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Ounce of Prevention Seminar (OOPS)



# **If I Ran the Zoo: Is Commercial Item Procurement a New Wild Adventure?**

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# Agenda

- DFARS Final Rule on Commercial Items and the new DoD Commercial Item Guidebook
- Updates from FY 2018 NDAA and Section 809 Panel Report
- Transactional Data Rule and other changes to the GSA and VA Federal Supply Schedule Program

# DFARS Final Rule

- DFARS Case 2016-D006
- Implements sections of the National Defense Authorization Acts (NDAAs) for FYs 2013, 2016, 2018
  - FY 2013: ref. § 831
  - FY 2016: ref. §§ 851-53, 855-57
  - FY 2018: ref. § 848
- Does *not* implement all changes from FY 2018 NDAA
- Does *not* implement changes from FY 2017 NDAA

# DFARS Final Rule

## Encouraging and Expanding Commercial Treatment

- Prior DoD commerciality determinations.
- Conversion from commercial to non-commercial procurement of an item.
- Supplies and services provided by “nontraditional defense contractors.”
- IT products / service purchases over the SAT.

# DFARS Final Rule

## Burdens for commerciality and price-reasonableness determinations

- Prime contractor information.
- Subcontractor information.
- DFARS ‘hierarchy’ of information.
- Access to books and records.



# DoD Commercial Item Guidebook

- New editions published in January 2018, following a draft distributed in Feb. 2017
- Published in two parts:
  - Part A: Commercial Item Determination
  - Part B: Commercial Item Pricing

# New Rules in the Pipeline: Sources of Change

- NDAA 2018
- Further review of current regulations on commercial items (under Section 849 of NDAA 2018) including:
  - FAR council determinations not to exempt contracts and subcontracts from certain procurement rules;
  - DFARS regulations requiring specific clauses in FAR Part 12 clauses;
  - DFARS regulations to assess all regulations that require a prime to flow-down clauses for COTS items.
- Section 809 Panel: recommendations on reforming laws and regulations concerning commercial items
- Draft bill of 2019 NDAA (H.R. 5515)

# New Rules in the Pipeline: Potential Substantive Changes

- Definitions:
  - Commercial items/services
  - COTS
  - Subcontracts
- Flow-downs
- Supply chain management
- E-Commerce Portals



# (Re-)Defining Commercial Items: NDAA 2018 Revisions

- Sec. 820-amends to the definition of a **subcontract** to exclude
  - “[A]greements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract.”.
- Sec. 847 – Revision to Definition of Commercial Item
  - Amends “**nondevelopmental item**” prong of definition

## (Re-)Defining Commercial Items: Section 809 Panel Recommendations

- Separate "commercial item" into "commercial services" and "commercial products“;
- Merge definitions of commercial items and commercial off-the-shelf items;
- Establish a uniform definition of "subcontract" and "subcontractor."

# (Re-)Defining Commercial Items: Draft 2019 NDAA

- Congress takes note of the Section 809 Panel Recommendations
- Sec. 831 would clarify commercial items as commercial products or commercial services.
- Sec. 832 would create one single definition for “subcontract”



# Managing the Supply Chain

- **Section 807 of 2018 NDAA: Process for Enhanced Supply Chain Scrutiny**—mandate for DoD to develop:
  - Tools to support due diligence, business intelligence or otherwise analyze commercial activity
  - Risk profiles of products or services
  - Integration with intelligence sources
  - Periodic review and assessment of software products and services
  - Synchronization of current authorities for making supply chain decision or improved use of S&D officials
  - Coordination with interagency, industrial and international partners to share information
- **Section 809 Panel recommendations:**
  - Establish preference for commercial items within supply chain
  - Limit the reach of flow-downs to lower-tier suppliers
  - Temper exclusionary policies (e.g., suspension and debarment) against lower-tier contractors.



# Managing the Supply Chain: Flow-downs—Sec. 809 Panel

- Minimize mandatory flow-downs for commercial item contracts;
- Revise "termination for convenience" clauses for commercial item contracts;
- Revise DFARS provisions on data rights for commercial product.



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## Flow-downs: Draft 2019 NDAA

- Sec. 833: limit applicability of certain executive orders and DoD regulations to DoD commercial contracts and subcontracts, to remove transactional barriers between DoD and commercial suppliers.

# E-Commerce Portal: NDAA 2018

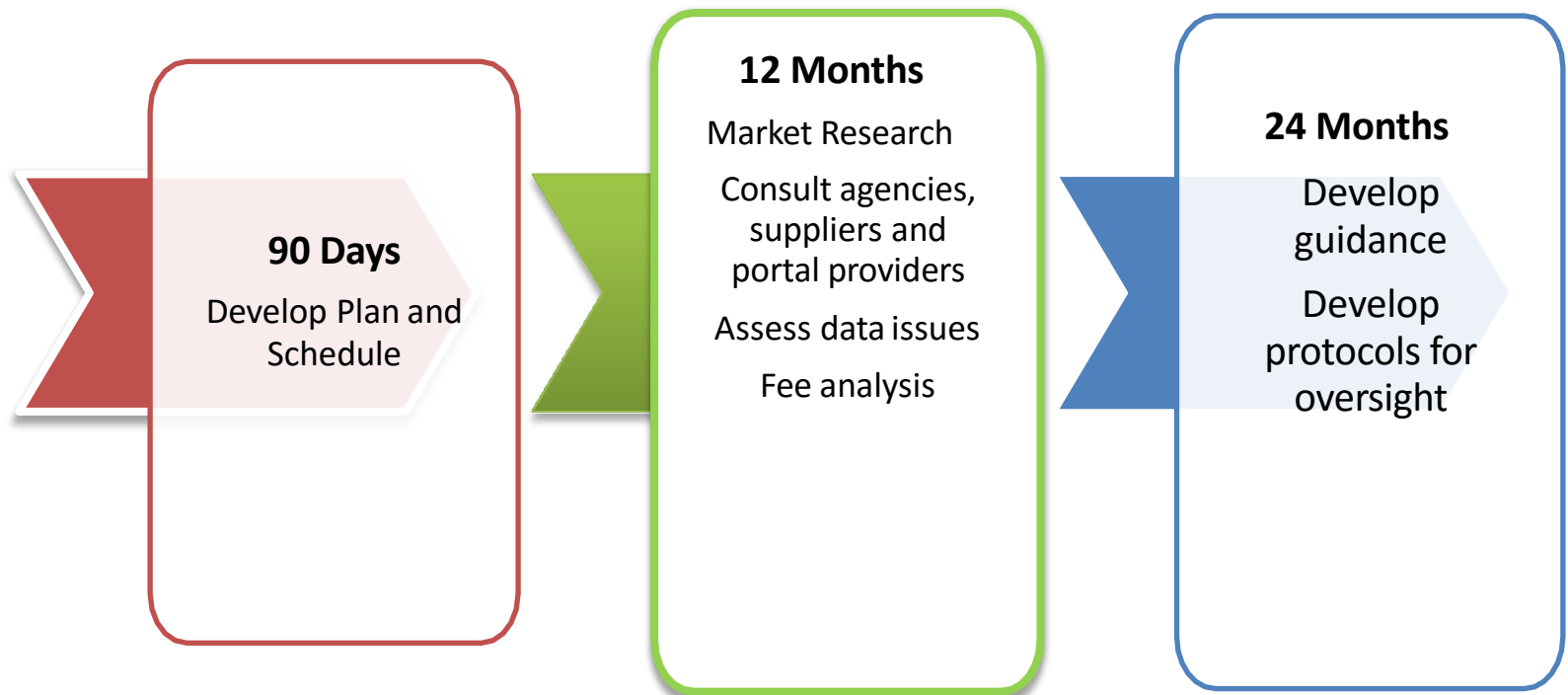
## Section 846: Procurement Through Commercial E-Commerce Portals

- Requires a multi-phased program to be established to procure commercial (COTS) products through commercial e- portals to enhance competition, expedite procurement, enable market research and ensure reasonable pricing.
- Procurements from the portal shall be made:
  - to the maximum extent practicable, under the standard terms and conditions of the portal to the maximum extent practicable
  - Under the Simplified Acquisition Threshold

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# E-Commerce Portal: NDAA 2018

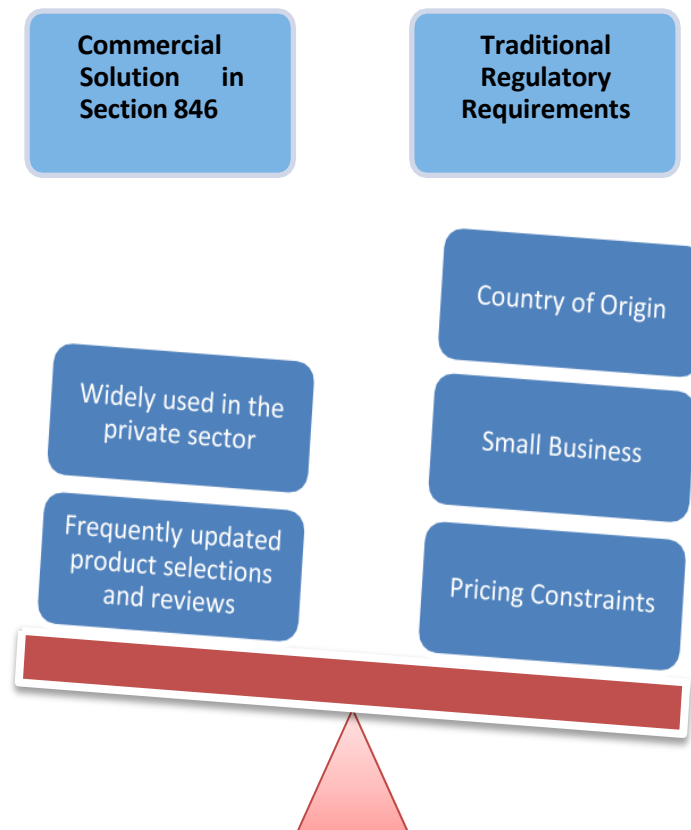


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# E-Commerce Portal: NDAA 2018

## The Weighing Game



# E-Commerce Portal: NDAA 2018

## Unsettled Questions

- How will the portals be selected?
- Will this be similar to the VA Prime Vendor Program?
  - Will portal holders have distribution contracts?
  - Fees?
  - flow-downs?
- How will program impact current federal contracts?
- Are there ecommerce marketplace options and distribution agreements?
- Some of the unknowns – risk and liability of e-commerce provider?



# Federal Supply Schedules Transactional Data Reporting Rule:

- Established June 2016 – pilot program
  - Transactional level data on purchases made through GSA contract vehicle
  - Monthly reporting
  - Elements reported include, but not limited to:
    - price per unit of quantity sold
    - total price sold
  - Elimination of Price Reduction Clause (PRC) and Commercial Sales Practices (CSP)



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**TDR**

**CSP/PRC**

**Reporting Sales**

- Only report GSA sales to <https://tdr.gsa.gov>
- Report monthly at a transactional level
- Report what is on the invoice

- Only report GSA sales to <https://72a.gsa.gov>
- Report quarterly by summary

**IFF Remittance**

- Pay quarterly, have the option to pay monthly
- Same portal as where you report sales

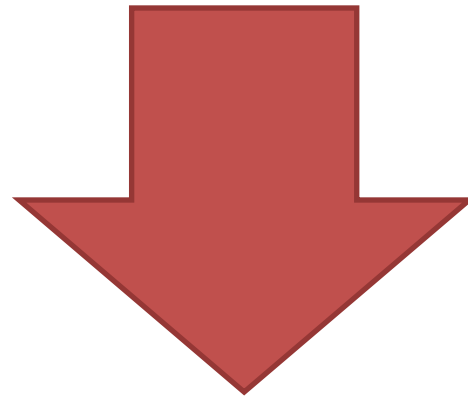
- Pay quarterly, NO option to pay monthly
- Same portal as where you report sales

**Price Negotiation**

- Pricing negotiated from comparison of like products and services (horizontal pricing)
- Removal of requirement to provide Commercial Sales Practices
- No pricing discount relationship created
- Removal of Price Reduction Clause and tracking requirement

- Provide all Commercial Sales Practices (vertical pricing)
- Establish a *Basis of Award Customer(s) and a Discount Ratio*
- If discount ratio is disturbed, trigger of the Price Reduction Clause

# Federal Supply Schedules Transactional Data Reporting Rule:



- Additional reporting requirements
- Questions regarding use of data
- “Apples to apples” comparison



- Limited liability (CSP & PRC)
- No impact on commercial sales
- Removal of tracking customer



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# Federal Supply Schedules

- New Rule on GSA Incidental Supply Schedule purchases
- Trade Agreements Act and the Department of Veterans Affairs
- VA Strategic Acquisition Center – Medical Surgical Prime Vendor-Next Generation

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# QUESTIONS?

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