

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## GSA's Commercial Marketplaces Initiative: Opening Amazon & Other Private Marketplaces To Direct Purchases By Government Users

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The U.S. General Services Administration (GSA) opened a new chapter in public procurement by awarding three contracts—to Amazon Business, Overstock.com, and Fisher Scientific—that will allow federal users to buy directly from online electronic marketplaces, with sales anticipated to total \$6 billion annually.<sup>1</sup> This proof-of-concept effort, dubbed the “commercial platforms” initiative by GSA, marks a radical departure from traditional procurement practices because it will allow individual Government users (not necessarily procurement officials) to make “micro-purchases” (generally up to \$10,000) using Government purchase cards. By removing the federal procurement system as an intermediary in the purchasing process, and in essence outsourcing the selection of available sources to private providers of electronic platforms, GSA’s initiative has both reshaped procurement and potentially redrawn a marketplace.

This BRIEFING PAPER reviews the purpose and history of GSA’s commercial platforms initiative,<sup>2</sup> which began with a mandate from Congress to explore electronic commerce options and evolved through long exchanges with industry, users, and other stakeholders. In assessing the reasons for the initiative, the PAPER notes a longstanding concern that users’ needs were not being met by the traditional procurement system. The PAPER discusses GSA’s decision to steer the initiative to existing commercial platforms and reviews key elements of the solicitation used to frame the “no-cost” contracts with the online marketplaces. Because Amazon Business was by far the most prominent of the awardees—indeed, Amazon had played an ongoing role in

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pressing for the procurement<sup>3</sup>—and vendors may want to sell through the commercial platforms to reach federal customers, this BRIEFING PAPER focuses on Amazon Business' procedures in discussing how vendors might join the commercial platforms. The PAPER concludes with a series of *Guidelines* that vendors and other market participants might use, as they enter this new corner of the federal marketplace.

## Purposes Of The Initiative

Throughout the commercial platforms initiative, Government policymakers have argued that the purposes of this initiative—the reasons to open commercial marketplaces for direct micro-purchases by Government users—are to harness mature commercial technologies to reduce costs and gather more data regarding purchases made for Government use. But those stated purposes, while certainly true, do not fully explain why the electronic marketplaces are being opened to direct purchases by Government users, largely bypassing the existing federal procurement system (and procurement officials). The initiative, for example, could have been redirected differently, to give only procurement officials access to the commercial portals. The fact that the initiative was shaped to give users direct access to the online marketplaces (albeit access that is structured and supervised) suggests that there is a deeper purpose here, one tied to the nature of the procurement market itself: the abiding concern that users' needs have not been adequately served by the existing federal procurement system.<sup>4</sup>

Traditional public procurement faces a conundrum because of what economists call an “agency problem”—the fact that public procurement, unlike a private purchase, relies on an intermediary (procurement officials, acting as agents for the principal, the Government) to accomplish

the purchase. As economists have long noted, an agent almost invariably strays from the principal's optimal outcome due to selfish interests.<sup>5</sup> Thus in the U.S. federal procurement system, as in almost all such systems, too often the equipment or services acquired are not what users would have chosen themselves. This can occur, for example, in regular equipment purchased for the military, because these purchases lack the high visibility (and thus accountability) of weapons systems purchases, and there is only a limited feedback system from soldiers to vendors to ensure consistent high quality.<sup>6</sup> As a result, often the quality of individual military equipment is so poor that service members prefer to purchase commercially available substitutes with their own money—often from electronic marketplaces.<sup>7</sup> This opens the door to an obvious question: why not allow users to purchase directly from commercial marketplaces, bypassing the flawed procurement system?

Allowing Government users to purchase directly can ease the unrecognized costs caused by traditional procurement's “agency” problem, costs which normally are borne by individual end-users and are thus (for the most part) invisible in the procurement system. By empowering individual end-users in appropriate circumstances to make individual best value determinations<sup>8</sup>—which is precisely what GSA proposes to do in the current initiative—this new approach could eliminate layers of aggregated agency costs, (at least arguably) better align purchases with end-users' particular preferences, and trade a potentially disinterested purchasing agent for a user informed by personal experience, who anticipates actually using the product. Direct purchases also would drive competing vendors to do better at meeting users' needs and so should provide users with improved goods and services. The outcome of “disintermediation” would be more efficiency

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in the sense of achieving better value for money and more efficiency (as policymakers have already noted) because of reduced transaction costs in every purchase.<sup>9</sup>

Understanding this aspect of the commercial platforms initiative—the efficiency gains promised by bypassing the traditional procurement system—has important ramifications. First and most obviously, it raises a potential threat to the procurement regime for commercial items as a whole; GSA has deferred that controversy for now, by limiting users to micro-purchases that Government purchase card holders have long been able to make independently anyway.

This perspective also helps explain why the Government has been willing to adopt a purchasing strategy of almost instant online purchases by federal users—a strategy that largely abandons the competition, transparency, and accountability that are hallmarks of traditional procurement. Because competition, transparency, and accountability (through mechanisms such as bid protests) were imposed in part to ensure that potentially indifferent procuring officials (the agents) in fact bought best value, arguably those devices will not be necessary when the end-users (who are personally incentivized to achieve value for money) purchase directly from the new commercial platforms.

Finally, recognizing that this new procurement strategy relies heavily upon federal users' incentives to achieve best value for their own purposes also helps explain the special requirements that Congress imposed on the commercial platforms initiative. As is discussed in detail below, in launching this initiative, Congress insisted that the commercial platforms accommodate the Government's special needs for cybersecurity, socioeconomic preferences, data aggregation, and excluding corrupt and incompetent vendors—requirements grounded in the Government's institutional goals which (unlike best value) will *not* necessarily be shared by individual purchasers. At the same time, however, as is noted below Congress stressed that GSA should accommodate the platforms' commercial practices as much as possible, at least arguably so that the broader competitive forces at work on those platforms can help guide individual purchasers towards achieving best value.

## History Of The Initiative

The commercial platforms initiative formally began

with Congress' direction to GSA under § 846 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 to assess electronic commerce options. After a series of public exchanges and reports, GSA opted to use existing commercial platforms rather than improving the Government's own online catalogues but to limit purchases on the platforms to micro-purchases. Throughout this chain of developments, from Congress and through GSA's policymaking process and ultimately the contract solicitation and award, the commercial platforms initiative evolved in an effort to reconcile existing commercial portals with the Government's special needs.

### Congress' Launch Of The Initiative

The U.S. Government's move to embrace electronic marketplaces began with a mandate from Congress for GSA to assess e-marketplaces in federal procurement.<sup>10</sup> Congress called, in § 846 of the FY 2018 NDAA, for GSA to establish a program to procure through commercial e-commerce portals “for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products.”<sup>11</sup> GSA was to establish the initiative under multiple contracts, through phases of planning and market analysis and consultations, “with the objective of enabling Government-wide use of such portals.”<sup>12</sup>

GSA was to consult with the market to determine commercial portals' standard terms and conditions, and “the degree of customization” for the Government's needs “that can occur without creating a Government-unique portal,” while remaining mindful of “the impact on existing programs” including GSA's Multiple Award Schedules (MAS) contracts, set-asides for small businesses, “and other preference programs.”<sup>13</sup> Congress emphasized the need to assess supply chain risks relating to specific product categories, such as health care products, and the special “precautions necessary to protect against national security or cybersecurity threats.”<sup>14</sup>

Consistent with Federal Acquisition Regulation (FAR) Part 12's preference for commercial items, Congress emphasized, in § 846, that GSA was, “to the maximum extent practicable,” to allow sales through the electronic portals to be made “under the standard terms and conditions of the portal.”<sup>15</sup> The accompanying conference report urged GSA “to resist the urge to make changes to the existing features, terms and conditions, and business

models of available e-commerce portals,” and instead to “demonstrate the government’s willingness to adapt the way it does business,” and “to be judicious in requesting exceptions” to normal commercial practices.<sup>16</sup>

Congress also set guidelines for protecting the federal supply chain through the electronic portals. GSA was to establish protocols for “compliance with laws pertaining to supplier and product screening requirements, data security, and data analytics.”<sup>17</sup> GSA was to rely only on e-commerce portals that are widely used in the private sector and that can be configured “to have features that facilitate the execution of program objectives, including features related to supplier and product selection that are frequently updated, an assortment of product and supplier reviews, invoicing payment, and customer service.”<sup>18</sup>

Congress made it clear that all procurement laws are presumptively to apply to the electronic portals, including the Anti-Deficiency Act (which bars purchases that are not supported by an appropriation). To facilitate small business sales through the portals, Congress also deemed every sale to a small business through a portal “an award of a prime contract for purposes of the goals established under . . . the Small Business Act,” and left agencies the discretion to restrict competition to small business concerns.<sup>19</sup>

In response to vendors’ concerns that the firms running the online portals could exploit their access to vendor sales data to displace those same vendors, Congress called for GSA to require that any portal “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” and to require that the portals “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.”<sup>20</sup> Congress followed up with § 838 of the NDAA for FY 2019, which bars misuse of sales data.<sup>21</sup>

Congress was also concerned that vendors would pay to be featured on the electronic portals, and thus skew users’ purchasing preferences. The conference report noted that Congress was “aware of various fee-based and other business-to-business arrangements to feature products offered by certain vendors in many commercial e-commerce

portals.”<sup>22</sup> The conferees, the report stated, expected GSA “to ensure that any contract. . . entered into for commercial e-commerce portals under this program preclude such business-to-business arrangements.”<sup>23</sup>

Although (as is discussed below) GSA ultimately decided to limit purchases on the portals to the much lower micro-purchase threshold (generally \$10,000), in launching the initiative under § 846 Congress would have allowed purchases up to the simplified acquisition threshold (currently \$250,000).<sup>24</sup> GSA has recommended that the micro-purchase threshold be increased to \$25,000 for platforms approved by GSA.<sup>25</sup> After an initial three-year contract period for the e-portals, the U.S. Government Accountability Office (GAO) is to submit a report on the initiative that is to assess (among other things) the impact on agencies’ ability to meet goals under the Small Business Act.

### GSA’s Planning & Industry Engagement

GSA initially published a report that noted that the Government could follow three possible models: to use commercial marketplaces (such as Amazon); to use the *technology* that powers those marketplaces (to use commercial solutions to enhance, for example, GSA’s online marketplace, gsaadvantage.gov); or, to shop directly from online vendors.<sup>26</sup> In a later report, published in April 2019, GSA chose to follow the first option first: to launch a pilot for purchases through commercial electronic marketplaces.<sup>27</sup> Under this approach, GSA would collect a “referral” fee for sales to Government users through the online marketplaces,<sup>28</sup> while avoiding the costs and risks of improving Government portals, or of relying on transactions through individual vendors’ websites.

GSA clarified the way forward for the commercial platforms in a draft request for proposals (RFP) in mid-2019.<sup>29</sup> The draft RFP package confirmed that:

- GSA intended to make awards to multiple commercial e-platform providers that offered diverse goods and services (not focused on a market niche) through “no-cost” contracts.
- Orders from these commercial marketplaces would be under the micro-purchase threshold and thus largely free from regulatory requirements (including the Buy American Act).<sup>30</sup>

- Purchasers would use Government purchase cards, which are available to any Government user with authorization.<sup>31</sup>
- GSA estimated that the electronic marketplaces would cover a market of roughly \$6 billion in federal sales.<sup>32</sup>

The initial commercial platforms solicitation published by GSA was challenged in a bid protest at the GAO by Overstock.com. GAO refused, however, to make the substance of that protest public, even in redacted form.<sup>33</sup> According to press reports, GSA resolved several additional agency-level protests (including one by Amazon),<sup>34</sup> and then GSA announced that award was delayed due to the COVID-19 pandemic.<sup>35</sup>

During this period before award, the procurement community focused closely on the terms of GSA's amended solicitation for the commercial platforms because the solicitation offered the best available information on how these new marketplaces—which could swallow billions of dollars in federal procurement annually—would be structured.

### GSA's Solicitation

The solicitation<sup>36</sup> that GSA issued in October 2019 underwent several substantial amendments before award was finally made in June 2020. As this process unfolded, GSA emphasized that a key goal in the procurement would be “user experience”—the federal purchaser's experience in using an approved commercial platform—which GSA identified as a “primary adoption driver for this initiative.”<sup>37</sup> This focus on “user experience” echoed the assumption, discussed above, that the risks of removing the contracting official/intermediary from the purchasing chain, and radically decreasing transparency and competition, would be outweighed by the gains in user satisfaction and quality as users were liberated to purchase directly on their own.

*Scope:* The solicitation sought commercial platforms that offer diverse commercial off-the-shelf (COTS) items.<sup>38</sup> “Specialty” marketplaces (for information technology or healthcare, for example) would not qualify.<sup>39</sup> The awardee platforms, though focused on supplies, could apparently offer both supplies and services<sup>40</sup>—a vitally important opening in a broader federal marketplace

dominated by a demand for services.<sup>41</sup> Consistent with Congress' mandate (discussed above), the commercial platforms will be available to customers across the Federal Government. While GSA will partner with other agencies that are interested in the proof of concept, “GSA does not intend to limit the e-marketplace platform to just these ‘proof of concept’ agencies and will allow ‘ad-hoc’ Government buyers to purchase on the platform as long as they have a GPC [Government Purchase Card].”<sup>42</sup>

*Contractual Structure:* GSA's Amended Statement of Objectives (SOO) said that each “individual order placed by an agency through the platform will create a contract between the agency and the vendor of the ordered product(s), separate from the commercial e-marketplace contract resulting from the RFP.”<sup>43</sup> As is discussed below, this approach—to treat each order as a separate contract—could have very important ramifications for cybersecurity compliance, among other legal obligations.<sup>44</sup>

Because each order through the commercial platforms will constitute a separate contract, in the Questions and Answers issued to offerors on November 5, 2019, GSA agreed (per an offeror's question) that because “suppliers are not considered subcontractors to the e-marketplace providers in customary commercial practice, . . . suppliers on the marketplace are not subject to flowdown of the clauses and provisions [included in Sections C and E of the solicitation], as this would be contrary to the text and legislative history” of § 846, the enabling legislation. As a result, those requirements (discussed further below) “are only applicable to the contract holder,” *i.e.*, the platform itself.<sup>45</sup>

To define the obligations of the purchasing user and the vendor offering goods and services through the commercial platform, each commercial platform will be required to proffer certain “click-through” text (defined in Attachment 1 to the solicitation) for every user making a purchase. The “click-through” text provides that the submission of an order through the platform “creates a contract. . . between the provider of the item being purchased. . . and the Federal agency purchaser.”<sup>46</sup> By entering into that contract, the provider (the seller) will agree that the click-through terms would take precedence over any conflicting provisions in either the private provider's or the Government purchaser's standard documentation. In accordance with federal fiscal law, any provision requiring a purchasing agency to pay any future

fees, interest, or legal costs to the seller, or otherwise to indemnify the seller, will be excluded. Any disputes between the seller and the Government customer will be subject to federal law, no arbitration or injunctive relief can be forced against the federal customer, and (in accordance with normal federal practice) contract performance is to continue during the pendency of a dispute.

*Vendor Data:* One of the most controversial issues in this initiative has been whether the commercial platform providers will be able to appropriate the data of third-party vendors on the commercial platforms. Small businesses and other vendors in the federal market have voiced concerns that Amazon and other platforms may use that price and demand data to take over portions of the federal market, displacing traditional contractors. In an effort to address these concerns, in § 838 of the NDAA for FY 2019 Congress said that the platform providers must agree not to use information “related to a product from a third-party supplier featured on the commercial e-commerce portal or the transaction of such product” for commercial purposes.<sup>47</sup>

While the platform providers are restricted in their use of the data generated by purchases across the platforms, the Government itself expected to benefit from new access to purchasing data from the platforms. Section C.8 of the amended solicitation said that, for “the avoidance of doubt, the Government shall have unrestricted use of the data referred to in Section 838 [of the NDAA for FY 2018].” In its press release announcing the awards on June 26, 2020, GSA noted that it expects the data on platform purchases will help the Government ensure compliance with socioeconomic requirements, such as “AbilityOne, small business, and supply chain risk management.” The amended solicitation noted that a “key intended benefit of this program is to gain better insight into what is being purchased under the micro-purchase threshold.” GSA therefore “seeks purchasing and spend data from the . . . platform providers, both at the account level (for buyer’s use) as well as at the platform level (for GSA’s collection and dissemination out to agencies).”<sup>48</sup> “All data,” said the solicitation, “is owned by the Government and will be transferred at the end of the contract period.”<sup>49</sup> Although the solicitation asked for certain data on a monthly basis, as “the program matures,” noted GSA, the Government “intends to make this more of a dynamic feed for real-time ingestion and will work with the platforms to ensure it aligns with their commercial practice.”<sup>50</sup>

*Competition, Price Reasonableness, and Quality Assessments:* Because federal users will be able to make purchases on the approved platforms in a matter of seconds, without traditional transparency or a formal competition, as noted, a recurring concern has been that the purchases could be at unreasonably high prices, of defective products, or on terms unfavorable to the Government.

The solicitation did little to require rigorous market research or competition, and instead left the purchasing process—potentially for thousands of dollars—in the hands of the individual federal users. The amended solicitation noted that ordering officials “are required to review similar items and their prices and price related terms and conditions. . . . from at least two suppliers.”<sup>51</sup> Through this limited review, GSA said, “the ordering official has determined the price of an item selected is reasonable and results in the best value.”<sup>52</sup> The amended solicitation included a draft user’s guide, which said that the “e-marketplace platform is expected to provide a means for the authorized purchase cardholder to document this review. This function will be useful both for purposes of review and approval prior to placement of orders and to maintain a record of purchases.”<sup>53</sup>

Although the solicitation hinted that prices on the platforms should be at commercial prices or better<sup>54</sup>—a requirement akin to the “most favored customer” requirement that has long been the hallmark of GSA’s own Multiple Award Schedule contracts<sup>55</sup>—ultimately the solicitation indicated that this meant merely that the commercial platforms should be offering Government customers the same prices that are offered commercial customers.<sup>56</sup>

One way to mitigate the risk that Federal Government users will purchase substandard products on the platforms is to allow the users to rely upon reviews posted by other customers—a standard part of modern electronic purchasing. A draft user’s guide which accompanied the solicitation cautioned, though, that Government purchasers “shall not post product ratings and vendor reviews until GSA disseminates guidance for the appropriate policy and procedures for such reviews.”<sup>57</sup> However, purchasers “may use the existing reviews as part of market research prior to the purchase of an item.”<sup>58</sup>

*Qualification of Suppliers:* Because federal purchasers

on the commercial platforms cannot, in practice, use the traditional means of protecting the Government from performance risk—technical assessments and thorough past performance reviews—in practice the Federal Government may need to rely on a cruder means of protecting itself from performance risks: exclusion. Traditionally, the Government would have excluded vendors through a finding of non-responsibility (by the contracting officer) or a lack of present responsibility (through suspension or debarment by a debarring official). But under GSA’s commercial platforms initiative, since the platforms control the roster of vendors available to federal customers, the platforms have (to a large extent) taken over the Government’s functions of exclusion—though the same concerns regarding fairness and competition persist.

To make the platforms’ qualification processes plain to GSA and the vendor community, the solicitation stated that offerors’ proposals “should describe the processes. . .to vet 3rd party suppliers. . .taking competition and supply chain risks into account.” This “vetting process should be published in a transparent manner on the e-marketplace platform provider’s site and publicly disclose all supplier fees associated with selling on the platform.” This site, the solicitation continued, “will be used as a reference point by the Government to direct prospective suppliers seeking information about the onboarding process.”<sup>59</sup> While these vetting processes are required to be transparent, the solicitation was explicit that the platform providers “reserve the right to manage the rules governing the on-boarding of new suppliers in accordance with their commercial practices.”<sup>60</sup>

Under GSA’s solicitation, GSA retained the authority to require the commercial platform providers to exclude vendors that have been suspended or debarred by the Government.<sup>61</sup> GSA’s solicitation further provided that offerors, in their proffered Performance Work Statements (PWSs), had to “describe [their] ability to accommodate Government requests. . .to prevent the sale of products or services to Government buyers that have been excluded by the Government.”<sup>62</sup> If the platforms prevent excluded vendors from selling to federal customers, this will give the Government a basic line of defense against corrupt or incompetent contractors—though it may result in a substantial increase in debarment actions, if for example vendors turn to debarment as a primary means to exclude competitors from this new marketplace.

The GSA solicitation also called for the platforms to explain how they will “prevent the sale of products or services to Government buyers by prohibited vendors.”<sup>63</sup> The solicitation explicitly notes that the platforms will be subject to § 889 of the NDAA for FY 2019, which prohibits executive agencies from entering into a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services—most prominently, equipment or services from Chinese telecommunications giant Huawei Technologies Company—on or after August 13, 2020.<sup>64</sup> An interim rule published on July 14, 2020, implementing § 889 prohibits agencies from contracting with entities that use end-products produced by the covered companies and prohibits the use of any equipment, system, or service that uses covered equipment or services as a substantial or essential component of any system or as critical technology as part of any system.<sup>65</sup>

How § 889 is implemented under the commercial platforms contracts will be noteworthy. Because under GSA’s solicitation each offeror was required to submit a PWS that would explain how the offeror would address, among other things, cybersecurity and supply chain security, and the PWS was to be incorporated into the platform contract, those PWSs should, in principle, offer important insights into how § 889’s “Huawei ban” will be implemented by the commercial platforms.<sup>66</sup> In fact, however, the PWSs from the three contractors, which GSA produced in redacted form in response to a Freedom of Information Act (FOIA) request, apparently did not address § 889 compliance directly.<sup>67</sup> Instead, once the pivotal interim rule implementing § 889 was issued in July 2020<sup>68</sup>—after the “commercial platforms” contracts were awarded in June—GSA announced that the “three awarded e-marketplace platform contracts (Amazon Business, Fisher Scientific, Overstock.com) within the Commercial Platforms proof of concept [had] been modified to include [the] FAR clause” that implemented § 889, FAR 52.204-25, “Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020).” Thus, though the commercial platform contractors’ offers apparently did not resolve how the “Huawei ban” would be addressed, their contracts with GSA ultimately were modified to include the § 889 obligations.

A related issue will be third-party vendors’ compliance

under § 889. Because each order to a third-party vendor through the platforms may constitute a separate contract,<sup>69</sup> part of the compliance burden of § 889—which falls on all contractors, including those under micro-purchases<sup>70</sup>—may be borne by the third-party vendors selling through the commercial platforms.

A separate but related question relates to counterfeits sold on the commercial platforms. As a result of its January 2020 trade deal with China, under which the United States vowed to find new ways to stop counterfeit goods in online marketplaces,<sup>71</sup> President Trump issued Executive Order 13,904<sup>72</sup> as part of a broader fight to stop counterfeit goods from China.<sup>73</sup> The January 31, 2020 executive order swept up electronic marketplaces (such as Amazon) in the measures called for to address counterfeiting. The order noted that it is the U.S. Government's policy to suspend and debar counterfeiters that "flout the customs law," for lack of present responsibility. Those suspended or debarred by Customs & Border Protection (CBP), said the executive order, should be "excluded from importation of merchandise into the United States."<sup>74</sup> The executive order also stated that it "is the policy of the United States Government that . . . other entities, including e-commerce platform operators, should not facilitate importation involving persons who are suspended or debarred by CBP."<sup>75</sup>

In an editorial for CNN, Peter Navarro, a senior White House trade adviser, followed up on Executive Order 13,904 by warning that the Department of Homeland Security would move aggressively to combat trafficking in counterfeits, including by "suspending and debarring repeat offenders." Navarro called for private sector "best practices" to stop counterfeiting, to include "significantly enhanced third-party marketplace vetting; . . . rapid notice and takedown procedures; and pre-sale identification of third-party sellers." Navarro said that the Trump administration "also wants e-commerce platforms to provide clearly identifiable country of origin disclosures." Navarro warned that these best practices were not meant as mere suggestions, and that the "federal government will use all means necessary to encourage rapid adoption and to monitor progress."<sup>76</sup>

The Trump administration's efforts to enhance cybersecurity and stop counterfeits suggest that there may be an increase in suspension and debarment actions to exclude

third-party vendors from the commercial platforms, in part because the Government has no other ready means (e.g., past performance or technical evaluations, responsibility determinations, etc.) to protect itself when federal users make rapid purchases from the e-commerce platforms. The Trump administration's call for exclusion may be amplified by market incumbents, which may argue that new firms entering the federal marketplace through the commercial platforms are not, in fact, presently responsible.

*Socioeconomic Requirements:* The U.S. procurement system sustains a remarkable array of socioeconomic requirements, including "Buy American" preferences, set-asides for small and disadvantaged businesses, and many other requirements grounded in special social, political, and economic goals. The Federal Government's special socioeconomic requirements are of course not part of a normal commercial marketplace, and so they present an immediate quandary: how can these socioeconomic requirements be accommodated as the Government uses a commercial platform?

The commercial platforms' obligations to accommodate socioeconomic requirements are narrowed because purchases on the platforms are limited to micro-purchases; micro-purchases are not subject to small business set-asides,<sup>77</sup> and, under FAR 13.201(d), micro-purchases "do not require provisions or clauses, except as provided at [FAR] 13.202 [related to Anti-Deficiency violations] and [FAR] 32.1110 [related to electronic payments]." This "paragraph takes precedence over any other FAR requirement to the contrary, but does not prohibit the use of any clause."

That does not mean, though, that micro-purchases on the platforms will be exempt from all socioeconomic considerations. GSA called for the platforms to allow purchasers to track purchases from small and disadvantaged businesses, and, by their terms, FAR Part 8's requirements apply to micro-purchases, including special requirements under FAR 8.002 regarding the AbilityOne program (discussed further below).<sup>78</sup>

As a threshold matter, GSA hoped to allow federal purchasers to identify and track purchases on the commercial platforms from small and disadvantaged businesses, so that those sales will "count" towards the purchasing agencies' socioeconomic goals. As the solici-



tation noted, because the enabling legislation (§ 846) “allows agencies to count [purchases] from small business suppliers toward socioeconomic contracting goals.”<sup>79</sup> GSA’s Amended SOO stated that it would be “important” for the platforms to be able to designate preferred vendors, preferred items, and items from small businesses.<sup>80</sup> The solicitation further asked offerors to describe “their capabilities related to identifying the various U.S. Small Business Administration defined socioeconomic groups, to include whether products can be filtered on certain designations.”<sup>81</sup> Amended Attachment 5 to the RFP, a draft user’s guide for the commercial platforms, similarly said that purchasers “are encouraged to consider items manufactured or supplied by small businesses when using the e-marketplace platforms, in accordance with FAR Part 19.”<sup>82</sup> An “important Government objective” is “to allow agencies and users to filter on small business, mandatory sources (e.g. AbilityOne) and other designations, as well as the ability to see those designations at the product level, when available.”<sup>83</sup> The offerors’ PWSs, to be incorporated into the contract, were to address socioeconomic requirements such as mandatory use sources.<sup>84</sup>

The key socioeconomic requirement to be addressed on the platforms is the AbilityOne program, which, as noted, applies even to micro-purchases. The AbilityOne program maintains a “Procurement List” of supplies and services produced by persons with disabilities; when a federal agency purchases the listed goods and services, the purchases generally must be made through the AbilityOne program.<sup>85</sup> Supplies or services that are “essentially the same” (ETS) as supplies or services on the Procurement List are not to be purchased; instead, agencies are to purchase AbilityOne supplies and services.<sup>86</sup> Both listed supplies and services and those that are “essentially the same” must be purchased through the program. The AbilityOne program reports that, through its mandatory-source procurement, it employs approximately 45,000 people who are blind or have significant disabilities. According to AbilityOne, the program operates at more than 1,000 locations, and runs more than 150 Base Supply Centers at military and Government installations. The program reportedly coordinates participation from approximately 500 nonprofit agencies nationwide, and roughly \$4 billion of AbilityOne products and services are procured by the Federal Government annually. The program notes that its largest customer is the Department of Defense (DOD), which annually procures more than \$2.3 billion of AbilityOne products and services.<sup>87</sup>

As noted, the micro-purchases to be made through the GSA commercial platforms are subject to the AbilityOne mandatory-source requirement. Apparently because of the practical difficulties in accommodating the mandatory-source requirement, GSA’s strategies for addressing AbilityOne goods and services shifted over time. The original solicitation said that priorities for “use of mandatory Government sources requirements” in the FAR, “particularly FAR 8.002 [AbilityOne and other mandatory-use sources], FAR 8.004 [non-mandatory Government sources], and FAR 8.005 [clause calling for use of AbilityOne],” shall “apply to all purchases made on the e-commerce marketplace platforms.”<sup>88</sup> This strict requirement was not carried into the amended solicitation, however; instead, the amended solicitation said that “proposals may indicate how the Mandatory Sources sections of the Statement of Objectives. . . [regarding] AbilityOne and ‘Essentially the Same’ Items. . . will be met within 120 days of award.”<sup>89</sup>

This new strategy called for the commercial platforms to identify mandatory-use AbilityOne items for users, though as noted the platforms could put that capability into place after award.<sup>90</sup> The Amended SOO asked offerors to “describe [their] capabilities to appropriately mark AbilityOne items and to promote them.”<sup>91</sup> The Amended SOO noted that agencies “are directed not to buy items that are essentially the same as AbilityOne products unless the products required are not available through the AbilityOne program.” The Amended SOO pointed out that an “important Government objective is an ability to mark or provide notification of the restriction ETS [essentially the same] items to Government buyers and to promote the purchase of the AbilityOne items instead.” GSA will be “tracking the sale of AbilityOne items as a key metric for the program.”<sup>92</sup>

A final socioeconomic issue related to domestic preferences. As noted, micro-purchases are exempt from domestic preferences such as “Buy American” requirements. GSA’s initiative builds on that exemption and imposes no domestic preferences on purchases through the commercial platforms.<sup>93</sup>

*Organizational Conflicts of Interest:* The U.S. Government has long been aggressive in addressing organizational conflicts of interest (OCIs)<sup>94</sup>—typically a conflict of interest which a contractor holds because of competing commercial ties or obligations.<sup>95</sup> Here, GSA’s Amended

RFP noted that, because OCIs were possible under this procurement, each offeror had to “disclose any known or potential OCI which presently exists or may exist at the time of award.”<sup>96</sup> Because contractors are expected to report on savings that agency customers achieve through the contractors’ own commercial platforms, the solicitation questions and answers<sup>97</sup> asked whether a platform provider’s assessment of savings, among other things, would constitute an OCI, and as a result whether these types of evaluations would be assigned to a third party. GSA said no and that it would accept the existing commercial practice of platforms assessing and reporting on their own estimated savings for the Government.<sup>98</sup>

*Fees to GSA:* One critical aspect of the commercial platforms initiative is the fee that will flow to GSA, the sponsoring agency—a fee of .75% on what GSA has estimated will be \$6 billion in annual sales, or roughly \$45 million annually.<sup>99</sup> Because GSA apparently will have few administrative responsibilities under these contracts, and limited legal liability for performance failures, these fees may exceed GSA’s costs. A lucrative arrangement of this kind could create a strong incentive for GSA (and other centralized purchasing agencies, at all levels of Government) to adopt commercial platforms as procurement solutions. If GSA’s fees do substantially exceed its costs over time, GSA may need to reduce its fee, much as GSA reduced its Industrial Funding Fee on the GSA Multiple Award Schedules when it determined that the revenues from the fee substantially exceeded the agency’s costs.<sup>100</sup> Notably, GSA continues to accumulate an operating surplus from the Industrial Funding Fee,<sup>101</sup> and the administrative fee under the commercial platforms initiative may provide the same sort of long-term financial support for the agency.

*Splitting Orders:* Because users will only be able to make micro-purchases on the new commercial platforms, a critical practical and legal issue is whether users will inappropriately “split” orders to keep them below the dollar cap for micro-purchases (the “micro-purchase threshold”).<sup>102</sup> Past GAO and inspector general reports have routinely found suspected splitting of orders to avoid the micro-purchase threshold and inadequate agency controls to check splitting of requirements.<sup>103</sup>

DOD guidance on the use of purchase cards treats splitting orders as a violation of purchase card policy. Split-

ting occurs when a purchaser “splits a known requirement at the time of the purchase into several transactions in order to circumvent their authorized dollar thresholds.”<sup>104</sup> The DOD guidance treats intentional misuse of purchase cards by “splitting” purchases to avoid the micro-purchase threshold as a form of abuse, subject to disciplinary action.<sup>105</sup>

Past assessments have concluded that the best answer to the misuse of micro-purchases is not more rigorous training, but to make micro-purchase data available through the Federal Procurement Data System (FPDS); currently, agencies may but need not report micro-purchase data to the FPDS.<sup>106</sup> (The FPDS data is then made more readily available through a separate website, USASpending.gov.) One commentator argued that training alone will not solve the “splitting” problem, and that therefore the micro-purchase threshold should be increased in order to reduce the burdens that small orders put on the procurement workforce.<sup>107</sup> Another commentator, Neil Whiteman, argued that the “splitting” that occurs with purchase cards (which are presumptively used for micro-purchases) can be adequately addressed only by including all purchase card data in the public FPDS.<sup>108</sup> “The lack of publicly available meaningful purchase card transaction data precludes investigation into the *full extent and consequences* of these abuses,” he wrote almost 20 years ago. “These problems,” he said, “are exacerbated by the fact that the majority of purchase card use is by end users in program and field offices (i.e., not procurement professionals trained in the complexities of federal procurement law and policy).” He concluded that this “small step—treating relevant data on purchase card transactions similarly to other small procurements—would allow meaningful review of the purchase card program to ensure that it is furthering the Government’s laws, programs, policies, and goals.”<sup>109</sup>

The procurement process for the commercial platforms initiative, from planning through competition, exposed a number of issues that remained less than fully resolved at the time of award. It was not clear by the time of award, for example, how the commercial platform providers and their third-party vendors would comply fully with new and very severe bars against purchasing certain banned products from China. What was clear, however, was that the new platforms would offer an entirely different approach to procurement—commercial supply chains

largely divorced from traditional Government procurement, which would allow federal purchasers to access commercial solutions directly.

## Selling On The Commercial Platforms

After some delay, on June 26, 2020 GSA awarded three “commercial platforms” contracts, to Amazon Business, Overstock.com, and Fisher Scientific. Users can now access those platforms through an innocuous GSA “landing

page” (reproduced below) which links directly to the awardee firms’ respective websites. GSA has done little to publicize the commercial platforms, despite the billions of dollars of annual sales that GSA has projected for the platforms.<sup>110</sup> As the screen shot below from the GSA website shows, the “landing page”—the entrance to a multi-billion-dollar marketplace—is little more than three links to three commercial marketplaces.<sup>111</sup> The question, then, is how vendors can access these new platforms, to sell to Government customers.

GSA “Landing Page” for Commercial Platforms

Many suppliers of commercial off-the-shelf (COTS) items are already selling their products on a business-to-business e-commerce marketplace.<sup>112</sup> For these suppliers, the transition to GSA’s chosen e-commerce marketplaces may be as simple as updating their seller profile page, as burdensome as initially registering to sell on a business-to-business e-commerce marketplace, or anywhere in between. For suppliers of COTS items that have not previously engaged customers through an e-commerce marketplace but that want to sell their products to Federal Government customers through GSA’s e-commerce marketplaces, the registration process will likely be entirely alien. In any case, suppliers need to know how they can begin selling to the Federal Government through GSA’s e-commerce marketplaces.

GSA’s solicitation shed some light on the process for third-party vendors joining the platforms. Specifically, the

solicitation required the selected contractors to “manag[e] all 3rd party suppliers that operate and sell products on [their] marketplace,” and specified that the contractors are “responsible for all supplier vetting, onboarding and order fulfillment.”<sup>113</sup> Building on these instructions, the solicitation stated: “This vetting process should be published in a transparent manner on the e-marketplace platform provider’s site and publicly disclose all supplier fees associated with selling on the platform.”<sup>114</sup> GSA may “direct prospective suppliers seeking information about the onboarding process” to the contractor’s site, but GSA ultimately will not be responsible for onboarding new suppliers.<sup>115</sup> Instead, the solicitation specifically provided that each contractor has “the right to manage the rules governing the on-boarding of new suppliers in accordance with their commercial practices.”<sup>116</sup> Put differently, suppliers presumably will register and sell their products to

the Federal Government through GSA's commercial platforms much like those suppliers register and sell their products through commercial business-to-business e-commerce marketplaces.

The commercial platforms' PWSs, which were incorporated into the contracts and released by GSA in redacted form,<sup>117</sup> offer important information on the platforms' current onboarding processes.<sup>118</sup> As those PWSs reflect, any supplier that wishes to sell its products on GSA's future e-commerce marketplaces will likely need to (1) register with the e-commerce marketplace provider, (2) select a selling plan, and (3) select an order fulfillment plan.

The Amazon Business PWS confirmed that registering to sell on the Amazon platform will require relatively little information. The Amazon Business PWS stated:

Amazon's seller registration and onboarding process is conducted through Seller Central (<https://sellercentral.amazon.com/>). To sell in the Amazon store, sellers create a selling account by providing tax identification, a business name, a bank account, and a credit card. Seller Central also serves as the primary tool for the seller to manage their business. Current fees for the seller including Referral, Fulfillment, Storage, and Seller Subscription fees are published and updated on Seller Central. An overview of the registration process is available publicly at: <https://services.amazon.com/sellinegettinR-started.html>. Once the account registration is complete, the seller can access Seller Central to manage their items and orders.<sup>119</sup>

A vendor thus will need to provide Amazon with the vendor's (1) bank account and routing number, (2) chargeable credit card, (3) Government-issued national ID, (4) tax information, and (5) phone number.<sup>120</sup> Registering to sell on GSA's commercial platforms may require additional information, however, as Federal Government contractors must, at a minimum, register in the System for Award Management (SAM)<sup>121</sup> and, according to the solicitation, will have at least their small business size statuses displayed on the e-marketplace platform.<sup>122</sup> Additionally, the solicitation "seeks the platform provider's help to add certain minimal terms and conditions to each individual order."<sup>123</sup> GSA's e-commerce marketplace contractors may ultimately require additional information or certifications in order to register because they possess "the right to manage the rules governing the on-boarding of new suppliers."<sup>124</sup>

Typically, after registering on a business-to-business

e-commerce marketplace, a seller must select a selling plan. For example, Amazon offers two selling plans from which suppliers can choose: (1) Individual and (2) Professional. Selling plans come with a variety of features, benefits, and fees.<sup>125</sup> If GSA's commercial platform contractors develop new Federal Government-specific selling plans, the contractors will need to publish such information "in a transparent manner on the e-marketplace platform provider's site [which] will publicly disclose all supplier fees associated with selling on the platform."<sup>126</sup>

Finally, because the solicitation specifies that the contractor is "responsible for all. . .order fulfillment,"<sup>127</sup> suppliers will likely need to select how they will fulfill orders that federal users place. Business-to-business e-commerce marketplace providers typically allow suppliers to fulfill orders in two ways: (1) merchant-fulfillment and (2) fulfillment by the marketplace provider.<sup>128</sup> Merchant-fulfillment means that the supplier itself stores and ships products directly to customers that place orders through the e-commerce marketplace.<sup>129</sup> For suppliers that choose to fulfill orders themselves, the e-commerce marketplace provider may charge shipping rates based on the type of product the customer purchases and the shipping service that the customer selects.<sup>130</sup> Fulfillment by the marketplace provider, however, means that platform provider takes responsibility for packaging, labeling, and shipping products.<sup>131</sup> Suppliers that select this option (1) pay various fees then (2) ship their products to the marketplace provider, which stores, packages, and ships the products when a customer places an order.<sup>132</sup> In light of the solicitation's language making GSA's e-commerce marketplace contractors "responsible for all. . .order fulfillment,"<sup>133</sup> it will be interesting to see whether the selected contractors permit merchant-fulfillment or require suppliers to select a fulfillment by the marketplace provider plan.

While it may be relatively easy to access millions of new customers, including Federal Government agencies, through e-commerce platforms, there are certain costs associated with this access. Business-to-business e-commerce marketplaces charge a variety of fees for the ability to sell on the marketplace.<sup>134</sup> While the solicitation requires contractors to "publicly disclose all supplier fees associated with selling on the platform,"<sup>135</sup> the responsibility for discovering those fees falls on potential suppliers, which must diligently assess each platform to ensure

that they are fully aware of all of the costs of doing business through the new platforms.

## Guidelines

These *Guidelines* are intended to assist you in understanding GSA's commercial platforms initiative. They are not, however, a substitute for professional representation in any specific situation.

**1.** Vendors should recognize the commercial platforms for what they are: a very new line of access to federal customers, bypassing traditional federal procurement channels and leveraging legal flexibilities for micro-purchases using Government purchase cards.

**2.** In accordance with GSA's exchanges with bidders during the procurement of the commercial platforms, the commercial platforms can be used to sell services, as well as goods, up to the micro-purchase cap (generally \$10,000).<sup>136</sup> Guidance from GSA has stated, however, that services must be "ancillary services affiliated with purchased items," and must be "allowed per the authorized cardholder's agency policy."<sup>137</sup>

**3.** In framing their future strategies for this market segment, vendors should note that GSA has urged that the micro-purchase threshold be increased to \$25,000 for GSA-approved platforms.

**4.** Both agencies and vendors using the commercial platforms should understand that traditional requirements of transparency and competition are largely erased on these new platforms; accountability will depend upon limited recordkeeping and *ad hoc* audits.

**5.** For other governments considering entering into similar commercial-platform arrangements, it is worth closely noting the history of this initiative—a history that shows commercial platforms' substantial negotiating power, which they may use to resist government-specific changes to their normal commercial practices.

**6.** While the micro-purchases allowed under this initiative are generally exempt from the Federal Government's socioeconomic requirements, some requirements—such as those under the AbilityOne program—do still apply.

**7.** Both the commercial platforms themselves and the third-party vendors that sell through the platforms are, it appears, subject to the requirements of § 889 of the

NDAA for FY 2019, the "Huawei ban," which raises serious compliance obligations.

**8.** Both the Government and other vendors may turn to debarment as one of the few means of excluding risky firms from the new commercial platforms.

**9.** Vendors that want to sell through the new commercial platforms should carefully research and assess the costs, benefits and procedures of the available platforms. The commercial platforms' PWSs demonstrate that the individual platforms will offer vendors very different services and support.<sup>138</sup>

**10.** GSA has offered remarkably little public support or marketing for the newly available commercial platforms, though taken together these platforms represent a novel form of federal market access potentially worth billions of dollars.

## ENDNOTES:

<sup>1</sup>See, e.g., Christopher R. Yukins, "Feature Comment: U.S. Government To Award Billions of Dollars in Contracts To Open Electronic Marketplaces to Government Customers—Though Serious Questions Remain," 61 GC ¶ 303 (Oct. 16, 2019) [hereinafter Yukins, 61 GC ¶ 303].

<sup>2</sup>See, e.g., Christopher R. Yukins, Robert Handfield, Thomas Kull & Andrea Patrucco, Webinar: Opening Online Marketplaces to Government Micro-Purchases (June 30, 2020), available at <https://publicprocurementinternational.com/2020/06/22/webinar-opening-online-marketplaces/>; Christopher R. Yukins, "GSA Awards Contracts To Open Amazon and Other Commercial Platforms to Billions of Dollars in Federal Micro-Purchases," Pub. Procurement Int'l (June 26, 2020), <https://publicprocurementinternational.com/2020/06/26/gsa-awards-contracts-to-open-amazon-and-other-commercial-platforms-to-billions-of-dollars-in-federal-micro-purchases/>; Christopher R. Yukins, Robert Handfield, Thomas Kull & Andrea Patrucco, "Feature Comment: Emerging From the Pandemic: U.S. Government Poised To Award 'Commercial Platforms' Contracts That Will Open Online Marketplaces to Federal Purchasers," 62 GC ¶ 172 (June 24, 2020); Christopher R. Yukins, "International Procurement Law: Key Developments 2019—Part I: How the Trump Administration May Reshape International Procurement Markets—Defense and Electronic Marketplaces," 2020 Gov't Contracts Year in Review Briefs 3 (2020); Christopher R. Yukins, "Two US Initiatives on a Collision Course: Trump's Buy American Order and the New Electronic Marketplaces," 2019 Pub. Proc. L. Rev. NA256 (2019); Yukins, 61 GC ¶ 303, *supra* note 1; Christopher R. Yukins, "Feature Comment: Trump Executive Order Calls for More Aggressive Use of the Buy American Act—An Or-

der Likely To Have More Political Than Practical Effect,” 61 GC ¶ 219 (July 31, 2019) (noting that increased Buy American Act preferences may push sales to micro-purchases on the commercial platforms); Christopher R. Yukins & Daniel Ramish, “Feature Comment: Section 809 and ‘E-Portal’ Proposals, By Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption,” 60 GC ¶ 138 (May 2, 2018).

<sup>3</sup>See, e.g., Stephanie Kirchgaessner, “Top Amazon Boss Privately Advised US Government on Web Portal Worth Billions to Tech Firm,” *Guardian*, Dec. 26, 2018, [https://www.theguardian.com/technology/2018/dec/26/amazon-anne-rung-government-services-authority?CMP=fb\\_a-technology\\_b-gdntech](https://www.theguardian.com/technology/2018/dec/26/amazon-anne-rung-government-services-authority?CMP=fb_a-technology_b-gdntech).

<sup>4</sup>For a broader discussion of these issues, see Abraham L. Young, “Empowering the End-User as Procurement Agent Through E-Commerce: Eliminating, Rather Than Managing, the Agency Problem,” 49 *Pub. Cont. L.J.* 651 (2020).

<sup>5</sup>See, e.g., Armen A. Alchian & Harold Demsetz, “Production, Information Costs, and Economic Organization,” 62 *Am. Econ. Rev.* 777, 785–90 (1972). See generally Barry M. Mitnick, “Origin of the Theory of Agency: An Account by One of the Theory’s Originators” (May 30, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1020378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020378).

<sup>6</sup>See Michael J. Ravnitzky, “Using Warfighter Feedback To Improve Acquisition: There’s an App for That,” *Army AL&T News* (Mar. 27, 2019), <https://asc.army.mil/web/news-using-warfighter-feedback-to-improve-acquisition-theres-an-app-for-that/>.

<sup>7</sup>See Todd South, “Hundreds of Soldiers To Test New Army Combat Boot, First Major Change in Nearly a Decade,” *Army Times*, Jan. 19, 2019, <https://www.armytimes.com/news/your-army/2019/01/14/hundreds-of-soldiers-to-test-new-army-combat-boot-first-major-change-in-nearly-a-decade/>.

<sup>8</sup>See generally Christopher R. Yukins, “A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model,” 40 *Pub. Cont. L.J.* 63, 75–76 (2010).

<sup>9</sup>See, e.g., John Shinal, “Amazon Is ‘Disintermediating’ More Parts of Tech,” *USA Today*, Jan. 28, 2016, <http://www.usatoday.com/story/tech/columnist/shinal/2016/01/28/amazon-disintermediating-more-parts-tech/79487646/>.

<sup>10</sup>National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 846, 131 Stat. 1283, 1483 (2017).

<sup>11</sup>Pub. L. No. 115-91, § 846(a).

<sup>12</sup>Pub. L. No. 115-91, § 846(a).

<sup>13</sup>Pub. L. No. 115-91, § 846(c)(2).

<sup>14</sup>Pub. L. No. 115-91, § 846(c)(2).

<sup>15</sup>Pub. L. No. 115-91, § 846(g).

<sup>16</sup>H.R. Rep. No. 115-404, at 879 (2017).

<sup>17</sup>H.R. Rep. No. 115-404, at 879 (2017).

<sup>18</sup>Pub. L. No. 115-91, § 846(d).

<sup>19</sup>Pub. L. No. 115-91, § 846(f); see Anti-Deficiency Act, 31 U.S.C.A. § 1341; Small Business Act, 15 U.S.C.A. § 644(g).

<sup>20</sup>Pub. L. No. 115-91, § 846(h).

<sup>21</sup>John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 1875 (2018).

<sup>22</sup>H.R. Rep. No. 115-404, at 879 (2017) (Conf. Rep.).

<sup>23</sup>H.R. Rep. No. 115-404, at 879 (2017) (Conf. Rep.).

<sup>24</sup>41 U.S.C.A. § 134. The micro-purchase threshold is variable, depending on circumstances; thus, for example, under FAR 2.101, the micro-purchase threshold (or cap) rises to \$35,000 for “acquisitions of supplies or services abroad that, as determined by the head of the agency, are to be used to support a contingency operation;. . .to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance. . .; or to support response to an emergency or major disaster” under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C.A. § 5121 et seq.

<sup>25</sup>Mark Lee, “The Recommended Micro-Purchase Threshold Increase—An Opportunity!,” GSA Commercial Platforms Initiative (July 19, 2018), <https://interact.gsa.gov/blog/recommended-micro-purchase-threshold-increase-opportunity>.

<sup>26</sup>U.S. General Services Administration, “Procurement Through Commercial E-Commerce Portals—Implementation Plan” (Mar. 2018), available at <https://interact.gsa.gov/sites/default/files/Commercial%20Platform%20Implementation%20Plan.pdf>.

<sup>27</sup>U.S. Gen. Servs. Admin., “Procurement Through Commercial E-Commerce Portals—Phase II Report: Market Research & Consultation” (Apr. 2019), available at <https://interact.gsa.gov/sites/default/files/Phase%20%20Market%20Research%20and%20Consultation%20%28Section%20846%29%20-%20FINAL%20April%202019.pdf>. In § 891 of the U.S. House of Representatives’ version of the pending National Defense Authorization Act for Fiscal Year 2020, H.R. 2500 (passed by the House on July 12, 2019), and in the House committee report which accompanied that bill, H.R. Rep. No. 116-120, at 178–79 (2019), the House Armed Services Committee, concerned by objections to the commercial marketplaces, called for GSA to revert to an approach which would assess all three models through pilots. The House bill called for GSA to establish the pilots before awarding final contracts for commercial marketplaces; it is thus possible that these congressional concerns will slow the government’s move to online commercial marketplaces. Notably, in the draft RFP referenced above, Att. 1, p. 2, GSA

itself says that it will continue to explore other e-commerce options.

<sup>28</sup>U.S. Gen. Servs. Admin., “Procurement Through Commercial E-Commerce Portals—Phase II Report: Market Research & Consultation” 14 (2019), available at <http://interact.gsa.gov/sites/default/files/Phase%20%20Market%20Research%20and%20Consultation%20%28Section%20846%29%20-%20FINAL%20April%202019.pdf>.

<sup>29</sup>Draft Request for Proposal No. 47QSCC19R0429 (July 2, 2019), available at [https://beta.sam.gov/opp/a57ae6013b55553409eded0954c4cea/view?keywords=47QSCC19R0429&sort=-relevance&index=&is\\_active=true&page=1](https://beta.sam.gov/opp/a57ae6013b55553409eded0954c4cea/view?keywords=47QSCC19R0429&sort=-relevance&index=&is_active=true&page=1) [hereinafter Draft RFP].

<sup>30</sup>FAR 13.201; FAR 25.100(b).

<sup>31</sup>FAR 13.301.

<sup>32</sup>Draft RFP, Att. 1, Statement of Objectives 2 (July 2, 2019), available at [https://beta.sam.gov/opp/a57ae6013b55553409eded0954c4cea/view?keywords=47QSCC19R0429&sort=-relevance&index=&is\\_active=true&page=1](https://beta.sam.gov/opp/a57ae6013b55553409eded0954c4cea/view?keywords=47QSCC19R0429&sort=-relevance&index=&is_active=true&page=1) [hereinafter Draft SOO].

<sup>33</sup>See Christopher R. Yukins, “Request Denied by GAO for Documents in Pending Protest Regarding GSA Electronic Marketplaces Procurement,” Pub. Procurement Int’l (Jan. 20, 2020), <https://publicprocurementinternational.com/2020/01/20/request-denied-by-gao-for-document-s-in-pending-protest-regarding-gsa-electronic-marketplaces-procurement/>.

<sup>34</sup>See, e.g., Jason Miller, “GSA’s E-Commerce Initiative Strained by New Protests, Questions Over Supply Chain Risk,” Fed. News Network, Mar. 9, 2020, <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/03/gsas-e-commerce-initiative-strained-by-new-protests-questions-over-supply-chain-risks/>; Jason Miller, “Amazon’s Protest of GSA’s E-Commerce Platform RFP Tells Us Why the Silly Season Is in Full Swing,” Fed. News Network, Dec. 9, 2019, <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2019/12/amazon-s-protest-of-gsas-e-commerce-platform-rfp-tells-us-why-the-silly-season-is-in-full-swing/>.

<sup>35</sup>See Christopher R. Yukins, “GSA Delays ‘Electronic Marketplaces’ Contract Awards,” Pub. Procurement Int’l (Apr. 1, 2020), <https://publicprocurementinternational.com/2020/04/01/gsa-delays-electronic-marketplaces-contract-awards/>.

<sup>36</sup>Amended Request for Proposal No. 47QSCC20R0001 (Jan. 8, 2020), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> [hereinafter Amended RFP].

<sup>37</sup>RFP, Att. 1, Amended Statement of Objectives 3 (Jan. 8, 2020), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> [hereinafter Amended SOO]. Note that, per FAR 37.602 and the Amended RFP, at 15, the SOO was not to be part of the completed contract, but the PWSs presented by the offerors in accordance with the SOO were to become part of the contract. Those PWSs have been posted by one of the

authors, in redacted form. See Pub. Procurement Int’l, “GSA Commercial Platforms Contracts—Performance Work Statements Submitted by Amazon Business, Overstock.com and Fisher Scientific,” <https://publicprocurementinternational.com/gsa-commercial-platforms-pws/>.

<sup>38</sup>Amended SOO, supra note 37, at 1.

<sup>39</sup>Amended SOO, supra note 37, at 2.

<sup>40</sup>Questions and answers published to the offerors on January 10, 2020, specifically stated that services could be sold through the platforms. See Questions and Answers, at Answer 6 (Jan. 10, 2020), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> (“It has always been the intent to start with product-based marketplaces for the proof of concept, the amended documents were not changed to exclude services.”). There was some confusion on this point, however, as Amended Attachment 5 to the RFP—a draft of instructions to prospective users—said that services could not be purchased on the platforms. See RFP, Att. 5, Ordering Procedures (Jan. 8, 2020), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> [hereinafter Ordering Procedures].

<sup>41</sup>U.S. Gov’t Accountability Office, GAO-17-244SP, Contracting Data Analysis: Assessment of Government-Wide Trends 4 (Mar. 9, 2017) (“About 60 percent of government-wide contract obligations are for services, with civilian agencies obligating 80 percent of their contract dollars for services.”).

<sup>42</sup>Amended SOO, supra note 37, at 4.

<sup>43</sup>Amended SOO, supra note 37, at 9.

<sup>44</sup>Section 846 (the enabling legislation for this initiative), the Amended SOO noted, “provides that all laws not specifically excluded apply to the program this RFP implements.” Amended SOO, supra note 37, at 9.

<sup>45</sup>Questions and Answers (Nov. 5, 2019), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> [hereinafter Nov. 5, 2019 Q&A].

<sup>46</sup>Amended RFP, Att. 4, Click-Through Text (Jan. 8, 2020), available at <https://beta.sam.gov/opp/a2c5a7f93334ac7d/view> [hereinafter Click-Through Text].

<sup>47</sup>John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 838, 132 Stat. 1636, 1876 (2018).

<sup>48</sup>Amended SOO, supra note 37, at 9.

<sup>49</sup>Amended SOO, supra note 37, at 9–10. The vendor questions and answers published by GSA on January 10, 2020 clarified that this Government right extended only to Government spend data—not all data on the private platform.

<sup>50</sup>Amended SOO, supra note 37, at 10–11. The list of requested data was addressed in Amendment 3 to the solicitation.

<sup>51</sup>Amended SOO, supra note 37, at 6.

<sup>52</sup>Amended SOO, supra note 37, at 6.

<sup>53</sup>Ordering Procedures, supra note 40.

<sup>54</sup>See Amended RFP, supra note 36, at 3 (“In line with B2B e-commerce practices, items sold to Government agencies through the awarded contracts are to be provided at commercial B2B pricing or better.”); see also U.S. Gen. Servs. Admin., Commercial Platforms Proof of Concept Frequently Asked Questions (FAQs) - Agency User 7, <https://interact.gsa.gov/sites/default/files/Commercial%20Platforms%20Proof%20of%20Concept%20FAQs%20-%20Agency%20User.pdf> (“Q: How is pricing determined on the e-marketplace platforms? A: Prices on the portals are expected to be highly competitive with purchases made through current open-market micro-purchase channels. Prices will fluctuate on a regular basis (and by design!), given that suppliers are always competing to be the fulfillment provider, much like they do on consumer sites. Agencies will also have access to Business-to-Business (B2B) pricing as well as tiered discounts which might not be available via the open market. GSA will continue to monitor prices on the platform to ensure they remain competitive (against a wide variety of available channels), while also recognizing there are other non-price attributes that might be of importance to buyers, such as delivery times.”).

<sup>55</sup>See, e.g., 48 C.F.R. § 538.272 (FSS Price Reductions).

<sup>56</sup>See Amended SOO, supra note 37, at 12 (platform “product pricing shall reflect the e-marketplace platform provider’s B2B pricing and any related discounts. Prices on the platform shall be updated dynamically (e.g. in real time); be reflective of all included items (including shipping costs), warranties or other benefits, and; shall not contain hidden costs or fees.”).

<sup>57</sup>Ordering Procedures, supra note 40.

<sup>58</sup>Ordering Procedures, supra note 40.

<sup>59</sup>Amended SOO, supra note 37, at 6–7.

<sup>60</sup>Amended SOO, supra note 37, at 7.

<sup>61</sup>See Amended SOO, supra note 37, at 3 (an “important” feature of the platforms would be the ability “to identify & remove vendors who are suspended or debarred from conducting business with the Federal Government.”).

<sup>62</sup>Amended SOO, supra note 37, at 7.

<sup>63</sup>Amended SOO, supra note 37, at 7.

<sup>64</sup>John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917 (2018).

<sup>65</sup>Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (July 14, 2020).

<sup>66</sup>Amended RFP, supra note 36, at 26–28.

<sup>67</sup>As part of the competition for the GSA “commercial

platforms” contracts, the three ultimately successful contractors submitted Performance Work Statements (PWSs). GSA produced redacted copies of those PWSs under a Freedom of Information Act (FOIA) request. See Pub. Procurement Int’l, “GSA Commercial Platforms Contracts—Performance Work Statements Submitted by Amazon Business, Overstock.com and Fisher Scientific,” <https://publicprocurementinternational.com/gsa-commercial-platforms-pws/>.

<sup>68</sup>85 Fed. Reg. 42,665.

<sup>69</sup>Click-Through Text, supra note 46 (proposed “click-through text” to be published to every customer, which could state: “The submission of this order through this platform creates a contract (Contract) between the provider of the item being purchased (Seller) and the Federal agency purchaser (Agency).”).

<sup>70</sup>See, e.g., 85 Fed. Reg. at 42,667 (Under the interim § 889 rule, the “prohibition will apply to all FAR contracts, including micro-purchase contracts.”). The interim rule amended FAR Subpart 13.2, which governs micro-purchases, to add the following provision at FAR 13.201(j): “(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see [FAR] subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.” 85 Fed. Reg. at 42,678.

<sup>71</sup>Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China, Sec. E (Jan. 15, 2020), available at [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_and\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_and\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_and_Trade_Agreement_Between_The_United_States_and_China_Text.pdf).

<sup>72</sup>Exec. Order No. 13,904, 85 Fed. Reg. 6725 (Jan. 31, 2020).

<sup>73</sup>See Jason Miller, “Does the E-Commerce Executive Order Throw a Wrench in GSA’s Effort,” Fed. News Network (Feb. 4, 2020), <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/02/does-the-e-commerce-executive-order-throw-a-wrench-in-gsas-effort/>.

<sup>74</sup>85 Fed. Reg. 6725.

<sup>75</sup>85 Fed. Reg. 6725.

<sup>76</sup>Peter Navarro, “Counterfeits Harm Americans and Threaten National Security. Trump Has a Plan to Combat Them,” CNN, Jan. 31, 2020, <https://www.cnn.com/2020/01/31/perspectives/peter-navarro-e-commerce-counterfeit-products/index.html>.

<sup>77</sup>Under FAR 13.003(b)(1), acquisitions “of supplies or services that have an anticipated dollar value above the



micro-purchase threshold, but at or below the simplified acquisition threshold, shall be set aside for small business concerns (see [FAR] 19.000, 19.203, and subpart 19.5).” But the referenced FAR 19.502-2 applies the small business set-aside obligation only to acquisitions above the micro-purchase threshold: “Each acquisition of supplies or services that has an anticipated dollar value above the micro-purchase threshold, but not over the simplified acquisition threshold, shall be set aside for small business. . . .” FAR 19.502-2(a).

<sup>78</sup>U.S. AbilityOne Comm’n, FAQs, [https://www.abilityone.gov/abilityone\\_program/faqs.html#13](https://www.abilityone.gov/abilityone_program/faqs.html#13) (AbilityOne requirement applies to micro-purchases as well).

<sup>79</sup>Amended SOO, supra note 37, at 4.

<sup>80</sup>Amended SOO, supra note 37, at 3.

<sup>81</sup>Amended SOO, supra note 37, at 7.

<sup>82</sup>Ordering Procedures, supra note 40.

<sup>83</sup>Amended SOO, supra note 37, at 4.

<sup>84</sup>Amended RFP, supra note 36, at 26–28.

<sup>85</sup>See FAR Subpart 8.7. See generally Mary Ellen Fraser, “Feature Comment: The AbilityOne Program—Employing Service-Disabled Veterans,” 51 GC ¶ 373 (Oct. 28, 2009).

<sup>86</sup>See, e.g., U.S. AbilityOne Comm’n, Policy No. 51.541, “Requirement To Purchase Products on the Procurement List Instead of ‘Essentially the Same (ETS)’ Items” (Apr. 27, 2015), [https://www.abilityone.gov/laws\\_regulations\\_and\\_policy/documents/US%20AbilityOne%20Commission%20Policy%2051%20541%20Requirement%20to%20Purchase%20PL%20Products%20Instead%20of%20Essentially%20the%20Same%20Final.pdf](https://www.abilityone.gov/laws_regulations_and_policy/documents/US%20AbilityOne%20Commission%20Policy%2051%20541%20Requirement%20to%20Purchase%20PL%20Products%20Instead%20of%20Essentially%20the%20Same%20Final.pdf).

<sup>87</sup>U.S. AbilityOne Comm’n, <https://www.abilityone.gov/index.html> (last visited Nov. 29, 2020).

<sup>88</sup>Draft RFP, supra note 29, at 16–21.

<sup>89</sup>Amended RFP, supra note 36, at 28.

<sup>90</sup>The solicitation Q&A on November 5, 2019 said: “Under section 4.B.iv, Contractors shall restrict ‘Essentially the Same’ (ETS) items on the Government agency-view within the platform and shall not display ‘Recommended Alternatives,’ except where agencies are attempting to purchase ETS, in which case, the Contractor is required to block the sale of ETS and substitute the AbilityOne product using AbilityOne sellers. This can occur either on the commercial e-commerce platform or by sending the buyer to the appropriate source. AbilityOne sellers are not mandated to sell items on the commercial e-marketplace platforms, however GSA’s program team has been proactive in communicating the value of this program to the AbilityOne distributor community. . . . Lastly, the contractor shall have the ability to remove listings from vendors attempting to sell AbilityOne products but who are not an authorized AbilityOne distributor.” Nov. 5, 2019 Q&A, supra note 45.

<sup>91</sup>Amended SOO, supra note 37, at 8. The PWSs

submitted by the three contractors addressed the AbilityOne requirement. The Fisher Scientific PWS at page 3 proposed to allow agencies to designate AbilityOne and “essentially the same” products; the Amazon proposal at page 7 was redacted under FOIA exemption 4 (sensitive commercial information); and the Overstock.com PWS, at pages 8–9, proposed to allow blocking of “essentially the same” products, as contemplated by the AbilityOne program. See supra note 67 (access to redacted PWSs).

<sup>92</sup>Amended SOO, supra note 37, at 8. The solicitation Q&A on November 5, 2019 stated that the “Government acknowledges that AbilityOne distributors need to participate on the platforms in order to display (and promote) them on the platform. Offerors should outline their strategy for bringing on AbilityOne distributors, as well as how they intend to comply with the requirements under section 4.B.iv. within 120 days of the start of the period of performance under this contract. Additionally, GSA’s program team has been proactive in communicating the value of this program to the AbilityOne distributor community, engaging both the AbilityOne and NIB [National Industries for the Blind] leadership, as well as briefing at a recent distributor conference.” Nov. 5, 2019 Q&A, supra note 45.

<sup>93</sup>The solicitation’s amended Attachment 5, a draft user’s guide, said only that purchasers “may consider a product’s Country of Origin when made available on the e-marketplace platforms as a part of their buying criteria.” Ordering Procedures, supra note 40.

<sup>94</sup>See, e.g., Fred W. Geldon & Caitlin Conroy, “Organizational Conflicts of Interest / Edition VI: Is the OCI Pendulum Swinging Back at GAO?,” 18-13 Briefing Papers 1 (Dec. 2018).

<sup>95</sup>See FAR Subpart 9.5.

<sup>96</sup>Amended RFP, supra note 36, at 26–27.

<sup>97</sup>See Nov. 5, 2019 Q&A, supra note 45.

<sup>98</sup>Nov. 5, 2019 Q&A, supra note 45.

<sup>99</sup>The solicitation’s Amended SOO said that the contractor “shall submit to GSA a remittance of no more than .75% on the value of each order placed on the e-marketplace platform.” Amended SOO, supra note 37, at 12. This fee “shall be included in the price of the item and not listed as a separate line item.” GSA “reserves the right to change the percentage at any time, but not more than once per year.” Amended SOO, supra note 37, at 12.

<sup>100</sup>General Services Administration Acquisition Regulation; Consolidation of Industrial Funding Fee and Sales Reporting Clauses; Reduction in Amount of Industrial Funding Fee, 68 Fed. Reg. 41,286 (July 11, 2003).

<sup>101</sup>U.S. Gen. Servs. Admin., Office of Inspector Gen., Audit of the Multiple Award Schedule Program Industrial Funding Fee, Report No. A090256/Q/A/P12003, at 1–2, Feb. 3, 2012, available at [https://www.gsaig.gov/sites/default/files/audit-reports/A090256\\_1.pdf](https://www.gsaig.gov/sites/default/files/audit-reports/A090256_1.pdf).

<sup>102</sup>See FAR 13.003(c)(2) (“Do not break down re-

quirements aggregating more than the . . . micro-purchase threshold into several purchases that are less than the applicable threshold merely to . . . [a]void any requirement that applies to purchases exceeding the micro-purchase threshold.”).

<sup>103</sup>See, e.g., “Tax IG Finds Ineffective IRS Purchase Card Controls,” 53 GC ¶ 339 (Oct. 19, 2011); U.S. Dep’t of Veterans Affairs, Office of Inspector Gen., Veterans Health Administration: Review of Alleged Irregular Use of Purchase Cards by the Engineering Service at the Carl Vinson VA Medical Center in Dublin, Georgia (June 27, 2017), available at <https://www.va.gov/oig/pubs/VAOIG-15-01217-249.pdf>; U.S. Gen. Servs. Admin., Office of Inspector Gen., GSA’s Purchase Card Program Is Vulnerable to Illegal, Improper or Erroneous Purchases (Sept. 30, 2016), available at [https://www.gsaig.gov/sites/default/files/audit-reports/A160022\\_1.pdf](https://www.gsaig.gov/sites/default/files/audit-reports/A160022_1.pdf);

U.S. Dep’t of the Treasury, Inspector Gen. for Tax Admin., Review of the Internal Revenue Service’s Purchase Card Violations Report and the Status of Recommendations (Jan. 25, 2018), available at [www.treasury.gov/tigta/auditreports/2018reports/201810018fr.pdf](http://www.treasury.gov/tigta/auditreports/2018reports/201810018fr.pdf); U.S. Gen. Servs. Admin., Office of Inspector Gen., GSA Office of Inspector General’s Fiscal Year 2015 Risk Assessment of GSA’s Charge Card Program (Sept. 26, 2016), available at <https://www.gsaig.gov/sites/default/files/audit-reports/A160054%20FY15%20Charge%20Card%20Risk%20Assessment%20Memorandum.pdf>; Nat’l Science Found., Office of Inspector Gen., Audit of NSF’s Purchase Card Program (Jan. 27, 2014), available at [https://www.nsf.gov/oig/pdf/14-2-006 Purchase Card Audit.pdf](https://www.nsf.gov/oig/pdf/14-2-006%20Purchase%20Card%20Audit.pdf).

<sup>104</sup> Department of Defense Government Charge Card Guidebook for Establishing and Managing Purchase, Travel, and Fuel Card Programs A-20 (June 3, 2020), available at [https://www.acq.osd.mil/dpap/pdi/pc/docs/DoD Govt Charge Card Guide 06-03-20.pdf](https://www.acq.osd.mil/dpap/pdi/pc/docs/DoD%20Govt%20Charge%20Card%20Guide%2006-03-20.pdf).

<sup>105</sup>Id. at L-2.

<sup>106</sup>FAR 4.606.

<sup>107</sup>Jeff P. MacHarg, “Doing More with Less—Continued Expansion of the Government Purchase Card Program by Increasing the Micropurchase Threshold: A Response to Recent Articles Criticizing the Government Purchase Card Program,” 31 Pub. Cont. L.J. 293, 309 (2002) (citing Steven L. Schooner & Neil S. Whiteman, “Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency,” 9 Pub. Proc. L. Rev. 148, 165–66 (2000)).

<sup>108</sup>Neil Whiteman, “Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?,” 30 Pub. Cont. L.J. 403, 457–59 (2001).

<sup>109</sup>30 Pub. Cont. L.J. at 459.

<sup>110</sup>See U.S. Gen. Servs. Admin., “GSA Awards Contracts for Commercial E-Marketplace Platform Providers” (June 26, 2020), <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-awards-contracts-for-commercial-e-marketplace-platform-providers> (“It is estimated that

open market purchases on government purchase cards represent an addressable market of \$6 billion annually.”).

<sup>111</sup>U.S. Gen. Servs. Admin., “Awarded E-Marketplaces,” Commercial Platforms, <https://www.gsa.gov/buying-selling/purchasing-programs/commercial-platforms/awarded-emarketplaces> (last visited Nov. 29, 2020).

<sup>112</sup>See Marketplace Pulse, Marketplace Year in Review 2019 (2019), available at <https://www.marketplacepulse.com/marketplaces-year-in-review-2019#sellers> (stating that “[i]n the US, there are 2.7 million sellers on Amazon.com out of 8 million globally” and noting that third party sellers also operate on eBay, Walmart, Jet.com, Google, Target, and other e-commerce marketplaces). “The industry continues to flourish, even when ignoring Amazon. . . . For a decade, Amazon and eBay were the only two marketplaces. Now. . . there are more significant retail ones, but there are also dozens of specialized marketplaces focused on niche markets. . . .” Id.

<sup>113</sup>Amended SOO, supra note 37, at 6.

<sup>114</sup>Amended SOO, supra note 37, at 6–7.

<sup>115</sup>Amended SOO, supra note 37, at 7.

<sup>116</sup>Amended SOO, supra note 37, at 7.

<sup>117</sup>See supra note 67.

<sup>118</sup>Amazon, one of the awardee commercial platforms, hosts more third-party suppliers than any other business-to-business e-commerce marketplace in the United States today. See Marketplace Pulse, “Marketplaces Year in Review 2019” (2019), available at <https://www.marketplacepulse.com/marketplaces-year-in-review-2019#sellers>. Accordingly, this paper relies mainly on Amazon’s current registration process as representative of what sellers may expect moving forward.

<sup>119</sup>The Amazon Business PWS is available (in redacted form) at <https://publicprocurementinternational.com/gsa-commercial-platforms-pws/>; see supra note 67.

<sup>120</sup>For additional information, see, e.g., Amazon, The Beginner’s Guide to Selling on Amazon 2, available at [https://m.media-amazon.com/images/G/01/sell/guides/Beginners-Guide-to-Selling-on-Amazon.pdf?tag=googhydr-20&id=SEUSSOAGOOG-sitelink-guide\\_BG2SOA\\_goghydr-20](https://m.media-amazon.com/images/G/01/sell/guides/Beginners-Guide-to-Selling-on-Amazon.pdf?tag=googhydr-20&id=SEUSSOAGOOG-sitelink-guide_BG2SOA_goghydr-20).

<sup>121</sup>See FAR 4.1102(a) (“Offerors and quoters are required to be registered in SAM at the time an offer or quotation is submitted. . . .”).

<sup>122</sup>See, e.g., Amended SOO, supra note 37, at 4 (“An important Government objective in this area is to allow . . . agencies and users to filter on small business. . . .”); id. at 7 (“The contractor(s) shall outline their capabilities related to identifying the various U.S. Small Business Administration defined socioeconomic groups, to include whether products can be filtered on certain designations.”).

<sup>123</sup>Specifically, the solicitation explains that “[o]ne acceptable solution is to include the text of Attachment 4

in the platform screen immediately preceding the conclusion of a purchase through a ‘click-accept’ or ‘pop-up’ or another appropriate mechanism requiring an affirmative response.” The solicitation, however, permits “other solutions that achieve the same objective.” Amended SOO, supra note 37, at 9.

<sup>124</sup>Amended SOO, supra note 37, at 7.

<sup>125</sup>For example, Amazon notes that its Individual plan is “best for sellers who plan on selling fewer than 40 items a month,” while the Professional plan is “best for sellers who plan on selling more than 40 items a month.” Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120. Amazon does not charge a subscription fee for an Individual plan, but charges suppliers \$0.99 for each item they sell. See *id.* On the Professional plan, Amazon charges suppliers a subscription fee of \$39.99 per month and no per-item fee. *Id.* Amazon’s Professional plan comes with the ability to access “advanced selling tools” and “add-on programs,” whereas Individual plan holders cannot access these features. See *id.*

<sup>126</sup>Amended SOO, supra note 37, at 6–7.

<sup>127</sup>Amended SOO, supra note 37, at 6.

<sup>128</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120.

<sup>129</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120.

<sup>130</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120.

<sup>131</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120.

<sup>132</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120.

<sup>133</sup>Amended SOO, supra note 37, at 6.

<sup>134</sup>See, e.g., Amazon, *The Beginner’s Guide to Selling on Amazon 2*, supra note 120 (noting that Amazon charges subscription, selling, shipping, and fulfillment fees that vary depending on the selling plan and types of products).

<sup>135</sup>Amended SOO, supra note 37, at 6–7.

<sup>136</sup>See supra note 40.

<sup>137</sup>U.S. Gen. Servs. Admin., “Get Started,” Commercial Platforms Program, available at <https://www.gsa.gov/buying-selling/purchasing-programs/commercial-platforms/get-started#HowtoBuy>.

<sup>138</sup>See supra note 67.

# BRIEFING PAPERS