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Court: Army ignored law's preference for commercial items in major intel procurement

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Congress meant what it said more than 20 years ago when it ordered the Pentagon to buy commercially-available products whenever possible, instead of building its own, a federal appeals court has ruled.

The U.S. Court of Appeals for the Federal Circuit found the Army acted "arbitrarily and capriciously" when it decided to develop a new increment of its main battlefield intelligence system from scratch under a single-award development contract.

Procurement officials, the court said, violated the Federal Acquisition Streamlining Act (FASA) and the law's preference for commercial items, because they pressed ahead with a traditional cost-plus development contract even though they knew commercially-available software was already available to meet some or all of their requirements.

The appellate decision sprang from a lawsuit filed by Palantir. In 2015, the company failed to persuade the Army that its products — already in use elsewhere in DoD — could form the basis for the next planned increment of the Army's Distributed Common Ground System (DCGS-A).

Documents produced during the litigation showed that analyses performed by the Army and the MITRE corporation had recommended a "hybrid" approach that used a commercial product along with a cloud computing platform for DCGS-A.

Nonetheless, the Army pressed ahead with a five-year engineering, manufacturing and development contract in which it planned to hire one large contractor to serve as the architect, developer and integrator. That approach would have roughly mirrored the one the Army used to build the first increment of DCGS-A, a system that was widely criticized by battlefield users.

Procurement officials claimed commercial products were "not available" to meet the Army's requirements for a second increment of DCGS, but the court found there was little reason to believe that.

"The Army was, or should have been, aware of Palantir's data management platform," Judge Kara Fernandez Stoll wrote on behalf of the three-judge panel. "Despite repeated notice that commercial products might well be available and could be modified to meet the Army's needs, the Army concluded that DCGS-A2 could not be procured as a commercial product with scant explanation … the Army's ultimate determination regarding its market research excluded commercial items from consideration in a conclusory fashion."

The judges emphasized that they were not ordering the Army to buy Palantir's specific product; only that the service must seriously consider commercial items before moving ahead.

The decision is significant, because it represents the first time an appellate court has ruled on a case in which a vendor has attempted to force the government to abide by congressional dictates that commercial items be used "to the maximum extent practicable."

Its effects on the DCGS procurement itself are less clear. In 2016, the lower Court of Federal Claims issued an injunction prohibiting the Army from moving forward with its plans for DCGS-A increment 2 until and unless it complied with FASA.

Since then, the Army has revised its plans for modernizing the intelligence system, updating it instead through a series of "capability drops." Palantir has already been awarded work under that approach, and the Army has said it plans to use a multiple-award commercial contract for the second capability drop.

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