



July 20, 2018

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Mandell
1800 F Street N.W., 2nd Floor
Washington, D.C. 20405

Subject: Requests for Information on Commercial e-Commerce Portals

Dear Ms. Mandell,

Thank you for the opportunity to provide comments in response to the General Services Administration's ("GSA") Requests for Information ("RFIs") on commercial e-Commerce portals.

The Coalition for Government Procurement ("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 Multiple Award Schedule ("MAS") program. Coalition members are also responsible for many of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

The Coalition appreciates GSA's thorough and deliberative approach in implementing the mandates of Section 846 of the Fiscal Year ("FY") 2018 National Defense Authorization Act ("NDAA"). The move to e-Commerce solutions envisioned by Section 846 holds the potential of affecting billions of dollars across millions of transactions for years to come. Considering the significant taxpayer investment involved, the Coalition believes that continued transparency and inclusion of all stakeholders, both in industry and government, in the deliberative process will be critical for the adoption of a successful e-commerce acquisition solution that is competitive, fair, and transparent.

Coalition members offer the following comments in response to the e-Commerce Portal RFIs. The recommendations regarding the requirements for portal providers reflects the statutory intent that contracts be awarded to multiple e-Commerce providers and e-Commerce models.

Proposed Micro-purchase Threshold Increase to \$25,000

The proposed increase in the Micro-Purchase Threshold (“MPT”) to \$25,000 represents a significant, fundamental change to the acquisition process, potentially expanding the market for micro-purchases by millions of transactions and tens of billions of dollars over the next decade. The timing of the proposed increase is unclear, as the government has yet to fully implement Section 806 of the FY 2018 NDAA, which increased the standard MPT for civilian agencies from \$3,000 to \$10,000 (an increase of more than 200%). Further, the proposal comes just one year after the FY 2017 NDAA increased the Department of Defense’s (“DoD”) MPT to \$5,000 and on the threshold of another increase to \$10,000, as proposed under Section 813 of the FY 2019 NDAA. The Coalition recommends that, at a minimum, GSA should first collect, evaluate, and share with the public any lessons learned from the recent increases to the MPT prior to implementing any further increases to the thresholds.

In addition, the Coalition is concerned that, to date, no analysis or data has been released to the public assessing the need for further increasing the MPT, or the potential impact on the current procurement system, including the impact on customer agencies and contractors. Further, the record provides no assessment of the potential impacts associated with waiving several government-unique requirements, such as the Trade Agreements Act (“TAA”) and the Buy American Act (“BAA”). Notably, the TAA, which implements the World Trade Organization Government Procurement Agreement (“WTO GPA”), is among the most significant government-unique requirements in terms of contract compliance. Generally, under the WTO GPA, signatory countries, including the United States, have agreed not to engage in discriminatory purchasing practices in government procurement against products from eligible countries (*i.e.* products from signatory countries). The TAA implements this objective by limiting applicable Federal procurements to only American products or products from countries that have agreed to not to discriminate against each other’s products, per the WTO GPA or Free Trade Agreements.¹

The purpose of the WTO GPA and the TAA is to promote fair and free treatment of American products in foreign government procurement. As noted on the United States Trade Representative (“USTR”) website:

A longstanding objective of U.S. trade policy has been to open new procurement opportunities for U.S. goods, services and suppliers to compete on a level playing field for foreign government procurement. Government procurement typically comprises 10 percent to 15 percent of a country’s GDP.

Throughout the 1990s, and into the 2000s, the USTR supported GSA’s application of the TAA to the MAS program, as it assisted the USTR in its efforts to open foreign government procurement to American products. The TAA does not apply to purchases below the MPT, which means that products from non-WTO GPA countries are eligible for purchase. Thus, in the absence of any assessment or analysis, it is unclear how the reduction of TAA-applicable transactions associated with the proposed increase of the

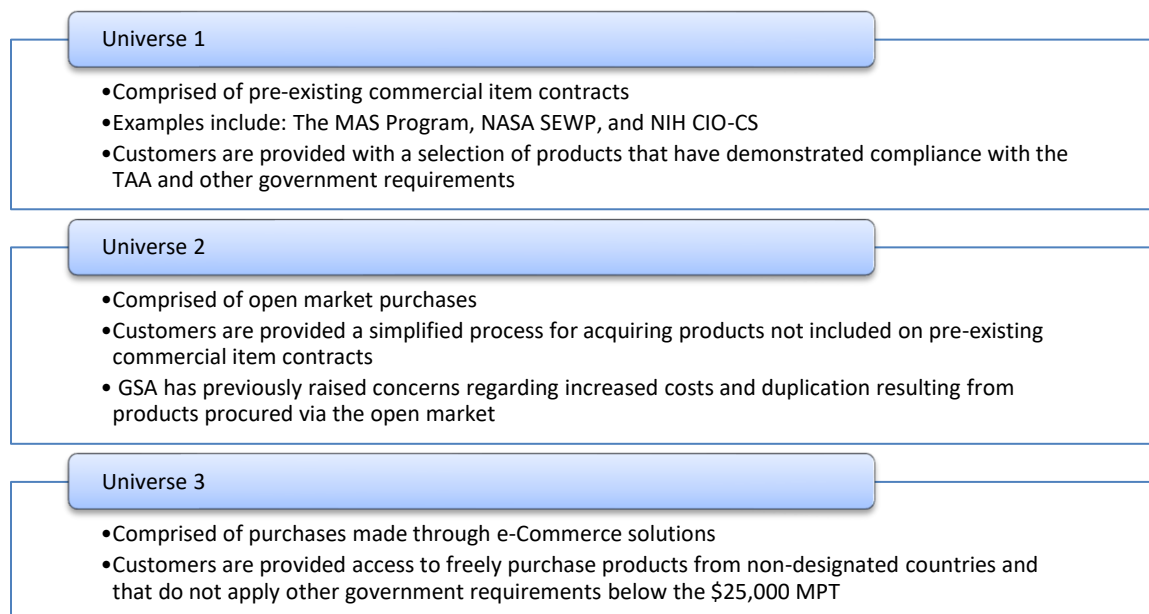
¹ The TAA, WTO GPA, and Free Trade Agreements are implemented at Federal Acquisition Regulation Subpart 25.

MPT to \$25,000 for transactions conducted through Section 846 e-Commerce portals is consistent with the USTR's efforts. More specifically, given the risk associated with some products of non-signatory countries, it is not clear why the Government should increase access to those products (and thus, risk) by constraining the applicability of the TAA.

Ultimately, a decision to elevate the MPT should be based on an analysis of the laws and policies that are affected by it. Otherwise, the GSA risks policy conflicts that could create cost and/or security challenges for the government. Therefore, the Coalition recommends that, prior to implementing any further increase to the MPT, GSA conduct a substantive assessment of the policies underlying the laws that would be waived at the new threshold and why the government's interests are served by waiving them. See Attachment 1 for the FAR clauses and laws that would be waived. In addition, GSA should execute a comprehensive cost-benefit analysis to demonstrate the need to increase the MPT to \$25,000, and that analysis should include the direct and indirect costs of compliance and security risks. GSA should share its findings with the public.

Creation of Multiple Parallel Procurement Universes with Differing Rules

Coalition members are concerned about the potential impact of GSA's plan to apply the proposed \$25,000 MPT only to purchases made through the e-Commerce portals. This approach risks the creation of multiple parallel procurement universes, each with its own unique application of rules and requirements for contractors:



Note: "Universes" 1 and 2 exist in the Federal market today. The implementation of e-Commerce portals with a separate MPT of \$25,000 would create a 3rd "Universe."

Importantly, these differing rules and mechanisms would have their own separate associated compliance costs (e.g. substantial transformation determinations and monitoring of country of origin).

The availability of different channels to the Federal market, with different sets of rules and associated costs, could have significant implications for contractors, and may impact their sourcing decisions. Consequently, if enacted, this change has the potential to fundamentally alter the products available in the Federal market. Moreover, this duplication of parallel procurement mechanisms appears to be inconsistent with the spirit of the GSA Administrator's four key priorities, specifically, the goal of reducing duplication. Duplicating purchasing processes, in particular, processes, with different rules, that achieve the same ends, is just as inefficient as duplicating contracts for the same products or services.

Based on the foregoing, the Coalition requests that any changes to streamline the process for procurements made through e-Commerce portals also apply to pre-existing contracts.

Conflicts of Interest

Data

Section 846 provides specific protections related to the use of data, including an unequivocal prohibition on portal providers using supplier transaction data for their own competitive purposes. Specifically, the statute provides:

(h) DISCLOSURE, PROTECTION, AND USE OF INFORMATION. — In any contract awarded to a commercial e-commerce portal provider pursuant to subsection (a), the Administrator shall require that the provider—

(1) agree not to sell or otherwise make available to any third party any information pertaining to a product ordered by the Federal Government through the commercial e-commerce portal in a manner that identifies the Federal Government, or any of its departments or agencies, as the purchaser, except if the information is needed to process or deliver an order or the Administrator provides written consent;

(2) agree to take the necessary precautions to safeguard any information pertaining to the Federal Government, especially precautions necessary to protect against national security or cybersecurity threats; and

(3) agree not to use, for pricing, marketing, competitive, or other purposes, any information related to a product from a third-party supplier featured on the commercial e-commerce portal or the transaction of such a product, except as necessary to comply with the requirements of the program established pursuant to subsection (a).

These protections are crucial requirements for suppliers, as there is a significant concern that the data could be used to the advantage of any portal provider that also offers its own products within its portal, which could disadvantage any competing suppliers within the portal by creating an unlevel playing field. Likewise, provider efforts to monetize data that, fundamentally, belongs to the government (in stewardship for its citizens) could amount to unjust enrichment of providers at the expense of citizens.

Therefore, to avoid confusion, the Coalition recommends that GSA affirm unequivocally that ownership of any data directly or indirectly related to a given transaction traversing the portal, aggregated or otherwise, resides with the Government, not any portal provider. Thus, consistent with statute, GSA should reiterate, in portal provider contracts terms and conditions, that portal providers are prohibited from using that data for any other purpose than facilitating the immediate transaction. We also suggest that GSA develop contract terms and conditions that specify that any such data obtained by portal providers cannot be used for competitive purposes.

Other Conflicts

The Coalition recommends that GSA provide additional clarification regarding how it will protect against apparent conflicts of interests among portal providers, including, but not limited to, the acceptance of any form of compensation to promote specific products, the use of data to compete with third-party suppliers, and, where a portal provider also offers products, the favorable treatment of portal-provider products relative to third-party supplier products within the portals. Further, the Coalition believes that any marketplace that maintains absolute authority related to determining vendor access to the market, collecting transactional data on purchases in the market, and establishing rules for participating in the market, is a conflict of interest. Accordingly, GSA should provide evidence-based rationale regarding how it will address such apparent conflicts of interests, including why its approach is in the best interest of the government and the American taxpayers.

In addition, the Coalition requests that GSA require all e-marketplaces to maintain transparent fee structures that identify any fee associated directly or indirectly with a transaction in the marketplace. This transparency will support GSA in assuring that these fees do not create barriers to entry to the Federal market, that competition is maintained over time in the portals, and that the value of e-Commerce solutions relative to other vehicles is understood clearly.

Competition

The Coalition appreciates GSA's commitment to the competition requirements provided by Section 846, as expressed during the public meeting in June 2018. Additional clarity regarding how GSA will define competition within the context of the e-Commerce portals would be helpful, along with an explanation how competition will be addressed on the order-level within the portal(s) and between multiple portal providers/solutions. In this regard, we request that GSA share with industry how it defines competition and provide opportunity for comment before going through any rulemaking process.

Counterfeit Products

Coalition members, along with other government stakeholders, remain concerned about the potential for e-Commerce portals to increase gray market purchases by the Federal Government. Significantly, the Government Accountability Office ("GAO") found that markets for counterfeit goods have evolved and that the proliferation of e-Commerce has contributed to increased purchases of counterfeit items.² For

² GAO 18-216 "Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market."

example, GAO conducted sample purchases from third party sellers on e-Commerce portals and found that more than 42 percent of items were counterfeit.

Gray market and counterfeit items present significant risks to both suppliers and Government buyers. Suppliers are concerned about the damage counterfeit items can pose to a brand and about potential legal liabilities. In its report, GAO identifies many of the risks to Government buyers, including safety risks from sub-standard products, national security risks in the IT supply chain, and the risk that Government funds could be supporting organized crime or terrorist organizations linked to counterfeit products.

Effective supply chain management will be a shared responsibility among the portal providers, suppliers, and Government buyers. Thus, GSA should clearly identify the responsibilities for all of these stakeholders and develop enforcement procedures to ensure the market is protected from counterfeit products. The Coalition recommends that GSA establish provisions to protect the integrity of the Government supply chain. For example, given GSA's statements on the importance of compliance during the public meeting, as well as the agreement of panelists and audience members that compliance should take place before purchasing, contract clauses should be developed for those portal providers actually providing their own or supplier products to conduct screening for counterfeit products.

Cybersecurity

Section 846 directs GSA to assess the precautions necessary to safeguard information against national security or cybersecurity threats. The Coalition supports GSA's efforts to ensure that the portal providers/solutions provide cybersecurity to protect the data generated through transactions on the portals. The Coalition recommends that GSA identify the specific cybersecurity standards, which portal providers/solutions, at a minimum, will be required to maintain. In this regard, the Coalition also recommends that GSA establish procedures to protect the integrity of the Government supply chain. The program should clearly identify the responsibilities of the stakeholders, including suppliers, portal providers, and Government buyers, when purchasing from e-commerce portals.

Ordering Procedures

At the June 2018 public meeting, GSA announced that ordering procedures will be developed to provide guidance to Government buyers when purchasing through the portals. The Coalition supports the development of streamlined and effective ordering procedures and recommends that GSA consider developing ordering procedures that mirror those found at FAR 8.405 for ordering products on the GSA Schedules.³ This approach would ensure a streamlined process for purchases that are between the MPT and the simplified acquisition threshold. While implementing ordering procedures, the Coalition notes

³ The streamlined ordering procedures for the Schedules have are premised on GSA negotiating fair and reasonable prices with contract holders. When considering ordering procedures for commercial portals, the Coalition notes that there have been some concerns raised about the prices available on commercial e-Commerce platforms when compared to the prices on the GSA Schedules. See "Amazon Business and GSA Advantage: A Comparative Analysis," Holland D. Canter and Tabitha J. Gomez, Naval Postgraduate School, December 2017.

that FAR 13.203(a)(1) already requires that, to the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers.

Products that Should Not Be Included

The Coalition recommends that GSA exclude healthcare products, as well as information technology products and software, from the inclusion in the e-Commerce portals. Congress specifically identified categories of products, in Section 846(c)(2)(B), with regard to the OMB/GSA consultation with agencies about their unique procurement needs. Coalition members believe that supply chain vulnerabilities for these products, at this point in time, present significant risks, and because of these risks, the products currently are not suitable for purchase on the portals.

Communications with Industry

Coalition members support GSA's efforts to meet with stakeholders, including the two public meetings, which have been especially informative. There are concerns, however, particularly regarding the proposal to raise the micro-purchase threshold for purchases through the portals, that GSA could be improve in its communications with industry. The proposal to raise the micro-purchase threshold was not discussed during the first public meeting, and industry only became aware of this significant proposed change for the e-Commerce portals after it was sent to Congress and part of the implementation plan.

It is noteworthy that, when the White House issued an IT Modernization Plan, a draft document was released to the public for comments before the final plan was issued. GSA should adopt a similar practice of preparing a draft proof of concept and seeking public feedback on that draft. Thus, going forward, the Coalition recommends that GSA release draft documents for public comments before submitting final documents.

Questions

The Coalition also requests that GSA respond to the following questions:

1. Is it GSA's intention to sell items on the portals that are above the micro-purchase threshold? If so, the portals should recognize that different regulations will apply for items in different threshold classifications.
2. Will the portals have the functionality to filter search results based upon whether an item complies with a specific regulation, regardless of price?
3. What will be used to determine the applicability of the micro-purchase threshold, a line within an order, or the total amount of the order, which may include multiple items?

Thank you for considering the Coalition's comments in response to the RFIs on commercial e-commerce platforms. The Coalition looks forward to working with GSA to develop a "common sense" e-commerce solution for Federal customers. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Waldron', written over a light gray rectangular background.

Roger Waldron
President

Attachment 1

Micro-Purchase Thresholds (MPT)

Increase of the micro-purchase thresholds to \$25,000 from \$10,000 (civilian, formerly \$3,500) and \$5,000 (DoD)) mean that certain laws/provisions will not apply to such purchases.

FAR part 8 applies per FAR 13.201(e), but Part 8 does not impose competition requirements for Schedule orders below the MPT and instead only encourages agencies to “distribute” orders among contractors.

Per FAR 13.201(1)(d), there are no required provisions or clauses for micropurchases, except (per FAR 13.202) FAR 52.232-39 - Unenforceability of Unauthorized Obligations) and 32.1110 (financing). So, that means no FAR 52.212-4 and 52.212-5, and thus (among others):

- No Prohibition on Contracting with Inverted Domestic Corporations
- No Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
- No Prohibition of Segregated Facilities
- No Equal Opportunity (per FAR 13.201(d) general instruction, although above monetary threshold and thus should be included)

In addition, the following will not apply to such larger purchases:

- No Buy American Act
- No small business preferences or provisions
- No competition requirements
- No OCI clauses or review
- No sole-source justifications

Attachment 2

Integrity of the Market

The Coalition proposes the following principles for GSA when creating an e-Commerce program that is fair, competitive, and open.

- Portal providers actually offering products of their own or of third party suppliers should strictly be an independent party, only hosting and maintaining the community for nonaffiliated buyer and seller transactions on their portal.
- Data protections for suppliers – Section 846(h)(3) requires that the portal provider may not use any information related to a product from a third-party supplier for pricing, marketing, competitive, or other purposes, providing a framework for ensuring protection of a level playing field among portal providers and suppliers.
- Competition – Competition should encompass both competition among suppliers and competition among portal providers/solutions. GSA has already determined that there are multiple types of portal providers and noted at the most recent public meeting that this e-Commerce program will encompass multiple portal providers. GSA should take additional steps to ensure that there is sufficient competition among portal providers. Significantly, a market research consultant⁴ determined that, in the commercial market, less than 1 percent of e-Commerce customers will visit competing retail sites to conduct effective market research.
- Transparent fee structure – e-Commerce marketplaces should maintain transparent fee structures to ensure that there is a healthy competitive landscape by assuring that these fees do not create barriers to entry to the Federal market, that competition is maintained over time in the portals, and that the value of e-Commerce solutions relative to other vehicles is understood clearly.
- Cybersecurity – The portals must maintain a minimum level of cybersecurity that protects that data generated through purchases on the portals. Section 846(h)(2), which requires portal providers to safeguard any information pertaining to the Federal Government, already lays the groundwork to ensure the protection.
- Conflict of Interest – GSA should protect against apparent conflicts of interest among portal providers. Potential conflicts of interest include portal provider receiving compensation to advertise specific products, portal providers using data to compete with third party suppliers, or favoring portal-provided products over third party supplier-provided products.
- Apply Government-unique requirements, as appropriate, *i.e.*, consistent with law/policy.

⁴ See research conducted by Millward Brown Digital, available at <https://www.businessinsider.com.au/macquarie-amazon-prime-estimates-2015-4>

- Ensure portal solutions maintain search engines that generate fair placement of products.