

House Wants Uncle Sam to Purchase COTS Items From Amazon and Other Online Sellers

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Government Contracts Alert

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The House version of the 2018 National Defense Authorization Act (“NDAA”) (passed July 14, 2017) includes key provisions that would radically change the way the Government purchases certain commercial items, and it may result in the extinction of large parts of the Federal Supply Schedules as we know them. Section 801 of the NDAA promotes Government wide use of online commercial marketplaces (“online marketplaces”) such as Amazon, Staples, and Grainger for the acquisition of certain commercial off-the shelf (“COTS”) items, defined as “commercial products” in the proposed legislation. If enacted, the NDAA would be a revolutionary development in the way the Government buys many of its products, allowing agencies to leapfrog over competitive bidding requirements and numerous mandatory clauses now included in Government contracts for commercial items.

The Department of Defense (“DoD”) currently purchases COTS items primarily through two methods: (1) time consuming individual competitive bidding contests or (2) vendors under previously negotiated Federal Supply Schedules administered by the General Services Administration (“GSA”) and the Veterans Administration (“VA”). While GSA and VA schedules are meant to provide the Government with a quick and cost-effective way to procure commercial items (broadly defined by the Federal Acquisition Regulation [“FAR”] to include both COTS items and items of a type customarily used by and offered for sale to the general public), the House Armed Services Committee’s (“HASC”) NDAA summary cited a disturbing statistic codified in a GSA Inspector General report, which “revealed that for IT products alone, GSA rates were 13 percent *higher* than those on the open market” (emphasis added). Moreover, in July 2017, the Government Accountability Office (“GAO”) reported that the DoD’s use of commercial item purchases has *declined* over the past ten years. Although the FAR strongly encourages agencies to purchase commercial items when available, Congress has repeatedly acknowledged the failures of the current regulations and agency practices to achieve that policy goal.

The proposed legislation takes a giant step toward remedying the Government’s purchasing failures. It provides for the establishment of a program to facilitate use of online marketplaces, which will be available to all agencies and mandatory for the DoD’s acquisition of specific commercial products. To establish the program, the GSA is to contract with online marketplaces commonly used in the private sector. Under these contracts, online marketplaces will be required to provide “a dynamic selection” of products and prices from numerous suppliers as well as “procurement oversight controls” (e.g., spending limits, order tracking, and two-person approval for purchases). In exchange, the Government will be prohibited from requiring any participating online marketplace to modify its standard terms and conditions as a condition of receiving a contract – with the limited exception of a handful of clauses that are required by statute to be incorporated in certain contracts, such

as the clause requiring the utilization of small businesses (FAR 52.219-8) and various equal opportunity clauses, including FAR 52.222-35 (veterans) and 52.222-36 (disabilities).

While utilizing modern-day electronic procurement methods has proven cost-effective for commercial consumers, Government contractors will undoubtedly have many questions, and concerns will certainly arise if the legislation is passed in its current form. For example:

- **How Can Contractors Ensure Compliance With Key Government Contracting Requirements?** Section 801 sets forth a process for “supplier and product screening” to ensure compliance with certain buying restrictions embedded in the FAR. On the first day of each month, GSA is to provide qualifying online marketplaces with several lists: (1) contractors that have been suspended or debarred; (2) suppliers that have certified compliance with domestic sourcing requirements (such as the Berry Amendment [10 U.S.C. 2533a], restrictions on specialty metals [10 U.S.C. 2533b], and the Buy American Act [41 U.S.C. 83]); (3) suppliers that have been issued waivers under the Trade Agreements Act; (4) products listed through Federal Prison Industries, Inc., and the AbilityOne Program; and (5) suppliers that are small businesses. Online marketplaces in turn must provide agencies with the ability to search for suppliers and products “authorized or not authorized for purchase” based on the lists provided by the GSA. This screening requirement, however, places the onus on the marketplace, while questions remain as to what consequences marketplaces face for making inaccurate eligibility determinations.
- **Transparency.** When contracting with online marketplaces, GSA will not be required to use competitive procedures. However, it is uncertain how GSA will evaluate and select the online marketplaces. As a result, it is also unclear how online marketplaces that are not selected will challenge these contract awards. On a separate note, participating online marketplaces will collect Government purchasing data under the program to facilitate transparency. On the first day of each month (at a minimum), the online marketplace will provide electronic access to certain information for each product ordered by the Government during the preceding month (e.g., product name, description, date and time of order, price, person and/or entity that made the purchase, official who authorized the purchase, delivery address, and number of suppliers that offered the same or a similar product at the same date and time the product was ordered). Section 801 leaves it unclear whether the online marketplace will provide the number of suppliers that offered similar products generally through the online marketplace or specifically the number of “screened” suppliers that offered similar products to the Government. Of more concern, perhaps, is what the Government will do with the data, how to manage and protect the data, and ramifications for the marketplace of failing to provide the data. Will the Government use the collection of this information as a backdoor avenue to audit participating suppliers?
- **What Products Qualify.** Section 801 limits the DoD’s obligation to buy commercial products from online marketplaces to those that are “appropriate.” No guidance is included as to what the term “appropriate” means. Without further definitional clarification, confusion will abound regarding the DoD’s obligations, and one can easily envision a new frontier of bid protests opening up with regard to purportedly inappropriate “appropriateness” determinations.

On the Senate side, in June the Senate Armed Services Committee (“SASC”) unanimously approved their version of the 2018 NDAA, on which the full Senate has yet to vote. While the Senate version does not contain a section similar to Section 801, Section 855 of the SASC-approved version includes provisions that are equally revolutionary. It essentially eliminates all flow-down clauses in subcontracts for COTS items and significantly reduces the number of mandatory clauses in commercial item prime contracts. The Senate version eliminates all DFARS regulations promulgated after the enactment of the Federal Acquisition Streamlining Act of 1994 that require specific contract clauses for commercial item acquisitions. Second, the Senate version eliminates all requirements for prime contractors to have flow-down clauses in subcontracts for COTS items unless the clause is required by law or necessary for the prime to meet contract requirements.

Both the House and the Senate agree the Government’s current acquisition model for commercial items does not take advantage of the fast-paced, competitive nature of the commercial market. Changes to commercial item acquisitions are necessary; the debate, however, surrounds how to formulate and implement those changes. As we eagerly await action by the full Senate and the reconciliation that will provide the final version of the FY 2018 NDAA, it is not too early for suppliers, especially those now on the Federal Supply Schedules, to begin examining with their legal counsel the impact of the changes proposed. The costs, risks and ease of doing business with the Government will change for COTS

suppliers, but understanding those changes requires careful deliberation well in advance of the impending passage of the legislation.