FAR & Beyond: Section 801: Limiting Competition to "Increase" Competition?

Since last week's FAR & Beyond blog, ***Existential Questions Surrounding H.R 2511's Proposed "Online Marketplace,"*** Section 101 of H.R. 2511, the Defense Acquisition Streamlining and Transparency Act (DASTA), concerning procurement through online marketplaces, is now Section 801 in the markup of the Committee's National Defense Authorization Act (NDAA) for Fiscal Year 2018. Section 801 is revised slightly, as compared to the original Section 101, however, the revised language does not address the existential issues raised in last week's *FAR & Beyond*. Rather, the changes highlight further the growing concerns surrounding the potential impact of the legislation on the federal procurement system, customer agencies, industry partners, and the American economy.

As the Coalition noted last week, the language being proposed here embodies the most consequential procurement policy changes in a generation. They have significant consequences for the government, for suppliers, and for the economy. As such, they need a much more thorough examination and review by stakeholders across the procurement community, including, the Executive Branch, Congress, and American industry that serves government. Such an examination and review has not taken place, and under these circumstances, the Coalition firmly believes that, by signing on to an online provider under the current language, the government risks bearing painful witness to the adage, married in haste, we may repent at leisure.

The proposed legislation represents much that the Coalition believes in: acquisition streamlining; commercial practices, terms, and conditions; increased access to the commercial market; and market-led competition. There remain, however, significant procurement and economic policy considerations that cause concern for many in industry. Chief among these concerns is the real potential to create a monopoly framework. The Coalition looks forward to continuing to work to improve the language, keeping in mind the issues discussed below.

As a threshold matter, Section 801's use of the term "online marketplace" is a misnomer. "Marketplace" implies an open, neutral exchange between buyers and sellers. Current online service providers sought by Section 801 are really online ***platforms, not online marketplaces***. These online platforms set the terms of entry for suppliers, including the fees charged to participate. They also set the terms of participation for buyers. Moreover, it is our understanding that current online service providers can and do use the transactional data from the platform to compete directly

against the suppliers they are servicing. As such, the *FAR & Beyond* blog will use the term "online platform" in lieu of "online marketplace" used in Section 801.

Section 801 includes a handful of changes from the original Section 101 language. Two the changes are of note.

First, Section 801 now requires GSA, not the Department of Defense (DoD), to establish a government-wide program to procure commercial products through a commercial "online platform." Section 801 further instructs the DoD to purchase, as appropriate, commercial products through GSA's new online platform program. Moving the "online platform" program to GSA implicitly validates the industry feedback that GSA has been receiving over the last decade. Specifically, current Multiple Award Schedule pricing policies, including the Price Reduction Clause, are outdated, bureaucratic, and burdensome. The current implementation and management of these policies reduces access to the commercial market place and limits competition. At the very least, the proposed Section 801 sends a clear message to GSA that it is time to streamline and reduce regulatory burdens that increase costs for all.

Second, Section 801 would require GSA to award "more than one contract with more than one [*i.e.* online platform] provider" for the government-wide program. This language is a change from DASTA Section 101's direction to award "one or more contracts," but it is a change without substance. Although it increases the minimum number of platforms from one to two, it remains a compliance-based approach that focuses on meeting a requirement rather than seeking to leverage/utilize, to the maximum extent practicable, the various robust online platforms available in the commercial marketplace, consistent with the approach to commercial item procurement envisioned in the Federal Acquisition Streamlining Act (FASA).

Significantly, the Competition in Contracting Act (CICA) is waived for the award of the online provider contract. Apparently, the (il)logic, as expressed in the summary of the bill, is that allowing the award of the online provider contract without full and open competition will foster greater competition in the long run through the online platforms. In addition, the language establishing the criteria for the "online provider" essentially is left unchanged. All told, hundreds, if not thousands, of commercial firms with their own online platforms will see their access to the federal market limited to the two online platform providers GSA selects. In essence, the language appears to stand for the proposition that we have to destroy competition to save it.

This potential distortion of the federal market is significant. Firms that previously contracted directly with the federal government likely will pay fees to, and, largely dictated by, an online provider for access to the federal market. In turn, to the extent an online provider competes with these firms in the federal market, that online provider

will be able to utilize the transactional data captured during the firms' transactions with the government. As last week's blog highlighted, this scenario represents an organizational conflict of interest that imparts an unfair competitive advantage and works to the detriment of the government. At bottom, the online provider will be getting paid to use the U.S. citizens' data assets, data assets which it will receive as a windfall free of charge, for its own business interests.

The limitation of entry to the federal market envisioned by Section 801 are compounded by language that continues to provide that the standard terms and conditions of the online provider cannot be altered by the federal government. Under the legislation, the online provider would have sole authority to set the transaction terms, not the buyers or sellers.

Finally, Section 801 waives CICA regarding transactions for commercial products through the online platform. As currently drafted, it appears that any point and click order of any size will be considered competitive, so long as there are at least two comparable products available for review/consideration via the online platform. This approach is of concern. Effective competition in the marketplace is enhanced by streamlining processes and increasing access to the commercial market. Additionally, for large dollar value contracts/orders, it remains fundamental that getting a better deal is contingent on direct competition (*e.g.* quotes) for firm agency commitments. It is unclear whether there are any requirements for direct competition for large dollar volume transactions (perhaps over $500,000) through the online platform.

The Coalition looks forward to working with all stakeholders on improving government-wide access to commercial products through an open, streamlined, transparent, fair, and secure process.