

THE MISSING LINK IN FEDERAL PROCUREMENT EVOLUTION:

Online Commercial Seller Rating Systems for Commodity Buys



Online federal government procurement has evolved rapidly with the adoption of commercial techniques. By implementing the missing link of this evolution—commercial seller rating systems for online commodity buys—the government can ensure that its buyers are equipped to make the best possible procurement decisions.

BY LUTHER D. TUPPONCE



ON MAY 12, 2004, THE OFFICE OF Federal Procurement Policy (OFPP) issued a memorandum encouraging the use of commercially available online procurement services, including reverse auctions. In that memo, OFPP stated that applying “electronic technologies to the acquisition of commercial items generally results in savings for the taxpayer by increasing both government efficiencies and broader supplier participation.” Although some additional legal issues remained to be clarified, OFPP’s memorandum represented the culmination of 15 years of a long and gradual process of change within the federal government, during which online procurement

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progressed from merely a method of payment to a means of actually buying commercial items—primarily commodities—through a variety of commercial online marketplace tools, including online catalogues, electronic RFQ/RFP systems, and online reverse auctions.

So, it is safe to say that the federal government has completed its online evolution with the adoption of commercial online procurement techniques, right? Not so fast. Two years after the OFPP memorandum, an important piece of the commercial online procurement model remains missing. However, before tackling that topic, let's discuss how we got here in the first place.

Background: Adopting the Commercial Procurement Model

As with most changes within the federal government, its entry into the world of commercial online procurement occurred gradually, beginning with the introduction of the SmartPay program in 1988. During the next decade and a half, various cultural, technological, legislative, and legal developments eventually overcame bureaucratic inertia and enabled the federal government to begin not just paying online, but buying online. The Acquisition Streamlining Act of 1994 (FASA) and the 1997 re-write of the Federal Acquisition Regulation (FAR), which encouraged innovation and eliminated the prohibition on reverse auctions,¹ were critical to the government's online evolution. Suddenly, government buyers were being told, "If the FAR doesn't prohibit it, do it" instead of "Don't do it, unless the FAR says so." Add

to that mix the well-publicized and consumer-driven dot-com boom, which introduced federal procurement personnel to online



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procurement in their own homes, and the government was well on its way to internalizing the information revolution.

By 1999, most federal government agencies utilized and provided Internet-related services of some kind, including agency Web pages, search engines, and e-mail. Moreover, online e-commerce services, such as eBay and Amazon.com, had become giants of the online marketplace. Most importantly, the federal government began piloting a variety of online solutions through which it could perform acquisition of commercial items.²

By 2000, it had become clear that online procurement techniques would become a permanent resource in the government's procurement toolkit,³ but questions lingered regarding the legality and propriety of the most revolutionary (and thus, most controversial) of those techniques—the reverse auction, which focused on price-driven procurements. The reverse auction question remained despite the issuance of "The President's Management Agenda"⁴ and the E-Government Act of 2002⁵—both of which encouraged use of technology to maximize government access, efficiency, and savings—and the 2004 release of OFPP's policy memorandum that encouraged use of "commercially available online procurement services [including online reverse auctions]" for commercial item buys.⁶

These concerns about reverse auctions were finally put to rest

in 2005, when both GAO and the Court of Federal Claims weighed in on the legality of reverse auctions in federal procurement. In *Matter of MTB Group, Inc.*, GAO clearly laid out the regulatory support for reverse auctions⁷ and summarized their argument by stating, "We thus find no basis to object generally to the agency's utilizing reverse auction procurement procedures."⁸ In a subsequent related decision, the Court of Federal Claims upheld GAO's finding, citing both FAR 102(d) and the OFPP memorandum as authority for the federal government's use of reverse auction techniques in procurement.⁹

It appeared that the evolution to commercial online procurement techniques was complete—now that the federal government was adopting the payment and the procurement pieces of the commercial online procurement model, encouraging increased use of commercial online procurement tools for commercial item or commodity buys, and disposing of any legal challenges to conducting reverse auctions. It seemed that all the government needed to do was expand the application and use of those techniques.

However, there remains a missing link—government buyers must have access to commercial performance-rating systems within their commercial online procurement tools. Such access must be established before these tools can achieve the best value for commodity buys.



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How the Commercial Marketplace Rates Online Seller Performance

Most successful online commercial marketplaces recognize the importance of ensuring that their customers receive satisfactory results from their online purchases. This is true regardless of whether those customers are buyers soliciting offers to sell (RFQ/RFP and reverse auction systems) or sellers soliciting offers to buy (catalogs and forward auction systems). Web sites like eBay and Amazon.com were among the earliest and best-known adopters of seller rating systems. Such systems enable buyers to submit real-time feedback of their experience with a particular seller. That information is then actively associated with each seller, so that buyers can instantly evaluate a seller's performance in a completely unfiltered, dynamic medium.

Most seller rating systems are as simple as enabling the buyer to pro-

vide feedback through a multipoint scoring system, which provides an overall indication of satisfaction; specific issues are addressed through written comments. On sites like eBay, sellers are permitted, and even encouraged, to provide an explanation or rebuttal in response to any negative comments they receive, but the score remains and is included in the cumulative score. Such systems are particularly useful because the buyer feedback is so focused—all respondents have completed a similar type of transaction buying through the same tool from the same seller, which typically sells the same types of items to those buyers. In the case of commodity items, which are not ruled by subjective evaluation criteria, the important aspects of these systems is that they empower the buyer to select the best seller through instant access to relevant information and, subsequently, to quickly and easily rate

that seller's performance once the buy is complete.

Buyer feedback mechanisms, in combination with overall seller performance data, have proven to be a simple and effective means for other potential buyers to determine whether a particular seller should be used or avoided. As with any data-averaging tool, the longer a rating system is in use and the more times buyers rate a seller, the more accurate and useful it becomes. The continued and growing use of seller rating systems in the commercial marketplace—including use by news outlets and general information sites to rate site content—clearly points

to the effectiveness of cumulative market feedback as a decision-making tool.

Unfortunately, current federal regulations and agency policies have severely limited the ability of the government buyer to rely on similar types of market feedback to rate seller performance through commercial procurement tools.

Current Government Regulations on Rating Seller Performance

For purposes of regulating seller past performance, the federal government generally divides procurements into two categories: those over \$100,000 and those of \$100,000 and less.¹⁰ Agency buyers are required to prepare contractor performance evaluations for all procurements over \$100,000. Those evaluations must be prepared according to agency procedures and provide for a minimum response time of 30 days. (The Department of Defense received a waiver to this requirement, so that performance evaluations are generally not required for procurements totaling \$1 million or less.¹¹) In any case, FAR makes no provisions for performance evaluations for procurements of \$100,000 or less, though some agencies have made limited exceptions for certain types of contracts.

Theoretically, this approach should allow for commercial seller rating systems to be used in conjunction with the corresponding commercial procurement tools, particularly given the FAR provision that the "content and format of performance evaluations . . . should be tailored to the size, content, and complexity of the contractual requirements."¹² However, OFPP and agency policies and procedures under FASA essentially preclude use of such commercial systems by:

- Specifically favoring an array of individual automated systems operated by the various agencies—to be eventually consolidated into a governmentwide system;¹³ and
- Dictating the data points and scoring system for all rating systems.¹⁴



In 2002, OFPP's goal of a uniform, consolidated, and government-operated past-performance system moved closer to reality when the Past Performance Information Retrieval System (PPIRS) came online, providing a governmentwide seller performance-reporting system for the federal government.

The de facto prohibition on commercial seller rating systems imposed by OFPP and agency policies and practices also appears to extend to simplified acquisitions. OFPP instructions regarding past performance for simplified acquisitions provide for a "note to the file" approach to evaluating past-performance information, but neither FAR nor OFPP policies actually require agency buyers to contribute to that information once performance takes place. Taken together with OFPP's general instructions regarding rating system design, this performance evaluation exception clearly discourages risk-averse government buyers from using commercial rating systems, even for these smaller simplified acquisition buys. Some agencies have taken the de facto prohibition a step further, explicitly barring buyers from completing contractor performance questionnaires (whether online or otherwise)¹⁵ and requiring narrative information that would effectively prevent implementation of many types of simplistic commercial rating systems.¹⁶

The end result of these regulations and policies has been to create a past-performance system that, with respect to commodity buys, is considerably removed from the commercial procurement tools that facilitate the creation and use of that performance history, and even further removed from current commercial practices.

So What?

As mentioned previously, the advantage of commercial rating systems is that they empower the buyer to select the most advantageous seller through instant access to relevant information and, subsequently, to

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quickly and easily rate that seller's performance once the purchase is complete. For commercial item or commodity buys, the current federal government model fails the buyer in both of those respects.

First, under the federal government model, buyers do not have instant, or even ready, access to relevant seller information. Unlike commercial systems, agency performance-evaluation tools employ a passive information-storage approach, relying on buyers to access and search through the various databases for individual seller data on a per acquisition basis. Ironically, in the federal government model, a buyer's search for relevant past-performance data is primarily directed by the seller, from which the buyer will ask for contractual references. The onus is then on the buyer to conduct the appropriate research to track down evaluations in the various agency databases, assuming any evaluations exist.¹⁷ Since sellers are able to list only those procurements that resulted in positive evaluations, this system immediately puts the buyer at an informational disadvantage. Moreover, because agency evaluation tools only store information for procurements exceeding \$100,000, the buyer has no way of knowing whether a particular seller has serious performance issues on buys below that threshold, even if such procurements account for 90 percent of that seller's business. The

present government system may be useful for complex service contracts where significant buyer resources can be utilized to search for and review seller performance evaluations of a few down-selected sellers, but it is extremely impractical for the hundreds of smaller commodity buys an individual government buyer may make during a given year, particularly during the weeks prior to the end of the fiscal year.

Second, for these small commodity buys, the limitations and complexity of the federal government model discourages active, widespread, and consistent participation of buyers in rating seller performance. As mentioned previously, current regulations virtually assure that buyers will not provide performance evaluations for buys of \$100,000 or less, thereby excluding performance data on billions of dollars worth of procurements annually. In addition, since performance evaluations must utilize agency forms and databases, evaluations are never prepared in direct conjunction with the particular commercial tool that facilitated the procurement. This situation inevitably increases the number of processes and adds more time and effort. For example, whereas an evaluation using a system such as that used on eBay might be completed in 2-3 minutes, a standard government evaluation form such as that used on the NIH site can take 10 times longer (or

more) to complete.¹⁸ An added disincentive to completing a government performance evaluation is the buyer's realization that the information will be stored with a variety of other past-performance information that may or may not have any relation to the buyer's purchase from the seller. On the other hand, if buyers were able to provide a rating directly on the procurement tool, it is highly likely that such feedback would become a rich source of information to other buyers using the same tool for similar procurements. In essence, the current government approach ensures that past-performance data remains in short supply for the billions of dollars spent annually on small commodity buys.



To date, the government's approach to rating seller performance has been to focus on service contracts rather than smaller commodity buys. In the process, agencies have both severely restricted availability of seller performance information and divorced any existing information from the commercial online marketplace in favor of data consolidation and centralization. For commercial item or commodity buys, the inefficiencies caused by this information gap limit the ability of the government buyer to ensure that taxpayers are getting the best value for their tax dollars.

The Evolution Continues

Different commercial marketplaces have dealt with these rating system restrictions in different ways. Some provide no rating or evaluation functionality; some simply ignore current regulations and policies and provide seller-rating functionality

for the government to use or not. In 2005, in response to considerable feedback from federal agencies investigating commercial online procurement technology, FedBid took a different approach. Agencies wanted to ensure that buyers using commercial online marketplaces would not only have access to relevant performance information, but also operate within their permitted authority. To address those needs, FedBid developed the ActivityCard, which includes a "performance alert" feature that operates on the premise that a seller's performance has been satisfactory unless otherwise noted by a buyer. In case a buyer experiences a materially problematic performance issue with

a seller, buyers can submit a "performance alert," which flags the seller but contains no performance information, ratings, or subjective content. Instead, this alert simply authorizes FedBid to

make the buyer's contact information available to the subject seller and to other buyers considering that seller for award. This permits the buyer to complete an offline evaluation according to regulations and policies, obtain seller response (as required), and then communicate the existence of that information to other prospective buyers. Accordingly, even though the content of the buyer's feedback is not readily available, other buyers are immediately aware that such feedback exists, and they can easily contact that buyer for details.

Although FedBid's approach is an effective and compliant alternative approach to the commercial rating system, it is simply that—an alternative, necessitated by the current restrictions on commercial rating systems. In order to truly maximize the effectiveness for agency buyers of any commercial marketplace, the

government must change its current policies and encourage commercial online marketplaces to offer buyers simple commercial rating systems that provide internally consistent performance data. Again, the key consideration here is to empower the buyer to choose the best seller through instant access to relevant information and, subsequently, to quickly and easily rate that seller's performance once the buy is complete. Data could remain confidential and visible only to the affected seller and other buyers, but the procurement tool should provide the common thread among the participating buyer, affected seller, and subsequent interested buyers. As in the commercial marketplace, buyer feedback on commercial online procurement tools is particularly useful to other buyers of commodity items because all parties have used, or are considering using, the same seller to complete a similar type of transaction for similar items or types of items. Because these are similarly situated buyers, the performance information has maximum relevance; and because it is integrated into the procurement tool, that performance information is instantly available and immediately usable.

The world of commercial online procurement has evolved rapidly over the last 15 years, and so far the federal government has done surprisingly well in following suit. If the government now takes steps to allow the market to dictate the type and location of relevant seller performance information for commodity buys, the government can ensure that its buyers are equipped to make the best possible procurement decisions. Assuming the government can address this missing link in its procurement evolution, the future of online procurement in the federal government looks very bright indeed. **CM**

Endnotes

1. See, e.g., FAR, 48 C.F.R. §§ 1.102(d) and 1.102-4(e), which provide that policies, procedures, and business strategies, including procurement procedures, are permissible unless otherwise specifically prohibited. The re-write also eliminated FAR, 48 C.F.R. § 15.610(e)(2) (1996), prohibiting auction techniques.
2. See Stephanie Sanborn, "Reverse auctions make a bid for the business world", InfoWorld (March 16, 2001), available at <http://www.infoworld.com/articles/hn/xml/01/03/19/010319hnetrend.html>.
3. See Brian Robinson, "Shopping for the right model", FCW.com (August 28, 2000), available at <http://www.fcw.com/supplements/B2G/2000/b2g-model-08-28-00.asp>, and Ina R. Merson, "Reverse Auctions: An Overview—The wave of the future or just one more addition to the toolkit?" Acquisition Solutions, Inc., Advisory (July 2000), available at <http://www.wifcon.com/analasirev.pdf>.
4. See "The President's Management Agenda" (Fiscal Year 2002), available at: <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>
5. "E-Government Act of 2002" (Pub. L. No. 107-347), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2458enr.txt.pdf.
6. Memorandum for Federal Acquisition Council Agency Senior Procurement Executives from Robert A. Burton, Associate Administrator, Office of Federal Procurement Policy, regarding Utilization of Commercially Available Online Procurement Services (May 12, 2004), available at <http://www.acqnet.gov/Notes/commercialtechniques.pdf>.
7. In Matter of Matter of MTB Group, Inc., B-295463 (February 23, 2005) at 2, the GAO stated the following: "First, as a general matter, while the FAR does not expressly recognize reverse auctions as a permissible procurement vehicle for goods and services, neither does it expressly prohibit the government from using auctions, and FAR § 1.102(d) provides that a procurement procedure is permissible where not specifically prohibited. At the same time, [Buyer]'s use of reverse auctions is fully consistent with FAR part 13 and promotes the underlying purpose of that regulation. In this regard, FAR part 13, which is generally aimed at streamlining the procurement process, advises agencies to use simplified acquisition procedures where, as here, the value of the acquisition is below the simplified acquisition threshold, FAR § 13.002; to make simplified purchases in the most suitable, efficient, and economical manner based on the circumstances of the acquisition, FAR § 13.003(g); and to use innovative procedures to the maximum extent practicable. FAR § 13.003(h). In addition, agencies are encouraged to use electronic purchasing techniques, FAR, 48 C.F.R. § 13.003(d), and to maximize the use of electronic commerce when practicable and cost effective. FAR, 48 C.F.R. § 3.003(f)."
8. Ibid.
9. MTB Group, Inc. v. United States, (June 7, 2005), available at <http://www.uscfc.uscourts.gov/Opinions/Miller/05/CMILLER.MTB.pdf>.
10. See FAR, 48 C.F.R. § 42.15 et. seq.
11. See Class Deviation 99-0002 (January 29, 1999).
12. FAR, 48 C.F.R. § 42.1502.
13. OFPP Memo, "Best Practices for Collecting and Using Current and Past Performance Information" (May 2000), available at <http://www.arnet.gov/Library/OFPP/BestPractices/pastpeformguide.htm> ("OFPP PPI Memo"). OFPP states, "The key to an efficient and effective Government-wide contractor performance system is the establishment, by each agency to the maximum extent practicable, of an automated mechanism to record and disseminate this information."
14. Ibid. ("[A]ll rating systems should track four basic assessment elements—cost, schedule, technical performance (quality of product or service) and business relations including customer satisfaction, and use five basic ratings: exceptional (5), very good (4), satisfactory (3), marginal (2), and unsatisfactory (1)...")
15. See NAVAIR TSD Acquisition Guide ("Past performance questionnaires should not be confused with questionnaires or surveys requested by contractors concerning the government's satisfaction with the requesting contractor's performance. This also includes past performance questionnaires from contractors regarding the past performance of another contractor. These surveys are governed by NAWCTSD Instruction 4730.1, Survey Instructions."), available at <http://www.ntsc.navy.mil/resources/library/acqguide/pastperf.htm>.
16. DoD Guide to Collection and Use of Past Performance Information (2003) at 3 ("Supporting narrative rationales for any performance ratings assigned are mandatory in DoD. The narratives are critical to any PPI assessment and necessary to establish that the ratings are credible and justifiable. These rationales need not be lengthy. But, if there were performance successes or problems, they should be documented. Include a description of the problems or successes experienced; an assessment of whether the problems were caused by the contractor, the government, or other factors; and how well the contractor worked with the Government to resolve the problems...").
17. See OFPP PPI Memo: "We expect that the Government-wide contract performance assessment process will evolve to where assessments are consistently performed on time on all appropriate contractual instruments electronically. When this happens, solicitations will need only to ask offerors to provide a list of past Government contracts that they have performed that were similar to the potential contract. The source selection teams will be able to electronically access the various agency contractor information systems and download the required information."
18. See, e.g., FDIC Contractor Past Performance RFP Reference Check Questionnaire, available at <http://www.fdic.gov/formsdocuments/3700-29.doc> (In a document that closely mimics the NIH and other agency past performance evaluations, the form states that the "[p]ublic reporting burden for this collection of information is estimated to average 45 minutes per response, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing the collection of information.")