

GSA & OMB Implement E-Commerce Provision

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Government Contracts Issue Update

On December 12, 2017, the President signed the FY18 NDAA ("the Act"). One of its notable provisions is Section 846, "Procurement Through Commercial E-Commerce Portals," which establishes an e-commerce portal program for the acquisition of commercial items throughout the federal Government. This article looks at initial steps the General Services Administration (GSA) and Office of Management and Budget (OMB) have already taken to implement this initiative.

Background: NDAA Section 846

The goal of Section 846 is to create an online platform that functions like Amazon or Overstock.com to enhance competition, expedite procurement, enable market research, and ensure reasonable prices for commercially available off-the-shelf (COTS) items. The Act defines an e-commerce portal as "a commercial solution providing for the purchase of commercial products aggregated, distributed, sold, or manufactured via an online portal." This definition specifically excludes "online portal[s] managed by the Government for, or predominantly for use by, government agencies." This means the portals should be modelled after private, commercial, online marketplaces. Commercial e-commerce marketplaces are usually structured through a provider that can either fulfill orders directly or provide a platform for third-party vendors to feature and sell products. Part of the initiative will involve defining the technologies and business processes best suited for federal acquisitions of COTS items.

Practice Areas

Government Contracts

GSA Schedule and Commercial Item Contracts

The Act requires GSA to establish the e-commerce portal program by entering into “multiple contracts with multiple commercial e-commerce portal providers.” OMB is tasked with primary oversight and reporting requirements set forth in the Act. Section 846 Act establishes a three-phase implementation plan:

- **Phase I, Implementation Plan:** GSA must establish an implementation plan and schedule within 90 days, including “discussion and recommendations” regarding the policies, requirements and procedures required for successful implementation.
- **Phase II, Market Analysis & Consultation:** GSA and OMB must report to Congress within one year of the Implementation Plan their recommendations and information “necessary for effective implementation.” These recommendations will address the following six factors:
 - Technical considerations for e-commerce portal functionality;
 - Unique department/agency needs;
 - Product suitability for the platforms;
 - Safeguarding federal information from cybersecurity threats;
 - Application of standard commercial terms & conditions in the federal context; and
 - Impact on other existing federal programs, such as Federal Supply Schedule contracts and small business set-asides.
- **Phase III, Program Implementation:** GSA and OMB will submit guidance on how to implement and govern the program, and address issues such as oversight protocols and compliance with “product screening requirements, data security, and data analytics.”

GSA & OMB Begin Phase I

On January 9, 2018, GSA and OMB held a town-hall style public meeting with industry, marking the beginning of Phase I efforts. The meeting allowed GSA to gather information from industry on commercial e-commerce portals and initiate dialogue between industry and Government regarding the implementation of Section 846.

The meeting was divided into three panels: (1) General Program Design; (2) Buying Practices; and (3) Implementation. Each panel contained “question panelists” from GSA and OMB, and “discussion panelists” from industry and industry groups. Each panel began with a presentation of the discussion panelists’ backgrounds and their overarching recommendations for the e-commerce portals, within their panel topic. The GSA and OMB question panelists and audience then posed questions to the discussion panelists.

The General Program Design panel focused on the overall design of the program. Industry urged GSA to adhere to commercial practices (within reason). Most of the discussion focused on: (1) increasing competition and value by creating threshold vendor standards while still allowing as many vendors who can qualify to participate; (2) the potential pitfalls of using an aggregator model (comparable to websites like Kayak); and (3) where the burden of compliance with applicable procurement regulations and preferences should fall. As to the last point, there were differences of opinion between whether the responsibility for compliance should fall on the Government, or companies should incorporate compliance mechanisms into their code.

During the Buying Practices panel, the discussion panelists emphasized several key points, some of which overlapped with the discussion in the General Program Design panel: (1) GSA should reduce barriers to entry, including minimizing onerous terms and conditions and compliance requirements, to encourage competition on the e-commerce platform; (2) the regulatory implementation schedule is too slow, and the prototype development phase should begin as soon as possible so GSA can begin seeing the pros and cons of various models; (3) the prototypes should focus on commodity products that are not highly configurable and also feature areas where the Government has the biggest spend; and (4) there is no single e-commerce platform or model that will necessarily work best, as the “preferred” model depends on what government buyers want.

The Implementation panel reiterated that implementation will depend largely on what GSA would like to achieve with this program. That is, does GSA want to purely replicate the efficiency of the COTS marketplace, or does it want to introduce some efficiency but maintain the public policy goals attendant to traditional procurements? The discussion panelists emphasized that GSA should decide what it wants to achieve, and share it with industry. Industry can then provide helpful comments that allow GSA to achieve its goals while making the marketplace successful. To facilitate GSA’s thinking, the panelists offered some topics for GSA to consider, including how government-specific terms and conditions fit into the program, whether the program should expand beyond COTS items, the role of third parties, whether piloting should take place, and the tradeoffs associated with having multiple portal providers (versus, for example, how the GSA Schedules program is structured).

Recommendations Moving Forward

There is no doubt that Section 846 has created a stir in the procurement community. We suggest contractors consider the following to prepare for the development and implementation of a commercial e-commerce portal:

- **Stay aware of the program’s development and implementation schedule.** The first formative steps of this initiative could unfold quickly, with Phase I scheduled to conclude in March 2018.
- **Look for opportunities to participate.** GSA and OMB have just begun the initial stages of gathering information and forming an implementation plan. The overall structure of the program is uncertain and will depend on industry input and the goals GSA wants to ultimately achieve. GSA and OMB plan on hosting additional town hall meetings in the future to continue soliciting industry input.
- **Be aware of how the program will interact with other established procurement programs and preferences.** GSA and OMB are tasked with assessing the program’s impact on other federal procurement programs. The development of the e-commerce portal program will no doubt affect companies’ business decisions and processes for selling COTS products to the Government.