

## LPTA procurements greatly restricted under new FAR rule

(March 1, 2021) - Bradley Arant Boult Cummings LLP attorneys Aron Beezley and Lisa Markman outline a recent Federal Acquisition Regulation final rule that restricts agencies' use of LPTA procurements.

The Federal Acquisition Regulation (FAR) Council recently issued its long-awaited final rule<sup>1</sup> limiting the ability of civilian agencies to use the Lowest Price Technically Acceptable (LPTA) procurement method.

The final FAR rule — which took effect on February 16, 2021, and largely tracks the language contained in the Defense Federal Acquisition Regulation Supplement (DFARS) final rule from 2019<sup>2</sup> — is codified at [FAR 15.101-2](#).

### What is LPTA?

The LPTA method is a competitive negotiation source selection process where the non-price factors of a proposal are evaluated to determine which proposals are "technically acceptable," and an award is then made to the "technically acceptable" offeror with the lowest price.

### What does the final FAR rule say?

Under the final FAR rule, the LPTA source selection process shall only be used when:

- (1) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;
- (2) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;
- (3) 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;
- (4) 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;
- (5) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; *and*
- (6) The contracting officer documents in the contract file the circumstances that justify the use of the lowest price technically acceptable source selection process.

Importantly, the final FAR rule also states that contracting officers shall avoid, to the maximum extent practicable, using the LPTA source selection process in the case of a procurement that is predominantly for the acquisition of:

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

(2) Personal protective equipment; or

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

## **What are the main differences between the FAR and DFARS rules?**

The main difference between the final DFARS rule from 2019 and the new FAR rule is that the DFARS rule imposes certain *per se* prohibitions on the use of the LPTA procurement method, whereas the new FAR rule does not.

In particular, DFARS 215.101-2-70(b) imposes a *per se* prohibition on the use of the LPTA method for procurements of:

(1) Items designated by the requiring activity as "personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties;"

(2) Engineering and manufacturing development for "a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019;" and

(3) Auditing contracts.

## **When does the new FAR rule go into effect?**

As noted above, the new FAR rule took effect on *February 16, 2021*.

## **What are the key takeaways?**

The final FAR rule — like the 2019 DFARS rule — greatly restricts the circumstances under which procuring agencies may use the LPTA source selection process. As such, government contractors should be on the lookout for improper inclusion of the LPTA method in solicitations, as well as agency misuse of the LPTA method during proposal evaluations.

The former situation may give rise to a pre-award bid protest — which generally must be filed before the closing time set for receipt of initial proposals — and the latter situation may give rise to a post-award bid protest — which generally must be filed within a very tight timeframe after contract award.

### **Notes**

1 <https://bit.ly/2ZX9q17>

2 <http://bit.ly/3aRZzna>

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