

**AMAZON.GOV: DISINTERMEDIATION IN PUBLIC
PROCUREMENT THROUGH DIGITAL PLATFORMS – BENEFITS
AND RISKS**

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1. INTRODUCTION

In June 2020, the U.S. General Services Administration (GSA) launched the Commercial Platform program and awarded three contracts to Amazon Business, Fisher Scientific and Overstock.com that allow federal agency buyers to purchase supplies directly from electronic marketplaces (e-marketplaces).² In March 2024, the pilot program was extended to a total of eight platforms.³ These digital platforms have potential to revolutionize century-old public procurement systems, bypassing procurement officials and giving priority to user preferences and customer satisfaction.

The reasons for launching the GSA Commercial Platforms program were twofold: increased efficiency and data collection.⁴ Although efficiency is a key principle of U.S.

² GSA, “GSA Awards Contracts for Commercial e-Marketplace Platform Providers,” news release, June 26, 2020, <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-awards-contracts-for-commercial-emarketplace-platform-providers>.

³ The eight platforms include: Amazon Business, Fisher Scientific, e-Procurement Services, Grainger, Noble, Pacific Ink, G-Commerce, and Staples; see GSA, “GSA Announces New Pool of Online Commercial Platforms to Help Federal Agency Buyers Meet Mission Needs,” news release, March 27, 2024, <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-new-pool-of-online-commercial-platforms-to-help-federal-agency-buyers-meet-mission-needs-03272024>.

⁴ C.R. YUKINS, A. YOUNG, K. ITTIG, E. VALLE, *GSA’s Commercial Marketplaces Initiative: Opening Amazon & Other Private Marketplaces To Direct Purchases By Government Users*, in *Briefing Papers*, n. 2/2020, 2.

Federal Acquisition Regulation (FAR)⁵ and data transparency is a focus of regulators (same as in many other procurement systems), they alone cannot explain the drastic shift from a government-managed system to a disintermediated user-led system. This paradigm shift is caused by three problems that are deeply engrained in government administration and can be best explained with the help of economic theories: the principal-agent theory, the public choice problem, and transaction costs. This article does not aim to elaborate on these theories in depth but uses them to better understand the adoption and benefits of e-marketplaces in government contracting.

Same as private transactions, public purchasing is not immune to the principal-agent problem. The principal-agent problem is caused by a conflict of interest and information asymmetries between the principal and its agent. Even though the agent should act on behalf and in the best interest of the principal,⁶ agents can be self-interested and make choices that conflict with the principal's priorities. In government contracting, a multitude of different principal-agent relationships exists.⁷ The most prominent relationship in government contracting is between the government as the principal and the procurement official acting as its agent.⁸

The second reason that helps explain the evolution of e-marketplaces in government contracting is the public choice problem, which is closely tied to the principal-agent problem.

⁵ Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796, Sec. 1 (August 30, 1974).

⁶ M.C. JENSEN, W.H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in *Journal of Financial Economics*, 4, 1976, 3.

⁷ See D. KLINGLER, *Efficiency, Quality and Sustainability in Government Contracting: A Law and Economics Analysis* (unpublished Dissertation, University of St. Gallen, 2024), 68-71.

⁸ C.R. YUKINS, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, in *Public Contract Law Journal*, n. 1/2010, 40.

Elected officials, bureaucrats and other government agencies often make self-interested choices counter to their public duties, such as running for reelection,⁹ which can conflict with efficiency goals or the maximization of social welfare. The here discussed e-marketplaces minimize the public choice problem by removing the public official from the purchasing process. This “disintermediation” creates a direct relationship between the users and companies (see figure below). Nonetheless, the legal relationship, i.e., the contract, between the government agency and the company remains.

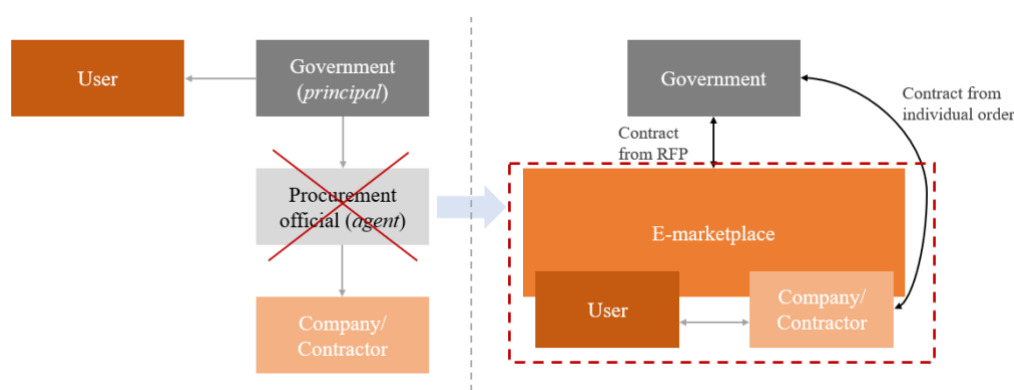


Figure 1: Traditional procurement (left) vs. e-marketplace (right)

A third explanation for the creation of e-marketplaces is transaction cost economics (TCE) developed by *Oliver Williamson* (1979). TCE shows that market transactions, such as trades between people, create transaction costs for the parties involved, including search, bargaining, and enforcement costs.¹⁰ These costs are known to be higher in public

⁹ J.M. BUCHANAN, G. TULLOCK, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, in *The Collected Works of James M. Buchanan*, Ann Arbor, University of Michigan Press, 1962.

¹⁰ O.E. WILLIAMSON, *Transaction Cost Economics: The Governance of Contractual Relations*, in *The Journal of Law & Economics*, 2, 1979, 2.

administrations due to the “jungle” of administrative rules and red tape.¹¹ Public procurement consists of many complex administrative rules that not only aim to deter public officials from abusing their power by means of transparency and integrity principles but also try to replicate private market principles, such as open competition and efficiency.¹² By contrast, e-marketplaces are privately run platforms that match demand and supply, with companies and consumers trying to maximize their profit or utility. Such marketplaces drastically reduce search and bargaining costs, which are high in public procurement for both the government and companies, and include tender, bidding, offer preparation, and tender evaluation costs. Using electronic means to procure goods and services, rather than relying on a middleman who organizes bidding and evaluates offers, not only helps to cut down personnel costs, but also helps to reduce transaction costs.

While e-marketplaces in public procurement address many issues and have advantages, they also create new challenges that can conflict with traditional procurement principles. After giving some background on the GSA Commercial Platforms program, this article highlights the challenges and benefits that e-marketplaces create and discusses their implications for the procurement principles of accountability, transparency, competition and the government’s need for cybersecurity and socioeconomic preferences.

2. BACKGROUND: GSA COMMERCIAL PLATFORMS PROGRAM

The Commercial Platforms program began with Congress’ direction to the GSA under the National Defense Authorization Act (NDAA) for the fiscal year 2018 to assess

¹¹ B. BOZEMAN, *A Theory of Government ‘Red Tape’*, in *Journal of Public Administration Research and Theory*, 3, 1993, 3.

¹² A. SANCHEZ GRAELLS, *More Competition-Oriented Public Procurement to Foster Social Welfare*, in KV THAI (ed), *Towards New Horizons in Public Procurement*, Florida, PRAcademics Press, 2010, 81, 105.

electronic commerce options.¹³ To create transparency on the government's make-or-buy decisions, the GSA published a report in March 2018 in which it outlined three options for the acquisition of commercial marketplaces: (1) use of existing commercial marketplaces, such as Amazon (Amazon.gov), (1) use of technology that powers those marketplaces, enhancing GSA's own marketplace (GSAadvantage.gov)¹⁴, and (3) direct purchases by users from online vendors.¹⁵ While the use of existing commercial marketplaces avoids reinventing the wheel, it also comes with a certain loss of control and proprietary ownership which would be protected by a government-run platform. The third option would have eradicated intermediation entirely but would have also lacked a matching platform. The GSA chose the first option and decided to launch a pilot in which users could directly purchase the products from contractors through existing commercial e-marketplaces.

In July 2019, the GSA published the draft request for proposals (RFP), which outlined three features of commercial platforms.¹⁶ First, the GSA announced to make awards to multiple commercial e-platform providers that offer diverse *off-the-shelf items and services*, excluding healthcare. The prospective platforms were not only allowed to offer

¹³ National Defense Authorization Act for FY 2018, Pub. L. No. 115-91 1283, 846 1483 (2017).

¹⁴ GSA Advantage! is an online shopping site for federal agencies to purchase commercial products and services from approved contractors and was launched by GSA in 1996, see https://www.gsaadvantage.gov/advantage/ws/main/start_page?store=ADVANTAGE.

¹⁵ GSA, "Procurement Through Commercial E-Commerce Portals—Implementation Plan," news release, March, 2018, <https://www.gsa.gov/cdnstatic/Commercial%20Platform%20-%20Implementation%20Plan%20%20Policy%20Assessment%20%5BSIGNED%5D.pdf>.

¹⁶ J. MILLER, *Amazon's Protest of GSA's e-Commerce Platform RFP Tells Us Why the Silly Season is in Full Swing*, Reporter's Notebook, *Federal News Network*, December 9, 2019.

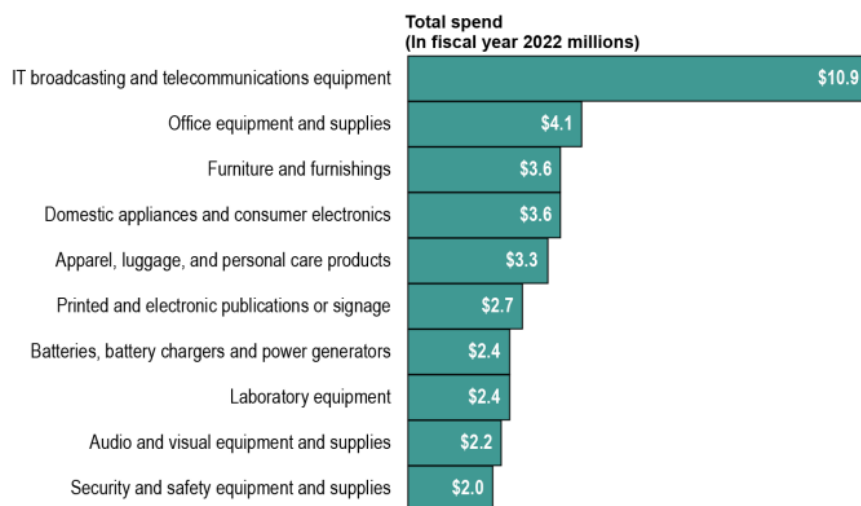
goods, but also “ancillary services affiliated with purchased items.”¹⁷ This approach is novel since services are generally not considered commercial off-the-shelf (COTS) items.¹⁸ The platforms also offer construction products – to the degree that they are standardized and fall below the micro-purchase threshold.¹⁹ The GAO 2023 Report identified IT equipment as the top category of products purchased on procurement e-platforms in 2021 to 2022 (see figure below).²⁰

¹⁷ GSA, “Get Started,” Commercial Platforms Program, <https://www.gsa.gov/buying-selling/purchasing-programs/commercial-platforms/get-started#HowtoBuy>.

¹⁸ Federal Acquisition Regulation, 48 C.F.R. ch. 1, 2.101 (April 1, 1984).

¹⁹ GSA, Commercial Platforms Program: Introductory Overview, June 2024, <https://www.commerce.gov/sites/default/files/2024-07/GSA%20Commercial%20Platforms%20Overview%20%28June%202024%29.pdf>.

²⁰ GAO, Report to Congressional Committees, “GSA Commercial Platforms Program: Opportunities Exist to Improve Implementation,” July 26, 2023 (GAO 2023 Report), <https://www.gao.gov/products/gao-23-106128>.



Source: GAO analysis of General Services Administration's (GSA) Commercial Platforms Program data. | GAO-23-106128

Figure 2: Top 10 categories by spend in GSA Commercial Platforms (2021-2022)

Second, the initiative only covers *small purchases*, i.e., purchase orders under the micro-purchase threshold (currently \$10,000), which are largely free from regulatory requirements, such as domestic preference rules.²¹ Because Congress approved to use e-marketplaces for purchases up to the simplified acquisition threshold (currently \$250,000),²² the GSA recommended that the micro-purchase threshold be increased to \$25,000 to include

²¹ *Ibid.*, 13.201, 25100(b).

²² S. JOHNSON, *The Recommended Micro-Purchase Threshold Increase-An Opportunity*, news release, July 19, 2018, https://buy.gsa.gov/interact/community/159/activity-feed/post/f7628e54-8639-4a25-ac43-333e10cc7a61/The_Recommended_Micro-Purchase_Threshold_Increase_-_An_Opportunity.

more goods and services.²³ Even though the Commercial Platforms initiative only covers small purchases, the GSA estimated that e-marketplaces will have a market size of \$6 billion in annual sales.²⁴ Third, the RFP allowed government users, like soldiers, to receive a *government purchase card* to directly place their orders on the e-marketplaces.²⁵

The GSA solicited the commercial platform contract in October 2019.²⁶ This initial solicitation was challenged in bid protests by several companies, including Overstock and Amazon.²⁷ In June 2020, after several amendments to the solicitation, the GSA awarded the contract to three platform providers: Amazon Business, Overstock.com and Scientific Fisher.²⁸ After a three-year contract period (which ended in June 2023), the U.S. Government Accountability Office (GAO) was tasked to assess whether the initiative met its intended goals.²⁹

The GAO evaluated the GSA Commercial Platforms program along 11 performance metrics (see table below), which are grouped and discussed in this article along three

²³ 41 U.S.C.A. § 134. The micro-purchase threshold is variable, depending on circumstances, see footnote 24, C.R. YUKINS, A. YOUNG, K. ITTIG, E. VALLE, *GSA's Commercial Marketplaces Initiative*, cit. .

²⁴ *Amended Request for Proposal No. 47QSCC20R0001* (January 8, 2020).

²⁵ *FAR 2019*, 13.301.

²⁶ *Amended Statement of Objectives (Amended SOO), RFP, Att. 1*, (January 8, 2020).

²⁷ J. MILLER, *Amazon's Protest of GSA's e-Commerce Platform RFP Tells Us Why the Silly Season is in Full Swing*, cit.

²⁸ GSA, "GSA Awards Contracts for Commercial e-Marketplace Platform Providers."

²⁹ C.R. YUKINS et al., *GSA's Commercial Marketplaces Initiative*, cit., 4.

categories: socioeconomic policies (metrics 1 to 4), e-marketplace benefits (metrics 5 to 7), and competitive concerns (metrics 10 to 11).

Table 1: GSA Commercial Platforms performance metrics (2021 vs. 2022)

GSA metric and description	Target	Performance for fiscal year 2021	Performance for fiscal year 2022
Small Business Spend – Increase the purchases from small businesses, as identified in the System for Award Management	Greater than 20%	21%	18%
Green Procurement Spend – Increase the percent of green-related (i.e., environmentally sustainable) product spend	Greater than 5%	1%	4%
AbilityOne Spend – Tracking measure to help agencies see their percent of total spend directed to AbilityOne ^a	Greater than 2%	0.11%	0.16%
Made in America – Increase the percent of spend on products with a Made In America label ^b	Greater than 5%	0.12%	0.49%
Time Savings – Maintain or exceed percentage of users stating that they saved time using the platforms, based on customer survey data	70%	85%	81%
Price Competitiveness – Maintain or exceed percentage of users that agreed they were able to find desired products with fair and reasonable pricing, based on customer survey data	84%	88%	93%
Customer Satisfaction – Maintain a customer satisfaction survey score equal to or greater than the previous calendar year's American Customer Satisfaction Index for Online Retailers ^c	Equal to or above 8.0	9.0	8.9
Active Purchasers – Increase the number of individual purchasers making at least one purchase on the platforms ^b	22,000	4,354	17,875
Repeat Purchasers – Increase the number of individual purchasers making more than one purchase on the platforms ^b	8,800	1,374	7,270
First vs. Third-party Sales – Fulfill the majority of sales by third-party suppliers as measured by the ratio of sales of provider's own private label items to third-party supplier items	More than 70% of sales fulfilled by third-party suppliers	Third-party sales 70%	Third-party sales 79%
Sales Distribution – Distribution of sales by platform provider greater than the combined average market share for consumer and government spend	Amazon Business	Amazon Business	Amazon Business
	92%	94%	96%
	Fisher Scientific L.L.C. 6%	Fisher Scientific L.L.C. 5%	Fisher Scientific L.L.C. 3%
	Overstock Government 2%	Overstock Government 1%	Overstock Government 1%

Legend: Bold font in the fiscal years columns indicates that GSA met the target for the metric.

Source: GAO presentation of General Services Administration (GSA) information. I GAO-23-108128

In its 2023 Report, the GAO made two recommendations to increase the use of the AbilityOne program (products produced by people with disabilities) and increase participation of small and medium-sized enterprises (SMEs), both of which have been implemented since then.³⁰ But overall, the program was viewed as a success, with agency participation increasing from six agencies in 2020 to 27 federal agencies by the end of 2022. Accordingly, the total spend through the platform more than tripled from \$12 million in 2021

³⁰ GAO 2023 Report.

to \$40 million in 2022.³¹ In March 2024, the GSA reported that more than 35 federal agencies and 40,000 card holders were using the platform³² and awarded a new set of contracts to eight commercial platforms, each with a maximum performance period of five years.³³

Under the new administration, the use of commercial platforms in public procurement could be in jeopardy. In February 2025, the Trump administration put a 30-day freeze on the government card in an attempt to reduce federal spending,³⁴ which will put the commercial platforms temporarily out of commission. Future will show whether the freeze will be extended or whether the benefits of e-marketplaces outweigh their costs.

3. FROM BEST VALUE TO CUSTOMER SATISFACTION: A NEW STANDARD?

By removing government officials from the purchasing process and allowing users to directly buy products from companies at the government's expense, the GSA Commercial Platforms program has the potential to disrupt the existing public procurement model. A core

³¹ GAO 2023 Report.

³² GSA, Commercial Platforms Program: Introductory Overview, June 2024.

³³ GSA, Commercial Platforms, <https://www.gsa.gov/buy-through-us/purchasing-programs/commercial-platforms/awarded-platforms>; see RFP for Commercial Online Platform Acquisition from December 13, 2022, <https://sam.gov/opp/9b3d25dde63840abb5c8d373396e3c77/view>.

³⁴ A. PEQUEÑO, *Trump Places Freeze On Federal Credit Cards In Newest DOGE Executive Order*, Forbes (February 26, 2025), <https://www.forbes.com/sites/antoniopequenoiv/2025/02/26/trump-places-freeze-on-federal-credit-cards-in-newest-doge-executive-order/>. See also Executive Order 14,219 of February 19, 2025 on "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative," F.R. 90(36) (February 25, 2025), <https://www.federalregister.gov/documents/2025/02/25/2025-03138/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency>.

element of traditional government purchasing is that the government buys works, goods, and services for the public with taxpayers' money. To ensure that the government uses public funds efficiently and buys goods in the public interest, a myriad of rules was put into place: the most important being the "best value for money" principle.³⁵ This principle requires procurement officials to purchase the highest quality product at a reasonable price. However, history has shown that this system does not always achieve customer satisfaction, leaving consumers dissatisfied with product quality and taxpayers plug the holes in government budgets.

E-marketplaces allow end-users to directly purchase the product that satisfies their needs best. For example, many U.S. soldiers buy their boots on the private market out of their own pockets, rather than using the boots provided and paid by the government – as the quality and fit of government-provided boots were not satisfactory and would often decide over life or death in a combat situation.³⁶ Hence, by introducing e-marketplaces in government purchasing, customer satisfaction is being elevated from one goal among many³⁷ to the main goal, arguably making traditional procurement principles like transparency, efficiency and competition, which were introduced to minimize the abuse of government power, redundant.

However, e-marketplaces bring new challenges. Reoccurring concerns are that end-users might purchase at unreasonably high prices, defective goods, or on terms unfavorable to the government.³⁸ As will be elaborated in the following sections, the "new" standard of customer satisfaction governing e-procurement marketplaces is only as good as the product

³⁵ FAR 2019, 1.102(a).

³⁶ T. SOUTH, *Hundreds of Soldiers To Test New Army Combat Boot, First Major Change in Nearly a Decade*, *Army Times*, January 19, 2019.

³⁷ S.L. SCHOONER, *Desiderata: Objectives for a System of Government Contract Law*, in *Public Procurement Law Review*, 11, n. 2, 2002, 115.

³⁸ C.R. YUKINS et al., *GSA's Commercial Marketplaces Initiative*, cit., 6.

information provided to the customers, the customers' diligence to assess the products, and the platforms' rigorous enforcement of safeguards for cybersecurity and marginalized groups.

4. SHIFTING ACCOUNTABILITY FROM THE GOVERNMENT TO PLATFORMS AND USERS: RISKS AND BENEFITS

The “disintermediation” of the traditional procurement process (see critical in section 4.4) and the replacement of procurement officials by e-marketplaces creates both opportunities and challenges. The following sections address the issue of shifted accountability from the government to private platforms and users, highlighting two core issues: supplier qualification and customer reviews.

4.1 *Government versus Platform Responsibilities*

In public purchasing, many administrative rules exist to minimize the principal-agent problem, prevent the abuse of government power, and hold procurement officials accountable for their actions. Public procurement systems around the world have established procurement principles to ensure the accountability of the government towards its citizens. One of them is the principle of transparency, which in most public procurement systems is understood as process transparency and aims at making procurement processes, including the tender, evaluation and award process of contracts, transparent to competitors and the public. Another fundamental principle engrained in many public procurement systems is integrity or anti-corruption. These principles are enforced through a review mechanism (called bid protests in the U.S.) that allows suppliers to challenge the lawfulness of a contract award.³⁹

³⁹ Government Accountability Office Bid Protest Regulations, 31 U.S.C §§ 3551-3556 (January 1, 2012).

By removing the government official as the intermediary, most of these principles become obsolete, at least with regard to their control function of the government. However, they can still be useful and necessary to control the actions of platform providers and users. The shift of responsibilities from the government to platforms also means a shift of *accountability* from the government to private platforms and users.

The following sections discuss the most important platform and user responsibilities (divided into project-related and process-related responsibilities) that historically were the government's responsibility. By shifting the purchasing decision from the government to the users, users now also carry the responsibility to conduct market research and provide customer reviews. Users are further responsible for the "efficient use of public resources" by using their purchase cards diligently and they face disciplinary actions when abusing order splitting rules (rules that prohibit the splitting of large orders to make them smaller and fall under more lenient rules). Platforms, by contrast, take over the government's role to register, vet, and electronically certify suppliers and their supply chains, to maintain records, and to conduct *ad hoc* audits.

Table 2: Responsibilities of the government, e-marketplaces, and users

	Responsible unit	Project-related responsibilities	Process-related responsibilities
Traditional procurement	Government	- Market research - Technical assessments - Past-performance review	- Identification of qualified suppliers - Prohibition of order splitting - Recordkeeping and contract audits - Judicial review (bid protests)
E-market-places	Platform operators	- Supplier qualification - Supply chain risk management	- e-certification - Limited recordkeeping and <i>ad hoc</i> audits - No judicial review
	Users	- Market research - Product review	- Use of purchase cards - Compliance with order splitting rules

This shift of responsibilities from the government to platforms also poses new threats. While there are some safeguards in place to prevent abuse (like order splitting rules), other responsibilities, like supplier qualification, are now in the discretion of private sector platforms. Even though private companies have an economic incentive to satisfy their customers, the main goal is to optimize their own profit – which may conflict with consumer welfare (further discussed in section 5.2) and the procurement principle to achieve “best value” for the public.

4.2 Supplier Qualification and Data Transparency

An important aspect of public purchasing is shielding the government from contractors’ performance risks by means of past performance reviews and technical assessments. The GSA Commercial Platforms program delegates the responsibility to select qualified suppliers and to manage the roster of vendors from the government to the platform operators. These tasks go beyond the scope envisioned in the initial solicitation, which merely stated that the platforms should describe and publish the *vetting process* for third-party suppliers⁴⁰ and *assess supply chain risks* relating to specific product categories, such as health care products.⁴¹ As outlined in the following, electronic vetting processes can increase efficiency, but platform vetting also holds risks.

Supplier qualification. Commercial platforms use different criteria than governments to evaluate third-party vendors who sell their products on the platform. While procurement officials are required to conduct performance-based supplier assessments, Amazon’s onboarding and registration process for third-party vendors includes the fulfillment of formal requirements, such as holding a bank account, credit card, tax

⁴⁰ *Amended SOO*, 6-7.

⁴¹ *National Defense Authorization Act for FY 2018*.

identification number, and the ability to fulfill the order.⁴² How a seller has performed in the past, i.e., whether it delivered satisfactory products on time, is not assessed, at least not at the onboarding stage.

Amazon performs a more performance-centered assessment at a later stage through the “Buy Box,” which allows an easy click-and-buy process for the consumer and allows the seller to participate in Amazon’s “Best Seller” ranking.⁴³ However, the criteria for Amazon’s Buy Box algorithm are not public and it is questionable whether the GSA has access to those. According to tech forums, the Buy Box algorithm takes into account the price, past fulfillment, customer feedback, and inventory depth.⁴⁴

Another difference between the government’s and Amazon’s supplier assessment is that Amazon’s performance-based criteria are not geared towards promoting the public interest. Amazon is a private company that aims to maximize profit. For example, for a seller to be eligible for the Buy Box, Amazon requires that the third-party seller joins “Amazon Fulfillment” and pays a fulfillment fee.⁴⁵ Amazon does not acknowledge other shipping services, such as UPS that might be cheaper for sellers. Hence, while platform operators aim to promote consumer welfare, they do not aim to promote the welfare of other stakeholders,

⁴² Amazon, Seller Central, <https://sellercentral.amazon.com/>, accessed February 27, 2023.

⁴³ Amazon, Best Seller Rank, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GGGMZK378RQPATDJ>, accessed February 27, 2023.

⁴⁴ Repricer Express, “Amazon Buy Box Eligibility: FBA Sellers Guide for 2023,” <https://www.repricerexpress.com/amazon-buy-box-eligibility-explained/>, accessed February 27, 2023.

⁴⁵ Désirée Klingler et al., “Amazon’s Theory of Harm,” *Thurman Arnold Project*, May, 2020, 6-12, <https://som.yale.edu/sites/default/files/2022-01/DTH-Amazon.pdf>.

such as third-party sellers – especially when those interests are counter to their profit maximizing goal.

To avoid grave misconduct by contractors, the GSA retained the authority to require commercial platform providers to exclude vendors that have been suspended or debarred by the government.⁴⁶ Despite this basic line of defense against corrupt or incompetent contractors, e-marketplaces are not required to exclude contractors for non-responsibility or lack of present responsibility, as traditionally done by contracting officers or debarment officials.⁴⁷ Also, the exclusion of vendors has the risk to be abused if vendors turn to debarment as a means to exclude their competitors from the marketplace.⁴⁸

A second line of defense against corrupt contractors is that platforms must accommodate the government's request to prevent the sale of products and services to government buyers by "prohibited vendors," including equipment or services from the Chinese telecommunications giant Huawei.⁴⁹ Separate but related instruments are measures to suspend and debar counterfeits as well as socioeconomic requirements, which are further discussed in Part 6.

e-certification. A benefit of e-marketplaces over the traditional procurement process is the electronic certification of suppliers. Since 2018, the European Union (EU) requires contractors to use the electronic European Single Procurement Document (ESPD), which intends to simplify the process of supplier qualification. The ESPD is a single self-

⁴⁶ See *Amended SOO*, 3.: an "important" feature of the platforms would be the ability "to identify & remove vendors who are suspended or debarred from conducting business with the Federal Government."

⁴⁷ C.R. YUKINS, *GSA's Commercial Marketplaces Initiative*, cit., 7.

⁴⁸ *Ibid.*

⁴⁹ See *Amended SOO*, 7; National Defense Authorization Act for FY 2019, Pub. L. No. 115-232 132 Stat. 1636, 838 1876, § 889 (2018). FAR amendment, 85 F.R. 42665 (July 14, 2020)

declaration form in which companies declare their suitability (absence of exclusion grounds) and financial, organizational, and project-related ability to perform the contract (selection criteria).⁵⁰ A related tool in EU public procurement is e-Certis, which identifies and links national certificates necessary to prove suppliers' compliance with tender criteria, e.g., tax, social and security obligations and criminal records.⁵¹ While the ESPD aims to *reduce transaction costs* for suppliers, the e-Certis mapping tool intends to *increase interoperability* among national administrative verification systems.

The GSA Commercial Platforms program addresses aspects of e-certification but does not exploit its full potential. While platforms can automatically apply tax exemptions and identify restricted items and excluded vendors, contractors must register for each of the e-marketplaces separately. No single electronic procurement document or interoperability between the platforms exists to onboard suppliers.

Data transparency. Another feature of the GSA Commercial Platforms program is to increase data transparency through the collection of vendor data and purchasing data below the micro-purchasing threshold. The amended solicitation stated that a “key intended benefit of this [commercial platform] program is to gain better insight into what is being purchased under the micro-purchase threshold.”⁵²

The collection of vendor data by platform operators is one of the most controversially discussed aspects of platform purchasing—both in the private sector (as

⁵⁰ EC, European Single Procurement Document, https://ec.europa.eu/isa2/solutions/european-single-procurement-document-espd_en/, accessed February 27, 2023.

⁵¹ EC, e-Certis, https://ec.europa.eu/isa2/solutions/e-certis_en/, accessed February 27, 2023.

⁵² *Amended SOO*, 9.

exemplified by EU antitrust cases⁵³ and as regulated in the EU Digital Markets Act⁵⁴ and the public sector.⁵⁵ Small businesses and other vendors have voiced the concern that Amazon and other platforms will use the price and demand data to take over portions of the federal market and displace suppliers. In antitrust law, this behavior is described as exclusionary conduct,⁵⁶ a strategy that Amazon was alleged of doing.⁵⁷ For the GSA Commercial Platforms program, Congress addressed this concern holding that platform providers must agree not to use information related to a product from a third-party supplier featured on the e-commerce portal.⁵⁸ But since data transparency was a main driver behind launching the platforms program, the solicitation clarified that the government will have unrestricted use of the vendor data.⁵⁹

While outsourcing supplier qualification to platform operators alleviates and benefits the government in many ways—by saving costs and increasing data transparency, it also introduces new challenges, such as the risk of abusing vendor data and debarring

⁵³ EC, Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime (Brussels, Dec. 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777, and see Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box, https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40703_8990760_1533_5.pdf.

⁵⁴ Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (the Digital Markets Act or DMA) entered into force on November 1, 2022. Among other things, the DMA allows business users to access the data that they generate in their use of the digital platform and consumers have more control over their personal data.

⁵⁵ C.R. YUKINS, *GSA's Commercial Marketplaces Initiative*, cit., 6.

⁵⁶ D. KLINGLER et al., *Amazon's Theory of Harm*, cit., 27-29.

⁵⁷ *Ibid.*

⁵⁸ *National Defense Authorization Act for FY 2019*.

⁵⁹ *Amended SOO*, 9.

competitors from the marketplace. Also, the GSA Commercial Platforms program is a missed opportunity to introduce e-certification and interoperability across various platforms: supplier onboarding and vetting is done by each platform individually and remains a black box and difficult to verify for the government.

4.3 Market Research and Customer Reviews

The use of e-marketplaces in government procurement has transferred the purchasing decision from the government to the end user. This disintermediation makes many traditional procurement principles that protected the customer against government abuse obsolete since the customer is now representing its own interests and should know best which products satisfy its needs. But the purchasing decision also comes with responsibilities, most importantly information gathering responsibilities, a transaction cost that the government has now outsourced to the end user.

On e-marketplaces, it is no longer the government official who defines the needs, tenders the contract, evaluates the offers, and selects the winning bidder. All these tasks are now done by the consumer. For private use, most people would conduct research about which products are offered in the market and then select the product with the best price-quality ratio.

As correctly highlighted in the FAR, market research is a time-consuming and costly process, which varies depending on factors such as urgency, complexity of the good, as well as the buyer's past experience.⁶⁰ Data on markets, products and suppliers is often not readily available and has to be gathered by a cumbersome process, consulting industry reports and expert opinions. The implementation of e-marketplaces drastically reduces these search costs and offers goods and services at a one-stop-shop. Another feature of modern electronic

⁶⁰ FAR 2019, 10.002.

purchasing that alleviates market research is customer reviews. As in most modern electronic purchasing, GSA platforms should allow users to reply upon reviews posted by other customers. To complement customer reviews, the GSA introduced an added safeguard: a limited agency review, requiring “ordering officials” to review similar items and their prices from at least two suppliers⁶¹ and assess whether the prices are “reasonable and result in the best value.”⁶²

The latter aspect was a major concern for the use of commercial platforms in public procurement, namely that customers might purchase at unreasonably high prices or buy sub-standard products.⁶³ This fear relies on the known trade-off between the lowest price and the highest quality. The customer’s purchasing decision is strongly influenced by the consumer’s available resources and its willingness to pay for the product. When government customers buy goods and services on e-marketplaces, they are still spending taxpayers’ money. This might incentivize government customers to choose the best (and potentially most expensive) product, rather than buying economically. However, this risk seems to be balanced by the customer’s budget constraint. Each government customer receives an authorized amount that it can spend for specific items, such as military gear, and thus the customer needs to carefully allocate the amount between shoe wear, clothing, cooking, and sleeping equipment.

But rather than leaving the investment decision entirely up to the customer, the GSA has chosen a more rigorous instrument to guarantee for competitive prices: a most favored nation (MFN) clause. The MFN clause requires commercial platforms to offer government customers the same prices that are offered to commercial customers. In the past, it has been

⁶¹ *Amended SOO*, 6.

⁶² *Ibid.*

⁶³ C.R. YUKINS, *GSA’s Commercial Marketplaces Initiative*, cit., 6.

found that MFN clauses can have anticompetitive effects and may increase prices or foreclose competition.⁶⁴ While MFN clauses imposed by private companies underlie antitrust scrutiny, government activities are exempt from antitrust investigation in the U.S.⁶⁵ and the EU.⁶⁶ By contrast, in Switzerland, government activities are subject to antitrust scrutiny, which allows the Swiss Competition Commission to scrutinize potentially anticompetitive behavior of public authorities.⁶⁷

The risk of customers buying sub-standard products on the platform is contained by two safeguards: the customer's preference to purchase high-quality products, which is arguably stronger than the procurement official's incentive, since the customers will be using the product, and the customer's ability to distinguish lemons (defective products) from peaches (high-quality products).⁶⁸ One way to alleviate the information asymmetry between the uninformed buyer and the informed supplier is to increase the salience of the desired

⁶⁴ *District of Columbia v. Amazon.com* (Sup. Court Civ. Div., 2021).

⁶⁵ Generally, acts of the government are exempt from antitrust scrutiny. See e.g., *Community Communications Company v. City of Boulder, Colorado*, 455 U.S. 40 (1982), and *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991). Note, however, that, if the government is involved in commercial activities, such as government contracts, the private contractors are still subject to antitrust scrutiny.

⁶⁶ See e.g., A. SANCHEZ GRAELLS, I. HERRERA ANCHUSTEGUI, *Revisting the Concept of Undertaking from a Public Procurement Law Perspective: A Discussion on Easypay and Finance Engineering*, SSRN (November 26, 2015).

⁶⁷ See D. KLINGLER, *Efficiency, Quality and Sustainability in Government Contracting: A Law and Economics Analysis*, cit., 59-60, e.g., *armasuisse Helikopter*, RPW 2007/4 517 (Swiss Competition Commission, August 7, 2007) in which the Swiss Competition Commission had to determine whether armasuisse, the Swiss federal office for defence procurement, had market power in the market for light transport and training helicopters (which was denied).

⁶⁸ Reference to A. AKERLOF, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, in *Quarterly Journal of Economics*, 84, 3, 1970, 488-500.

products, as argued in Thaler and Sunstein’s nudge theory.⁶⁹ The platform feature of customer reviews and the limited agency review should help reduce information asymmetries and support customers in their search task. However, customer reviews are only as good as individuals diligently review the products, and as those reviews are not influenced, for example, by paid reviews—a business practice that became the subject of recent U.S. antitrust investigations⁷⁰ and has been prohibited for the GSA procurement platforms (see further below in section 5.2).

Another concern raised was that customers might split orders for their purchase to fall under the micro-purchase threshold. While government officials are prohibited from splitting orders under the U.S. FAR,⁷¹ in e-marketplaces the responsibility to (not) split orders is delegated to the users. The Department of Defense (DOD) Guidance on the “Use of Government Purchase Cards” treats order splitting by customers as a violation of the purchase card policy, which is subject to disciplinary action.⁷²

While e-marketplaces and the transfer of the purchasing decision from the government to the customer helps to solve some issues – it alleviates market research and

⁶⁹ R. THALER, C. SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books, 2008.

⁷⁰ FTC Charges Supplement Marketer with Hijacking Ratings and Reviews on Amazon.com and Using Them to Deceive Consumers (Feb. 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-charges-supplement-marketer-hijacking-ratings-reviews-amazoncom-using-them-deceive-consumers>; FTC to Explore Rulemaking to Combat Fake Reviews and Other Deceptive Endorsement (Oct. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-explore-rulemaking-combat-fake-reviews-other-deceptive-endorsements>.

⁷¹ FAR 2019, 13.003(c)(2).

⁷² Department of Defense Government Charge Card Guidebook for Establishing and Managing Purchase, Travel, and Fuel Card Programs A-20 (June 3, 2020), https://www.acq.osd.mil/dpap/pdi/pc/docs/DoD_Govt_Charge_Card_Guide_06_03-20.pdf.

promotes customer satisfaction, other problems, such as order splitting, are merely shifted (from the government to platforms and users) and require new regulation to avoid abuse.

4.4 Do Platforms lead to Disintermediation?

Another question worthwhile investigating is whether the removal of government officials from the procurement process and the use of commercial platforms does truly amount to disintermediation. The Oxford dictionary defines disintermediation as “reduction in the use of intermediaries between procures and consumers.” The classic example is investing directly in the securities market rather than through a bank. The main reasons for disintermediation are to reduce costs and increase delivery speed. The use of the term “disintermediation” has become popular in the 1960s, with a peak in the 1980s, and has continuously declined since then (see graph below).

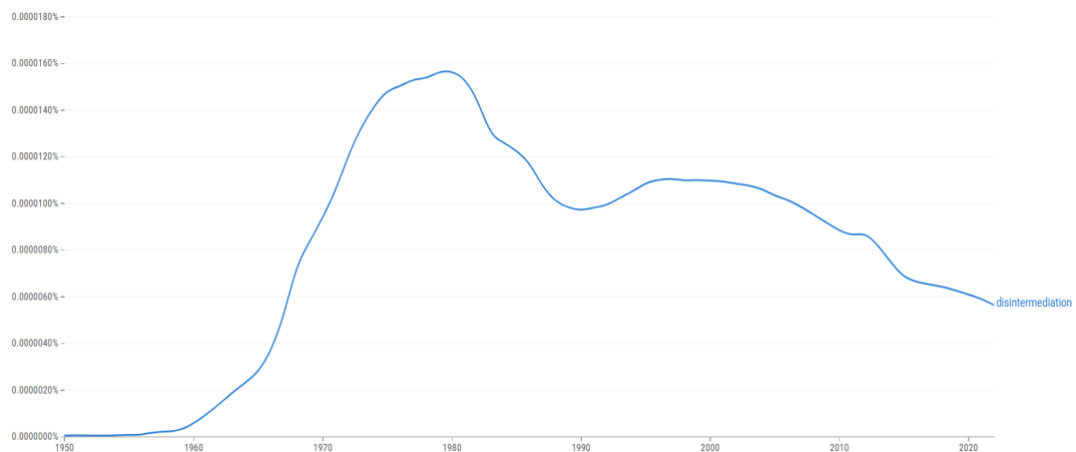


Figure 3: Use of “disintermediation” over time (Source: Google Books Ngram Viewer)

While it was originally hoped that virtual marketplaces like Amazon are edging out middlemen, they are now seen as the new middleman. At the advent of the

internet, electronic commerce was seen as a powerful tool of disintermediation for reducing transaction costs. The idea was that by allowing consumers to buy products directly from producers, the supply chain would be shortened, thereby “disintermediating” the standard middlemen. However, what largely happened was that new intermediaries appeared in the digital landscape, such as Amazon and eBay.⁷³ This development has also been referred to as reintermediation.

By offering a platform to match supply and demand, the GSA commercial platforms have successfully managed to reduce costs. In 2022, platform customers reported time savings of 81% and 93% of users reported that they were able to find desired products with fair and reasonable pricing (see Table 1). However, we need to keep in mind that some costs, such as search costs, have merely been shifted from the government to the users. Furthermore, the shift of responsibilities from the government to platform operators also makes clear that those platforms have become the new agent. The platforms offer services against fees and pursue their own interests. This also means that safeguards against the principal-agent problem have not become obsolete, but instead must now focus on the relationship between the government and e-marketplaces acting as their agent.

5. COMPETITION ON AMAZON.GOV: THE SAME OR DIFFERENT?

While e-marketplaces in the private sector are often a means to increase competition, some critics have raised the concern that e-marketplaces in public procurement would erase competition.⁷⁴ This section analyzes this concern in more detail and suggests that while

⁷³ M. BARUN SARKAR, B. BUTLER, C. STEINFELD, *Intermediaries and Cybermediaries: A Counting Role for Mediating Players in the Electronic Marketplace*, in *Journal of Computer-Mediated Communication*, 1, 3, 1995.

⁷⁴ M. BARUN SARKAR, B. BUTLER, C. STEINFELD, *Intermediaries and Cybermediaries: A Counting Role for Mediating Players in the Electronic Marketplace*, cit.

formal competition as known in public procurement might be reduced, e-marketplaces can offer a more competitive environment. Nonetheless, the section also highlights some anticompetitive effects that occurred on private sector platforms and cautions that those might occur in a similar fashion in the public sector.

5.1 Market Access and Open Competition

Competition in public procurement is traditionally understood as consisting of open solicitation and competitive bidding. While a few authors argue that competition in government procurement aims to mimic private markets,⁷⁵ many understand competition as a means to achieve other procurement principles, such as transparency and equal treatment.⁷⁶ Some critics have argued that e-marketplaces abandon competition as a hallmark of traditional procurement.⁷⁷ Even though formal tendering and bidding is no longer required on e-marketplaces, it is argued here that e-marketplaces do not abandon competition entirely, but provide for a different form of competition that more closely resembles competition in the private market.

If we follow the literature that argues that public procurement aims to replicate free market principles, such as competition and efficiency, competition on commercial platforms comes closer to this ideal. Any supplier who wants to sell goods on a commercial platform

⁷⁵ A. SANCHEZ GRAELLS, *More Competition-Oriented Public Procurement to Foster Social Welfare*, in KV THAI (ed.), *Towards New Horizons in Public Procurement*, PRAcademics Press, Florida, 81, 2010, 105.

⁷⁶ S. ARROWSMITH, *The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies*, *Cambridge Yearbook of European Legal Studies*, 14, 2012.

⁷⁷ C.R. YUKINS, *GSA's Commercial Marketplaces Initiative*, cit., 6.

and meets the formal requirements outlined above, can register on the platform. Hence, compared to traditional procurement and supplier qualification rules, barriers to enter e-marketplaces are relatively low for suppliers—certainly lower than navigating the various administrative rules in public procurement law.

E-marketplaces can also help address one of the core challenges of public procurement: increasing access for small and medium enterprises (SMEs). On Amazon, a large share of third-party suppliers are SMEs. Hence, platforms are able to reach small suppliers that would have otherwise been deterred by the many procurement rules or would not have heard of the advertised contract.

Furthermore, e-marketplaces can not only increase what is called “brand competition,” that is competition between different brands on the platform, but also advance “platform competition,” i.e., competition between the various platforms,⁷⁸ such as between Amazon and Overstock. Both brand and platform competition help decrease prices, increase product quality and diversity, and promote innovation. Another benefit of private marketplaces is that they are self-correcting, in the sense that they help eliminate competitors that offer above-market prices or subpar quality.

Another feature and advantage of commercial platforms is that not only domestic but also foreign suppliers can offer their products on the platform as long as they comply with the platform’s formal registration requirements. For example, on Amazon, many products are offered by Chinese and European suppliers. For Amazon, the GSA lists as geographic areas the U.S, Canada, Mexico, France, Italy, Spain, Germany, the UK, Japan and India.⁷⁹ This openness stands in contrast to traditional procurement rules, including domestic preference rules, such as the Buy American rules, which require procurement officers to buy

⁷⁸ D. KLINGLER et al., *Amazon’s Theory of Harm*, 2.

⁷⁹ GSA, Commercial Platforms Program: Introductory Overview, June 2024.

goods and services that were produced in the United States.⁸⁰ Because e-marketplaces include goods and services below the micro-purchasing threshold, domestic preference rules do not apply, and foreign suppliers can sell their products on the platforms. If the threshold was raised above the micro-purchase threshold—as Congress allowed—this would necessitate a change of law, or platforms would need to find solutions to restrict access of foreign suppliers to the GSA Commercial Platforms.

5.2 Amazon.gov and Potential Anticompetitive Effects

Amazon has been the subject to various antitrust investigations, both in the EU⁸¹ and the United States.⁸² After the European Commission’s decision on “Google Shopping,” in which it found that featuring paid-for vendor products over other products was illegal,⁸³ Amazon changed its vendor featuring practice. Amazon now marks paid products as “sponsored” and provides some transparency on why some of the products appear on top of the search list. Accordingly, Congress has expressed the concern that vendors would pay to

⁸⁰ Buy American Act, 41 U.S.C. §§ 10a-10d Pub. L. No. 72-428 8301-8303 (March 3, 1933).

⁸¹ FTC Sues Amazon for Illegally Maintaining Monopoly Power (September 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

⁸² Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291; Commission accepts commitments by Amazon Barring it from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime (December 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

⁸³ Commission Fines Google EUR2.42 billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

be featured on the electronic portals and thus skew users' purchasing preferences.⁸⁴ The GSA is expected to ensure that any contract for commercial e-commerce portals precludes any such business-to-business arrangements.⁸⁵

Another potentially anticompetitive practice of Amazon that is being investigated by the U.S. Federal Trade Commission (FTC) is self-preferencing,⁸⁶ that is the preferencing of the platform's own private label products, for example, by featuring them at the top of the search results.⁸⁷ Even though no court has decided on the illegality of such practice, the same risk exists when Amazon is offering its own products on procurement e-marketplaces. As outlined on the GSA website, Amazon is the only GSA commercial platform that acts both as platform provider and as seller of products.⁸⁸ The GSA Commercial Platforms program has approached this issue by setting the target that more than 70% of all sales must be fulfilled by third-party suppliers, which has been achieved so far – with third-party sales amounting to 79% in 2022 (see Table 1).

Another anticompetitive behavior that Amazon could have been engaged in is “predation for merger.”⁸⁹ Around the year 2000, Amazon wanted to acquire diapers.com, one

⁸⁴ H.R Rep. No. 115-404, at 879 (2017) (Conf. Rep.).

⁸⁵ H.R Rep. No. 115-404, at 879 (2017) (Conf. Rep.).

⁸⁶ Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291; Commission accepts commitments by Amazon Barring it from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime (December 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

⁸⁷ D. KLINGLER et al., *Amazon's Theory of Harm*, 19-23; C. FARRONATO et al., *Self-Preferencing at Amazon: Evidence from Search Rankings*, NBER working paper 30894, January 2023.

⁸⁸ GSA, Commercial Platforms Program: Introductory Overview, June 2024.

⁸⁹ D. KLINGLER et al., *Amazon's Theory of Harm*, cit., 27-29.

of its third-party suppliers, but failed. After the supplier's refusal to be acquired, Amazon created its own private label diaper brand (Mama bear) with a price that was lower than the one offered by the third-party supplier (diapers.com), which eventually led to the sale of the company to Amazon for a loss.⁹⁰ The GSA addressed contractors' concerns of Amazon using vendor data and copying successful supplier products by prohibiting the use of vendor data by marketplace operators. Hence, the government will be the sole owner of the data.

Finally, Amazon was accused of exclusionary conduct by excluding competitors from the platform by asking for excessive fulfillment fees.⁹¹ Although sellers can choose between "Amazon Fulfillment" and other shipping services, only suppliers that choose Amazon Fulfillment are eligible for the "Buy Box," which drastically increases sales for third-party sellers. Hence, third-party sellers are strongly encouraged to use Amazon Fulfillment even when Amazon charges above-market prices for said service. While an investigation for excluding competitors was nearly unthinkable under U.S. antitrust law (which is focused on consumer welfare), the case is now pending before a district court.⁹²

Another aspect that was challenged by the FTC are Amazon's costly onboarding fees that sellers must pay to sell their products on the platform.⁹³ Amazon can charge similar

⁹⁰ D. KLINGLER et al., *Amazon's Theory of Harm*, 27-29.

⁹¹ Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291; Commission accepts commitments by Amazon Barring it from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime (December 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

⁹² Complaint *FTC v. Amazon.com Inc.* (September 26, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1910129AmazonCommerceComplaintPublic.pdf. See for process history, <https://www.ftc.gov/legal-library/browse/cases-proceedings/1910129-1910130-amazoncom-inc-amazon-commerce>.

⁹³ Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291; Commission accepts commitments by Amazon

fees to register suppliers on Amazon.gov. Arguably, such fees would only be considered anticompetitive if Amazon holds market power in the public procurement market and if the onboarding fees are higher than what suppliers would traditionally pay for participating in government contracting. Because only a fraction of products (products below the micro-purchase threshold) are sold on e-marketplaces and transaction costs for participating in government contracting are relatively high, Amazon's exclusionary conduct on the total procurement market seems unlikely. However, if the market is defined as the market of procurement platforms, the assessment may look differently if Amazon's onboarding fees are higher than those of other GSA Commercial Platforms. In 2022, Amazon's combined average market share of all platform sales amounted to 96%, which speaks to its market power. GSA noted that they are "taking steps to encourage increased spend on other platforms" to reduce Amazon's high sales volume.⁹⁴ The author recommends keeping a close eye on potential exclusionary conduct by Amazon, for example by charging higher onboarding fees than other platforms.

Finally, it is important to highlight that the GSA has entered into "no-cost" contracts with commercial platforms.⁹⁵ In other words, the platforms are not paid by the government to offer their services (as in traditional procurement contracts), but conversely, the platforms have to pay the GSA a "referral" fee. The GSA receives 0.75% of the total annual sales volume on the platforms.⁹⁶ Relying on the estimated annual sales volume of USD 6 billion,

Barring it from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime (December 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

⁹⁴ GAO 2023 Report, 13.

⁹⁵ See Overstock.com's Performance Work Statement, <https://publicprocurementinternational.com/gsa-commercial-platforms-pws/>.

⁹⁶ GSA, "Procurement Through Commercial E-Commerce Portals—Phase II Report: Market Research & Consultation" 14 (2019),

the GSA would receive roughly USD 45 million annually.⁹⁷ So far, neither the GSA nor the GAO have made exact numbers public. Even though the GSA currently finances itself through purchases by other federal agencies, this fee arrangement could create an economic incentive for other agencies to adopt similar e-procurement marketplaces.⁹⁸ While the adoption of new e-marketplaces would increase platform competition and lower purchase prices, the existence of parallel e-marketplaces would not only pose challenges to the interoperability between the platforms, but would also increase transactions costs for suppliers if they have to register on each platform separately.

6. CYBERSECURITY AND SOCIOECONOMIC POLICIES

With the launch of the Commercial Platforms program, the government has transferred many responsibilities to platform operators and its users. However, Congress insisted that the commercial platforms accommodate the government's special needs for cybersecurity, socioeconomic preferences, data aggregation, and exclusion of vendors. Those requirements are grounded in the government's institutional goals which, unlike best value and customer satisfaction, are not necessarily shared by the individual users.⁹⁹

<https://www.gsa.gov/system/files/Phase%20II%20Market%20Research%20and%20Consultation%20%28Section%20846%29%20-%20FINAL%20April%202019.pdf>.

⁹⁷ Amended SOO, 37.

⁹⁸ Yukins et al., "GSA's Commercial Marketplaces Initiative," 10.

⁹⁹ Ibid, 3.

6.1 Cybersecurity and the “Huawei Ban”

With the increased use of cloud-based government systems and cyber-attacks against such systems, cybersecurity has become more important. One risk of cyber-attacks is that they can result in unauthorized disclosure of data or the disruption of services. This risk is particularly pronounced for e-marketplaces that not only manage vendor data, but also store proprietary (and potentially sensitive) government user data. Storing sensitive but unclassified (SBU) government data in corporate cloud solutions has also raised questions of foreign intelligence access.¹⁰⁰ Another risk for commercial platforms is the interruption of services by cyber-attacks, which could result in millions of losses in sales per day.¹⁰¹ Protecting platforms against cyber-attacks is now in the responsibility of platform operators.

The GSA’s solicitation required each interested platform to explain how it will address cybersecurity and supply chain security, and how it will prevent the sale of products and services to government buyers by “prohibited vendors.”¹⁰² While the platforms’ cybersecurity protocols are not public for good reasons, the platforms’ submitted statements did not address compliance with §889 of the NDAA for FY 2019, which prohibits executive agencies from entering into contracts with entities that use covered telecommunication and video surveillance equipment or services, most prominently from the Chinese telecommunications giant Huawei (referred to as “Huawei ban”).¹⁰³ As a response, the GSA

¹⁰⁰ GAO, Cybersecurity High-Risk Series: Challenges in Protecting Privacy and Sensitive Data (Feb. 14, 2023), <https://www.gao.gov/products/gao-23-106443>.

¹⁰¹ E.g., during 59 minutes of internet outage, Amazon missed out on an estimated \$34m in sales, see Ben Chapman, “Amazon missed out on \$34m in sales during internet outage,” Independent (June 8, 2021), <https://www.independent.co.uk/news/business/amazon-down-internet-outage-sales-b1861737.html>.

¹⁰² *Amended SOO*, 7.

¹⁰³ *Ibid.*

unilaterally announced that the contract with the three awarded e-marketplace platforms (Amazon Business, Overstock.com, and Fisher Scientific) was modified to include §889.¹⁰⁴ Despite this announcement, the performance work statements of the three platforms did not address compliance with §889 directly,¹⁰⁵ which remains an open issue. To what extent third-party vendors have been excluded from GSA commercial platforms is unclear, as neither the GSA nor the GAO has reported on this issue. However, an incident in 2021 has revealed that GSA's own marketplace (GSA Advantage!) is not spared from (inadvertently) selling prohibited Chinese products.¹⁰⁶

Another separate but related issue is the sale of counterfeits on commercial platforms. Even though not directly regulated in the contract with the platforms, Executive Order 13,904 on "Ensuring Safe and Lawful E-Commerce for United States Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights" (issued in January 2020, and still in effect today) requires that e-commerce platform operators should not facilitate the importation of products involving persons who are suspended or debarred by Customs & Border Protection.¹⁰⁷

¹⁰⁴ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917 (2018).

¹⁰⁵ See for the Performance Work Statements (PWS) of Amazon, Fisher Scientific and Overstock, <https://publicprocurementinternational.com/gsa-commercial-platforms-pws/>.

¹⁰⁶ S. BIDDLE, *U.S. Military Bought Cameras in Violation of America's Own China Sanctions*, in *The Intercept* (July 20, 2021), <https://web.archive.org/web/20210723040955/https://theintercept.com/2021/07/20/video-surveillance-cameras-us-military-china-sanctions/>.

¹⁰⁷ *Executive Order 13904 - Ensuring Safe and Lawful E-Commerce for United States Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights Holders* (January 31, 2020). See also J. MILLER, *Does the E-commerce Executive Order Throw a Wrench in GSA's Efforts?*, in *Federal News Network* (February 4, 2020), <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/02/does-the-e-commerce-executive-order-throw-a-wrench-in-gsas-effort/>.

6.2 Opportunity for Sustainable Public Procurement

The U.S. FAR, as many other procurement laws, not only aims to achieve efficiency or best value for money, but also pursues social, environmental, and political goals, so-called socioeconomic programs.¹⁰⁸ These include set-asides for small and disadvantaged businesses, sustainable acquisitions, and domestic preferences. The solicitation required the platforms to describe their capabilities to identify the defined socioeconomic groups and to specify whether products can be filtered by designated vendors and items.¹⁰⁹ The amended Statement of Objectives (SOO) emphasized that it was “important” for the platforms to designate preferred vendors and items.¹¹⁰ Whereas private commercial platforms are not required to pursue socioeconomic goals, this section investigates how e-marketplaces can accommodate socioeconomic requirements in public procurement.

Although some socioeconomic requirements, including the small business set-asides and the Buy American preference, do not apply to micro-purchases, the GSA Commercial Platforms program still targets more than 20% of products purchased from small businesses (which amounted to 18% in 2022). In 2022, products sold with “Made in America” labels amounted to less than 1%. Other requirements, such as the AbilityOne program and sustainable procurement, are applicable to micro-purchases. The AbilityOne program is a mandatory-source requirement that requires federal agencies to buy products produced by persons with disabilities in lieu of products that are essentially the same. The new e-marketplaces allow users to easily identify AbilityOne items. However, in its 2023 report, GAO’s analysis indicated that AbilityOne purchases made up a small percentage (0.16%) of

¹⁰⁸ Regulated in Subchapter D of the FAR.

¹⁰⁹ *Amended SOO*, 7.

¹¹⁰ *Ibid.*, 3.

total program sales (see Table 1) and recommended to increase awareness of AbilityOne products on commercial platforms, which has now been implemented.¹¹¹

Even though sustainable procurement is not mandatory (albeit strongly encouraged) in U.S. federal procurement,¹¹² the GSA commercial platforms offer a “green” product filter function. One might wonder what the benefit is of such a filter function. Most traditional tender platforms do not allow to designate products into socioeconomic categories but necessitate contracting authorities and suppliers to conduct a manual keyword search. A search on USAspending.gov (the U.S. federal government contracts database) for sustainable products as defined in section 23.107 FAR reveals that since their introduction in 2011 (until October 2022), only 5,000 (out of 42 million) awarded contracts involved green products. The federal agency that awarded most green products is the U.S. Department of Defense (DOD), accounting for 0.0064% of its total procurement spending.¹¹³ Hence, although regulations encourage federal agencies to buy green, the practical relevance of sustainable procurement is still small. The GSA Commercial Platforms program has set a target for green procurement spend of more than 5% (which is still low) and reported that in 2022, 4% of total programs sales related to environmentally sustainable products (see Table 1 above).

¹¹¹ GAO, Report to Congressional Committees, “GSA Commercial Platforms Program: Opportunities Exist to Improve Implementation,” July 26, 2023, <https://www.gao.gov/products/gao-23-106128>.

¹¹² Since May 2024, Section 23.103(a) FAR states that “Agencies shall procure sustainable products and services to the maximum extent practicable.” See Final Rule on Sustainable Procurement, F.R. 89(78) (April 22, 2024), <https://www.federalregister.gov/documents/2024/04/22/2024-07931/federal-acquisition-regulation-sustainable-procurement>.

¹¹³ D. KLINGLER, *Efficiency, Quality, and Sustainability in Government Contracting: A Law and Economics Analysis*, unpublished Dissertation, University of St. Gallen, 2024, 116. See USAspending.gov, Search for all contracts awarded from 2011 until October 13, 2022, accessed on October 12, 2022, <https://www.usaspending.gov/search/?hash=bb36b2221ab62442bcf847963ef1e1d8>.

The new e-marketplaces have potential to promote sustainable procurement by making it easier for government customers (and agencies) to search and filter for green products (i.e., increasing the salience of the desired option, in the terms of Thaler and Sunstein).¹¹⁴ As advertised on the GSA website¹¹⁵ (see figure below), e-marketplaces can identify sustainable products that fall within statutory or Environmental Protection Agency (EPA) purchasing programs, as defined in §23.107 and 23.108 FAR.¹¹⁶

¹¹⁴ R. THALER AND C. SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books, 2008.

¹¹⁵ GSA, Awarded Online Platforms, <https://www.gsa.gov/buy-through-us/purchasing-programs/commercial-platforms/awarded-online-platforms>.

¹¹⁶ §23.107 states that “agencies shall ensure compliance with statutory purchasing program requirements,” which include products containing recovered materials, biobased products, energy-efficient products, or ozone-depleting products. §23.108 further requires contracting officers to purchase to the maximum extent practicable products and services that meet EPA purchasing program requirements, including water-efficient products, chemically-intensive products and products with ecolabels. The European Commission has taken a similar, but more extensive approach, defining green public procurement (GPP) criteria for 21 product categories, including computers, buildings, electricity, and textiles. GPP criteria recommend procurement authorities to use recognized standards, like the ISO or EN standard, to evaluate energy efficiency, CO2 emissions and recyclability along the product’s life cycle, while allowing alternative ways to show the “greenness” of the product. See https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

Table 3: Features and capabilities of GSA’s Commercial Platforms Program

Features and Capabilities	Consumer Websites	GSA's Commercial Platforms program
Intuitive and Familiar User Experience	Yes	Yes
Detailed Product Information	Yes	Yes
Speedy Delivery	Yes	Yes
Order Tracking	Yes	Yes
Competitive, Real-Time Pricing	Yes	Yes
B2B Pricing / Discounts	No	Yes
Volume Discounts / Tiered Pricing	No	Yes
Tax Exemption (automatically applied)	No	Yes
Identification of Restricted Items / Excluded Vendors	No	Yes
Identification of Sustainable / "Green" products per EPA guidance	No	Yes
Support of Mandatory Source programs (AbilityOne) and Small Business	No	Yes
Approval Workflows / Account Hierarchies	No	Yes
Product Curation by Agencies	No	Yes
Spend Analysis (Across all Agency Accounts)	No	Yes

The new e-marketplaces have a similar function to search and filter for “green” products as the “GSA Advantage Environmental Aisle,” which allows federal agencies to search and purchase green products through GSA’s Multiple Award Schedules, and Best-in-Class contracts.¹¹⁷ Having a programmed drop-down menu that asks each seller to indicate whether the product falls into one of the socioeconomic categories (“green,” small business, or disadvantaged groups) makes searching and buying green products easier and more user-friendly – a feature that is particularly important when end users, instead of trained procurement officials, are purchasing the products and services.

¹¹⁷ GSA, Buy Green Products, <https://www.gsa.gov/governmentwide-initiatives/climate-action-and-sustainability/buy-green-products-services-and-vehicles/buy-green-products>.

7. CONCLUSION

E-marketplaces are revolutionizing and have the potential to disrupt traditional government procurement. The GSA Commercial Platforms program, awarded by the GSA in 2020 to Amazon and other platforms, removes the procurement official from the purchasing process and let's end users buy products directly from companies. Whether this truly amounts to disintermediation is questionable. This article proposes that it rather introduces platforms as new middleman. Nevertheless, e-marketplaces are revolutionizing traditional procurement principles by substituting the guiding principle of “best value for money” (and the difficulties relating to defining best value) with a new standard of customer satisfaction. It is no longer the government official who balances efficiency against quality aspects, but the consumer. E-marketplaces also help simplify market research by offering products at a one-stop-shop and by introducing customer reviews.

However, e-marketplaces are criticized for abandoning the procurement principles of competition, transparency, and accountability. Recognizing that e-marketplaces create new challenges, this article suggests that e-marketplaces do not abandon but redefine traditional procurement principles and can offer solutions to economic problems, such as high transaction costs, that traditional procurement has failed to address.

By removing procurement officials from the procurement process, e-marketplaces help eradicate the principal-agent problem of officials not acting in the best interest of the public. E-marketplaces also make administrative rules obsolete that were necessary to protect the public from the government's abuse of power, such as bid protests. However, e-marketplaces create new principal-agent problems, namely the risk that platforms act in their own self-interest, rather than in the best interest of the government or the public at large, and require mechanisms that ensure accountability of platform operators and users, such as the protection of vendor data, MFN clauses, and order splitting rules.

Even though e-commerce platforms make traditional procurement processes (including offer solicitation, offer opening, and award notices) that were protected through process transparency obsolete, e-marketplaces provide a different kind of transparency: data

transparency. Further, e-marketplaces are criticized for abandoning competition. The author acknowledges that e-marketplaces might erase formal competition (including tendering and competitive bidding) as required by traditional public procurement laws, but argues that e-marketplaces create competition that more closely resembles competition in private markets, along with its benefits of lower prices, increased product quality and variety, and innovation.

The shift of responsibilities from the government to platform operators is complex and introduces new risks. This shift is accompanied by a delegation of power. While the government saves costs by delegating supplier qualification and data collection obligations to platform operators, it also runs the risk of abuse and loss of control. For some of the risks, GSA has put safeguards in place. For example, platform operators are not allowed to use vendor data. But for other areas, the GSA Commercial Platforms program has created a “black box.” For example, platform operators can select suppliers based on their own criteria and must establish their own cybersecurity concept and mechanisms to exclude prohibited vendors – none of which are made public. Future will show whether these safeguards can protect the government and users against external threats, including cyber-attacks and counterfeits, and against internal risks, such as platforms’ potential anticompetitive practices like self-preferencing.

An aspect in which private commerce differs considerably from public procurement is socioeconomic requirements, which are mandatory (AbilityOne) or strongly encourage (sustainable procurement) in the public sector. However, current procurement databases do not allow buyers and users to search and filter for sustainable products. The GSA e-marketplaces offer a function that allows sellers to categorize and users to filter for “green” products, like Amazon’s filter option for “more sustainable products.”

Finally, two key questions that will need to be answered for e-marketplaces to prosper are their applicability to other jurisdictions and their scalability to larger contracts. Amid the necessary transfer of accountability from the government to platform operators, an introduction of a privately managed e-platform in the EU seems unlikely at this stage. However, there might be potential for introducing similar e-marketplaces for tenders below the EU tender threshold, similar to micro-purchases in U.S. federal contracting. The

heightened requirements for transparency for large contracts and the government's increasing need to manage cybersecurity and supply chain risks answer the second question. The scalability of e-marketplaces to larger contracts, i.e., contracts above the U.S. micro-purchase or simplified acquisition threshold (or above the EU tender threshold) seems unlikely. Larger contracts, e.g., for train infrastructure, are also less standardized and require specific expertise – which will likely exceed expertise of the average government user. However, one aspect that current procurement platforms can learn from the GSA Commercial Platforms program and should consider introducing is the search and filter option for “green” products, based on existing sustainability criteria. This feature bears large potential in promoting sustainable public procurement by increasing the salience of “green” products and allowing buyers to specifically target this product category.

Abstract. *E-marketplaces have the potential to disrupt traditional public procurement systems. While the U.S. General Services Administration (GSA) Commercial Platforms program was criticized for abandoning competition, transparency, and accountability as safeguards of traditional procurement, this article shows that e-marketplaces do not abandon but redefine those principles. Process transparency becomes data transparency, formal tendering and bidding become competition as observed in private markets, and accountability is shifted from the government to platform operators and users. A concept that is elevated on e-marketplaces (and to some degree replacing value for money) is the standard of customer satisfaction. It is the customer (and not the government official) who buys the product from the seller and who assess the quality and price of the product. At the same time, e-marketplaces also pose new challenges in government procurement that must be properly managed. Rather than disintermediating public procurement, digital platforms re-intermediate public procurement and create new principal-agent problems – since private marketplaces like Amazon are profit-seeking and do not aim to maximize social welfare. While competition law helps to deter anticompetitive behavior of platform operators, mandatory government requirements (such as cybersecurity concepts) remain necessary to protect the government and its users against external threats. Although e-marketplaces hold promising features to simplify procurement processes, such as digital supplier profiles, interoperability between different platforms is still an issue. One of the greatest advantages of e-marketplaces is the functionality to define filters, which can help promote socioeconomic policies. The added function to search and filter platform offerings for “green” products increases the salience of sustainable products and helps promote sustainable procurement.*