THE COALITION for Government Procurement

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All:

The Coalition for Government Procurement (the Coalition) is seeking your consideration and analysis of the General Service Administration's (GSA) effort to implement an e-commerce procurement platform for use by federal agencies. Although we recognize that the Government, itself, may not be subject to antitrust law, as discussed below, we believe that its proposed e-commerce solution risks constraining the market. As your core mission is to promote competition in the market, we believe that your expert insight could be helpful to the Government and could assure that it continues to enjoy the benefits of competition, namely, low prices, high quality services, and innovative solutions.

By way of background, the Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Its members collectively account for a significant percentage of the sales generated through GSA contracts, including the Multiple Award Schedule (MAS) program. Coalition members also are responsible for many of the commercial item solutions purchased annually by the Federal Government. These members include small, medium, and large business concerns. Based on the draft solicitation for this effort, the Government's anticipated "pilot" program alone will limit market access to a single type of e-commerce platform solution, the so-called "e-Marketplace model," for up-to-five years and implicate up-to-$30 billion dollars in market value. This "pilot" e-commerce program will provide all U.S. Government agencies access to commercial products, and it will affect both the commercial competitors of the e-Marketplace provider(s), as well as commercial entities that sell on the platforms.

GSA is charged with establishing this government-wide e-commerce program for agencies to procure certain commercial products pursuant to Section 846 of the Fiscal Year 2018 National Defense Authorization Act (NDAA). Under the law, this program is supposed to be carried out through the use of multiple contracts with multiple commercial e-commerce solution providers in order to test e-commerce solutions. To this end, the legislation anticipated that the program would be implemented in phases and involve market analysis.

After developing its construct of three potential commercial market e-commerce solution models (*i.e.* the e-Marketplace model, e-Procurement model, and e-Commerce model)[1], however, GSA proposed piloting for implementation only one of them, the e-Marketplace model, where a portal provider offers for sale its proprietary products, products from third-party vendors, or both. ***The language of Section 846, as well as its legislative history, however, show that Congress' direction and intent was to afford the providers of multiple types of models of e-commerce solutions access and the opportunity to participate in the Government e-commerce market.*** Indeed, that section utilizes an expansive term for e-commerce that reflects a desire for, "a program to procure commercial products through commercial e-commerce portals…" to be carried out, "through multiple contracts with multiple commercial e-commerce portal providers." Further, the statute clearly 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." [Emphasis added.]

This expansive language is critical, as it promotes the Government's ability to access the multiple types of e-commerce solutions that exist, or will exist, as a result of commercial market competition. It avoids the potential for one e-commerce model to control access to the Government market. Moreover, by testing three approaches, the Government could avoid having its purchasing activities directly or indirectly subsidize a particular market solution, which could distort the forces of the commercial market.

Coalition members are very concerned that this piloting of only the e-Marketplace model solution puts the significant heft of the Government (again, for up-to-five years, with up-to-$30 billion dollars) behind unduly restricting competition. In the Government market, by narrowing the focus of the Section 846, aside from not exploring fully the benefits and challenges associated with all commercial solutions, GSA manifests the intent to limit market access for solution providers, and, by so doing, threatens a result that will undermine competition. Rather than relying on the forces of the competitive market, it has arrogated to itself the role of determining winners and losers for e-commerce solutions. By restricting competition in this manner, it also threatens the commercial market overall. Consider the following:

- GSA's draft solicitation fails to address e-Marketplace provider price parity provisions.[2] Through those provisions, an e-Marketplace provider is permitted to require that a price offered it by a supplier be at least as favorable as the most favorable terms upon which the product is offered via other sales channels.
    - By inhibiting innovations in pricing that could serve customers in both sectors, the e-Marketplace provider effectively serves as a gate keeper, demanding its terms in exchange for access to the Government space while, at the same time, extending its reach into the commercial space.
- GSA's draft solicitation anticipates what effectively is a "pay-for-play" scheme, under which the e-Marketplace provider/gate keeper could charge different fees to third-party sellers in exchange for different levels of product placement.

[1] *See* https://interact.gsa.gov/sites/default/files/Commercial%20Platform%20Implementation%20Plan.pdf at 6.
[2] There are reports that dominant technology providers may be reacting to public pressure against their influence by retreating from such provisions, *see, e.g.,* https://www.digitalcommerce360.com/2019/03/12/amazon-quietly-ends-its-third-party-pricing-parity-policy/, but such measures are not enough. The stability of policy on which the market can rely to invest and compete cannot be subject to the discretion of a dominant market player.

- Generally, in the Government contracts context, any type of kickback is barred by the Anti-Kickback Act. Although it has not been determined whether payment for enhanced product placement in this context would constitute a kickback, the scheme raises the risk of an insidious problem for the Government that exists in the kickback scenario. Over time, rather than price, quality, and delivery terms that align with the Government's needs, Government purchasing decisions will be influenced by search results, which, in turn, will be driven by kickbacks paid by third-party suppliers to e-Marketplace providers.

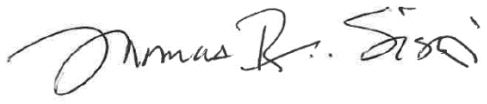
- GSA's draft solicitation and planning documents allow for an e-Marketplace provider to compete against third-party suppliers that are selling on its platform. Under these circumstances, the e-Marketplace provider's role as the manager of the platform conflicts with its role as a seller on the platform. Specifically, it possesses the ability to set the terms of entry; establish the search parameters, presentation features, and result placement (for a fee); and prescribe the rules pertaining to the method of fulfillment of subsequent orders.[3]
    - Notwithstanding the strict requirements of Section 846, none of GSA's documents contain controls, restrictions, or oversight mechanisms governing the e-Marketplace provider's potential use of transactional data for its commercial purposes. Should transaction information obtained by the e-Marketplace provider be converted to personal use, it could have a deleterious impact on competition in the Government and commercial markets.

These and other serious issues have been raised in various comments to the Government during this implementation process, but they have gone unaddressed. In the meantime, GSA is moving apace to secure contract award by the new year. For this reason, Coalition members seek your review of the Section 846 implementation/contracting effort for its impact on competition in the commercial and Government markets and any assessment you can provide. To this end, we are enclosing links to key Government planning documents and the Coalition's filings associated with this effort.

Coalition members hope you are able to provide your thoughts on this matter with the materials we are providing, but if you need additional information or otherwise would like to discuss this matter, please feel free to contact me at tsisti@thecgp.org or 202-751-2035.

Thank you in advance for your time and consideration of this matter.

Sincerely,



Thomas R. Sisti
Executive Vice President and General Counsel

[3] In the Government contracting context, this scenario could be viewed as an Organizational Conflict of Interest (OCI). Contracting Officers are responsible for identifying OCIs early in the acquisition process, obtaining appropriate legal and technical assistance, and recommending a course of action to resolve them. *See* FAR 9.5.

Links to Key Government e-Commerce Planning Documents and the Coalition's Filings

Planning Documents:

- July 2, 2019 Draft RFP
- April 2019 Phase 2 Report
- December 4, 2018 RFI
- June 15, 2018 Supplier RFI
- June 15, 2018 Platform Provider RFI
- March 2018 Phase 1 Report

Coalition Filings:

- August 1, 2019 Draft RFP response
- June 12, 2019 Procurement through e-Commerce Portals Phase II Report
- March 7, 2019 Letter to the GSA Administrator "Known Unknowns"
- December 21, 2018 RFI Response
- July 20, 2018 RFI Response
- January 16, 2018 Letter to GSA following Public Meeting