to apply the presumption of regularity, holding that the extensive record evidence cited by the Court of Federal Claims in support of its decision was sufficient to rebut the presumption of regularity:

> Under the Administrative Procedure Act, even where an explanation or reason is not required for an agency's determination, a reviewing court has the power to require an explanation. In determining whether to require an explanation, the agency decision is entitled to a presumption of regularity. Because of that presumption of regularity, the agency should not be required to provide an explanation unless that presumption has been rebutted by record evidence suggesting that the agency decision is arbitrary and capricious.

> Here, the court extensively cited record evidence showing that the Army's decision was arbitrary and capricious and in violation of 10 USC § 2377. In particular, the court performed a searching review and analysis of [the market research submissions and agency analyses thereof]. Based on this review, it concluded that the Army neglected to determine whether possible commercially available alternatives meet or could be modified to meet the requirements of the Army's acquisition. Accordingly, the court properly determined that the record evidence rebutted the presumption of regularity.[36]

The Federal Circuit concluded by confirming that it was not directing any particular outcome in this acquisition; it was only requiring that the Army do more to satisfy its obligations under FASA.[37]

K-Con

Background

K-Con arose from two Army solicitations utilizing the General Services Administration eBuy system for the construction of a laundry facility and a communications equipment shelter at Camp Edwards, Massachusetts.[38] In both instances, the Army used Standard Form 1449, "Solicitation/Contract/Order for Commercial Items."[39] Neither the Army's solicitations nor the resultant contracts included an express requirement that awardees provide performance and payment bonds. The solicitations and contracts did not include FAR 52.228-15, "Performance and Payment Bonds—Construction."[40] Both solicitations and contracts included contract line item numbers (CLINs) and statements of work that called for construction-related tasks.[41]

In October 2013, the Army awarded both contracts to K-Con.[42] Before issuing notices to proceed, however, the Army asked K-Con to provide performance and payment bonds for both contracts.[43] K-Con informed the Army that it could not provide the requested bonding.[44] The Army did not terminate the contracts for convenience, but rather allowed K-Con two years to obtain the required bonding.[45] Subsequently, K-Con submitted a request for equitable adjustment for increases in costs for materials and labor due to the passage of time between contract award and K-Con obtaining sufficient bonding.[46] The Army denied K-Con's request, and K-Con appealed to the Armed Services Board of Contract Appeals (ASBCA).

Prior Proceedings

The ASBCA stated the "sole legal question . . . [is] whether the bonding requirements of FAR 52.228-15 were incorporated into [the] Contract[s] . . . by operation of law at the time of contract award" under the *Christian* doctrine.[47] "Under the so-called *Christian* doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law."[48] The ASBCA therefore engaged in a two-prong analysis assessing whether FAR 52.228-15 is "both mandatory and represent[s] a significant public procurement policy."[49]

Regarding the first prong, the ASBCA held that FAR 52.228-15 "is a mandatory clause in a government construction contract."[50] Specifically, the ASBCA noted that the statute—formerly known as the Miller Act[51]—and the FAR require contractors to furnish the Government with performance and payment bonds when a contract for the "construction, alteration, or repair of any public building" exceeds $150,000.[52] The ASBCA found that the contracts were "plainly construction contracts" based on the relevant CLINs and statements of work.[53] Because the value of each contract exceeded $150,000, the ASBCA concluded that "FAR 52.228-15 was a mandatory clause in the contract."[54]

Regarding the second prong, the ASBCA "conclude[d] that bonding requirements are a significant component of public procurement policy."[55] Specifically, the Miller Act's payment bond provision affords protections to subcontractors on federal construction projects because "[u]nder the doctrine of sovereign immunity, mechanics' liens [typical in commercial construction] cannot be placed against public property."[56] The Miller Act's performance bond provision "provides protection to the government in situations where the prime contractor defaults . . . or is terminated for cause."[57] Therefore, the ASBCA found that the bonding requirements "represent a significant component of public procurement policy."[58] The ASBCA held that "the Miller Act applies to construction contracts, even when those contracts are solicited as commercial items, and requires those contracts to contain FAR 52.228-15."[59]

K-Con moved for reconsideration of the ASBCA's decision "in light of FAR 12.301, which addresses clauses to be incorporated into commercial item contracts."[60] The ASBCA found "no reason to abandon [its previous] holding."[61] Specifically, the ASBCA found that "by its terms, FAR 12.301 does not *preclude* the extant incorporation of FAR 52.228-15 into commercial item contracts."[62] Put another way, although FAR 12.301 states that com-

mercial item contracts "shall, to the maximum extent practicable, include *only* those clauses—(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice," the *Christian* doctrine can operate to bring in additional clauses.[63] The ASBCA therefore determined that the contracts must include FAR 52.228-15 (and in fact contain that clause by operation of law, whether or not included explicitly) because the "contracts were for construction-related activities."[64] Subsequently, K-Con appealed to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit's Decision

The Federal Circuit addressed two issues on appeal. First, whether the contracts at issue were construction contracts. Second, whether the contracts included FAR 52.228-15's bonding requirements under the *Christian* doctrine.

Regarding the first issue, the Federal Circuit determined that K-Con could not now argue that the contracts were for commercial items rather than construction because K-Con failed to inquire into the alleged ambiguity during the solicitation.[65] In a twist to the traditional rule of *contra proferentem* under which ambiguous terms are interpreted against the drafter, long-standing precedent known as the patent ambiguity doctrine requires Government contractors to seek contemporaneous clarification of patent ambiguities (as opposed to latent ambiguities) or else forfeit their right to advance their interpretation of ambiguous contract terms in a dispute.[66] Here, the Federal Circuit determined that the contracts were patently ambiguous because the Army used the standard commercial items contract form, but also included "many indications that the contracts were for construction, not commercial items."[67] K-Con never inquired whether its contracts were for commercial items or construction, and the Federal Circuit therefore found that K-Con waived its right to argue that the contracts were for commercial items.[68]

Regarding the second issue, after having dispensed with the argument that K-Con's contracts were commercial item contracts instead of construction contracts, the Federal Circuit affirmed the ASBCA's two-pronged *Christian* doctrine analysis. Under the first prong, the Federal Circuit affirmed that the bonding requirements are mandatory in Government construction contracts over $150,000.[69] Under the second prong, the Federal Circuit affirmed that the bonding requirements "express a significant or deeply ingrained strand of public procurement policy."[70] As such, the Federal Circuit concluded that, under the *Christian* doctrine, the "standard payment and performance bond requirements in construction contracts were incorporated into K-Con's contracts by operation of law at the time the contracts were awarded."[71]

Implications

On their face, neither *K-Con* nor *Palantir* purports to change the law of commercial item acquisition. In practice, however, they may carry significant consequences for how contractors and agencies view and utilize commercial item acquisition. Unfortunately, the net result may be greater skepticism of commercial item contracting on both sides, raising serious questions as to how the U.S. Government will attract largely commercial businesses to participate in public procurements.

Palantir can be viewed as both a boon to commercial item vendors and a burden on agencies. For commercial companies that believe they may not be able to comply with the requirements associated with noncommercial acquisition, *Palantir* provides support for the idea of raising an objection (whether through informal correspondence or formal protest) when agencies attempt to impose noncommercial item obligations on commercial item acquisitions.[72] However, for agencies, the lesson of *Palantir* might be that they need to formally document market research much more than they previously have. They may view the decision as creating the risk that acquisitions will be delayed and complicated by preaward protests. Professor Schooner recently summarized the impact *Palantir* may have on agencies' market research obligations:

> The Federal Circuit appears to establish a relatively high bar for agencies to explain (on the record) why they rejected (or chose not to follow) market research indicating that a commercial solution might be available. In other words, when an agency's market research uncovers a *single, potential commercial solution*, the Federal Circuit considers disregarding that research—or failing to provide a sufficient explanation for why that *potential* solution is not in the Government's best interests—arbitrary and capricious behavior. Viewed solely through the lens of Administrative Procedure Act jurisprudence, that makes sense. . . .
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> * * *
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> Still, despite the passage of almost 25 years, *Palantir* comes as a surprise. Experienced procurement professionals are familiar with the broad range of statutory mandates and market research guidance found in the FAR. But we sense that

> conventional wisdom understood the market research rubric as more guidance than mandate. In other words, agencies enjoy broad discretion in conducting—and documenting—their market research.[73]

K-Con, in contrast, serves as a powerful reminder to contractors that doing business with the Government is very different than doing business with private parties, even when the Government purports to offer a so-called commercial item contract. Commercial item acquisition might clear away many burdensome aspects of the federal acquisition system, but principles of sovereign immunity and separation of powers, along with the federal common law applicable to Government contracts, mean that the law of Government contracting diverges in many important ways from the law applicable to private contracts.

K-Con demonstrates two aspects of the federal common law applicable to Government contracts that diverge from the laws applicable to private contracts. The first issue that *K-Con* presented to the Federal Circuit was whether the contract was a commercial item contract or a construction contract. The Federal Circuit determined that the issue was patently ambiguous.[74] In a contract between private parties, the doctrine of *contra proferentem* would usually require that such ambiguity be construed against the drafter—here, the Government.[75] Yet, the federal common law of contracts provides that, where a contract is patently ambiguous and a contractor does not object to that ambiguity prior to contract award, the patent ambiguity doctrine prevents the contractor from making any such objection in a subsequent dispute.[76] Applying the patent ambiguity doctrine, the Federal Circuit held that K-Con had waived the opportunity to argue that its contract was a commercial item contract subject to FAR Part 12. Then, the Federal Circuit applied the *Christian* doctrine to incorporate into the contract an omitted term, thereby demonstrating another unique feature of contracting with the Government.[77]

To the extent that, as Professor Schooner suggests, contracting agencies may be surprised to read *Palantir*, contractors may be similarly surprised to read *K-Con*. This may be, in part, because the patent ambiguity and *Christian* doctrines can lead to unexpected results. Lawyers and judges may identify patent ambiguities during litigation that would not have occurred to the parties negotiating those same documents. And, it can be difficult to predict which clauses will be incorporated by operation of law pursuant to the *Christian* doctrine.[78]

While *K-Con* turned on that Federal Circuit's application of the patent ambiguity and *Christian* doctrines, those are only two of many unique rules applicable to Government contracts. For example, due to the Federal Government's sovereign immunity, a private party to a Government contract can only obtain monetary relief for any Government breach of contract, not the specific performance available against private parties.[79] And, obtaining that monetary relief is conditioned on careful compliance with the many procedural requirements of the Contract Disputes Act (CDA),[80] many of which can operate as jurisdictional traps for the unwary.[81]

In addition to sovereign immunity, principles of separation of powers mean that the Government is often not contractually bound by actions of the Government officials involved in the formation and administration of contracts. A private firm, like all private parties, is generally bound by statements and actions of its representatives with "apparent" authority to bind the firm.[82] Thus, representations of a contractor's employees and agents will bind that contractor if the Government reasonably believed that the contractor employee or agent in question was authorized to bind the contractor—*i.e.*, that the contractor's representative had apparent authority.[83] The Government, in contrast, is not bound by actions of those with apparent authority; it is only bound by those with actual authority.[84] Most daunting—private parties doing business with the Government have full responsibility of ensuring that the agents with whom they deal are acting within their actual authority, and the law will presume private parties know the scope of authority for each Government official with whom they deal, even if that official provides erroneous advice as to his or her own actual authority.[85] This can result in holding invalid a contract or contract modification based on what seems to be a technicality of authority, even where all parties involved clearly believed a legally binding agreement was in place.[86] Private parties doing business with the Government, by commercial item contract or otherwise, must be sure to ascertain the scope of the authority of any Government representative with whom they deal.[87]

These are but a few of the most drastic differences between the law applicable to Government contracts and contracts between private parties. *K-Con* does not purport to change these long-standing principles of sovereign immunity, separation of powers, or federal common law. Rather, *K-Con* serves as an important reminder that, regardless how emphatically Congress may encourage agencies to make the acquisition process more friendly to commercial

firms, the resulting contracts will nevertheless be subject to unique law of Government contracting, not the rules that govern the private marketplace.

Future reform is by no means futile. Much can and should be done to improve the U.S. Government's access to commercial innovation. But, if that reform is to succeed, all parties need to understand the ground rules of doing business with the Government.

Guidelines

These *Guidelines* are intended to assist you in understanding the implications for the Federal Government's acquisition of commercial items of the Federal Circuit's recent *Palantir* and *K-Con* decisions. They are not, however, a substitute for professional representation in any specific situation.

1. Whenever working with the U.S. Government, understand and appreciate the unique nature of the United States as a business partner. The sovereign does not transact business under the same rules and norms that govern the private marketplace. Commercial item contracting is no exception.

2. The *Palantir* decision turns largely on the presence of strong record evidence showing that the Army was on notice of the potential for a commercial solution to meet its requirements but did not seriously consider a nondevelopmental approach. A commercial vendor that believes its commercial product or service can meet an agency's needs should provide the agency with documented notice of its capabilities. In response, an agency that receives such notice will need to carefully document its consideration of a commercial approach.

3. Carefully review solicitations and market research documents (such as RFIs) to assess whether the agency intends to include requirements that are not amenable to commercial item contracting or standard commercial practice. *Palantir*, FASA, and FAR Part 12 provide support for a contractor to lodge a challenge to any such requirements, but the right to object will likely expire on the proposal submission deadline.

4. Carefully review all contract terms and conditions before submitting a proposal or quote to determine whether there is any ambiguity, particularly as to the performance required, the terms of payment, and the applicable compliance obligations. This has always been best practice due to the patent ambiguity doctrine, but *K-Con* is a stark reminder of how much leverage the Government has to interpret (and to read in) contract terms after award.

5. Carefully analyze whether a solicitation omits certain clauses or requirements that are nevertheless mandated by law to be included in the resulting contract. This has always been best practice due to the *Christian* doctrine. Agencies often omit mandatory provisions from solicitations (whether by oversight or misunderstanding), and the boards of contract appeals and Court of Federal Claims may find that these clauses are nevertheless incorporated into the contract by operation of law.

6. Contractors, agencies, and their counsel should watch carefully how the GAO and the Court of Federal Claims handle cases where the record evidence of an agency's awareness of a commercial solution is not as strong as in *Palantir*, or cases where the record shows that the agency carefully considered a commercial approach but made a reasoned and documented determination to acquire a developmental solution.

7. The *Palantir* and *K-Con* decisions should be considered in context of the 809 Panel's recommendations to streamline defense acquisitions. Many of the Panel's recommendations are directed at reforming the commercial item acquisition process to make it more simple and effective. Any changes Congress may make in response to the 809 Panel's recommendations should be made with *Palantir* in mind.

ENDNOTES:

[1]Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[2]Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018), 60 GC ¶ 287.

[3]K-Con, Inc., v. Sec'y of the Army, No. 2017-2254, 2018 WL 5780251 (Fed. Cir. Nov. 5, 2018), 60 GC ¶ 351.

[4]National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (Nov. 5, 1990); see also O'sullivan & Perry, "Commercial Item Acquisitions," 97-05 Briefing Paper 1 (Apr. 1997).

[5]Report of the Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws (Jan. 1993); see 35 GC ¶ 71.

[6]Pub. L. No. 103-355.

[7]10 U.S.C.A. § 2377(a)(2); 41 U.S.C.A. § 3307(b)(2).

[8]10 U.S.C.A. §§ 2377(b)(3)–(5); 41 U.S.C.A. § 3307(c)(3)–(5).

[9]See FAR pt. 13.

[10]See Office of the Secretary of Defense Acquisition, Technology, and Logistics, Department of Defense Guide-

book for Acquiring Commercial Items 19 (Jan. 2018), https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_A_Commercial_Item_Determination_20180129.pdf ("In general, the Department ascribes to the school of thought that once an item has actually been bought and sold in the commercial marketplace, it remains commercial. In other words, the fact an item that was once sold in the commercial marketplace, but now is only sold to DoD, does not change its commerciality.").

[11]Pub. L. No. 115-232, 132 Stat. 1636, 1859 (Aug. 13, 2018).

[12]See FAR 15.403-1(b).

[13]See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018).

[14]FAR 52.212-4(c).

[15]FAR 52.212-4(l).

[16]51.212-5(a)(2).

[17]52.212-5(b), (c).

[18]See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889 (2015).

[19]Section 809 Panel, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. I, at 17 (Jan. 2018) (footnotes omitted), available at https://section809panel.org/.

[20]Nash, "Disputes Over Commercial Item Terms and Conditions: More Than Anticipated—Part II," 31 Nash & Cibinic Rep. NL ¶ 44 (Aug. 2017).

[21]See Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 222–23 (2016), 58 GC ¶ 430.

[22]129 Fed. Cl. at 222–23.

[23]129 Fed. Cl. at 222.

[24]See Brief of Amicus Curiae Technet in Support of Plaintiff-Appellee at 15–22, Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018) (No. 2017-1465), 2017 WL 3270388, *15–22 (detailing relevant congressional hearings).

[25]129 Fed. Cl. at 226–33.

[26]Palantir USG, Inc., Comp. Gen. Dec. B-412746, May 18, 2016, 2016 CPD ¶ 138.

[27]129 Fed. Cl. at 295.

[28]129 Fed. Cl. at 266.

[29]129 Fed. Cl. at 266–68.

[30]129 Fed. Cl. at 282.

[31]129 Fed. Cl. at 282 (emphasis added).

[32]129 Fed. Cl. at 276–77.

[33]United States Opening Brief at 29, Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018) (No. 2017-1465), 2017 WL 1482099, at *29.

[34]Palantir USG, Inc. v. United States, 904 F.3d 980, 990 (Fed. Cir. 2018), 60 GC ¶ 287 (internal citations omitted).

[35]904 F.3d at 993–94 (internal citations omitted).

[36]904 F.3d at 995 (internal citations omitted).

[37]See 904 F.3d at 995 ("To be clear, we are not suggesting that the Army must choose Palantir as the awardee. We simply affirm that the Army must satisfy the requirements of 10 U.S.C. § 2377.")

[38]K-Con, Inc., ASBCA Nos. 60686, 60687, 17-1 BCA ¶ 36,632, 2017 WL 372992 (Jan. 12, 2017).

[39]17-1 BCA ¶ 36,632, 2017 WL 372992.

[40]17-1 BCA ¶ 36,632, 2017 WL 372992.

[41]17-1 BCA ¶ 36,632, 2017 WL 372992.

[42]17-1 BCA ¶ 36,632, 2017 WL 372992.

[43]17-1 BCA ¶ 36,632, 2017 WL 372992.

[44]17-1 BCA ¶ 36,632, 2017 WL 372992.

[45]17-1 BCA ¶ 36,632, 2017 WL 372992.

[46]17-1 BCA ¶ 36,632, 2017 WL 372992.

[47]17-1 BCA ¶ 36,632, 2017 WL 372992.

[48]17-1 BCA ¶ 36,632, 2017 WL 372992 (citing G.L. Christian & Assocs. v. United States 312 F.2d 418, aff'd on reh'g, 320 F.2d 345 (Ct. Cl. 1963)).

[49]17-1 BCA ¶ 36,632, 2017 WL 372992.

[50]17-1 BCA ¶ 36,632, 2017 WL 372992.

[51]40 U.S.C.A. §§ 3131–3134.

[52]17-1 BCA ¶ 36,632, 2017 WL 372992.

[53]17-1 BCA ¶ 36,632, 2017 WL 372992.

[54]17-1 BCA ¶ 36,632, 2017 WL 372992.

[55]17-1 BCA ¶ 36,632, 2017 WL 372992.

[56]17-1 BCA ¶ 36,632, 2017 WL 372992.

[57]17-1 BCA ¶ 36,632, 2017 WL 372992.

[58]17-1 BCA ¶ 36,632, 2017 WL 372992.

[59]17-1 BCA ¶ 36,632, 2017 WL 372992.

[60]K-Con, Inc., ASBCA Nos. 60686, 60687, 17-1 BCA ¶ 36,756, 2017 WL 2267005 (May 8, 2017).

[61]17-1 BCA ¶ 36,756, 2017 WL 2267005.

[62]17-1 BCA ¶ 36,756, 2017 WL 2267005.

[63]17-1 BCA ¶ 36,756, 2017 WL 2267005 (emphasis added).

[64]17-1 BCA ¶ 36,756, 2017 WL 2267005.

[65]K-Con, Inc., v. Sec'y of the Army, No. 2017-2254, 2018 WL 5780251, at *3 (Fed. Cir. Nov. 5, 2018), 60 GC ¶ 351.

[66]2018 WL 5780251, at *2.

[67]2018 WL 5780251, at *2.

[68]2018 WL 5780251, at *3.

[69]2018 WL 5780251, at * 3–*4.

[70]2018 WL 5780251, at *6.

[71]2018 WL 5780251, at *6; see also Nash, "Construction As a Commercial Item: The Christian Doctrine Bites a Contractor," 32 Nash & Cibinic Rep. NL ¶ 63 (Dec. 2018).

[72]See Castellano, Blanchard & Casimir, "Palantir: Federal Circuit Confirms Agencies' Obligations To Prioritize Commercial Solutions," Arnold & Porter Perspectives (Sept. 17, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/09/palantir-federal-circuit-confirms-agencies.

[73]Schooner, "Commercial Products and Services: Raising the Market Research Bar or Much Ado About Nothing?," 32 Nash & Cibinic Rep. NL ¶ 52 (Nov. 2018).

[74]K-Con, Inc. 2018 WL 5780251, at *2–*3.

[75]Allen, "Government Contract Interpretation: A Comprehensive Overview," 15-4 Briefing Papers 1 (Mar. 2015).

[76]15-4 Briefing Papers 1.

[77]15-4 Briefing Papers 1.

[78]See generally Nash & Cibinic, "The 'Christian Doctrine': What Is the Rule?," 10 No. 9 Nash & Cibinic Rep. ¶ 48 (Sept. 1996) (chronicling leading Christian doctrine cases and concluding: "We can't remember an instance where we read more cases and learned less."); Darst, "The Christian Doctrine at 50: Unraveling the Procurement System's Gordian Knot," 13-11 Briefing Papers 1, at 1 (Oct. 2013) ("Even today, the Christian doctrine remains one of the least understood principles of federal procurement law, and courts, administrative bodies, and other practitioners continue to struggle to determine the circumstances under which Christian will be applied as well as the scope of that application.").

[79]See Sisk, Litigation With the Federal Government § 4.8(b)(4) (2016).

[80]41 U.S.C.A. §§ 7101–7109.

[81]28 U.S.C.A. § 1491(a)(1); see e.g., Castellano, "After Arbaugh: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation," 47 Pub. Cont. L.J. 35, 50–58 (2017) (for example, under current law, the requirements to properly certify a claim, state a sum certain, obtain a Contracting Officer's final decision, and (among others) timely appeal from that decision are considered jurisdictional prerequisites to CDA litigation).

[82]See Am. Anchor & Chain Corp. v. United States, 331 F.2d 860, 861–63 (Ct. Cl. 1964).

[83]See 331 F.2d at 861–63.

[84]See 331 F.2d at 861–63; Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383–84 (1947).

[85]See 331 F.2d at 861–63; Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383–84 (1947).

[86]See e.g., Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007), 49 GC ¶ 356.

[87]See generally Arnavas, "Authority of Government Representatives," 99-09 Briefing Papers 1 (Aug. 1999); House, Abernathy & Kelleher, "Resolving Government Construction Claims Without Litigation," 93-10 Briefing Papers 1 (Sept. 1993).

BRIEFING PAPERS