



IT Alliance
for Public Sector
A Division of ITI



THE COALITION
for Government Procurement



June 13, 2017

The Honorable Mac Thornberry
Chairman
2216 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Thornberry:

On behalf of the below signed organization, we are happy to submit comments on Section 101 of H.R. 2511, the Defense Acquisition Streamlining and Transparency Act. While at this time we cannot endorse the proposal in the current form, we do want to help find a path to support and look forward to the continued dialogue to help address concerns and questions that may exist.

Please find attached the perspectives, questions and concerns we've identified to help continue the conversation. Thank you in advance for your consideration. If you have any questions regarding the attached comments, please reach out to Eminence Griffin at egriffin@itic.org.

Sincerely,

Information Technology Alliance for the Public Sector
The Coalition for Government Procurement
The Associated General Contractors of America

ISSUE: The draft Defense Acquisition Streamlining and Transparency Act appropriately seeks to advance the goal of leveraging commercial e-commerce practices in the acquisition of certain commercial off-the-shelf (COTS) items. The current language, however, raises significant procurement policy and legal issues impacting the future of the federal marketplace. These include, but are not limited to, the following:

- The language essentially authorizes the award of a no-bid contract for the e-marketplace, creating the risk of a monopoly acquisition platform, which ultimately could undermine competition for these items in the government space and distort activity in the commercial space.
- It is not clear how this provision can be reconciled with existing law, including but not limited to the Buy American Act, Trade Agreements Act, small business preferences, and CICA;
- The language is silent regarding how government and vendor interests in data and security will be safeguarded, and how this program will be reconciled with existing government commercial buying platforms.

Although these issues are fundamental to the integrity of the procurement process, ARWG supports the effort to improve access to commercial items for government customers and believes the draft bill can be remediated to a point where it will enjoy industry support.

PROBLEM STATEMENT: Section 101 of the draft Defense Acquisition Streamlining and Transparency Act addresses the procurement of COTS items through online marketplaces. Subsection (a) would require the DoD “to procure commercial products through online marketplaces ... through one or more contracts with one or more online marketplace providers.” Subsection (b) sets forth criteria for online marketplaces, and subsection (c) clarifies the supplier and product screening required in the online marketplaces. Marketplaces would be limited to those that are commonly used in the private sector; provide a dynamic selection of products and prices from numerous suppliers; provide procurement oversight controls, such as two-person approval for purchases; and would screen suppliers and products to ensure compliance with suspension and debarment, domestic sourcing, and other similar statutes.

The Proposal Risks Creating a Government-Sponsored Monopoly/Duopoly –

By exempting the selection of an e-marketplace vendor contract from the full and open competition requirements of the Competition in Contracting Act (CICA), the draft language allows the government to execute a no-bid contract award for its business market to a single private entity (“one or more online marketplace providers”). This one act risks vesting enormous market power and control with a private firm (or a small number of firms) to exploit COTS vendors’ efforts to access the government market or the commercial market. By so doing, it could jeopardize the government’s access to the benefits of competition, which include innovation and downward price pressure, as vendors may not wish to participate in business activity where the balance of negotiation power is so distorted.

Indeed, there is significant concern that an online marketplace provider could use access to the government market as a negotiation tool for access to that provider’s commercial market channels. Although subsection (b)(4) articulates, as a criterion, that the marketplace may not feature or prioritize a supplier’s product based on any compensation paid by that supplier to the marketplace, this restrictive criterion is limited in effect to compensation “that is exclusively for such featuring or prioritization on the online marketplace.” Under the draft language, the

marketplace provider would have leeway to leverage or connect these business activities indirectly, thus causing potential disruption in the commercial market, as well.

In addition, we believe that the potential award of a single, central marketplace platform is not in the government's interest. There are product- and industry- centric marketplaces manifesting optimized pricing, terms, and conditions that offer products that may not be captured on a single, universal site that offers a wide-range of COTS. The possibility of awarding one contract would require that these vendors abandon their own platforms to sell to the government and effectively mutes the benefits of dynamic selection and dynamic pricing that the draft bill expressly sets forth as mandatory criteria for online marketplaces (*see* (b)(2)).

Further, because the draft bill states that the online marketplace provider shall not be required to modify its standard terms and conditions as a predicate to receiving a marketplace contract, the government may be hamstrung in its efforts to protect the interest of its agencies and taxpayers. Clearly, to access innovation, and consistent with the Federal Acquisition Streamlining Act (FASA), the government should seek to maximize the use of commercial terms, conditions, products, and processes to make its marketplace as familiar to commercial vendors as possible. That approach, however, as envisioned in statute, is to take place in an environment driven by competitive market forces. Awarding a contract without the benefit of competition to a firm that has no obligation to accommodate the mission requirements of its government customer, notwithstanding the significant business enrichment it is receiving via its channel to agencies, especially in connection with requirements imposed by statute, is a bad bargain for the government. At a minimum, it subjects the government to cost risk, and it does not mirror what takes place in the commercial market.

Exemptions from Compliance Requirements Should be Extended to Government Marketplaces

Under Section 101(i), an online marketplace provider is defined as
a commercial, non-Government entity providing an online portal for the purchase of commercial products. The term does not include an online portal managed by the Government for, or predominantly for use by, Government agencies.

It should be noted that DoD, GSA, NASA, and VA all operate substantial e-commerce platforms. Those platforms are the channels through which the government accesses commercial products and innovation, and they represent the single largest avenue through which small businesses, after investing in those channels, serve their government. With so much at stake, and with so much government investment in these e-commerce platforms, before simply holding them in abeyance in favor of a contract for marketplace platform(s), Congress should understand the root cause of the problem it seeks to address and whether its solution is worse than the problem.

Compliance is Unclear and Could Become a Source of Disputes

The lack of clarity regarding the operation of, and compliance with, the law creates the possibility of post-enactment disputes. As noted above, the draft language provides the online marketplace some broad, albeit general, exemptions from law. Fundamentally, laws cannot be repealed by implication; they must be referenced specifically for repeal. Because the laws enumerated below will be in effect for the online marketplace, and the draft bill describes few laws for enforcement (*e.g.*, suspended, and debarred vendors under Section 101(c)(1)(A)), language is needed either to exempt explicitly the online marketplace from their applicability, or to clarify compliance with them on the part of the online marketplace contractors.

A clue to the nature of the problem may exist in the draft language itself. Consider that, after satisfying certain criteria:

- Notwithstanding any other provision of law, under Section 101(d), purchases through an online marketplace:
 - are deemed to satisfy statutory requirements for competition;
 - are deemed to be commercial product procurements; and
 - are deemed to be prime contracts for the purposes of meeting small business contracting goals when the business meets the definition of a small business.
- Notwithstanding any other provision of law, under Section 101(e), an online marketplace shall not be required to modify its standard terms and conditions as a condition of receiving a contract.

Further, under Section 101(f), the award of the online marketplace contract may be made without full and open competition, as otherwise required by CICA. Against this backdrop, nowhere in the draft bill’s criteria for online marketplaces and/or the draft bill’s supplier and product screening requirements is there any language explicitly requiring the government to comply with fundamental statutory and regulatory requirements related to, *inter alia*:

- The Buy American Act
- The Trade Agreements Act
- The Small Business Act
- Audit and Oversight Requirements

It is not clear whether the Committee intended to exempt transactions conducted via these online marketplaces from these requirements. If the government customer does not have to comply, the language should be changed to explicitly exempt these transactions from these requirements. Additionally, it is unclear whether the Committee intended the marketplace to fall outside of the priority of mandatory sourcing requirements. For example, for supplies, a contracting officer must look to Federal Prison Industries or AbilityOne to fulfill orders before using another contracting vehicle. The language does not address where the online marketplace falls in the list of mandatory sourcing. Even if the online marketplace exempts the vendors from meeting these requirements, the Committee must address if the online marketplace will be included in the prioritization or explicitly exempt government customers from the requirement when purchasing from online marketplaces.

What is apparent from the face of the draft bill is a concern with existing laws and regulations that are affecting the “rapid purchases of goods at the best prices.” What is not apparent is why government platforms are singled-out as the problem given that they are not afforded the same exemptions from law and regulation that are envisioned for the new online marketplace, or why the Committee would choose to shelter the online marketplace from competition and risk disrupting the order of the market and the market distortions identified above. Rather, the Committee should support a level playing field by establishing identical statutory and regulatory exemptions for government and commercial online marketplaces, as well as for all other commercial item acquisitions vehicles. By so doing, it will foster market competition among all marketplaces in the government space and promote the benefits that flow therefrom.

Furthermore, the Committee does not address the disparity that would occur to contractors offering services that must purchase COTS in fulfillment of their contracts. By not allowing these contractors to fulfill these requirements streamlined processes of the draft bill, the Committee is creating an uneven playing field where the contractors are put at a disadvantage by having to meet stricter compliance burdens. We believe the Committee should clarify that

contractors are authorized to purchase COTS in fulfillment of contract requirements and that the exemptions from specific compliance requirements extend to those contractors when doing so. The lack of compliance also raises cybersecurity concerns as inserting non-compliant IT products into a government or contractor system creates too high of a cybersecurity risk to both the supply chain and the government mission. The Committee should consider requiring that DoD create guidance on the purchase of any IT products from the portal to insure compliance with cyber security standards.

Finally, the Committee appears to be creating yet another sub-framework of commercial item within the statutory definition. If there is merit in creating a waiver framework for the category of commercial items purchased through the online marketplace, then that waiver should be extended across that category of commercial items. There is nothing unique about the online marketplace mechanism that supports separate treatment in that purchasing channel.

Data Risks –

Although the transactions envisioned here may not involve voluminous exchanges of confidential vendor information, data generated under the online marketplace, as drafted, could have significant economic and security value to the stakeholders under the program. Vendor delivery terms; government spending and product use patterns; product delivery information; supply chain information, all, under the right circumstances, also could be of monetary and security value to market competitors and international adversaries. For this reason, it is unclear why this issue is given such minimal treatment under the draft bill.

Section 101(h) provides that:

[i]n any contract awarded to an online marketplace provider pursuant to subsection (a), the Secretary of Defense shall require that the provider agree not to sell or otherwise make available to any third party any of the information listed in subsection (g)(1) in a manner that identifies the Federal Government, or any of its departments or agencies, as the purchaser, except with written consent of the Secretary.

The information associated with activity in the online marketplace in isolation, may appear to be inconsequential, when combined with other information, may create a mosaic of detail that puts either the nation or vendors at risk. For example, huge shipments of COTS items to a potential war zone might signal inappropriately future government action. Under the draft bill language, although it is clear such information will be collected (*see* Section 101(g)(1)), it is not clear how that information will be secured.

From ARWG's perspective, the draft bill language needs to be amended to recognize the interests in information; to assure that, to the extent that information is possessed by the online marketplace provider, it remains secured; and to assure that the government receives just compensation for information it permits to be released.

Fee Structure –

While the Committee include a prohibition on product placement in exchange for compensation, it does not fully address authorizations or limitations on fee constructs that would be acceptable and fit Congressional intent. For example, we do not believe that eCommerce portal providers should be able to erect a "pay-to-play" fee structure for vendors wishing to access the market and make their inventory available to the government customer now authorized to shop there. To avoid the opportunity to control market access and effect inequities in competition within the market, the Committee should clearly delineate what elements must be included in contract

language to manage how the portal provider is compensated and what expenses vendors can anticipate.

RECOMMENDATION: To address the concerns identified above, the Committee should amend the draft bill language as follows:

- To address the risks associated with a potential government-sponsored monopoly/duopoly, ARWG believes that online marketplace contracts should not restrict competition for those contracts or otherwise discriminate against vendors and should permit product- and industry- centric marketplaces that otherwise are used widely in the private sector, including in business-to-business e-commerce. In addition, ARWG believes the Committee should address the issue of contractor's ability to purchase off the online marketplace to fulfill requirements under services contracts. Thus, ARWG offers the following changes to the draft language:

(a) ESTABLISHMENT OF PROGRAM. —The Secretary of Defense shall establish a program to procure commercial products through online marketplaces for purposes of expediting procurement and ensuring reasonable pricing of commercial products. The Secretary shall carry out the program in accordance with this section, ~~through one or more~~ **by executing the maximum number of** ~~contracts~~ **practicable** with ~~one or more~~ online marketplace providers, and shall design the program to enable Department of Defense-wide use, **as well as use by contractors when providing government furnished property under terms of a contract**, of such marketplaces.

(b) CRITERIA FOR ONLINE MARKETPLACES. —The Secretary shall ensure that an online marketplace used under the program established pursuant to subsection

(a)—

- (1) is used widely in the private sector, including in business-to-business e-commerce;
- (2) provides dynamic selection, in which suppliers and products may be frequently updated, and dynamic pricing, in which suppliers may frequently update product prices;
- (3) enables offers from ~~multiple~~ a supplier or suppliers ~~on~~

~~the same or similar products~~ to be sorted or filtered based on product and shipping price, delivery date, and reviews of suppliers or products;

(4) does not feature or prioritize **or otherwise require for the placement of** a product of a supplier based **directly or indirectly** on any **form of** compensation, consideration, or fee paid to the online marketplace by a supplier that is for such featuring or prioritization on the on-line marketplace;

(5) provides procurement oversight controls, including spending limits, order approval, and order tracking;

(6) provides consolidated invoicing, payment, and customer service functions on behalf of all suppliers;

(7) satisfies requirements for supplier and product screening in subsection (c); and

(8) collects information necessary to fulfill the information requirements in subsection (g).

(e) REQUIREMENT TO USE STANDARD TERMS AND CONDITIONS OF ONLINE MARKETPLACES. — ~~Notwithstanding any other provision of law~~ **To the maximum extent practicable,** a procurement of a product through a commercial online marketplace used under the program established pursuant to subsection (a) shall be made under the standard terms and conditions

of the marketplace relating to purchasing on the market-
place,

(i) DEFINITIONS. —In this section:

(1) ONLINE MARKETPLACE PROVIDER. — The term “online marketplace provider” means a commercial, ~~non-Government~~ or government entity providing an online portal for the purchase of commercial products. ~~The term does not include an online portal managed by the Government for, or predominantly for use by, Government agencies.~~

- To address cybersecurity concerns of inserting non-compliant IT products into a government or contractor system, ARWG offers the following changes to the draft language:

(c) SUPPLIER AND PRODUCT SCREENING.—The Secretary shall—

(1) provide or ensure electronic availability to an online marketplace provider awarded a contract pursuant to subsection (a), no less frequently than the first day of each month—

(A) the list of suspended and debarred contractors contained in the System of Award Management maintained by the General Services Administration;

(B) a list of suppliers, by product category, that satisfy the requirements of section 2533a or 2533b of title 10, United States Code; and

(C) a list of products, by supplier, that are suitable for the Federal Government to procure

pursuant to section 8503 of title 41, United States Code; and

(2) ensure that an online marketplace used under the program established pursuant to subsection (a) provides the ability to search suppliers and products and identify such suppliers and products as authorized or not authorized for purchase during the procurement and order approval process based on the most recent lists provided pursuant to paragraph (1).

(3) solicit feedback from industry and issue guidance on appropriate purchase of information technology products from the marketplace prior to authorizing any information technology procurement. Guidance should ensure that no information technology product purchased on the market place is allowed access to a government or contractor owned network or system without proper testing or ensuring cybersecurity standards are met.

- To address the unbalanced application of law and policy, as well as potential compliance issues, ARWG believes the Committee needs to decide which laws it deems inapplicable to these types of procurements and then, unequivocally, identify them as such in the bill. In addition, whichever provisions of law are deemed inapplicable to these types of procurements, they should be inapplicable to all online marketplace providers, as well as to all other commercial item acquisition vehicles. Further, to assure the maximum participation in the online marketplace, the language needs to be amended to permit vendors offering their comprehensive lists of products to participate.

(d) RELATIONSHIP TO OTHER PROVISIONS OF LAW. — (1) Notwithstanding any other provision of law, a procurement of a product made through an online marketplace under the program established pursuant to subsection (a)—
(1A) is deemed to satisfy requirements for full and open competition pursuant to section 2304 of title 10, United States Code, and section 3301 of title 41, United States Code, ~~if there are offers from~~

~~two or more suppliers of such a product on the online marketplace;~~

~~(2) is deemed to be a procurement of a commercial product if the product has been purchased within the previous year by a non-Government entity through the online marketplace; and~~

~~(3B) is deemed to be an award of a prime contract for purposes of the Governmentwide goals established under section 15(g) of the Small Business Act (15 U.S.C. 644(g)), if the purchase is from a supplier that is a small business concern (as defined under section 3 of the Small Business Act (15 U.S.C. 632)).~~

~~(2) Any provision of law or regulation deemed inapplicable to commercial online marketplace providers under the program established under subsection (a) shall also be deemed inapplicable to government online marketplace providers and all other commercial item acquisition vehicles.~~

(g) ORDER INFORMATION. —

(1) IN GENERAL. —The Secretary of Defense

shall require each online marketplace provider awarded a contract pursuant to subsection (a) to provide to the Department of Defense, ~~not less frequently than the first day of each month,~~ the ability to electronically access the following information with respect to each product ordered ~~during the preceding month~~ **in real time**

- To address the potential unjust enrichment, lost revenue, and security risks associated with the handling of data under this program, the draft language should be amended as follows:

(h) LIMITATION ON INFORMATION DISCLOSURE.

— (1) In

any contract awarded to an online marketplace provider pursuant to subsection (a), the Secretary of Defense shall require that the provider agree not to sell or otherwise make available to any third party any of the information listed in subsection (g)(1) in a manner that identifies the Federal Government, or any of its departments or agencies, as the purchaser, except with written consent of the Secretary.

(A) In no case shall the Secretary consent to the release of any information listed in subsection (g)(1) that, alone or with other information, could be of logistical or national security value to the United States.

(B) In no case shall the Secretary consent to the release of any information listed in subsection (g)(1) without receiving just compensation from the entity receiving such information, which just compensation shall be deposited in the U.S. Treasury, except no compensation shall be required from vendors in the online marketplace for information needed to fulfill orders placed via the marketplace and if it would otherwise be incorporated in reporting of previous orders fulfilled, is the information of those fulfilling an order, and the information is delivered to the vendor fulfilling the order.

(2) Information under subsection (g)(1) is the property of the U.S. Government and shall be safeguarded as such.

