Marketplace Tweak May Halt DOD Commercial Buying Slide

By Daniel Wilson

Law360, Nashville (July 28, 2017, 8:52 PM EDT) -- A recent U.S. Government Accountability Office report indicates that the volume of commercial items purchased by the U.S. Department of Defense has gradually declined over time, but experts say a proposed move to allow the use of online commercial marketplaces like Amazon.com could reverse that trend.

Despite a number of attempts Congress has made in recent years to spur the Pentagon to make greater use of commercial items, the department has been resistant to those changes, and the percentage of contract spending it directs toward commercial spending has slowly declined over time, according to the GAO.

But a new legislative proposal in the 2018 National Defense Authorization Act would significantly overhaul commercial off-the-shelf, or COTS, purchases — a major part of overall federal commercial purchasing — by allowing the use of online commercial marketplaces, a provision that attorneys say could appeal to both vendors and contracting officers and turn that slide around.

“If that happens, that would be a sea change,” Covington & Burling LLP of counsel Jason Workmaster said.

Since 2013, lawmakers have made several legislative changes to the way the DOD purchases commercial items, a category that includes products and services that are otherwise publicly available in the commercial market and need at most minor modifications to meet the DOD’s needs, ranging from cleaning services to space vehicles.

Congress has long pushed the department to purchase commercially where possible, perceiving commercial purchases as a cost- and time-saving measure when compared to bespoke purchases. Their legislative efforts, not all of which have been codified into regulation yet, include required improvements in the training and documentation available to contracting staff, simplified purchase procedures for certain commercial items, and requirements for agency heads to personally approve the use of noncommercial purchases in certain service categories, to name a few examples.

But after being tasked with reviewing how those legislative changes had affected the way the Pentagon actually purchased commercial items, the GAO found in a July 17 report that the department’s use of commercial item purchase procedures declined over a decade through the end of fiscal year 2016. That drop was both in absolute dollar terms and as a relative percentage of the DOD’s overall contractual obligations, dropping from 22 percent to 16 percent between 2007 and 2016.
A large part of the explanation for the decline in absolute commercial spending comes from the DOD’s overall budget shrinking amid strict federal budget caps imposed following the passage of the Budget Control Act in 2011.

But the reasons for the relative decline as a percentage of overall contracting are harder to pin down, and the GAO report — which the GAO notes, due to limits in the way contracting data is recorded, ignores instances where the DOD purchases commercial items through other buying procedures, through interagency agreements, or through subcontracts — does not shed any light on the issue.

Attorneys suggested, however, that a likely factor behind the decline is ongoing skepticism among DOD officials about the commercial item purchasing process, particularly regarding whether commercial items available through multiple-award federal contracting vehicles are competitively or fairly priced.

“I think it’s fair to say, from industry’s perspective, that DOD has been over the course of time somewhat resistant to commercial item acquisition, over concerns over whether it’s getting good pricing. ... From my perspective, [related guidance and regulations] that the DOD has been considering really reflect a lot of skepticism about commercial items,” Workmaster said.

And for commercial suppliers who want to do business with the DOD, this continued resistance to buying commercial items is leaving them potentially billions of dollars worse off as a group.

Although the GAO said that the decline in the DOD’s use of commercial item contracts over the past decade has been gradual and has “remained in a narrow range,” percentage-wise, just a single percentage point of the DOD’s annual contract spending typically equals somewhere between $3 billion and $4 billion.

But if a clause currently included in the House version of the 2018 NDAA makes it to the final, compromise version of the bill, the usage of commercial vendors by the DOD is likely to see a strong uptick, attorneys said.

Driven by the House Armed Services Committee’s concern that the DOD is currently “rarely able to buy off-the-shelf items quickly and at a reasonable price,” that provision, Section 801, would allow the U.S. General Services Administration to contract with commonly used online commercial marketplaces “like Amazon, Staples, or Grainger,” for the purchase of COTS items, not only at the DOD but governmentwide.

“These portals function like mini-marketplaces, ensuring that the buyer gets the best price without a lot of red tape,” committee staff said in a summary of the bill.

Buying through a marketplace method, rather than the now-common method of issuing task orders for commercial items under overarching indefinite-quantity contracts, “may truly revolutionize and greatly increase the purchase of commercial items,” McCarter & English LLP partner Daniel Kelly said.

“This runs against a trend where agencies, especially DOD, are closely scrutinizing commercial item designations,” he said.

The exact model for any marketplace contracts, however, remains uncertain, with the idea only set out in broad strokes in the legislation, and the devil will be in the details, attorneys noted.
Among potential downsides and roadblocks are a lack of pricing controls when compared to the initial vetting used for vendors on traditional governmentwide contracts, an issue that may raise concerns for government auditors. And it also remains unclear what sort of protest procedures — if any — would be in place for marketplace operators or vendors miffed their products aren’t picked, attorneys said.

But if the marketplace model is ultimately implemented, staff who work at the front line of government purchasing are likely to embrace it, Workmaster said.

“I think for the acquiring entities, the ultimate customers, they’ll be thrilled,” Workmaster said. “I think [for] a lot of folks within the DOD and throughout the government who are actually purchasing this stuff and using it ... they would rejoice to be able to move to a system that would make it a lot easier for them to purchase without all of the panoply of rules and regulations that we’re used to when the government is buying goods and services.”

--Editing by Mark Lebetkin and Kelly Duncan.

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