

International Stability Operations Association

White Paper

Lowest Price Technically Acceptable (LPTA) Acquisitions: Is Contractor Aversion to LPTA a Good Value?

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Bottom Line Up Front:

ISOA supports 2017 NDAA changes establishing conditions on use of LPTA source selection processes and encourages DOD to adopt FAR rules changes quickly and ensure contracting officers implement the rule properly. Contractors should embrace recent legislative changes regarding LPTA while maintaining vigilance regarding implementation and application to ensure updates are codified in the Federal Acquisitions Regulation (FAR),¹ and operationalized swiftly and consistently. ISOA will continue to monitor the LPTA source selection process.

For many years contractors have justifiably criticized the Lowest Price Technically Acceptable (LPTA) source selection process. Concerns throughout the years have varied but it is often cited that LPTA “cuts into profit margins” by discouraging creative solutions that may cost more short term, but would benefit the company and the government in the long term.² In addition, LPTA is said to be overused causing “decreased innovation, increased performance risk, and decreased competition.”³ However, in the last four National Defense Authorization Acts (fiscal years (FYs)

¹ Some legislative changes have only be directed to be updated in the Defense Federal Acquisition Supplement or (DFARS) and not the government wide Federal Acquisition Regulation (FAR) proper. This is a concern that will be discussed further below.

² Jeff Kinney, “DoD Rule Defines When LPTA May be Used,” Federal Government Information Technology News, January 15, 2019.

³ See, for example, Richard B. Oliver and Aaron S. Ralph, “The Fiscal Year 2019 NDAA Imposes Government-Wide Limitations on the Use of LPTAS Procurements,” August 29, 2018, <https://www.pillsburylaw.com/en/news-and-insights/ndaa-limitations-lpta-procurements.html>

2016-2019) Congress has passed legislation limiting both the scope and selection procedure criteria for LPTA. Despite these changes some in the contractor community continue to believe that any use of the LPTA process is bad for the U.S government and businesses that are in support. This paper briefly explains the differences between LPTA and other contract source selection methods, specifically Tradeoff. Recent legislative changes affecting the LPTA process will be discussed, concerns regarding implementation acknowledged, and it will conclude by urging contractors to maintain vigilance regarding implementation of the new laws rather than push for legislation eliminating the Government's ability to ever use the LPTA bid process.

BACKGROUND

The category of LPTA as a method for source selection is set out in the Federal Acquisitions Regulation (FAR), a regulatory framework which standardizes and governs federal procurement practices across agencies and departments. The FAR describes what it calls the “best value continuum” as the method for government agencies to select the best contracting method. This continuum includes the two acquisition processes most often used for large government procurement: LPTA and Tradeoff.⁴ Both source selection processes are part of the Contracting by Negotiation in FAR, part 15 which states that solicitations awarded on the basis of LPTA “meet or exceed acceptability standards for non-cost factors.” LPTA proposals are therefore evaluated for acceptability but in the final analysis all those that meet that bar are then ranked by cost alone.⁵ Tradeoff contracts, however, allow the government to consider selection for reasons “other than lowest price” to include any number of “significant factors or subfactors,” such as whether a company has already proven expertise in a certain area or is large enough to recruit experienced

⁴ Approximately 93% of new, competitively awarded contracts greater than \$1 million awarded in FY2013 use one of these two processes. Government Accountability Office (GAO) Report No. 14-584, “Factors DOD Considers When Choosing Best Value Processes Are Consistent with Guidance for Selected Acquisitions,” July 2014.

⁵ FAR 15.101-2 states that “solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.”

staff in a timely fashion.⁶ The two processes, however, are mutually exclusive. When contracts are being competed, if the process is LPTA, Tradeoff considerations are not permitted.⁷

In recent years, in response to concerns for certain DoD support requirements, the Under Secretary of Defense for Acquisition, Technology and Logistics issued two memoranda. The first, dated March 4, 2015, entitled “Appropriate Use of Technically Acceptable Source Selection Process and Associated Contract Type” directed a more limited use of LPTA, stating that it be used only “when there are well defined requirements, the risk of unsuccessful contract performance is minimal, price is a significant factor in the source selection, and there is neither value, need, nor willingness to pay for higher performance.”⁸ The second, dated April 1, 2016 entitled “Department of Defense Source Selection Procedures” outlined procedures for using both LPTA selection processes consistent with stated “best value” criteria. Collectively these memoranda attempted to address concerns regarding the use, and ostensive abuse, of LPTA. Additionally, 2016 saw bipartisan legislation introduced directing the DoD to avoid using LPTA criteria to the maximum extent practicable in instances “when the procurement is for information technology systems engineering and technical assistance, or other knowledge-based professional services or other operations outside the United States, including in Afghanistan or Iraq.”⁹ NDAA FY2016, Section 894 then set criteria for when the LPTA process would be “generally appropriate” for

⁶ According to FAR 15.101-1, a Tradeoff process is appropriate when it may be in the best interest of the Government to consider an award to entity other than the lowest priced offeror or other than the highest technically rated offeror. In such cases: (1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation and (2) The solicitation shall state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

⁷ Past performance criteria are often allowed to be used in both Tradeoff and LPTA, as by statute is a mandatory criterion for all source selection. Concerns regarding the adjudication of when past performance can be factored in are discussed below.

⁸ *Department of Defense Memorandum*, “Appropriate Use of Technically Acceptable Source Selection Process and Associated Contract Type,” Under Secretary of Defense for Acquisition, Technology and Logistics, March 4, 2015.

⁹ “Warner, Rounds, Beyer, Wittman Act to Encourage Competition & Innovation in DOD Cyber Procurement,” Press Release, Website of Senator Mark R. Warner, April 21, 2016. https://www.warner.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=A4D27777-C176-4924-970A-C72128D00A60

“commercial or noncomplex services or supplies where the requirement is clearly definable, and the risk of unsuccessful contract performance is minimal.”¹⁰

Further constraints were directed in NDAA FY2017, Section 813¹¹ which mandated that the DoD only use LPTA if the following six conditions are met:

1. Minimum contract requirements in terms of performance objectives, measures, and standards are clearly identified.
2. There is little or no value in exceeding the minimum requirements set forth in the proposal request.
3. There is little or no subjective evaluation as to the desirability of one proposal versus another.
4. There is a high degree of confidence that a review of technical proposals other than the lowest bidder would not result in the identification of factors that could provide value or benefit to DoD.
5. A justification is included for the use of an LPTA evaluation methodology in the contract file.
6. DoD has determined that the lowest price reflects full life-cycle costs, including operations and support.

In addition, Section 847 added that all calculations of price must “reflect full life-cycle costs”.

In the midst of these new constraints the Government Accountability Office (GAO) investigated LPTA, specifically regarding its use in information technology services, and found that the Army, Navy, and Air Force *rarely* used LPTA source selection procedures. According to the GAO, “our analysis found that the three military departments awarded 781 new contracts valued at \$10 million or more during this time frame [2016-2017]. Of these 781 contracts, 133 contracts were awarded for IT and support services. However, only 9 of the 133 contracts used LPTA

¹⁰ NDAA FY2016, (P.L. 114-92).

¹¹ NDAA FY2017, (P.L. 114-328; see also 10 U.S.C. 2305).

source selection procedures.”¹² Contractor concerns to the contrary, LPTA’s recent history does not show even a pervasive use of the LPTA process, let alone overuse.

The same is true regarding fears of any future constraints on innovation, as the FY2018 NDAA added limits to the scope of LPTA for defense-related research and development contracts.¹³ Directed in Section 832 is the “shall not” clause for the use of LPTA for “engineering and manufacturing development contracts of major defense acquisition programs.”¹⁴ In addition, DoD was now authorized to use the “Other Transaction Authority” selection processes for certain prototype programs.

NDAA FY2019

The future will see even more constraints on the use of LPTA. With the NDAA for FY2019, it is now the policy of the United States Government to avoid using LPTA source selection criteria if it would “deny the Government the benefits of cost and technical tradeoffs in the source selection process.”¹⁵ The following limitations on the use of the LPTA process are now law:

(1) An executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers.

(2) The executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal.

(3) The proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror’s proposal versus a competing proposal.

¹² *Government Accountability Office Report*, “Defense Contracting: DoD’s Use of Lowest Price Technically Acceptable Source Selection Procedures to Acquire Selected Services,” November 2017, p.3.

¹³ *Congressional Research Service Report*, “Acquisition Reform in the FY2016-2018 National Defense Authorization Acts (NDAAs), January 19, 2018, p. 5.

¹⁴ NDAA FY 2018 (Section 832).

¹⁵ NDAA FY 2019 (Section 880), Public Law No: 115-232.

(4) The executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency.

(5) The contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file.

(6) The executive agency has determined that the lowest price reflects full life-cycle costs including for operations and support.

In addition, the law directs that LPTA should be *actively avoided* regarding certain procurements, specifically for those contracts with requirements for:

(1) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, and other knowledge-based professional services.¹⁶

(2) Personal protective equipment.

(3) Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

The good news is that Congress has done quite a bit in the last few years to reign in the use of LPTA. It unlikely it will do more any time soon. The bad news is that DFARS is late in making such revisions (120 days after the date of the enactment of this Act or August 13, 2018) and the FAR, which could easily incorporate these limitations government, has no set timeframe for an update.

RETHINKING CONCERNS

¹⁶ In a January 15, 2019 letter to the Department of Defense, the Professional Services Council (PSC) argues that “health care services and records and telecommunications devices and services,” should be added to this list of LPTA prohibitions.

While criticisms focused on LPTA's overuse or consequences resulting in a lack of innovation were addressed by both Congress and DoD, other concerns remain. First, there is the concern that directing these changes directed for the DFARS is taking much more time than it should.¹⁷ More problematically, there seems to be no official timeline for codification of similar restrictions on LPTA into the government-wide FAR. As many contracting companies operate in both the Department of Defense and civilian agency arenas, restrictions on the use of LPTA should be incorporated into the FAR and the DFAR and FAR must be harmonized ensure standardization of source selection practices across the government.

In addition, as is the case with all new legislation and regulation, they will be subject to various interpretations and applications. The contractor community should, therefore, continue to advocate as needed to ensure prompt application of the new legislation. In addition, contractors should remain vigilant as they monitor the relevant agencies regarding their application of the new laws in specific cases to ensure the laws are applied consistently within the newly restricted best value criterion. This includes the "pre-decision" process used by contracting officers to use the LPTA or Tradeoff. While procurement officials have asserted that LPTA is best utilized in procurements "of well known, low risk, common goods and services," it remains open as to what will in fact count as "well known" or "low risk". This metalevel adjudication requires that such decisions are made by a well-trained, experienced, and unbiased acquisition workforce. Contractors that have concerns about the prevalence or caliber of such gatekeepers are not unjustified. The same concerns apply to interpretations of the six conditions directed in the FY2019 NDAA.¹⁸

Overall contractors should push for commitments from the relevant agencies that they will be adequately training and appropriately monitoring their contracting officers to ensure they are up to date on all new legislation and how to apply the new restrictions in a way that is consistent and

¹⁷ In a recent conversation with the DFARS office the new legislative changes are in process. (February, 2019).

¹⁸ For example, who and by what criteria is determining that a bid request is fully "clear" and "objectively measurable"? There is no statutory or regulatory definition of these or other normative terms found in the legislative language.

transparent. As stated above, contractors' concern is to ensure proper adjudication regarding the use, or not of the LPTA process itself.

Another would be monitoring the Government's use of the "past performance" criterion. While "past performance" is, by statute, a mandatory evaluation element of *all* source selections, if selection personnel determines that past performance would act as a "discriminator" then the criteria by which past performance will be evaluated must be specifically articulated in the LPTA solicitation. The contracting team, however, makes this decision and can decide that past performance is not a discriminator.¹⁹ Note that incumbent contractors often count on their past performance advantage, demonstrating past performance through the use of customer satisfaction and evaluation research, however the fact is that LPTA contracts may be awarded to those with no track record at all. The GAO confirmed this prerogative by way of its recent decision (2018) in the *Data Monitor Systems, Inc.* bid protest when the Air Force was permitted to ignore past performance, making their selection using only the two traditional LPTA factors when deciding on a base operations and support services contract—technical merit and price. Consistent with the FAR, it was argued, "past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition."²⁰ While some contractors believe that ignoring past performance opens the door for the misapplication of the LPTA process, greater vigilance regarding the new legislation, not further legislation, is what is what is key.

CONCLUSION

For many years contractors have justifiably criticized the Lowest Price Technically Acceptable (LPTA) source selection process. Many of these concerns have been addressed through legislation and agency policy for the Department of Defense. Nonetheless, as the latest legislation has yet to be included in the DFARS, let alone the FAR, we urge that legislative requirements be incorporated into the FAR and put into practice by DOD and other federal agencies rapidly. ISOA

¹⁹ This adjudication requires additional documentation. FAR Part 15, *Frequently Asked Questions*, <https://www.cohenseglia.com/practice/government-contracting/>.

²⁰ B-415761, March 6, 2018. For more analysis see Steven Koprince, "GAO: Past Performance Evaluation Not Required in LPTA Set-Aside Competition," March 2018.

will be monitoring these issues as contractors press the government to codify the new laws as appropriate, and apply them fairly and consistently.