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Defense Primer: Lowest Price Technically Acceptable Contracts

Background

When procuring goods or services, the Department of Defense (DOD) generally seeks to obtain the best value for the government by encouraging full and open competition, as required by the 1984 Competition in Contracting Act (P.L. 98-369, also known as CICA). *Full and open competition* occurs when all eligible prospective contractors are permitted to submit bids or proposals in response to a proposed contract action.

Best value, when used in the context of government procurement, refers to the expected outcome of an acquisition that, in the government's estimation, provides the greatest overall benefit in response to the requirement (Federal Acquisition Regulation 2.101).

Getting the Best Value for DOD

CICA generally mandates that, whenever practical, DOD must obtain full and open competition through the use of competitive contracting procedures. Part 15.101 of the Federal Acquisition Regulation (FAR) establishes two primary types of competitive source selection procedures intended to obtain the best overall value for DOD: (1) the *tradeoff* process and (2) the *lowest price technically acceptable* (LPTA) process. The tradeoff process is generally used when DOD is awarding a contract and considering cost as one of several selection factors. For example, DOD may also award contracts based on non-cost-related factors including quality and performance, a firm's technical or managerial expertise, or past performance. Each of these criteria may be evaluated on a sliding or pass/fail basis. The use of LPTA is appropriate when DOD is awarding a contract and considering price as the sole selection factor. The LPTA process uses price as the sole determining factor for all proposals deemed to be "technically acceptable," or for a proposal that meets DOD's specified minimum performance requirements. Past performance does not need to be an evaluation factor when it is not relevant for the particular acquisition.

In recent years, DOD has faced criticism for using LPTA instead of a tradeoff process in certain acquisitions. Congress has expressed concern regarding the perceived inappropriate use of LPTA and has passed legislation limiting DOD's use of LPTA.

Benefits to Using LPTA

Some analysts argue that DOD may benefit from certain use of the LPTA process, including potential cost benefits, accelerated acquisition time frames, and fewer bid protests.

Cost Benefits

Under LPTA, DOD evaluates all factors other than price on an *acceptable* or *unacceptable* basis and does not consider levels of quality beyond that binary description. Some observers have asserted that, in circumstances where DOD cannot appreciably benefit from exceeding its stated minimum technical requirements, the use of LPTA may result in savings.

Accelerated Time Frames

In certain circumstances, the LPTA process may offer a more streamlined and simplified approach to procuring certain goods and services. Firms bidding for a contract may understand the specific thresholds of acceptability and can sometimes submit proposals more quickly. For DOD contracting officers, award decisions require relatively less subjective analysis compared to other source selection processes, and may accelerate decisionmaking.

Fewer Bid Protests

Contracts awarded on the basis of lowest price may be considered easier to defend against bid protests. In 2015, then Under Secretary of Defense for Acquisition, Technology, and Logistics Frank Kendall identified such a benefit, stating that "objective source-selection criteria are harder to contest successfully." However, he cautioned that source-selection criteria and acquisition strategies should not be designed around limiting the likelihood of bid protests.

When is LPTA Appropriate?

According to the FAR, the LPTA process is considered best suited for contracts in which

- contract requirements are well defined, simple, or reoccurring;
- there is a low risk for poor performance;
- there is little development work to be completed; and
- there is no appreciable value to DOD for performance exceeding the technical requirements.

Recent changes to statute and regulation have set forth specific requirements for the use of LPTA and circumstances where DOD should generally avoid the use of LPTA. Section 813 of the FY2017 National Defense Authorization Act (NDAA) (P.L. 114-328) required that DOD only use LPTA if the following conditions are met:

- minimum contract requirements in terms of performance objectives, measures, and standards are clearly identified;
- there is little or no value in exceeding the minimum technical or performance requirements set forth in the proposal request;
- there is little or no subjective evaluation as to the desirability of one proposal versus another;
- 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;

- little or no additional innovation or future technological advantage will be achieved by using a different source selection process;
- any goods being obtained are generally expendable in nature, are nontechnical, or have a short life expectancy or shelf life;
- a justification is included for the use of an LPTA evaluation methodology in the contract file; and
- DOD has determined that the lowest price reflects full life-cycle costs, including operations and support.

DOD is also required to avoid, to the maximum extent practical, the use of LPTA for procurements predominantly intended to acquire knowledge-based professional services (such as cybersecurity services); personal protective equipment; or knowledge-based training or logistics services in support of contingency operations or other operations outside of the United States. Other specific prohibitions on the use of LPTA can be found in statute, including 10 U.S.C. §4232, which prohibits the use of LPTA for the engineering and manufacturing development of a major defense acquisition program.

Case Study: Air Force Use of LPTA

In 2017, the Government Accountability Office (GAO) reviewed a \$21.5 million Air Force contract for centralized mail sorting services in Germany. The Air Force used LPTA, as the requirements for the service were well defined and noncomplex. The risk and consequences of poor performance were low and there was no appreciable value for performance exceeding the minimum stated requirements.

DOD Use of LPTA

In 2010, DOD introduced its Better Buying Power (BBP) initiative, which was aimed at cutting acquisition costs by \$100 billion over a five-year period. Under this policy, LPTA was viewed as a source selection procedure that might help DOD reduce expenditures. In 2014, GAO found that LPTA was highly attractive to DOD contracting and program officials due in part to declining budgets and initiatives such as BBP. According to GAO, from FY2009 to FY2013, DOD's use of LPTA for new, competitively awarded contracts grew from 26% to 36%. Similarly, a Bloomberg analysis found that there was an appreciable increase in DOD's use of LPTA between 2008 and 2017. A 2019 GAO study also found that DOD used the LPTA process 25% of the time for competitive contracts greater than \$5 million, compared with other federal agencies, which used the LPTA process 7% of the time. Some observers have drawn attention to the perceived correlation between increased use of LPTA and budget constraints.

Some critics of DOD's use of LPTA argue that by not providing industry with a business incentive to offer better performance, there is no motivation for industry to develop new, improved, or innovative products and services in circumstances where DOD could benefit from better contractor performance. The use of LPTA conditions the government market to offer potentially less desirable goods and services because the incentive structure encourages firms to reduce their prices as long as their product remains above the threshold of technical acceptability. Further, critics argue that LPTA contracts are not always the most

effective and efficient approach to ensuring quality and performance in the long term. These analysts argue that the use of LPTA may sacrifice long-term value for short-term savings.

Recent Congressional Activity

Congress has expressed concern regarding the inappropriate use of LPTA for source selection. As noted in the FY2016 NDAA Conference Report (H.Rept. 114-270), Congress has been "concerned that ... bias towards reducing prices paid by [DOD] to the exclusion of other factors could result in DOD buying low cost products that have the potential to negatively impact the safety of U.S. military personnel."

Recent Legislation

FY2017 NDAA (P.L. 114-328)

Section 813: Required DOD to avoid using LPTA when doing so would deny the benefits of cost and technical tradeoffs in the source selection process and when acquiring information technology services, personal protective equipment, and knowledge-based services.

Section 814: Prohibited DOD from using LPTA when procuring personal protective equipment, where the level of quality or failure of the item could result in combat casualties.

Section 892: Prohibited DOD from using LPTA for acquisition of audit services.

FY2018 NDAA (P.L. 115-91)

Section 822: Specified that LPTA may only be used when there is no, or minimal, prospect for future technological advantage or for items that are expendable, nontechnical, or expected to have short shelf lives.

Section 832: Prohibited the use of LPTA for the engineering and manufacturing development of Major Defense Acquisition Programs. The Senate Armed Services Committee report noted that, while DOD did not classify the source selection process used to acquire the Northrop Grumman B-21 Raider as an LPTA process, the acquisition procedure used resembled an LPTA process, not a trade-off process.

Additional Provisions: Prohibited the use of LPTA for selected software development programs (Section 874), aviation critical safety items (Section 882), and audit services (Section 1002).

FY2019 NDAA (P.L. 115-232)

Section 880: Prohibited government agencies from using LPTA when doing so would deny the benefits of cost and technical tradeoffs in the source selection process. Specifically, use of LPTA was prohibited when acquiring personal protective equipment and certain knowledge based services (e.g., cybersecurity).

FY2020 NDAA (P.L. 116-92)

Section 806: Required revision to the Federal Procurement Data System (FPDS, or any successor system) to facilitate the collection of complete, timely, and reliable data on the source selection process, to include tracking the usage of source selection mechanisms.

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