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U.S. Government To Award Billions Of Dollars In Contracts To Open Electronic Marketplaces To Government Customers—Though Serious Questions Remain

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FEATURE COMMENT: U.S. Government To Award Billions Of Dollars In Contracts To Open Electronic Marketplaces To Government Customers—Though Serious Questions Remain

Proposals to the U.S. General Services Administration are due soon in a \$6 billion procurement under which multiple no-cost contracts will be awarded to vendors that will open electronic marketplaces to federal users making micro-purchases (generally up to \$10,000). Although federal purchase card holders have long been able to make micro-purchases with few regulatory constraints regarding competition, transparency or socioeconomic requirements, this new initiative appears likely to normalize and expand those purchases—and so may revolutionize small purchases in the federal market.

Launch of the Electronic Marketplaces Initiative—The electronic marketplaces initiative launched with a mandate from Congress for GSA to assess and use e-marketplaces in federal procurement, under § 846 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018, P.L. 115-91. See Yukins, “Two U.S. Initiatives on a Collision Course: Trump’s Buy American Order and the New Electronic Marketplaces,” 6 Pub. Proc. L. Rev. (Thomson Reuters, forthcoming 2019). Congress called for action in part because Amazon and other online vendors so dominate commercial marketplaces. There seemed little reason for the Government to be left behind, especially since GSA’s own studies have shown that federal buyers are already using Government-issued purchase cards to make hundreds of millions of dollars in

purchases from online commercial marketplaces every year.

The initial legislation prompted concern in the federal procurement community, especially among small businesses that feared being displaced by large electronic marketplaces. Congress followed up with § 838 of the NDAA for FY 2019, P.L. 115-232, which bars misuse of sales data and is discussed further below. Beyond minimal statutory guidance, however, Congress has left it to GSA to develop the electronic marketplaces, and—importantly—there has been *no* new regulatory effort to shape these billions of dollars in purchases.

It is difficult to gauge how large these electronic marketplaces may grow. GSA believes that the electronic marketplaces will carry \$6 billion in annual sales, but that estimate may prove low. In FY 2014, federal buyers made an estimated \$17 billion in micro-purchases, at a much lower micro-purchase limit (\$3,500 versus the current \$10,000). See *Government Purchase Cards: Little Evidence of Potential Fraud Found in Small Purchases, But Documentation Issues Exist* (GAO-17-276), available at www.gao.gov/assets/690/682770.pdf. Moreover, because the electronic marketplaces will offer buyers and sellers structured platforms with relatively few requirements regarding transparency, competition or accountability (discussed below), vendors may crowd into the electronic marketplaces, and federal purchasers may shift from other vehicles (such as the GSA and Veterans Affairs schedule contracts, currently a nearly \$50 billion marketplace) for low-value sales. The new electronic marketplaces thus may “swallow” a large portion of the bottom tiers of the \$550 billion federal market.

GSA’s Evolving Plans—In the initiative’s first stage, in March 2018 GSA published a report which explained three paths that the Government could take to use e-marketplaces: the Government could use existing commercial marketplaces (such as *Amazon.com* or *Walmart.com*), the Government could use the technology that powers those marketplaces (to enhance, for example, GSA’s unwieldy

gsaadvantage.gov), or Government users could purchase directly from online vendors. See GSA, *Procurement Through Commercial E-Commerce Portals Implementation Plan*, at 18 (March 2018), available at interact.gsa.gov/blog/welcome-commercial-platform-initiative-group.

In a follow-up report in April 2019, GSA announced that it would follow the first option: to contract with existing marketplaces (also known as electronic “platforms,” or “e-platforms”). See GSA, *Procurement Through Commercial E-Commerce Portals—Phase II Report: Market Research & Consultation* (April 2019) (GSA Phase II Report), available at interact.gsa.gov/blog/welcome-commercial-platform-initiative-group. This approach—to use existing online marketplaces—holds substantial advantages for GSA. It will allow GSA to collect a “referral” fee of .75 percent (or roughly \$45 million in fees on \$6 billion in sales) for purchases by Government users through the online marketplaces, while avoiding the costs and risks of improving Government portals, or of relying on transactions through individual vendors’ websites.

GSA’s plan has met with concerns from Capitol Hill. In § 891 of the U.S. House of Representatives’ version of the pending NDAA for FY 2020, H.R. 2500 (passed by the House on July 12, 2019), and in the House committee report which accompanied that bill, H. Rep. No. 116-120, 116th Cong., 1st Sess., pp.178–79 (June 19, 2019), the House Armed Services Committee, concerned by objections to the commercial marketplaces, called for GSA to revert to an approach which would assess *all three* models through pilots.

Nonetheless, GSA has proceeded with its pilot initiative to award contracts for electronic marketplaces. GSA issued a draft request for proposals in mid-2019, No. 47QSCC19R0429, and published a final solicitation, No. 47QSCC20R0001 (available on www.fbo.gov) for which proposals are due on Nov. 1, 2019. Under GSA’s final solicitation, multiple no-cost contracts for three years (base plus two option years) will be awarded to electronic marketplaces offering diverse goods (and not services) that are commercial off-the-shelf items. Like the draft GSA solicitation, § C.6 of the final GSA solicitation left open the possibility of reopening the competition later to admit additional platforms. Per the Statement of Objectives (SOO) of the final solicitation, any Government official holding GSA’s Government-wide purchase card (which requires training and authorization, see, e.g., Federal Acquisition Regulation subpt. 13.3) will be able to purchase through the electronic marketplaces.

Concerns Under the Final Solicitation—As noted, despite concerns about these new electronic marketplaces, there has been no new regulatory effort to guide this initiative. GSA has solicited public comments at several junctures, but those comments have not formed a coherent, binding body of regulations to govern this new multi-billion-dollar market. As a result, while the final solicitation followed the expected trajectory—contracts will be awarded to vendors that host commercial electronic marketplaces for micro-purchases by federal users—GSA’s final solicitation still left unresolved a number of concerns:

- *Micro-Purchases May Climb Well Beyond \$10,000*: While the solicitation states that the new electronic marketplaces are to be used, at least on a pilot basis, only for micro-purchases, those purchases will not necessarily be limited to the current general micro-purchase limit of \$10,000. E.g., FAR 2.101; William Clark, Chair, Civilian Agency Acquisition Council, *Memo-randum for Civilian Agencies: Class Deviation from the Federal Acquisition Regulation (FAR) Increasing the Micro-Purchase Threshold* (Feb. 16, 2018). Micro-purchases for special purposes—contingency operations abroad, for example—can reach much higher levels, see, e.g., U.S. Department of Defense, Defense Pricing and Contracting (DPC), *Government Purchase Card: Frequently Asked Questions* (summary table of micro-purchase thresholds for Defense Department acquisitions), www.acq.osd.mil/dpap/pdi/pc/faq.html; 61 GC ¶ 147, and GSA has urged Congress to increase the standard micro-purchase limit to \$25,000 for GSA-approved electronic portals, see GSA Phase II Report, *supra*, at 4.
- *No Mandates for Rigorous Competition or Transparency*: In accordance with FAR pt. 13’s minimal requirements for micro-purchases, GSA’s final solicitation does not require rigorous competition or transparency for orders in the new electronic marketplaces. Instead, without notice to the broader commercial market, federal purchasers will only need to review two competing items on the marketplaces, and will need to be able to document that review (perhaps through something as simple as a recorded “screen shot” of an offered item). See SOO § 4.B. Users need not purchase the least expensive item; indeed, the only pricing requirement is the cursory review of two items. There will be no published notice of

the purchases, and there is no indication that sales data (which might, for example, show patterns of imprudently costly purchases), though required for purchasers, agencies and GSA, see SOO § 4.C, will be published outside the Federal Government. As a practical matter, the billions of taxpayer dollars spent through the new marketplaces may prove to be largely invisible to the taxpayers who contributed those funds, and to the broader commercial marketplace that might otherwise compete for those purchases.

- *No Guarantee That Socio-Economic Goals Will Be Met:* Because of the way goods will be bought in these new electronic marketplaces—direct micro-purchases by Government users—there will be little, if any, formal acquisition planning process. Users will simply search, click and buy. As a result, socio-economic goals in procurement that normally are resolved in the planning process—purchasing from small or disadvantaged businesses, for example, or accessibility requirements—may not be fully addressed. Proponents of the new electronic marketplaces may argue, though, that these concerns are overstated, because only micro-purchases will be made through these new marketplaces, and micro-purchases are already exempt from almost all procurement requirements, including socio-economic requirements. See FAR 13.201(d). Proponents are also likely to note that GSA's final solicitation calls for items on the marketplace to be identified and searchable as eligible under special Government preferences (such as AbilityOne), see SOO § 4.A, and AbilityOne items will not be easily replaceable by “essentially the same” items on the new platforms, see SOO § 4.B. Those limited measures aside, however, individual Government purchasers ultimately will be responsible for honoring these special preferences, per attachment 2 to the solicitation. As a practical matter, therefore, as these new electronic marketplaces gain momentum and more small procurements shift to these vehicles, and as the centrifugal forces of the market disperse purchasing authority to potentially unaccountable individual users, regularized purchases through the electronic marketplaces may displace traditional purchases from small and disadvantaged businesses, and other socio-economic goals of the Federal Government
- in procurement—such as the accessibility of information technology and environmental sustainability—may lose traction.
- *No Domestic Content Requirements:* Given the Trump administration's emphasis on “Buying American,” one notable socio-economic casualty of the new marketplaces may be domestic preferences. See, e.g., Yukins, Feature Comment, “Trump Executive Order Calls For More Aggressive Use Of The Buy American Act—An Order Likely To Have More Political Than Practical Effect,” 61 GC ¶ 219. Because only micro-purchases are allowed in the new marketplaces, and micro-purchases are exempt from the Buy American Act, see FAR 13.201; FAR 25.100, and generally fall anyway below the Trade Agreements Act monetary thresholds, see FAR 25.402, it appears that none of the normal domestic preferences (or exclusions of foreign goods) will apply to purchases in the new marketplaces. As a result, GSA's solicitation notes that users of the new marketplaces “may consider”—but apparently are not bound by—an item's country of origin. The practical effect may be striking: for example, users may be able to buy Chinese goods directly through the new electronic marketplaces, though Chinese goods traditionally would have faced severe price discrimination under the Buy American Act, and could have been barred entirely under larger procurements by the Trade Agreements Act (since China has not yet joined a trade agreement covering procurement trade with the United States). See Yukins and Green, *International Trade Agreements and U.S. Procurement Law* (2018), ch. 9 to *The Contractor's Guide to International Procurement* (ABA 2018) (Erin Loraine Felix & Marques Peterson, eds.), draft available at ssrn.com/abstract=3443244.
 - *Security Review, But Without Published Standards:* Much as the lack of acquisition planning in the new electronic marketplaces may impede socio-economic goals, so too may the Government's acute security concerns—the need to exclude items that pose cybersecurity risks, for example—be exacerbated by the new marketplaces. GSA's pending solicitation excludes a limited list of targeted companies that are considered high-risk, such as Kaspersky Lab and Huawei. Section E.3.8 of the solicitation goes a step further, however,

and may make proposals subject to review *and potential rejection* by a new interagency council established under 41 USCA § 1322, the Federal Acquisition Security Council (FASC). (The FASC only recently held its first meeting. See Rick Weber, “Federal Acquisition Security Council, Created Under 2018 Tech Law, Holds First Meeting,” *Inside Defense*, May 2, 2019.) GSA’s final solicitation does not specify what standards the FASC will apply in rejecting proposals, however, which raises serious questions under the FAR, see, e.g., FAR 15.203, and indeed under basic international norms for anti-corruption, see UN Convention Against Corruption, Art. 9.1(c) (parties are to ensure the “use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures”). While the Government may argue that its national security determinations should enjoy deference, recent controversies surrounding the Trump Administration’s alleged confluences of private, political and national security interests may mean that less deference will be afforded here. The FASC review of proposals under GSA’s final solicitation—a review which apparently will focus on proposals *at contract inception*—also may divert attention from an ongoing risk during contract *administration* that dangerous goods and suppliers may be added to the electronic marketplaces after contracts are awarded. Although GSA’s final solicitation warns that the new electronic marketplaces “shall employ effective supply chain risk management processes and controls,” see SOO § 4.B, the electronic marketplaces will be allowed to follow their normal commercial practices for “on-boarding” new vendors—standard practices which some may argue do not screen adequately for security risks to the Government.

- *No Clear Pathway to Protest:* Those seeking to stop protests (challenges) to purchases under the new contracts may argue that the new contracts are indefinite-delivery, indefinite-quantity (IDIQ contracts, sometimes known as “framework agreements” or catalogue contracts), and so purchases under the new contracts (since below the monetary thresholds for task-order protests) are not protestable per FAR 16.505(a)(10). On the other hand,

GSA’s final solicitation does not term these IDIQ contracts and emphasizes in attachment 1 that federal customers, when purchasing through the new electronic marketplaces, will be entering into separate contracts—which suggests that the purchases will not be orders under IDIQ contracts, and so will not be subject to the task-order protest bar. Resolving these issues of protestability will be important going forward, if accountability issues emerge in purchasing through the electronic marketplaces.

- *Potential Liability Under the GSA FSS Price Reduction Clause:* GSA’s Federal Supply Schedule (FSS) contracts still often rely on a most-favored-customer provision, the Price Reduction clause, GSAR 552.238-81, to ensure that GSA FSS customers receive reasonable pricing. Under that clause, commercial sales *below* the GSA FSS price may violate the most-favored-customer commitment, and thus may trigger a price reduction (or even a fraud action) under the FSS contract. Notably, § 4.D of GSA’s final solicitation for electronic marketplaces warns that “commercial sales through the e-marketplace could trigger the Price Reduction Clause based upon the terms [and] conditions of that individual supplier’s FSS contract”—a potentially serious concern for vendors using both the GSA schedules and the new GSA electronic marketplaces as sales vehicles. This risk is further complicated by § B.1 of the GSA solicitation, which says that “items sold to Government agencies through the awarded contracts are to be provided at commercial B2B [business-to-business] pricing or better”—thus suggesting that the electronic marketplace pricing is to fall below vendors’ commercial pricing, which in practice (depending on the terms of vendor’s schedules contract) may trigger the FSS Price Reduction clause.
- *Vendor Data May Be Misappropriated:* Although Congress mandated that data gathered from federal sales in the electronic marketplaces not be misused, and GSA’s final solicitation bars misuse of the data, see SOO § 4.C, some in the vendor community remain concerned that those running the electronic marketplaces could in fact capture vendor data regarding sales on the marketplaces, and use that data to divert future sales to themselves. The Coalition for Government Procurement has urged that

this is a potential organizational conflict of interest, and the GSA final solicitation requires offerors of electronic marketplaces to submit plans to address this risk—a risk that may have to be assessed further as the electronic marketplaces pilot progresses.

Conclusion—GSA’s final solicitation stressed that awards for the new electronic marketplaces will be driven by “user experience,” which is a reflection, in part, of the frustration many federal users have with traditional procurement methods. While the new marketplaces promise users flexibility and responsiveness, the electronic marketplaces initiative is in many ways a radical departure from traditional contracting—an outsourcing of the procurement

function without much of the transparency, competition and accountability that normally protect federal purchasing. Members of the federal procurement community (and the broader procurement community around the world) are likely to watch this pilot closely, to determine whether the efficiency gains outweigh the significant concerns that surround these new marketplaces.



This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Professor Christopher R. Yukins of the George Washington University Law School in Washington, D.C.