

How Low Can You Go? New FAR Rule Discourages Civilian Agencies from Using LPTA Procedures

Litigation Alert

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Last week, the Federal Acquisition Regulation (FAR) Council issued a [final rule](#), effective February 16, 2021, amending the FAR to include specific criteria that an agency must satisfy before using lowest price technically acceptable (LPTA) source-selection procedures. Similar to the Department of Defense's (DoD) 2019 final rule limiting the use of the LPTA method (which we previously covered [here](#)), the new FAR rule contains a strong preference against the use of LPTA procedures in certain procurements and will require contracting officers to document their analysis of five criteria before soliciting supplies and services on an LPTA basis. As discussed below, these additional requirements could provide contractors yet another basis to challenge LPTA procurements in either pre-award or post-award bid protests.

Background

As explained in our [alert](#) covering DoD's LPTA rule, the FAR contemplates two bases for award: (1) the tradeoff process and (2) the LPTA process. Under the tradeoff process, an agency may award a contract to a technically superior offeror at a higher cost who has been deemed to represent the best value after analyzing tradeoffs between both cost and non-cost evaluation criteria. Under the LPTA process, the agency must make award to the technically acceptable offeror that is the lowest priced, without regard to technical superiority. LPTA procedures have been the subject of significant criticism over the years, including that they are frequently misused in complex procurements, chill innovation, and require the government to determine "technical acceptability" without an objective frame of reference. Most recently, Congress weighed in on the subject, stating in [Section 880 of the 2019 National Defense Authorization Act \(NDAA\)](#) that "[i]t shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process."

The New FAR Rule

Similar to its DoD counterpart at [DFARS 215.101-2-70](#), the new rule significantly limits the ability of civilian agencies to use LPTA procedures. Specifically, the new rule requires agencies to include written documentation in the contract file demonstrating that:

The agency can comprehensively and clearly describe its minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

The agency believes the technical proposals 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;

The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency; and

The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired.

Further, the rule mandates that "contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominantly for the acquisition of:

- 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, or other knowledge-based professional services;
- Personal protective equipment; or
- Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq."

Notably, one public comment to the interim rule "expressed concern that the rule is not being applied to the General Services Administration (GSA) Federal Supply Schedule (FSS)." The FAR Council responded that GSA will separately address the applicability of Section 880 to the GSA FSS Program.

The New FAR Rule's Impact and Takeaways

Ultimately, the new FAR rule will impose a heavy burden on contracting officers to justify the use of the LPTA source-selection method. By requiring agencies to take additional steps, including meeting heightened documentation requirements, the new rule increases the prospect of: (1) pre-award protests challenging acquisitions using LPTA procedures and (2) post-award protests challenging the agencies' improper reliance on LPTA procedures and criteria in best value/tradeoff procurements. Moreover, it remains to be seen if and how Congress's preference against LPTA procurements will be implemented under the FSS program. Therefore, FSS contractors should continue to closely monitor any regulatory developments on this subject.

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