The Future of COTS Procurement: Section 846 Industry Day Highlights

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On June 21, 2018, the General Services Administration (“GSA”) and the Office of Management and Budget (“OMB”) held their second Industry Day concerning the implementation of Section 846 of the National Defense Authorization Act (“NDAA”) of 2018 (“Procurement Through E-Commerce Portals,” known hereafter as the “Portals Program”).[1] The Industry Day, GSA’s first since issuing its Phase I implementation plan, provided a unique opportunity for GSA to update the public on its current thinking for the Portals Program. A few highlights from the Industry Day are set out below.

- **GSA Will Award Multiple Portal Contracts**

  At several points during the meeting, GSA representatives were adamant the agency would award multiple contracts to Portal Providers. Jeffrey Koses, a Senior Procurement Executive at GSA, even stated that if GSA issued a solicitation for the Portals Program and, after reviewing proposals, found only one offeror to be qualified, GSA would cancel the solicitation and start the process anew. Clearly, GSA has felt the collective pushback from industry against a single commercial Portal Provider, and is committed to awarding multiple portal provider contracts.

- **“Portal of Portals” Concept Noticeably Absent**

  During a recent Coalition for Government Procurement panel, GSA introduced the public to a new phrase – “Portal of Portals.” During that panel, GSA explained they were considering the agency operating a website to serve as an aggregator for all
awarded Portal Providers, and analogized their concept to travel websites that search for the best fares across airline websites. Although GSA representatives stated they believed GSA already possesses the statutory authority to operate as the “Portal of Portals,” GSA nonetheless asked Congress for explicit legislative authority (via a broadening of the definition of “commercial e-commerce portal”). The current draft 2019 NDAA legislation, however, does not include language granting this request (despite Congress including language granting two other GSA requests). Taken together, the silence from both Congress and GSA could mean this concept has been discarded as too significant a departure from the commercial intent behind the Portals Program. That being said, GSA representatives spent considerable time discussing the importance of the “customer experience,” and stated they were still looking for a solution to allow for easy navigation of all Portal Providers, including the potential use of an aggregator.

### Focus Remains on Procurements Under Micro-Purchase Threshold

Although Section 846 grants the Portals Program authority to process transactions up to the Simplified Acquisition Threshold (soon to be $250,000), GSA and OMB representatives have stated repeatedly the Portals Program will focus on transactions under the Micro-Purchase Threshold. During the Industry Day, GSA representatives repeated this position, and noted the current draft 2019 NDAA grants their request to increase the Micro-Purchase Threshold to $25,000 for purchases made through an approved Portal. If included in the final 2019 NDAA, this language not only will make the Portals Program the preferred vehicle Government-wide for any purchase under $25,000, but will allow the GSA Schedules Program to maintain its status as the preferred contracting vehicle for all commercial item procurements above $25,000. Convincing Congress to include this language is a win-win for GSA.

### RFIs will Inform GSA’s Decision-Making

A common criticism of the Phase I Implementation Plan was that the proposed “E-Marketplace Model” would force a Portal Supplier to compete against a Portal Provider for awards on the Portal Provider’s platform. During the Industry Day, GSA representatives noted this result was somewhat unavoidable, as their research showed a significant percentage of small businesses do not operate online marketplaces that could qualify as approved Portals. GSA representatives stressed the information provided in response to the two Requests for Information (“RFIs”) GSA released on June 15, 2018 (one directed to potential Portal Providers and a second directed to potential Portal Suppliers) would be critical in helping GSA/OMB assess how best to implement a Portals Program that creates fair competition among all interested parties. Responses to these RFIs are due to GSA by July 20, 2018.

Looking ahead, GSA announced its intention to roll out a “Proof of Concept” to select agencies and Portal Providers in 2019. Until then, GSA/OMB will review the responses to its RFIs and continue to meet with stakeholders one-on-one. GSA/OMB representatives also stated they hope to hold a third Industry Day in a few months to provide another update on the Portals Program.
[1] As we have written on this blog many times before, Section 846 (or Section 801 as it was known previously) will change the way the Federal Government buys commercially-available-off-the-shelf ("COTS") products under the Simplified Acquisition Threshold ("SAT").

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