

Department of Defense Issues Final Rule Restricting the Use of LPTA Procurements

Effective October 1, 2019, a new rule issued by the U.S. Department of Defense (DOD) amends the Defense Federal Acquisition Regulation Supplement (DFARS) to limit the use of lowest price technically acceptable (LPTA) procurements. In December 2018, we [highlighted the DOD's proposed rule](#) limiting LPTA procurements. The [final version of that rule](#), published on Thursday, September 26, 2019, is, as of October 1, 2019, found at section 215.101-2-70 of the DFARS. As our earlier analysis concluded, this amendment to the DFARS significantly restricts DOD's ability to favor low cost options over technical superiority.

Final Rule

The final rule has not changed substantively since the proposed rule issued in December 2018. To recap, under the rule, LPTAs will now only be permitted when all the of following criteria are met:

1. Minimum requirements can be clearly described and measured;
2. No or minimal value will be realized from a proposal that exceeds minimum technical or performance requirements;
3. Proposed technical approaches require no or minimal subjective judgment by the source selection authority (SSA);
4. The SSA is confident that reviewing all technical proposals would not lead to the identification of characteristics that could provide value or benefit;
5. No or minimal additional innovation will be realized by using a difference selection method;
6. The goods being procured are predominantly expendable, nontechnical or have a short life expectancy/shelf life;
7. The contract file contains a determination that the lowest price reflects full life-cycle costs; and
8. The contracting officer documents the contract file describing the circumstances justifying use of the LPTA process.

Note that while criterion number six applies specifically to goods, the rule does not distinguish between the limitation on supplies and services. Accordingly, acquisition of services under the LPTA model is likewise restricted and the SSA would have to meet the other seven enumerated criteria to justify an LPTA acquisition.

Section 215.101-2-70 also restricts contracting officers from using LPTAs, to the maximum extent practicable, for the acquisition of:

- IT services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing or other knowledge-based professional services;
- personal protective equipment; or
- knowledge-based training or logistics services in contingency operations outside the United States.

Further, the new DFARS section 215.101-2-70 imposes an outright prohibition on LPTAs for procurements of:

- personal protective equipment or aviation critical safety item when the level of quality or failure of the item could result in combat casualties;
- engineering and manufacturing development for a major defense acquisition program; or
- auditing contracts.

The above restrictions apply to negotiated procurements, orders placed against General Services Administration schedule contracts, commercial items acquisitions and orders placed under multiple award indefinite delivery contracts. The DFARS Procedures, Guidance and Information (PGI) will provide contracting officers additional guidance on how to comply with the new rule.

Potential Effects

We will be monitoring how offerors respond to LPTA procurements in the upcoming year. As commentators noted during the public comment phase of the rulemaking process, a few of the terms in the rule, such as "value" and "full life-cycle costs" require further explanation. DOD advised that the PGI will provide additional guidance on such terms and will describe the protocol for contracting officers to seek assistance when acquiring supplies and services affected by the rule.

Contractors should be on the lookout for potential misuse of LPTA procurements as DOD agencies attempt to comply with the new DFARS section 215.101-2-70. Any offeror that has reason to believe that a DOD agency is improperly using a LPTA procurement under the new rule must challenge the terms of the solicitation in the form of a bid protest at the Government Accountability Office or U.S. Court of Federal Claims before proposals are due.

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