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NEWSLETTER

Death Knell for LPTA?

November 2019

Has the era of "lowest-price technically-acceptable" (LPTA) competitions ended? Although recent reports confirm the declining use of LPTA by procuring agencies across the government, two recent rulemakings will place significant regulatory limits on LPTA procurements for the foreseeable future.

On September 25, 2019, the U.S. Department of Defense (DOD) released a final rule restricting the use of the LPTA contracting model, which rose in popularity ten years ago following the Great Recession and in response to tightening agency budgets. The DOD rule follows Congressional efforts in recent years to restrict the use of LPTA in response to complaints from government buyers and industry, which have long resisted the use of LPTA on complex acquisitions—such as technology and professional services contracts—that are better suited to a best value model that rewards offerors who go above and beyond the minimum requirements. The LPTA model, by its very nature, discourages creativity and innovation that could benefit the government and taxpayers.

The new rule amends the DFARS to implement the LPTA restrictions set forth in both the 2017 and 2018 National Defense Authorization Acts (NDAAs). Section 813 of the 2017 NDAA required a change in the DFARS to incorporate six factors that contracting officers must consider in determining if LPTA is an appropriate procurement model. Subsequently, Section 822 of the 2018 NDAA modified these requirements to include two additional factors. The new rule incorporates these factors, identifies types of products and services for which LPTA competitions should be avoided whenever possible, and identifies certain products, services and programs for which the LPTA model is strictly prohibited.

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Following issuance of the new DFARS rule, the FAR Council issued a proposed rule that would apply many of the same LPTA restrictions to civilian agencies as well.

DOD's New LPTA Restrictions

LPTA contracts are awarded to lowest-priced offerors who meet the minimum required technical or performance standards. Unlike other competition models, the agency gives no additional credit to offerors who exceed the minimum requirements, nor does the agency conduct any qualitative analysis or comparison of the relative merits and/or risks of an offeror's proposed technical approach or past performance. The new rule sets restrictions on when a defense agency can conduct a procurement using the LPTA model. Under the new rule, LPTA competitions may be used only when the following eight factors are satisfied:

1. Minimum requirements can be clearly described and measured;
2. No, or minimal, extra value would be added by proposals exceeding the technical or performance requirements;
3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority (SSA) to determine awardee;
4. SSA is confident that reviewing all technical proposals would not result in additional characteristics that would provide value or benefits;
5. No, or minimal, additional innovation or future technological advantage would be achieved by using a different procurement model;
6. Goods being procured are predominantly expendable, nontechnical, or have a short life expectancy/ shelf life;
7. Contract file contains a determination that the lowest price reflects full life-cycle costs; and
8. Contracting officer documents the contract file describing the circumstances justifying the use of LPTA.

While the new rule does not strictly ban the use of LPTA under these circumstances, it states that agencies must avoid LPTA procurements "whenever possible" when acquiring any of the following:

1. IT services, cybersecurity services, systems engineering and technical assistance services, and advanced electronic testing services;
2. Items designated by the requiring activity as personal protective equipment; or
3. Services designated by the requiring agency as knowledge-based professional services.

The new rule also specifically prohibits the use of LPTA competitions when an agency solicits auditing services, engineering and manufacturing development for future major defense programs, or for personal protective equipment and aviation critical safety items where any differences in quality or any failure could result in combat causalities. In addition, LPTA cannot be used for personal protective services—even those deemed not a risk for combat causalities—and training and logistics services for operations outside of the United States.

While the DOD stated it does not intend for the new policy to act as a blanket ban on all LPTA use, these new requirements strongly imply that LPTA should only be used in the narrowest of circumstances and require thoughtful and detailed justification to do so. The LPTA model can no longer be used in circumstances in which the DOD should be taking advantage of potential innovation or future technological advantages. Defense agencies can use the LPTA model only when there is no additional value available from an offeror who proposes to exceed the solicitation's minimum requirements.

Recent Data on the Use of LPTA by Procuring Agencies

The day after the release of the DOD's final rule, GAO released a report, GAO-19-691, providing information on its study of agencies' uses of the LPTA model. While the report does not consider the release of DOD's final rule, it was written in anticipation of the final rule and highlights the potential impact of the rule's restrictions on LPTA competitions going forward. For example, GAO found that in FY2018, DOD agencies (Army, Navy, Air Force, and Defense Logistics Agency) used LPTA for an estimated 25% of competitive contracts and orders valued at $5 million or more. With the new restrictions, this percentage should decrease considerably.

In addition, the GAO report also reviewed six agencies' guidance for the use of LPTA and found that only DOD and DHS had existing source selection guidance reflecting criteria to use the LPTA process such as those outlined in the 2017 and 2018 NDAAs. Acquisition policy officials from VA, GSA, USDA, and HHS all stated that they did not have agency-specific guidance for using the LPTA process beyond what is available in the FAR. However, these officials also stated that they were waiting for regulations to be finalized before determining if additional guidance was needed.

Because the DFARS applies only to defense agencies, the new rule does not apply government-wide. Among civilian agencies (GSA, VA, HHS, DHS, and USDA), GAO found that they used the LPTA model for an estimated 7% of their competitive contracts and orders valued at $5 million or more. Industry groups are urging the civilian agencies to follow DOD's lead in restricting the use of the LPTA model. These industry efforts may have impacted the inclusion of legislation included in the 2019 NDAA aimed at restricting the LPTA model government-wide. The 2019 NDAA requires that the FAR be revised to incorporate similar provisions within 120 days after enactment, which would have been in December 2018.

Proposed FAR Rule

On October 2, 2019, the FAR Council released a proposed rule that would implement the relevant sections of the 2019 NDAA that specify the criteria that agencies must consider in order to conduct a civilian agency procurement using the LPTA model. The proposed rule is not a mirror image of the DFARS rule but shares many similarities. The FAR rule would include six of the eight criteria adopted in the DFARS, including whether:

1. Executive agency can clearly describe and measure minimum requirements;
2. Executive agency would realize no, or minimal, extra value by proposals exceeding the technical or performance requirements;

3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority (SSA) to determine awardee;
4. Executive agency is confident that reviewing all technical proposals would not result in additional characteristics that would provide value or benefits;
5. Contracting officer documents the contract file describing the circumstances justifying the use of LPTA; and
6. Contract file contains a determination that the lowest price reflects total costs—including for operations and support.

Unlike the DFARS rule, the proposed FAR rule would not completely ban the use of LPTA under any circumstances. But, the proposed rule requires agencies to avoid the use of LPTA, to the maximum extent possible, for procurements involving: IT services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing services; audit or audit readiness services; health care services and records; telecommunications devices and services; or other knowledge-based professional services; personal protective equipment; and knowledge-based training or logistics services in contingency operations or other operations outside of the United States. Comments on the proposed rule are due on or before December 2, 2019.

Assuming the proposed FAR rule is adopted, civilian agencies will likely further reduce their use of LPTA going forward. This, coupled with the new DFARS rule, may signal the beginning of the end to the LPTA procurement era for the foreseeable future . . . until it reemerges in another 10 or 20 years.