

## CHAPTER 14

### The Pursuit of Streamlined Purchasing: Commercial Items, E-Portals, and Amazon

BY

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#### *1. Introduction*

Throughout its history, the U.S. federal government has considered a range of innovations in its procurement policies and practices. A number of these efforts have involved the acquisition of commercial items. In U.S. federal procurement, the term ‘commercial items’ generally refers to those products and services that are of a type offered, sold, or leased in the commercial marketplace.(1) The U.S. federal government has long promoted the acquisition of commercial items, and while policies promoting commercial item acquisition have existed since the 1970s, the major acquisition reforms of the 1990s, the Federal Acquisition Streamlining Act of 1994 (FASA), and the Clinger-Cohen Act of 1996 (CCA, also known as the Federal Acquisition Reform Act of 1996 [FARA])(2) placed a renewed emphasis on the federal government’s purchase of commercial items. These reforms to accommodate the commercial market are gaining new momentum, as the U.S. government explores the use of commercial online platforms, such as Amazon, for direct purchases by government officials that would bypass traditional procurement channels.

#### *2. Procurement Reform and Commercial Items*

The commercial item provisions of FASA were based on recommendations from an advisory panel established under the National Defense Authorization Act (NDAA) of 1991.(3) The 1991 NDAA directed the Department of Defense (DoD) to establish an advisory panel, known as the Section 800 Panel,

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(1) Federal Acquisition Regulation (FAR) 2.101 includes a formal definition for commercial item.

(2) Federal Acquisition Streamlining Act of 1994, Public Law No. 103-355, 13 October 1994; Federal Acquisition Reform Act of 1996, Public Law No. 104-106, Division E, Section 4001, 10 February 1996.

(3) “National Defense Authorization Act for Fiscal Year 1991”, Pub. L. No. 101-510.

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to (1) review the acquisition law applicable to the DoD with a view toward streamlining the defense acquisition process; (2) make any recommendations for the repeal or amendment of such laws as the Panel considered necessary; and (3) prepare a proposed code of relevant acquisition laws.(4) Prior to the 1990s procurement reforms, DoD agencies frequently met their needs through government-unique requirements, with products frequently designed under government-specific specifications. Along with the move to introduce reform and greater efficiency to the procurement process, the findings of the Section 800 Panel identified the benefits of purchasing commercial items, including: that they are less expensive; are more technically advanced than their government unique counterparts; purchasing commercial increases competition, which generally leads to lower prices; they offer greater economies of scale, increase surge capacity and increased access to cutting-edge technologies.(5)

Thus, the Section 800 Panel recommended changes to the procurement laws, including: a preference for commercial items; a definition of commercial item; a more streamlined process for commercial items acquisitions; and relief from numerous statutes and contracts clauses for acquisitions for commercial items.(6) The Section 800 Panel recommendations were adopted in FASA. In addition to the commercial item benefits noted above, the federal government has recognized that while historically, DoD procurements often took the lead in promoting technological developments, more recently, such development occurs primarily in the private sector.(7) Therefore, in addition to promoting a more streamlined procurement process, the less burdensome requirements for commercial items were established in part to encourage commercial item vendors to offer their products and services to the federal government.

In 1996, the CCA added a definition for commercial-off-the-shelf (COTS) items. COTS items are those commercial items that are: sold in substantial quantities in the commercial marketplace; and offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.(8) COTS items are a

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(4) Government Accountability Office, *Acquisition Reform: DOD Acquisition Law Advisory Panel's Operations and Report*, GAO/NSIAD-94-5, December 1993.

(5) See Section 809 Panel Report, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, Vol. I, January 2018 (recounting history).

(6) FAR 12.503, Applicability of certain laws to Executive agency contracts for the acquisition of commercial items, lists the statutes that are not applicable to commercial item procurements, such as those related to: Cost Accounting Standards, Truthful Cost or Pricing Data, Contingent Fees, Requirement for a clause and certain other requirements related to kickbacks and Requirement for a clause under the Fly American provisions.

(7) Office of the Undersecretary of Defense For Acquisition, Technology and Logistics, "Intellectual Property: Navigating Through Commercial Waters: Issues and Solutions When Negotiating Intellectual Property With Commercial Companies", 15 October 2001; Office of Secretary of Defense Acquisition, Technology and Logistics, "Commercial Item Handbook", November 2001.

(8) FAR 2.101, Definitions.

subset of commercial items and have exemptions from procurement laws and regulations in addition to those that do not apply to commercial items; such as component tests of domestic sources under the Buy American Act.(9)

### ***3. Federal Purchase Cards and Lessons Learned***

Among the procurement innovations introduced by FASA and CCA was the expanded use of a purchase card program, which involved contracts with banks to provide standard commercial charge cards for use by federal employees.(10) FASA authorized agency cardholders to make micro-purchases (initially capped at \$2,500 and later raised to \$3,500) without obtaining competitive quotations if the price was considered reasonable and the agencies ‘equitably distributed’ such purchases among qualified vendors.(11) From 1994, when the expanded program was launched, to 2003, the use of government purchase cards increased from \$1 billion to \$16 billion.(12) While the purchase card program offered greater opportunity for streamlined acquisition of small, commercial item purchases, GAO and others found that the program was also plagued by fraud, waste and abuse, as well as inefficient purchasing.(13) In particular, GAO found in 2004 that: “improvements in program management and oversight could save hundreds of millions of dollars by (1) strengthening controls and monitoring transaction activity to minimize fraudulent, improper, and abusive purchase card transactions and (2) leveraging the government’s buying power to achieve discounts with frequently used vendors”.(14)

In response to recommendations from GAO, the General Services Administration (GSA) and the Office of Management and Budget (OMB) took a number of steps to improve the purchase card program, including training programs for agency users, monitoring tools and guidance.(15) OMB guidance required cardholders to maintain documentation to minimize the risk of erroneous and improper purchases.(16) GAO recently conducted a government-wide review of the purchase card program and issued a report in February 2017.(17) GAO

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(9) FAR 12.505, Applicability of certain laws to contracts for the acquisition of COTS items.

(10) Government Accountability Office, “Contract Management: Agencies Can Achieve Significant Savings on Purchase Card Buys”, GAO-04-430, p. 4.

(11) *Ibid.*, p. 9, and pp. 4-5 and ff.

(12) *Ibid.*, p. 11.

(13) Government Accountability Office, “Purchase Cards: Increased Management Oversight and Control Could Save Hundreds of Millions of Dollars”, GAO-04-717T, 28 April 2004.

(14) *Ibid.*, p. 13.

(15) Government Accountability Office, “Government Purchase Cards: Little Evidence of Fraud Found in Small Purchases, but Documentation Issues Exist”, GAO-17-276, 14 February 2017.

(16) *Ibid.*, p. 15.

(17) *Ibid.*

found little evidence of improper or potentially fraudulent purchases among micro-purchase transactions, but noted that incomplete documentation increased the risk that fraud, charge card misuse, and other abusive activity could occur without detection.(18) The lessons learned from the purchase card program may prove useful as the federal government considers further innovations in commercial item procurement, such as the e-commerce portal program discussed below.

#### **4. Commercial Item Purchases – The Next Steps**

Current federal procurement laws and regulations continue the preference established under FASA and CCA for the acquisition of commercial items. Regulations governing agency procurements require agencies to conduct market research to determine whether commercial items or non-developmental items(19) are available to meet the Government’s needs or could be modified to meet the Government’s needs.(20) Thus, in conducting a procurement, an agency is generally required to first determine whether a commercial item exists that can meet its needs.

Despite the continued emphasis on commercial item purchasing, the consensus among many procurement experts is that, particularly for DoD procurements, the process remains overly complex and the use of commercial items to meet agency needs has not been fully realized.(21) Only 18% of DoD purchases in FY 2017 were for commercial items and over the previous five years (2012-2017) DoD spending on commercial items declined by 29%.(22) The limited success of commercial item procurements appears due in part to the fact that despite some exceptions, the procedures for commercial item purchasing are too similar to traditional procurements. In addition, a recently commissioned procurement panel, tasked by Congress with reforming the current DoD procurement process (the Section 809

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(18) *Ibid.*, pp. 15, 33 and ff.

(19) Under FAR 2.101, a non-developmental item generally refers to a previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement; or a previously developed item that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(20) FAR 10.002(b); see, e.g., *Palantir USG v. United States*, 904 F.3d980 (Fed. Cir. 2018).

(21) Section 809 Panel Report, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, *op. cit.*, pp. 15, 17 and ff.

(22) *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, *op. cit.*, p. 21, see also “Defense Contracts: Recent Legislation and DOD Actions Related to Commercial Item Acquisitions”, GAO-17-645, July 2017.

Panel) found a variety of reasons for the shortcomings in commercial item purchasing. The Panel found inconsistent interpretations of policy, as well as continuous changes to commercial item buying regulations. The panel noted that the FAR has been amended more than 100 times to address commercial buying and thus commercial buying policies have become increasingly difficult to follow.(23) In addition, since FASA was enacted the Panel found that the number of DoD-related commercial buying provisions had increased by 188%.(24) This increase in provisions has also impacted the number of contract clauses applicable to commercial items. In 1995 there were a total of 57 FAR and DFARS clauses applicable to commercial items.(25) In early 2018, that number had increased to 165 FAR and DFARS clauses applicable to commercial items.(26)

Thus, there are a number of issues undermining the federal government's full and effective use of commercial item procurements, which were intended to bring greater efficiency, lower costs and the latest technology to government users. The Section 809 Panel, as of 2018, is proposing a broad range of reforms to DoD procurements, including changes in the acquisition of commercial items. While the Section 809 Panel's recommendations will likely have a significant impact on how the federal government, and DoD in particular, acquires goods and services, as of this writing, they have not yet been finalized.

### 5. *Amazon.gov*

While, as of this writing, the broader procurement reforms and innovation from the Section 809 Panel remain a work in progress, Congress did enact legislation at the end of 2017 to test an innovative procurement method. In what has become known as the 'Amazon Amendment' or 'Amazon.gov', section 846 of the National Defense Authorization Act for 2018 (2018 NDAA)(27) establishes a framework for the use of commercial e-commerce portals (e-portals) for the purchase of COTS items.(28) By requiring the use of e-portals, on a government-wide basis, the legislation seeks to enhance competition, expedite procurement, enable market research, and ensure reasonable pricing of commercial products through multiple contracts with multiple commercial e-commerce portal providers.(29)

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(23) *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, *op. cit.*, p. 21.

(24) *Ibid.*

(25) *Ibid.*

(26) *Ibid.*

(27) Section 846, "National Defense Authorization Act for Fiscal Year 2018", *Public Law* No. 115-91.

(28) *Ibid.*, No. 27.

(29) *Ibid.*

As the legislation was being developed, some in the procurement community expressed concerns that the e-portal framework was tailor-made for Amazon, given its dominance in the commerce e-portal marketplace, both in terms of consumer and business purchases.<sup>(30)</sup> While Amazon's inherent advantages may permit it to play an outsized role, the final legislation sought to address some of these concerns, although critics of the plan remained unconvinced.<sup>(31)</sup> Others have noted that while the role to be played by Amazon and other online market retailers has yet to be determined, the provision has substantial implications for companies that sell commercial items to the government, and it also sets up a potential clash between more traditional contractors and large e-commerce platforms.<sup>(32)</sup>

Section 846 of the 2018 NDAA provides for a three-phased approach to establishing the e-portals, occurring over a three-year period. Phase I: Implementation plan; Phase II: Market Analysis and Consultation; and Phase III: Program Implementation and Guidance.<sup>(33)</sup>

Under Phase I, an implementation plan was required within 90 days of when the 2018 NDAA became law (December 12, 2017), "including a discussion and recommendations regarding whether any changes to, or exemptions from, laws that set forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government are necessary for effective implementation of [Section 846]".<sup>(34)</sup>

Under Phase II, not later than one year after the date of the submission of the implementation plan, the General Services Administration (GSA) (the leading centralized purchasing agency in the U.S. Government) and the Office of Management & Budget (OMB) (within the White House) were required to provide recommendations for any changes to, or exemptions from, existing laws necessary for effective implementation of the program.<sup>(35)</sup> These recommendations were to be made after conducting consultation and anal-

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(30) See for example, D. DAYEN, "The 'Amazon Amendment' Would Effectively Hand Government Purchasing Power Over To Amazon", *The Intercept*, 2 November 2017, which notes: "experts believe only one or two companies would have the wherewithal to participate. That means monopoly or duopoly control of \$53 billion in federal purchasing".

(31) D. DAYEN, "Congress Prepares To Send Major Gift To Amazon While Trump Battles, Amazon Washington Post", *The Intercept*, 10 November 2017: "critics still see the program as tailor-made for Amazon to dominate. First of all, no online retailer has as large a footprint as Amazon, which is responsible for almost half of all e-commerce sales. Procurement officials are as likely to lean on Amazon as any other consumer, especially because of the array of third-party sellers supplying at least a semblance of competition in one site".

(32) R.K. TOMPKINS and R.M. PARRY, "National Defense Authorization Act for Fiscal Year 2018 Analysis: DoD 'Amazon' Bill Poised to Become Law", *Holland & Knight Government Contracts Blog*, 15 November 2017.

(33) Section 846 (c) (1), "National Defense Authorization Act for Fiscal Year 2018", *op. cit.*, p. 27.

(34) *Ibid.*, p. 33.

(35) *Ibid.*, p. 27.

ysis, including: market analysis and initial communications with potential commercial e-commerce portal providers; consulting affected departments and agencies about their unique procurement needs; assessment of the products or product categories that are suitable for purchase on the commercial e-commerce portals; a review of standard terms and conditions of commercial e-commerce portals in the context of Government requirements; an assessment of the precautions necessary to safeguard any information pertaining to the Federal Government, especially precautions necessary to protect against national security or cybersecurity threats; and an assessment of the impact on existing programs, including schedules, set-asides for small business concerns, and other preference programs.(36)

Phase III begins not later than two years after the date of the submission of the implementation plan and provides for the issuance of guidance to implement and govern the use of the program including protocols for oversight of procurement through the program, and compliance with laws pertaining to supplier and product screening requirements, data security, and data analytics.(37)

The legislation provides that a procurement through a commercial e-commerce portal used under the program established must not exceed the simplified acquisition threshold,(38) which was raised from \$150,000 to \$250,000 under the 2018 NDAA.(39)

While it does not specifically reference Amazon or any other vendor, the legislation expressly encourages the government to model the program after e-portals that are widely used in the private sector, in part so the government e-portal will have or 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.(40)

Pursuant to the requirements for a Phase I implementation plan, GSA and OMB held a public meeting in January 2018 to solicit input from the public on development of the e-portal program. Key stakeholders from government, industry, the legal community and others attended the meeting and exchanged ideas on implementation of the plan.(41) The variety of positions from the various stakeholders suggests that as of mid-2018, much work needed to be done. A primary topic of discussion focused on questions regarding the

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(36) *Ibid.*, p. 35.

(37) *Ibid.*, p. 27.

(38) *Ibid.*

(39) *Ibid.*

(40) *Ibid.*

(41) A copy of the transcript of the 9 January 2018 public meeting: Procurement Through Commercial e-Commerce Portals, is available at: [www.interact.gsa.gov](http://www.interact.gsa.gov).

primary purpose of the Section 846. Although the statute calls for the creation of e-portals for purposes of “enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products,”(42) a number of participants suggested that the language of Section 846 created uncertainty and that GSA and OMB should make a clear statement as to the program’s primary goal. In addition, the discussion and comments made by participants focused on areas such as competition, both that the e-portal level and order level, and the nature and description of the e-portal:

“What does competition mean or pricing mean? Is it by the unit or total spend or what?

Is it a shopping mall? Or is it more interactive where government is seeking a quote based on dollar size of order?

We need to be clear about what we mean about e-commerce portals too. Do we mean e-procurement or e-auction or e-markets?”.(43)

Meeting participants also expressed concern regarding the issue of competition at the e-portal level and sought clarification on whether the government sought a single e-portal or multiple e-portals. A participant suggested that if competition is the government’s overarching goal, then multiple e-portals should be part of the effort.(44)

Another topic of discussion addressed the issue of the government’s interest in a streamlined process that moves more closely to a commercial purchasing experience. For example, Jonathan Aronie, a procurement lawyer experienced in commercial item contracting, recognized the general goal of moving DoD’s purchase of COTS items to more closely resemble commercial purchasing practices. However, Mr Aronie noted the challenge of leveraging “commercial buying practices to the maximum extent possible without abandoning the country’s other national priorities and the need to assure that taxpayer money is spent wisely and appropriately”.(45) Mr Aronie further observed that: “we need to remember that the federal government is not a commercial entity and should not be expected to adopt purely commercial buying practices”.(46) In contrast, representatives of e-portal providers such as Amazon highlighted the benefits of the services they could offer the government and their ability to create a more efficient buying process, using commercial terms and conditions.

(42) Section 846 (a), “National Defense Authorization Act for Fiscal Year 2018”, *op. cit.*, p. 27.

(43) J. MILLER, “What are the goals of OMB, GSA’s e-commerce portal? That is step 1 of phase 1”, *Federal News Radio*, 16 January 2018.

(44) *Ibid.*, p. 43.

(45) J. ARONIE, “Comments”, in U.S. General Services Administration, *Procurement Through Commercial e-Commerce Portals – Implementation Plan*, March 2018, pp. 21-24.

(46) *Ibid.*, p. 45, and pp. 22 and ff.



Thus, as with earlier procurement reforms, such as FASA and FARA, a key element of the debate over implementation of the e-portal program is how far should the government move to adopting commercial practices and removing traditional rules and oversight mechanisms in pursuit of greater efficiency and agency discretion. The e-portal debate is in many ways reminiscent of the prior procurement reforms, which many saw as an opportunity to make the government operate more like a business.(47)

The U.S. General Services Administration's Phase I implementation plan, issued on schedule in March 2018, identified three possible models for portal providers:

- E-Commerce model, where product vendors leverage an online platform to sell their own proprietary or wholesale products and the vendor is responsible for fulfillment of orders. There is limited competition under this model.
- E-Marketplace Model, where online marketplaces (such as Amazon) connect buyers with a portal provider's proprietary products, third party vendors, or both. This model offers increased competition given access to both proprietary and third-party products.
- E-Procurement Model, where e-procurement is a software-as-a-service model that is managed by the buying organization. The portal provider does not sell products in this model, rather contracted suppliers are responsible for fulfilling orders – many from outside marketplaces – which allows a larger supplier pool and horizontal price comparisons.(48)

In May 2019, GSA issued its report under Phase II, which announced GSA's preferred approach: the government will try e-marketplaces. During the next phase GSA will use a proof of concept for evaluating e-marketplaces before making any significant investments and before issuing any regulations.(49) Under the proof of concept plan, although Congress authorized use of the electronic platforms for purchases up to the 'simplified acquisition threshold' (generally \$250,000), GSA will limit users' purchases on the selected e-marketplaces to the micro-purchase threshold (currently \$10,000) to promote the use of the program while mitigating risk.(50) GSA selected the e-marketplace model

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(47) S. Kelman, the Administrator of the Office of Federal Procurement Policy during the Clinton Administration who was a leader of the 1990s procurement reform effort, sought (1) a procurement system defined by greater purchaser discretion, (2) less encumbered by bureaucratic constraint, and (3) a system that was more businesslike. S.L. SCHOONER, "Fear of Oversight: The Fundamental Failure of Businesslike Government", 50 *Am. U. L. Rev.*, 2001, pp. 627, 636-637.

(48) U.S. General Services Administration, *Procurement Through Commercial E-Commerce Portals – Implementation Plan*, *op. cit.*, p. 6.

(49) U.S. General Services Administration, *Procurement Through Commercial E-Commerce Portals – Phase II Report: Market Research and Consultation*, April 2019, p. 3.

(50) *Ibid.*

for the proof of concept, noting that it will continue to assess opportunities to leverage the benefits of the other commercial e-commerce portal models.(51) GSA also recommended increasing the micro-purchase threshold from \$10,000 to \$25,000 for a five-year period to promote adoption of the e-commerce portals.(52) If the threshold is raised as recommended, federal officials – ordinary users – will be able to make purchases up to \$25,000 directly from any e-marketplaces that GSA has endorsed, and in return GSA will receive a small fee from the vendors that run the selected commercial e-marketplaces.

The collection and protection of data is an important issue to be addressed during implementation of the e-portal program. The Phase II report noted conflicting concerns regarding the collection and use of data created under the e-portal program. The e-portal legislation includes restrictions on e-portal provider use of Government-owned data for pricing, marketing, competitive, or other purposes. However, e-portal providers offering the e-marketplace model argue that the data protections will make it difficult to provide appropriate supplier screening, customer service, and warranty work, while the supplier community fears that the e-marketplace model portal providers could use data regarding Government purchases to gain an unfair competitive advantage.(53)

A primary concern of suppliers regarding potential data misuse involves product ‘white labeling’, when an e-portal provider uses supplier sales data to enter the market with its own version of the supplier’s product, often at a lower price point. The supplier community expressed concern that GSA will be unable to determine whether an e-marketplace model portal provider will have used Government data to displace a supplier’s product.(54) As a result, suppliers seek additional data protection, while e-portal providers argue that without access to purchase data they “could not operate their marketplaces effectively or in the best interest of the Government”.(55) GSA anticipates that limiting the proof of concept to purchases below the micro-purchase threshold will decrease the unintended consequences related to data use and enable GSA to make course corrections and adapt to commercial practices.(56)

In addition to addressing the access and use of data during the next phase of the e-portal implementation, GSA will have an opportunity to assess other key issues raised by this new procurement strategy, including: transparency

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(51) *Ibid.*

(52) Note that the Section 809 *Panel Report* (Vol. III) recommended a much more liberal approach to purchasing “readily available” items in the market, which could in effect increase the simplified acquisition threshold to \$15 million.

(53) U.S. General Services Administration, *Procurement Through Commercial E-Commerce Portals – Phase II Report: Market Research and Consultation*, *op. cit.*, p. 5.

(54) *Ibid.*, p. 6.

(55) *Ibid.*

(56) *Ibid.*

(will it be possible to track purchases made by Government users across a private e-marketplace?), bid challenges (discussed further below), competition (although Congress has said purchases under this initiative meet the Competition in Contracting Act's requirement for 'full and open' competition, will ordering online in a commercial e-marketplace provide true competition?), socioeconomic goals (will small and disadvantaged businesses be drowned out by the din of a commercial e-marketplace?), and compliance with international trade laws (how will vendors challenge discriminatory solicitations if there are no solicitations in an e-marketplace?).

Therefore, as the federal government proceeds through the three phases of the e-portal program, key issues to address include: the overall goal(s) of the program; the nature of competition, at both the e-portal and order levels; and the extent to which the government pursues a commercial buying experience, including as provided in Phase III, any exemptions from existing procurement laws.

## ***6. Streamlined Procurements – Lessons Learned***

Establishing well-defined goals for the e-portal program should assist the government in determining appropriate competition requirements, as well as a suitable regulatory regime. Once such goals are established, past efforts in procurement streamlining offer important lessons on how the government can address the above issues in implementing the e-portal program. As discussed previously, the acquisition reforms of the 1990s and related efficiency efforts provide a cautionary tale of potential pitfalls in the effort to simply the acquisition process.

### **6.1. Purchase cards**

As discussed earlier, the government's expansion of the purchase card program, which like the e-portal program, provides a simplified process for commercial item purchases, was plagued by inefficiencies, as well as fraud, waste and abuse.<sup>(57)</sup> The purchase card program was improved by applying fundamental tools of oversight, such as controls and the monitoring of transaction activity to minimize fraudulent, improper, and abusive purchase card transactions.<sup>(58)</sup>

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<sup>(57)</sup> Government Accountability Office, "Purchase Cards: Increased Management Oversight and Control Could Save Hundreds of Millions of Dollars", *op. cit.*, p. 11.

<sup>(58)</sup> Government Accountability Office, "Government Purchase Cards: Little Evidence of Fraud Found in Small Purchases, but Documentation Issues Exist", *op. cit.*, p. 13.

Problems with purchase cards were also experienced by the Department of Homeland Security (DHS),(59) which was given certain exemptions from competition requirements in the wake of the terrorist attacks in September 2001 in support of its mission to secure the homeland and protect it against conventional and unconventional attacks in the US. While this special authority was intended to enable DHS to more effectively meet its mission, it led to widespread fraud, waste and abuse.(60) With regard to the DHS purchase card program, GAO found that a weak control environment and breakdowns in key controls exposed DHS to fraud and abuse in its use of the purchase cards.(61) GAO found that DHS cardholders failed to follow the same procedures and that inadequate staffing, insufficient training, and ineffective monitoring also contributed to the weak control environment.(62) The lack of proper training and oversight led to questionable purchases, such as an \$8,000 Samsung 63-inch plasma screen television acquired at the end of the fiscal year.(63) GAO noted that the large-screen television sat unused and in its original packaging 6 months after it was purchased.(64)

Shortcomings in the DHS purchase card program were also highlighted in the agency's procurement activity in response to Hurricane Katrina in 2005. DHS made thousands of purchase card transactions to buy goods and services for hurricane rescue and relief operations.(65) For Katrina-related procurements, Congress authorized DHS an increase to the micro-purchase threshold from \$2,500 to \$250,000,(66) which is the same threshold that potentially could be applied to the current e-portal program. Due to the issues noted above, GAO found problematic purchasing activity including an instance where DHS paid double the retail price for 20 flat-bottom boats.(67) In another instance, weaknesses in DHS's inventory control and procurement practices led to over 100 laptops being lost or misappropriated when shipped to New Orleans as part of the relief efforts.(68)

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(59) DHS was established under the Homeland Security Act of 2002, *Pub. L.*, No. 107-296.

(60) *See*, for example, House Committee on Government Reform, 109<sup>th</sup> Congress, "Waste, Abuse and Mismanagement in Department of Homeland Security Contracts", 2006, i, 3.

(61) Government Accountability Office, "Purchase Cards, Control Weaknesses Leave DHS Highly Vulnerable to Fraudulent, Improper and Abusive Activity", GAO-06-957T, 19 July 2006.

(62) *Ibid.*, p. 53. In addition, GAO and the DHS Office of Inspector General estimated that 45% of DHS's purchase card transactions were not properly authorized, 63% did not have evidence that the goods or services were received, and 53% did not give priority to designated sources, *ibid.*

(63) Government Accountability Office, "Purchase Cards, Control Weaknesses Leave DHS Highly Vulnerable to Fraudulent, Improper and Abusive Activity", *op. cit.*, pp. 53, 5 and ff.

(64) *Ibid.*, p. 54.

(65) *Ibid.*, pp. 53, 1 and ff.

(66) *Ibid.*, p. 56.

(67) *Ibid.*, pp. 53, 5 and ff.

(68) *Ibid.*, p. 58.

GAO concluded that DHS: failed to commit sufficient resources to its purchase card program, including insufficient staffing to effectively manage and oversee the purchase card program; failed to ensure that cardholders received adequate training; and failed to provide sufficient monitoring and oversight, including the use of post-payment audits to monitor and oversee cardholder's compliance with agency-wide and government-wide purchase card policies.(69) GAO recommended action to improve the processes and internal controls to maximize the value and benefit of the purchase card and minimize the potential for fraud, waste, and abuse.(70)

The government-wide and DHS purchase card programs, like the e-portal program, place an emphasis on an efficient process for the purchase of commercial items. The experiences with the purchase card programs reinforce that such streamlined procedures, without adequate safeguards, are subject to mismanagement and inefficiencies. As the government develops the e-portal program, it should keep in mind that oversight mechanisms such as those discussed above are key to a successful streamlined process for commercial item purchases, which can enhance both the integrity as well as the efficiency of the system.

## 6.2. Framework agreements

The government's expanded use of framework agreements or indefinite-delivery/indefinite-quantity (IDIQ) contracts,(71) as part of the 1990s procurement reforms, also offers insights into issues that can arise when promoting streamlined acquisition methodologies. In the US, as elsewhere, framework agreements have been viewed as a critical tool to enhance the efficiency of the acquisition process.(72) However, the increasing popularity of framework agreements in the post-reform era led to concerns regarding reduced levels of competition and a lack of transparency.(73) In addition, while framework agreements are preferred for their perceived efficiencies and flexibility, some argued that they were in fact used to avoid regulations associated with traditional methods, rather than as a means of efficiency.(74) To address these concerns,

(69) *Ibid.*, pp. 53, 7-11 and ff.

(70) *Ibid.*, pp. 53, 30 and ff.

(71) In the U.S. federal procurement system, framework agreements are generally known as indefinite delivery indefinite quantity (IDIQ) contracts. See FAR Subpart 16.5.

(72) See G.L. ALBANO and C. NICHOLAS, *The Law And Economics Of Framework Agreements*, Cambridge, CUP, 2016, p. 4, where the authors note that "framework agreements are considered to have the potential to 'increase dramatically the freedom [given to] public officials to use their judgment in the procurement process' to enhance value-for-money outcomes, as then head of the United States (US) Office of Federal Procurement Policy urged the procurement community to adopt back in 1990".

(73) See, for example, Government Accountability Office, "Contract Management: Few Competing Proposals for Large DOD Information Technology Orders", GAO/NSIAD-00-56, 20 March 2000.

(74) C.R. YUKINS, "Are IDIQ Inefficient: Sharing Lessons With European Framework Contracting", *Pub. Cont. L.J.*, 2008, p. 545.

adjustments were made through laws and regulations that restored certain transparency, oversight and competition features of traditional procurements to the ordering process under IDIQ contracts.(75)

### 6.3. Bid protests

Another oversight mechanism that could be impacted by the use of the e-portals is the bid protest. Bid protests have served as a fundamental element of transparency and oversight for the U.S. federal procurement system for decades. However, as currently proposed, direct ordering under the e-portal process has the potential to permit federal purchasers to bypass the normal pre-award publication on which most pre-award protests are based.(76) Reducing the ability to challenge awards under the e-portal system undermines a critical oversight tool to promote fairness in the award process and reduce the potential for corruption.(77) In addition, as others have noted, direct ordering under the e-portal system may run counter to a number of international trade agreements, such as the Agreement on Government Procurement, to which the US is a party. These agreements generally allow vendors to protest certain ‘covered’ procurements.(78) Creating an ordering system that bypasses the protest process adversely impacts the U.S. commitment to such agreements and opens the door for others – the United States’ trading partners – potentially to do the same.(79)

## 7. Conclusion

As discussed, the work of the Section 809 Panel and the legislation to establish the e-portal program are part of the current initiative to address perceived shortcomings in prior efforts to create a simplified commercial item purchasing process for U.S. federal agencies. As GSA proceeds with its e-portal implementation plan there is the sense of a new beginning in commercial item purchasing. After many years of failure in hosting its own online catalog, GSA

(75) See, for example, the “National Defense Authorization Act for Fiscal Year 2002”, section 803, Competition Requirements, providing that all DOD purchases of services over \$100,000 under multiple award contracts be made on a ‘competitive basis’, in *Pub. L.*, No. 107, § 803 (b)(1), (c)(2); “National Defense Authorization Act for Fiscal Year 2008”, section 843, Enhanced Competition Requirements for Task and Delivery Order Contracts, providing for i) protests of task and delivery orders exceeding \$10 million; ii) enhanced competition requirements for task and delivery orders exceeding \$5 million; and iii) prohibition against single award task or delivery order contract valued at over \$100 million unless approved by agency head, in *Pub. L.*, Nos 110-181, § 843.

(76) See C. YUKINS and D. DAMISH, “Section 809 and ‘E-Portal’ Proposals, by Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption”, *The Government Contractor*, 2 May 2018, Vol. 60, No. 17.

(77) *Ibid.*, p. 67.

(78) *Ibid.*

(79) *Ibid.*

is – at Congress’ insistence – turning to embrace commercial online marketplaces. This new approach, though it will launch on only a small pilot, opens the door to a very different federal marketplace for small-value purchases, one in which users (who are likely to focus more on quality, and less on price) can guide purchasing. At least initially, this may prove to be a small-value marketplace with few real regulatory constraints. This may well transform this corner of the federal market. However, as discussed above, part of the reason prior efforts fell short is that the removal of traditional oversight mechanisms often resulted in the misuse of these simplified procedures. As also noted, these oversight mechanisms are necessary, not only to prevent abuse, but also to promote the efficiency that is sought by simplified procedures. The U.S. federal government’s ongoing effort to create a less complex purchasing process for commercial items reinforces the need for robust oversight and compliance mechanisms. Given these challenges, Congress wisely provided for a three-phase implementation plan for the e-portal program. Thus, the government has an opportunity to test and refine its approach for the program. Nevertheless, given the dynamics of the current commercial e-portal market and the prospect of dominance by a single provider such as Amazon, the challenges are significant. While the e-portal program seeks to move more closely to a purely commercial buying experience for the federal government, past experience suggests that traditional (if cumbersome) protections guaranteeing competition, transparency, accountability and oversight may be necessary to ensure the effectiveness, efficiency and integrity of the program.