THE COALITION
for Government Procurement

March 7, 2019

The Honorable Emily Murphy
Administrator
U.S. General Services Administration
1800 F Street NW
Washington, DC 20405

Subject: Commercial Platform Initiative "Known Unknowns"

Dear Administrator Murphy:

The Coalition for Government Procurement (the Coalition) sincerely appreciates the open dialogue conducted by the General Services Administration (GSA) over the past year with government and industry stakeholders on the implementation of Section 846 of the FY2018 National Defense Authorization Act (NDAA). In response to your request for industry input during the December 12, 2018 Federal Market Initiative Industry Day, the Coalition would like to share our members' feedback on some of the remaining "Known Unknowns" from industry's perspective related to the Commercial Platform Initiative.

The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for a significant percentage of the sales generated through the GSA contracts, including the MAS program. Coalition members include small, medium, and large business concerns that account for more than $145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common-sense acquisition.

As you know, GSA's open communications with stakeholders in public meetings, through Requests for Information (RFIs), one-on-one meetings and other engagements during the Phase II market research have been highly productive in raising awareness for both government and industry about the opportunities and the challenges associated with implementing an e-Commerce platform(s) that maximizes commercial best practices and, at the same time, meets Federal purchasers' unique requirements.

As GSA prepares to issue its Phase II report in March 2019, we would like to share the attached list of "e-Commerce Platform Initiative Known Unknowns" that have yet to be addressed. Our members sincerely appreciate your consideration of these issues and look forward to your response.

Best regards,

Roger Waldron
President

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## e-Commerce Known Unknowns

The Coalition for Government Procurement submits the following list of remaining "Known Unknowns" related to the Commercial Platform Initiative. This list is provided in response to GSA's request at the Federal Marketplace Industry Day on December 12, 2018 for industry's input on topics for the Government to address as it seeks to provide a commercial e-Commerce platform for Federal purchasers.

### 1. Restricting the Proof of Concept Scope to a Single Provider Model

In its December 2018 Request for Information (RFI), GSA proposed piloting only one of the three portal provider models it identified in its Phase I report, the "e-Marketplace model." It is our understanding that no information has been provided to date about the analysis that was conducted by the Government to justify the selection of one model and the exclusion of the other two. Coalition members are concerned that, through this approach, GSA does not fully leverage the deliberative approach provided by Congress and signed into law by the President. By not fully exploring all commercial solutions, GSA eliminates critical stakeholders that might help the government develop innovative e-Commerce approaches, and thus, risks promoting the creation of addition "unknown unknowns." In addition, this approach places GSA, and perhaps the limited number of vendors included in the pilot, in the position of determining winners and losers, rather than the market. Moreover, the pre-selection of the e-Marketplace model risks institutionalizing the bias towards this portal provider business model over others GSA identified in its Phase I report.

### 2. The Establishment of Parallel Procurement Universes

The current approach for the Section 846 pilot would establish parallel procurement universes for commercial items:

- *Procurement Universe 1:* Where pre-existing contracts for commercial products ensure compliance with government unique requirements, like the Trade Agreements Act (TAA), is mandated.

- *Procurement Universe 2:* Where products, including IT, from non-TAA designated countries like China, are available for purchase on GSA-approved contracts through a commercial e-Commerce platform.

Under these circumstances, this new, seemingly non-compliant procurement universe would establish a channel to the government market that competes directly with existing programs, such as the GSA Schedules, without accepting standard compliance and other government-unique requirements that exist for those programs.

Moreover, GSA's current approach is particularly confusing when considering that the purpose of the TAA is to promote fair treatment and opportunities for American companies, products, and jobs through government procurement. The importance of the of the TAA cannot be overstated, as the market for foreign government contracts produces additional opportunities beyond those available through the market for domestic government contracts. Specifically, the United States is a founding member of the Organization of Economic Cooperation and Development (OECD), an intergovernmental organization of developed countries that promotes democracy and market economies. Cumulatively, 33 OECD countries spend more than $4.2 trillion through government contracts on an annual basis, which is more than eight times greater than the spending of the United States government on its own contracts.

Notably, because the TAA applies to GSA's Schedules program, products from eligible countries can be purchased by the Federal government, while products from non-eligible countries cannot be purchased. As a result, even when an individual transaction's value does not exceed the Micro-Purchase Threshold (MPT), compliance with the TAA is still assured under the Schedules program. The rise of supply chain security concerns manifested in recent legislation demonstrates that this issue is only growing in importance and not ameliorated at any arbitrary dollar valuation. Accordingly, GSA's community of TAA-compliant industry partners remain concerned regarding how the agency will address these important matters associated with the treatment of foreign products, as well as other sources of mandatory supply like AbilityOne.

### 3. Cybersecurity and Supply Chain Risks

In the absence of specific requirements or restrictions, such as limitations on the types or categories of products available for purchase through the proof of concept, GSA's current approach will, in fact, increase the government's cyber and supply chain risks by creating a GSA-approved channel where gray market, and potentially compromised, products are readily available. Stakeholders are unclear about this approach because it runs counter to the requirements set forth under Section 846. Indeed, pursuant to paragraph (c)(2) of the statute, Congress required GSA to include in its Phase II report, "An assessment of the products or product categories that are suitable for purchase on the commercial e-Commerce portals." Congress also instructed GSA to include an assessment of the necessary precautions that would need to be implemented to assure national security and cybersecurity. Based on GSA's statements during the December 2018 public meeting, it is the Coalition's understanding that, at this time, GSA is not considering any additional requirements or restrictions for products available through the Section 846 pilot. In light of these statements, will GSA share any analysis of its decision to not exclude any product from the pilot, especially IT and healthcare products, with its industry partners?

### 4. Impact on Small Businesses

Historically, GSA's Schedules program has provided customer agencies with an exceptional framework for achieving their small business requirements by enabling purchases to be directed to small business vendors. Indeed, small businesses were awarded more than $12

billion through the Schedules program in 2018, which accounted for more than 36 percent of total spending through the program.

Prior to establishing a new, seemingly non-compliant channel to the government market, GSA must understand and address the impact that portal provider fees, which the Coalition understands are typically 15 percent, would have on small business participation. In addition, GSA should address how other market-affecting terms and conditions, such as volume-based promotions or product display within search results and "Most Favored Nation" pricing agreements within and without the marketplace, could impact their small business partners. Further, considering that the small business utilization rate on GSA's Schedules program has exceeded the government-wide goal of 23 percent for more than 25 years, GSA should consider how shifting the burden for assuring compliance with small business requirements to customer agencies would influence the ability for customer agencies to achieve their small business requirements.

**5. Assuring Fair and Reasonable Pricing**

In recent forums, GSA has indicated that the principle value of its Multiple Award Schedules (MAS) program is providing Federal customers with ready access to compliant products at "competitive" prices. Indeed, several recent studies confirmed the program's effectiveness in delivering best value outcomes for customers through comparisons with alternative commercial platforms. These studies noted that GSA provides significantly lower pricing and faster and cheaper shipping for its customers than the commercial alternatives to which they are compared.[1,2] In light of these findings, it is not clear how GSA's current approach would ensure compliance and pricing through the commercial e-Commerce portals that would be comparable to current GSA programs.

**6. Promoting Competition**

Through competition, the forces of the marketplace incentivize vendors to provide the government with their best products at their best prices. Further, by maintaining competition in the Federal marketplace, the government keeps downward pressure on prices and, over time, incentivizes innovation. GSA, however, has yet to publicly release any analysis, data, or rationale addressing how its current approach will impact competition across different e-Commerce models, within e-Commerce models, and with pre-existing programs. This lack of substantive assessment is particularly troubling when considering, again, the findings of several recent studies, including the Coalition's study of the AbilityOne Commission's e-Commerce pilot, which have confirmed that GSA's current e-Commerce tools already provide lower pricing and faster and cheaper shipping for its customers than the commercial alternatives to which they are compared.

[1] *See:* http://thecgp.org/images/Amazon-Business-and-GSA-Advantage-A-Comparative-Analysis.docx
[2] *See:* http://thecgp.org/images/AbilityOne-e-Commerce-Report.pdf

7. **Ensuring the Protection of Data**

GSA has the opportunity to leverage the terms and conditions of the Section 846 pilot's contracts to address potential inconsistencies between commercial platforms and Federal law and/or policy. For instance, Section 846, as well as Section 838 of the FY 2019 NDAA, provide specific protections related to the use of data, including an unequivocal prohibition on portal providers using supplier transaction data for their own competitive purposes. For suppliers, these protections are critically important as this data could yield a significant advantage for any portal provider that also offers its own products within its portal. Absent such protections, competing suppliers within the portal would be disadvantaged relative to the portal provider, as they would have to operate on an unlevel playing field. Further, recognizing that data traversing the pilot platform fundamentally belongs to the government, any portal provider efforts to monetize that data would amount to an unjust enrichment of those providers at the expense of American taxpayers. Through the terms and conditions of the Section 846 pilot's contracts, GSA can include specific requirements for the protection of data to address the forgoing concerns, and in turn, ensure a fair Federal market for all suppliers where its customers have access to best-value solutions that are competitively priced.

8. **Understanding the Impact of Fees, Commissions, and Other Market-Affecting Terms and Conditions**

GSA needs to know understand and address the impact that fees, commissions, or other market-affecting terms and conditions have on the over-arching best interests of the government. Not only do these fees risk negative price impacts, but they also could discourage competition, small business participation, and government access to innovative solutions. Moreover, potential inconsistencies between the terms and conditions of portal providers and Federal law and/or policy, such as the Most Favored Nation pricing provisions mentioned above, risk limiting opportunities by reducing competition, increasing prices, and discouraging participation in the Federal market for small, medium, and large businesses.

Coalition members are especially concerned regarding GSA's plans for addressing organizational conflicts of interest inherent to the Section 846 pilot. Recall that, pursuant to Federal Acquisition Regulation (FAR) Part 9.505-4:

> *When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance.*

Again, a specific example of a classic organizational conflict of interest is the ability of portal providers with proprietary products to establish fees within the portal for their own products and the products of third-party vendors. In order to assure a fair Federal e-Commerce market, the Coalition believes that GSA should share how it intends to address classic examples of organizational conflicts of interest under the Section 846 pilot, including, but not limited to: "pay-to-play" arrangements, the plurality of roles performed by the platform provider and their

associated competing interests, and other market-affecting terms and conditions. Addressing these issues will ensure a fair and competitive market that enhances value for government customers while providing the broadest possible to access to commercial suppliers.