Surprise, Surprise, Congress Does Listen — Well, Kind Of

An Analysis of NDAA Section 846's Online Marketplace Provisions

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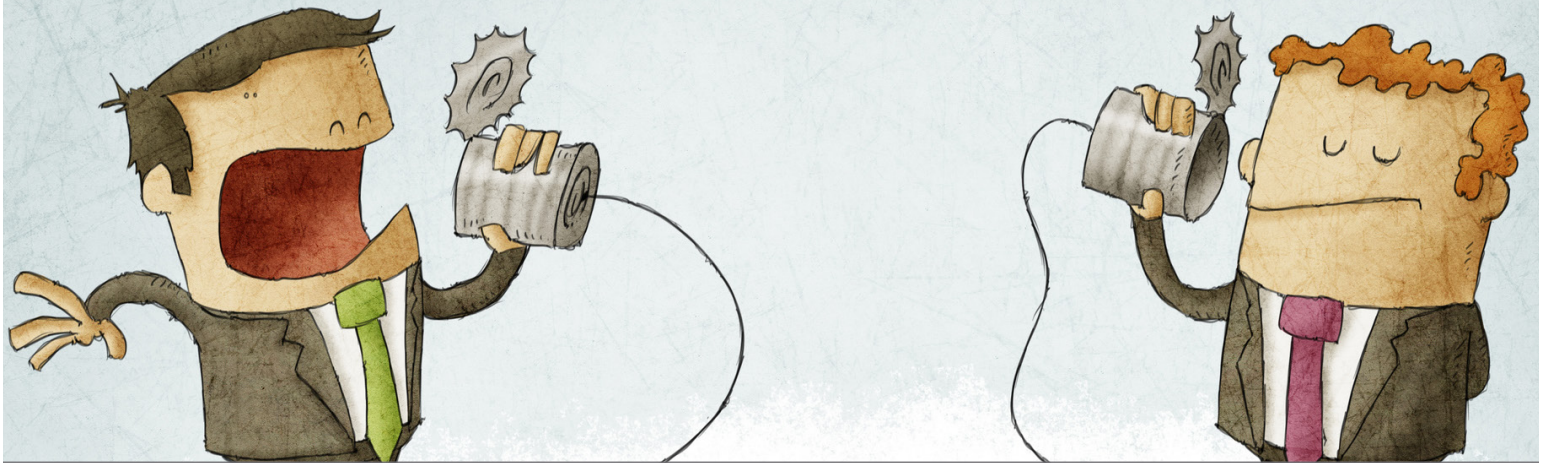

There has been a lot of speculation about the future of commercial items purchasing within the federal Government since Representative Mac Thornberry circulated his "Section 801" proposal to hand over the bulk of DOD COTS purchasing to one or two existing online commercial marketplaces. (See Section 801 article HERE). Industry groups mobilized, companies called their legislators, and the media contributed several stories describing the wide spread criticism of the House NDAA proposal. To the surprise of many, however, the Senate seems to have heard industry's concerns – or at least some of them.

The compromise language that just emerged from the House/Senate Conference, designated Section 846 of the 2018 NDAA, reflects significant improvements from the original Thornberry bill. While the new compromise language still moves the Government significantly down the path toward the creation of an online marketplace, which almost certainly will change the way DOD (and likely other federal agencies) will purchase COTS items, the new approach resolved many of the most problematic provisions of the original House bill.

Unlike Section 801, which contemplated a quick, non-competitive award to an existing commercial marketplace provider to handle DOD COTS purchasing, Section 846 directs OMB and GSA to create a phased-in implementation plan and schedule to develop, evaluate, and implement the new online marketplaces (now called "ecommerce portals") over the better part of three years. The new language identifies a three-phase approach.

- Phase 1 gives OMB and GSA 90 days to develop an implementation plan and schedule.

- Phase 2 gives OMB and GSA a year after the plan/schedule is complete to conduct market research and to consult with federal agencies, potential ecommerce portal providers, and potential suppliers. Among other things, the "consultation" contemplated in this phase will focus on how current commercial portals function, the standard Ts & Cs of such portals, and to what extent the currently-existing portals would have to be modified to meet Government needs. This phase also will involve an assessment of data security, consideration of issues of concern to "non-traditional" Government contractors, and a review of the impact of fees charged by portal providers. On the issue of fees, the Conference Report accompanying the compromise language offered this warning to GSA: "The conferees are aware of various fee-based and other business-to-business arrangements to feature products offered by certain vendors in many commercial e-commerce portals. The conferees expect the Administrator to ensure that any contract or other agreement entered into for commercial e-commerce portals under this program preclude such business-to-business arrangements."

- Phase 3 gives OMB and GSA two years (from the creation of its Phase 1 plan/schedule) to develop guidance for the use of the portal, "including protocols for oversight" of procurements through the new program.

As OMB and GSA progress through these three phases under the watchful eye of Congress and the GAO, their efforts will be guided by other provisions of Section 846 that differ significantly from Section 801.

As with Section 801, Section 846 vests significant responsibility in GSA to come up with a means to ensure products sold through the portals are screened to meet applicable statutory requirements. This likely refers to regimes like the Trade Agreements Act ("TAA"), the Buy American Act ("BAA"), environmental requirements, security requirements, and the like. The language leaves it to GSA to figure out whether it will provide the necessary product data to the portal providers or will develop a mechanism for the providers to obtain those date on their own, presumably directly from the suppliers/ manufacturers. In either case, the continuing importance of product attribute data suggests neither suppliers nor portal providers should view the new procurement process as one devoid of obligations and/or risks.

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The new language, for example, significantly reduces (but does not eliminate) the obstacles to becoming an official portal provider. Previously, Section 801 incorporated requirements only a handful of companies in the world (if that many) could have met. Section 846 is less restrictive. It defines an acceptable portal as a "commercial solution providing for the purchase of commercial products aggregated, distributed, sold, or manufactured via an online portal." It directs GSA to "consider" portals that are "widely used in the private sector" and that "have or can be configured to have" frequently updated supplier and product selections, as well as an assortment of product and supplier reviews.

As before, the language still expressly states the portal cannot be managed by the Government or designed for the primary use by the Government. Thus, neither GSA Advantage nor FedMall can satisfy the Section 846 requirements.

Unlike the House version of the bill, Section 846 does NOT state the portal providers will be selected without competition – a provision that greatly concerned not only industry, but many GSA officials as well. To the contrary, Section 846 states that current procurement laws will apply to the program unless explicitly exempted. This new language suggests GSA will have to develop some sort of competitive process to select the portal providers. Whether that means GSA will conduct a full-and-open, head-to-head competition among potential portal providers or an everyone-who-meets-the-requirements-gets-in type competition (like GSA uses to award Schedule contracts) is unclear. In either case, the removal of the "non-competitive" language from Section 801 is a material improvement over the House bill.

On the flip side of the *obtain-data-from-GSA* coin, the new compromise language includes an expected *submit-data-to-GSA* obligation on the part of portal providers. Specifically, pursuant to Section 846, portal providers will have to collect and provide "order information" to GSA. While GSA is left to determine what sort of "order information" it needs, chances are the resulting list will be similar to the data currently required through GSA's TDR program. (See TDR article HERE.)

Notwithstanding the Section 846 language directing OMB and GSA to ensure the awarded portals meet certain requirements, the compromise bill clearly reflects an effort on the part of Congress to minimize meddling in the structure of existing commercial ordering platforms. In fact, the Conference Report accompanying the compromise bill "encourages" GSA "to resist the urge to make changes to the existing features, terms and conditions, and business models of available e-commerce portals, but rather demonstrate the government's willingness to adapt the way it does business." This "encouragement" becomes a bit more pointed in the next sentence: "Pursuant to a diligent review of existing law and regulation, the conferees direct the Administrator to be judicious in requesting exceptions."

Section 846 doesn't have much to say about how agencies will purchase through the portal. Rather, it leaves most of that to GSA and OMB to figure out down the road. At this point, however, the language provides the authorized portals will be limited to COTS purchases. (The language actually uses the term "commercial products," but strangely redefines the term to mean COTS items.) Importantly, the language no longer includes the prior indecipherable provision providing that purchases would be deemed to meet all competitive requirements merely by virtue of there being more than one supplier selling the product. Here again, the removal of the non-competitive language represents an improvement over the prior language. (The new language, however, provides no insight regarding the "protestability" of orders placed through the new portals, which currently is one of the only means industry has to hold agencies accountable for flawed purchasing decisions.)

Another improvement over the original Section 801 language is the way the compromise bill deals with the treasure trove of data to which the portal providers will have access. The previous Thornberry language precluded the online marketplace provider from selling or giving those data to third parties, but imposed no constraint on the provider's use of those data for its own strategic purposes. Consequently, if a provider also were a seller, the provider could have used sales data from its competitors strategically to tailor its own offering and price its own products. The new language precludes this by requiring the portal provider to agree "not to use for pricing, marketing, competitive, or other purposes, any information related to a products from a third-party supplier featured on the commercial e-commerce portal...." While this is improved language, it will not be easy for GSA to police this requirement. No doubt, the GSA OIG already is thinking through how it can help.

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Probably the most important change regarding purchasing relates to the prior Section 801 language that precluded ordering agencies from altering the marketplace provider's standard terms and conditions. That prohibition raised serious concerns over how fair a marketplace's standard terms would be in a near-monopoly situation. The prohibition also raised significant questions about how the Government would deal with critical policy imperatives; things like data security, the Anti-Deficiency Act, socio-economic goals, country of origin rules, and the like.

The new language resolves at least some of those questions by providing that purchases through the portals "shall be made, *to the maximum extent practicable*, under the standard terms and conditions of the portal…." This is not unlike the language currently used in FAR Part 12 procurements requiring that "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses … determined to be consistent with customary commercial practice." Since it will not be easy to define when a commercial term must be accepted by the Government or not, however, this likely will be an area for future litigation — just as it has been under FAR Part 12.

Notwithstanding the many improvements in the Section 846 language, the extensive breadth of the new program continues to concern many.

- First, the ecommerce portals will accommodate purchases up to the Simplified Acquisition Threshold. While more limited than the original Section 801 language, this still will direct a significant volume of DOD COTS purchasing into the hands of commercial entities.

- Second, while the language is focused on DOD purchasing, it expressly states the portal must be able to accommodate Government-wide purchasing. In other words, DOD is just the starting point. We can expect to see the program expanded to all agencies over time.

- Third, and perhaps most importantly, a companion provision of the NDAA provides that if a product previously has been purchased through a commercial items vehicle (e.g., a FAR Part 12 contract), it cannot be purchased via a more structured procurement (e.g., a FAR Part 15 contract) in the future without jumping through certain hoops. Indeed, the text expressly states that monies given to DOD may not be used to fund a FAR Part 15 procurement if the products

being procured previously were purchased through a FAR Part 12 procurement. This new language appears to be designed to make it extremely difficult for DOD (and other agencies in the future) to circumvent the new portals by creating full and open commercial items competitions.

On the topic of commerciality, it is worth noting that, in addition to the ecommerce portal provisions of the compromise bill, the NDAA also includes a number of provisions designed to expand the Government's use of commercial items purchasing vehicles and expand the number of products qualifying as commercial items. These new provisions direct DOD to undertake a broad review of its current regulations, contracts, and subcontract flow-down terms to get rid of non-commercial clauses and provisions that have crept into DOD programs over the years. Indeed, the new language directs the Defense Acquisition University to develop new, meaningful training for COs to help them master commercial items acquisitions. This is a welcome development.

Finally, in addition to the positive changes for large businesses, small businesses also have something to cheer about in the compromise language. Section 846 makes clear purchases through the new ecommerce portals are deemed purchases from prime contractors such that the ordering agencies still get their small business purchasing credit. The language also expressly states that agencies still can set aside their purchases for small businesses as they did before. (These provisions also suggest small business designation will be one of the several attributes portal providers will be required to display on their web sites.)

In the end, the new language is a significant improvement over the original House proposal, but it leaves many questions unanswered. Section 846 directs OMB and GSA to fill in those blanks. And it provides for multiple reviews (including a detailed, phased-in GAO review) of how well OMB and GSA do their job. Time will tell what the new program looks like. But we can be certain of one thing at the moment. The commercial items procurement landscape will change. It just may take longer than Rep. Thornberry had hoped.

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