

Change Is Upon Us: An Analysis of the Section 801 COTS Provisions of the 2018 NDAA

Article By:

Jonathan S. Aronie

In the words of Taylor Swift, “This is a new year. A new beginning. And things will change.” While I suspect Ms. Swift was not writing about Section 801 of the National Defense Authorization Act of 2018 when she tweeted this inspirational prognostication, she might as well have been – although, admittedly, it probably would not have generated quite so many re-tweets. In any event, if you have not done so yet, you should give it a read (Section 801 that is; not Ms. Swift’s tweets).

Section 801 of the NDAA, which is set to be voted on in the House Armed Services Committee (HASC) as early as this afternoon, directs DOD to purchase COTS items through existing online commercial marketplaces, and to make such marketplaces available to other federal agencies for COTS purchases as well. The directive to purchase products through an online marketplace upends current federal contracting rules and will have a significant impact on all current federal purchasing vehicles – including GSA Schedules, NASA SEWP, FedMall, NIH CIO-CS, and more. Consequently, it also will have a significant impact on all COTS manufacturers, distributors, and resellers.

Here is a summary of the key provisions of Section 801 with some related observations that may be of interest to those who manufacture, sell, and/or resell COTS items to the Government:

Section 801 directs GSA to establish and administer a program through which DOD will purchase COTS items through existing online marketplaces. While GSA will administer the program, it is prohibited from running the marketplaces. The bill makes clear the marketplaces may not be managed by the Government and may not be used primarily by the Government. The marketplaces must be run by private entities that aggregate, distribute, sell, and/or manufacture products.

- **Observation:** GSA Advantage and FedMall are run by the Government and, thus, neither meets the requirements of an online COTS marketplace under the bill. Interestingly, industry attempted to have the draft HASC language modified so that a Government online portal that could meet the marketplace requirements would receive the same benefits as a commercial portal, but the authors of the legislation rejected the idea of any acceptable Government-run marketplace.
- **Observation:** The bill seems to permit a marketplace run by an entity that distributes

products and sells its own products, which has led some industry groups to express concern over potential conflicts between the marketplace and the vendors selling through it.

GSA must award “multiple” marketplace contracts. Notably, however, GSA is not required to use competitive procedures to award the marketplace contracts. GSA expressly may award the marketplace contracts *without the use of full and open competition*.

- **Observation:** The draft legislation originally contemplated the award of “one or more” marketplace contracts. The current language reflects a change championed by multiple vendor and industry groups to increase competition among marketplace providers. The current language, however, does not go as far as industry wanted. Multiple industry groups recommended the legislation be modified to require GSA to execute “the maximum number of contracts as practicable with online marketplace providers.” This language was rejected.
- **Observation:** The bill does not instruct GSA how it should evaluate and select an appropriate marketplace. The bill only authorizes GSA to make the award without competition. It is unclear whether this means GSA may award the marketplace contracts without any formal evaluation. It also is unclear what basis for legal challenge non-selected marketplace vendors will have.

While directed at DOD purchasers, the bill makes clear GSA must design the program so that it enables *government-wide use*; not just DOD use.

- **Observation:** The HASC staff has been working with the House Oversight and Government Reform Committee to look for ways to expand the online marketplace plan to cover the entire Federal Government. HOCR Chairman Gowdy apparently has waived his committee’s jurisdiction over this issue in order to permit the HASC to proceed with its government-wide legislation.

While DOD is not required to use the marketplace for all purchases, the bill requires that DOD “shall” use the marketplace “as appropriate” for COTS purchases. The directive does not extend to services and does not extend to non-COTS commercial items.

- **Observation:** The requirement to use the marketplace for all COTS purchases “as appropriate” would seem to open the door to future legal challenges. GSA will have to figure out what is “appropriate” and what is not, or at least provide guidelines for DOD purchasers to make that determination at the purchase level.

The bill identifies a number of capabilities a marketplace must possess in order to qualify under the new program. The marketplace must:

- Be widely used in the private sector, including for business-to-business purchases.
- Offer dynamic product selection.
- Offer dynamic product pricing.

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- Present offers from multiple suppliers.
 - Be sortable by
 1. Product price,
 2. Shipping price,
 3. Delivery date,
 4. Supplier reviews, and
 5. Product reviews.
 - Not feature or prioritize any product or supplier based on fees or compensation that is “exclusively” paid for such featuring or prioritization.
 1. **Observation**: The bill does not appear to prohibit prioritization based on fees paid not “exclusively” for that purpose. Industry groups attempted to modify this language before its incorporation into the NDAA to prohibit any featuring or prioritization “based ***directly or indirectly*** on any ***form of*** compensation, consideration, or fee paid to the online marketplace” This language was rejected by the HASC.
 2. **Observation**: The bill also does not appear to prohibit prioritization for reasons other than fees or compensation, such as the marketplace owner prioritizing its own products over those of others.
 - Provide the capability of ensuring procurement oversight controls, including
 1. Spending limits,
 2. Order approval, and
 3. Order tracking.
 - Allow for consolidated invoicing, payment, and customer service.
 - Provide for product screening by Government purchasers for
 1. Excluded vendors (i.e., vendors that have been suspended or debarred from selling to the Government),
 2. Products that comply with the Berry Amendment,
 3. Products that comply with DOD’s Specialty Metals rules,
 4. Buy American Act (BAA)-compliant products,
 5. Trade Agreement Act (TAA)-compliant products,

6. JWOD (AbilityOne)-compliant products, and

7. Products sold by small and other disadvantaged businesses.

- Collect necessary government purchasing data. (The bill directs GSA to maintain the ability to access purchasing data on a monthly basis, including the number of suppliers that offered a similar product on the same date a product was purchased.)
- **Observation:** These requirements (a-j) severely limit the number of existing marketplaces that conceivably could qualify as a DOD COTS marketplace.

The bill requires GSA to conduct reviews of suppliers to ensure they meet the requirements listed above.

- **Observation:** Ultimately, GSA will have to establish regulations to implement these requirements.
- **Observation:** While not identified in the bill, presumably the GSA OIG will be involved in this facet of the new program.

With respect to ordering/purchasing, agencies will be relieved of current competition obligations. A purchase through the marketplace automatically will meet CICA's competition requirements so long as two or more similar products are available through the marketplace.

- **Observation:** Query what exempting marketplace purchases from full and open competition means when it comes to DOD's purchasing decisions. Will DOD purchase through the marketplace on an LPTA (low price technically acceptable) basis, or will value still come into play? Also, will disappointed bidders have any vehicle to challenge irrational and/or unreasonable purchasing decisions? Since there is no cap on the size of marketplace purchases, industry could see massive non-competitive purchases become the norm. Considering the Federal Government makes flawed procurement decisions quite often (remember, according to GAO, more than 40% of bid protests are effective, meaning the agency takes some form of corrective action), the idea that purchasers need not engage in any competitive process is concerning.

Agencies still may set aside purchases for small businesses, and awards to the vendors selling through the marketplace are considered awards to prime contractors for small business tracking purposes.

All purchases made through the marketplace must be made in accordance with the marketplace's standard terms and conditions. And Government purchasers may not require the marketplace to change its standard Ts&Cs.

- **Observation:** The bill's language suggests that when DOD requires changes to standard commercial terms and conditions they will be precluded from purchasing through the marketplace, and will have to use a different purchasing vehicle. This hints at a small window of ongoing usefulness for GSA Schedules, FedMall, etc.

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- **Observation:** The bill is silent regarding what happens when a vendor's standard terms and conditions conflict with the marketplace's. Presumably, the marketplace vendor will be able to exert significant pressure on the commercial terms and conditions of all sellers.

Regarding the massive amounts of data the marketplace will control, the bill provides that the marketplace may not make data available to any third party.

- **Observation:** The bill places no limitation on how the marketplace itself can use the data for its own marketing and sales purposes. This could create a significant power differential where the marketplace provider acts as a reseller and a seller of its own products at the same time.
- **Observation:** Several industry groups have objected to what they view as an unjustified Government giveaway. Recognizing the value of the data that will be available to the marketplace providers, industry pushed to have the initial language modified to require "just compensation from the entity receiving" the Government's purchasing data. The proposed language was rejected.

The bill directs GAO to assess the program's impact on small businesses after three years.

However the foregoing issues resolve themselves, if enacted, Section 801 unquestionably will change the way the Government purchases – and the way vendors sell – COTS items. And it also almost certainly will have a dramatic impact on the viability of the Government's current purchasing vehicles, including GSA's MAS Program. In fact, as noted above, industry attempted to modify the initial HASC language so that the regulatory advantages going to commercial online marketplace providers under the bill also would apply to Government online marketplace providers like GSA Advantage, FedMall, etc. The authors of the bill rejected the proposal outright.

While the foregoing discussion outlines some of the concerns expressed by some companies and industry groups, other groups have expressed additional concerns over the potential negative consequences of the legislation. Some have complained the use of a marketplace that treats "similar" items as the same for competition purposes effectively renders COTS purchases LPTA and (a) will drive prices into a dangerous downward spiral and (b) will drive the Government toward cheaper foreign products. Others, in contrast, have expressed concern the significant fees charged by online marketplaces will *increase* the Government's costs. Other criticisms have centered around the potential monopolistic power of the online marketplaces to drive prices, product attributes, and terms and conditions. In the same vein, some vendors worry about the negative impact of putting the totality of DOD's purchasing data in the hands of two marketplaces that also are direct competitors of the vendors they host. (As noted above, the bill allows the marketplace to sell products as well as host products.)

The current version of the online marketplace provision, designated Section 801 of the 2018 NDAA, heads into Full Committee Markup later today. Then, depending on how things go in the House, the bill will head to the full House, and then to the Senate where new voices will be heard and, perhaps, changes made. If Section 801 makes it past the Senate, and becomes law, GSA will have to mobilize to develop the rules and regulations that will govern the new program. Here again, there will be new opportunities for supportive and concerned voices to be heard. Regardless of what tune these voices sing, Ms. Swift had it right: "This is a new year. A new beginning. And things will change."

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