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FEATURE COMMENT: Emerging From The Pandemic: U.S. Government Poised To Award ‘Commercial Platforms’ Contracts That Will Open Online Marketplaces To Federal Purchasers

The General Services Administration is poised to award contracts to commercial companies that host “electronic marketplaces” online (at sites such as *Amazon.com* and *Walmart.com*). This “commercial platforms” initiative could radically reshape Government procurement in goods and services, as federal users will be able to make direct “micro-purchases” (typically up to \$10,000) directly from these commercial platforms.

As the authors of this piece will discuss during a free June 30, 2020 noontime webinar (see www.publicprocurementinternational.com for details), although the GSA initiative is both important and highly innovative, it raises a number of challenges as well.

The introductory portion of this article, prepared by Professor Christopher Yukins of George Washington University Law School’s Government Procurement Program, introduces GSA’s “commercial platforms” initiative, which may be the first major effort by an industrialized nation to open online commercial marketplaces for purchases by government users. Professor Robert Handfield, author of the portion of this article that addresses supply chain resilience, is the Bank of America University Distinguished Professor of Supply Chain Management at North Carolina State University, and Director of the Supply Chain Resource Cooperative; he will discuss how the Government’s

use of commercial platforms can improve the resilience of Government supply chains in times of crisis. Thomas Kull, professor of supply chain management at the W. P. Carey School of Business at Arizona State University, is the author of the section which reviews the training that will be needed under this initiative, as non-procurement professionals take on substantial purchasing responsibilities through the new platforms. In the next section of the article, Christopher Yukins will discuss other open issues under the new initiative, including how to address counterfeits and vendor qualification. Finally, Andrea Patrucco, professor of project and supply chain management at Penn State University Beaver, will discuss the potential impact of this initiative in state and local governments, and internationally.

Introduction—The history of GSA’s “commercial platforms” initiative was detailed in an earlier piece, see 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. As that piece noted, the initiative was launched when Congress asked GSA to assess how to use electronic marketplaces in federal procurement, under § 846 of the National Defense Authorization Act for Fiscal Year 2018, P.L. 115-91. See Yukins, “Two U.S. Initiatives on a Collision Course: Trump’s Buy American Order and the New Electronic Marketplaces,” 6 Pub. Proc. L. Rev. NA256 (2019).

Congress called for action in part because of the dominant role that Amazon and other online vendors play in the commercial marketplace; Congress did not want the Government to be left behind, especially since Government studies have shown that federal buyers already use Government-issued purchase cards to make hundreds of millions of dollars in micro-purchases from online commercial marketplaces every year.

Micro-purchases are normally capped at \$10,000, but that limit has risen to \$20,000 in

the current health emergency. See, e.g., Office of Management and Budget, Memorandum M-20-18, “Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19),” www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf. GSA and OMB have recommended to Congress that the micro-purchase threshold be increased to \$25,000 for purchases made through commercial online marketplaces. See Mark J. Lee, Assistant Commissioner, Office of Policy and Compliance, Federal Acquisition Service, GSA, “The Recommended Micro-Purchase Threshold Increase—An Opportunity” (July 19, 2018), interact.gsa.gov/blog/recommended-micro-purchase-threshold-increase-opportunity.

For the most part, Congress left it to GSA to shape the commercial platforms initiative. Online market providers have submitted solicitations to GSA for no-cost contracts, which will allow those providers to open their online marketplaces to federal users, subject to certain requirements. GSA estimates the contracts will result in \$6 billion annually in micro-purchases by federal users, though other studies suggest that the total market may be several times that size. GSA will receive a .75 percent fee on those purchases, but the ultimate contractual relationship and fulfillment will be entirely between the federal purchasers and the vendors—GSA will have no direct role in the sales.

The new initiative will empower federal users, who have long complained about slow federal procurement cycles which can yield substandard goods and services. See Christopher R. Yukins, “A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model,” 40 *Pub. Cont. L.J.* 63 (2010), ssrn.com/abstract=1776295 (“principal-agent” problem—the deviation from optimal outcomes caused by the procuring official’s indifference or self-interest—is a central problem in public procurement). While federal employees already may make micro-purchases directly, without involving federal contracting officials, the platforms opened by GSA will almost certainly create new market opportunities as users and vendors deal directly for both goods and services. Because micro-purchases carry almost no regulatory constraints regarding competition, transparency or socioeconomic requirements, this new GSA initiative appears likely to normalize and expand micro-purchases outside traditional procurement channels—and so may revolutionize small purchases in the federal market.

GSA’s awards of the commercial platform contracts were delayed at the beginning of April due to the pandemic. See Laura Stanton, Deputy Assistant Commissioner for Category Management, Information Technology Category, GSA, “Commercial Platforms Acquisition Delayed” (April 1, 2020), interact.gsa.gov/blog/commercial-platforms-acquisition-delayed. This was ironic, because as Professor Handfield explains below, the Government’s ability to respond to the pandemic—the resilience of its supply chains in a time of crisis—could have been enhanced by access to these commercial platforms.

Enhancing Supply Chain Resilience—The COVID-19 pandemic has highlighted the need for resilient supply chains. The keys to supply chain resiliency include stability, trust, transparency and agility, as market actors look to rewrite their supply chain playbooks. GSA’s commercial platforms initiatives could reinforce the relationships between federal purchasers and their suppliers on all these points—though challenges remain. To ensure that the platform can support future supply chain resilience in the face of uncertainty, several requirements are needed.

To begin with, supply chain transparency is essential if the new commercial platforms are to improve the Government’s supply chain resilience. Transparency provides the necessary visibility, both locally and globally, to understand and anticipate the operating environment, and enable supply market intelligence. This works both ways—from the customer to suppliers in anticipation of demand and from the suppliers to customer to inform and forewarn of delivery issues. Transparency is also needed to validate sources of supply, and if possible, ensure that past performance and peer reviews of supplier performance is assured. Unless the new platforms afford that type of transparency and effective measures of past performance, including the validity of the product’s authenticity and country of origin, these platforms may not provide the level of resilience and assurance that the Government needs to deal with rapidly changing environments.

As Professor Handfield and his colleagues Niels Strazdins and Ian George have noted, see “Supply Chain Resilience and Renewal: Part I” (Bloomberg New Economy Forum 2020), www.neweconomyforum.com/news/supply-chain-resilience-part-1/, supply chain resilience also depends on stability of demand and strong operational performance. The new GSA

commercial platforms could provide both: the online marketplaces have demonstrated their operational reliability over many years, and federal buyers—because they will bypass traditional open competition requirements—will be able to deliver more stability of demand over time. This is particularly important for small volume buys. The platform can provide a catalogue of authentic suppliers, and avoid buyers having to reach out to dubious and unproven sources that have doubtful performance histories. Such was the case with regard to the N95 and personal protective equipment situation during the pandemic, when suppliers of N95 masks that were not approved by the National Institute for Occupational Safety and Health or the Food and Drug Administration began selling to state agencies.

Trust between partners, Professor Handfield and his colleagues noted, is an essential human element of what is an increasingly automated activity. While competition in a marketplace is normal, they point out, competing within one's own supply chain "is a luxury few can afford yet many still engage in due to a lack of vision and/or capability." *Id.* The streamlined purchasing allowed by the new commercial platforms, with direct relationships between users (purchasers) and suppliers, could help reinforce that trust—and thus the resilience of the supply chain. Other purchasers can also share their experiences with suppliers, providing both good and bad reviews, much like the Amazon experience works to reward suppliers that have strong track records in the marketplace and to punish those that do not.

Finally, agility in thinking and action helps partners recognize that success turns on the performance of the whole supply chain, and that every member needs to be prepared to take action to address issues as they arise. Whether GSA's commercial platforms will be able to achieve this kind of agility and responsiveness will depend, in part, on whether federal users are appropriately trained for their new roles in purchasing—a topic taken up below by Professor Thomas Kull.

Training of Users—The implementation of a user-friendly e-marketplace platform, as is currently being piloted by GSA, coupled with the potential rise in the Federal Government's micro-purchase threshold, raise the possibility that more Government purchases will be done by non-procurement professionals. Studies show that a critical success factor of such e-procurement platforms is attention

to human resources, particularly knowledge—not only knowledge of the platform itself, but an ability to commit to use the platform to its fullest. While non-procurement professionals may know how to operate a user-friendly, Amazon-like platform, assuring the micro-procurement process adds value to a micro-buyer's stakeholders is an entirely different challenge.

It is important to note that federal procurement professionals are not only well trained at assuring statutory compliance, they are also well trained at assuring the Government receives good value for its purchases. At minimum, this requires knowing when one has clear detail on requirements, doing satisfactory research to know product capabilities, gathering adequate purchase alternatives, performing appropriate analyses to make a selection, and all the while following-up with users to assure satisfaction with the purchasing process. Beyond these minimum activities are other, more strategic actions that include using the available tools and data for analyses, reviewing trends over time to find areas of improvement, and being pro-active in assuring purchases are furthering the organization's mission.

Taken together, an expansion of micro-procurement to non-procurement professionals puts the public's value-for-money more at risk unless those micro-buyers are provided the basic skills for achieving procurement excellence. Given this, a two-phase approach seems warranted: assessment and development. First, an assessment of existing learning platforms is needed to determine if the delivery of procurement knowledge is designed for the likely-to-grow micro-buyer community. Second, development of micro-learning and online learning mechanisms should be done where gaps exist from this assessment. Note: these steps take time. As GSA experiments with e-marketplace platforms, it should begin the process now by gauging the learning needs of its future micro-buyer community.

One of the challenges in training will be to ensure that federal purchasers on the new commercial platforms—who typically will not be procurement officials—fully understand the special challenges facing federal procurement today. One of those challenges, as Professor Yukins notes in the following section, stems from contractor qualification and the threat of counterfeit goods on commercial platforms.

The Counterfeit Challenge—Possible Trigger to Debarments—As a result of its January 2020 trade deal with China, under which the U.S. announced that it would find new ways to stop counterfeit goods in online marketplaces, the Trump administration has stepped up its fight to stop counterfeit goods—and that fight may have a direct impact on the pending commercial platforms initiative. See Yukins, “Trump Administration’s Fight Against Counterfeit Trade May Impact GSA’s Electronic Marketplaces Initiative” (Feb. 25, 2020), *publicprocurementinternational.com/2020/02/25/trump-administrations-fight-against-counterfeit-trade-may-impact-gsas-electronic-marketplaces-initiative-which-is-no-longer-stalled-by-protest/*.

In a February 2020 piece, Jason Miller of *Federal News Network* asked whether an executive order issued by President Trump as a result of the trade deal with China, *Ensuring Safe & Lawful E-Commerce for US Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights Holders* (Jan. 31, 2020), could affect GSA’s commercial platforms initiative. The order, which press reports made clear was aimed at counterfeit goods on Amazon and other online marketplaces, said that e-commerce “is being exploited by traffickers to introduce contraband into the United States.” The order noted that it is

the policy of the United States Government that any person who knowingly, or with gross negligence, imports, or facilitates the importation of, merchandise into the United States in material violation of Federal law evidences conduct of so serious and compelling a nature that it should be referred to U.S. Customs and Border Protection (CBP) of the Department of Homeland Security for a determination whether such conduct affects that person’s present responsibility to participate in transactions with the Federal Government.

The order thus emphasized that a firm that traffics in counterfeit goods on an electronic commerce platform could face debarment. If a firm is referred to CBP, the order said, it is the “policy of the United States Government, as reflected in Executive Order 12549 of February 18, 1986 (Debarment and Suspension), and elsewhere, to protect the public interest and ensure the integrity of Federal programs by transacting only with presently responsible persons.” Pursuant to that policy, persons who “flout the customs laws” may be considered to “lack present

responsibility,” and so may be subject to possible debarment under Federal Acquisition Regulation subpt. 9.4.

The Trump administration’s campaign against counterfeit goods thus may open a broader effort to debar vendors on the commercial platforms. Debarments of vendors—which are very possible, 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 an online commercial platform—may begin with CBP debarments. Under the executive order, CBP may target for debarment those third-party vendors on commercial platforms that “knowingly, or with gross negligence” import counterfeit goods. While the executive order focused on counterfeits and contraband, in principle a wider array of importing firms may be at risk if they facilitate violations of federal law.

The decision to debar vendors on the online marketplaces could have a collateral impact on other governments that follow GSA’s piloting effort to open these commercial marketplaces to government users. In the following section, Professor Patrucco discusses first steps that state and local governments, and governments abroad, are taking in adapting to electronic marketplaces.

Future Pathways for Online Marketplaces in Public Procurement—Understanding the advantages of online platforms for public procurement presents an incredibly timely problem, as the COVID-19 crisis has certainly spawned an interest in the need to introduce electronic marketplace “solutions,” which can increase Government resilience in responding to emergency situations and facilitate purchases by lowering transaction costs, diversifying suppliers, optimizing user experience and expediting order fulfillment.

When assessing the types of procurement platform to be implemented, at least three business models are possible, which vary in the degrees of competition, user experience, capability for fulfilling compliance requirements, and administrative complexity:

- The **e-commerce model**, under which a platform provider sells its own proprietary products directly to the buyers and fulfills product orders;
- The **e-procurement model**, under which the platform provider does not sell products,

but aggregates data from e-commerce and e-marketplace sites for price and product comparisons, while third-party sellers process the orders;

- The **e-marketplace model**, under which a provider (e.g., Amazon) offers its own proprietary products and products from third-party sellers, and mimics the consumer shopping experience by providing functions for searching, comparisons and product or supplier reviews.

The GSA initiative falls in the last group—which seems to be the solution likely to provide the optimal balance between commercial efficiency and public accountability.

On one hand, an e-marketplace is able to guarantee dynamic competition (i.e., multiple suppliers, multiple buyers, diverse products); on the other, it can make the procurement process more manageable, by centralizing account and spend management, and ensuring compliance with required procedures.

One question, then, is whether the states are likely to adopt similar e-marketplace models. E-commerce systems are becoming more and more popular among states, as these systems have a demonstrated ability to improve process transparency, boost competition, expand agencies' supplier base, maintain financial controls, measure performance and promote efficiency in workflows.

In recent years, we have seen pioneering initiatives from several states in this direction. Oregon, for example, introduced a new statewide e-procurement platform (OregonBuys); similarly, in 2019, Maryland established the eMaryland Marketplace Advantage system, in which more than 12,000 vendors have already registered and positioned themselves to do business with Maryland and its local governments. Georgia, as well, has a system in place called the "Team Georgia Marketplace."

The GSA initiative thus could represent a source of inspiration for those states that may invest in more technology to support their procurement processes. It is worth noting, though, that states are unlikely to utilize the GSA contracts directly (even if ultimately permitted by GSA), because using GSA contracts in most states typically is through an exception process.

The outlook is slightly different for local governments. As an initial matter, while local governments certainly use platforms and technologies for the execution of some procurement activities, they are still using traditional paper-based practices as well.

Furthermore, due to the high number of local governments, there is high heterogeneity in technology adoption: while some local governments already have online systems in place (e.g., to receive electronic bids and other offers), most others do not.

To fill this gap, some states are pressing local governments to receive bids electronically and use e-procurement systems across different steps in the procurement process; while this imposition has not been well received by local government professionals, most of them recognize that several aspects of e-commerce and e-procurement could be highly beneficial to local governments. As a result, some states are encouraging this transition by allowing local governments to use centralized, statewide electronic procurement systems.

State or local efforts modeled on the GSA commercial platforms initiative would represent another opportunity for local governments to advance the digitalization of procurement activities. However, until there is broader understanding of the commercial platforms' risks and benefits, widespread adoption across the U.S. is likely to take time.

Public agencies conducting procurement in the European Union would also face real challenges in adopting an approach similar to the GSA commercial platforms. Although the 2014 EU Procurement Directives put e-procurement at the heart of the ongoing European reforms, the recent COVID-19 emergency has highlighted the great fragmentation (and relative lack of maturity) that characterize the use of technology to support public procurement processes in Europe. Procurement software solutions have been available in the marketplace for years, but several barriers arise when trying to implement these solutions at large at the EU member state level. Often, the barriers also stem from the fragmented operational environments in individual countries.

Conclusion—GSA's commercial platforms initiative, by opening online marketplaces to federal users' micro-purchases, could have an enormous impact on broad portions of the federal marketplace. The contracts under the initiative are likely to be awarded soon, as the pandemic wanes and GSA can turn its attention from the COVID-19 crisis. The commercial platforms initiative may well improve the resilience of federal supply chains, in part by allowing users to deal directly with online vendors. To succeed, however, the initiative will need to address a number of challenges, including the training of federal purchasers

and issues with counterfeit goods and vendor responsibility. If these and other challenges can be met—if GSA’s commercial platforms initiative succeeds—it may serve as a model for other public purchasers across the U.S., and across the globe.



This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Christopher Yukins

(GWU), Robert Handfield (NCSU), Thomas Kull (ASU) and Andrea Patrucco (Penn State University Beaver). The views expressed are those of the individual authors. The authors will discuss GSA’s “commercial platforms” initiative in a free online webinar on June 30, at noon Eastern; further information is available at www.publicprocurementinternational.com.