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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 cost is only one factor to be considered in awarding a contract. For example, DOD may award contracts based on noncost factors such as 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 price is the determining factor in awarding a contract. Under LPTA, for all proposals deemed to be technically acceptable and therefore meeting DOD's specified minimum performance requirements, price is the determining factor in awarding a contract, with no consideration given to any other factors. 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

A number of analysts have identified specific benefits that LPTA may provide DOD, including potential cost benefits, accelerated acquisition time frames, and fewer bid protests.

Cost Benefits

Under LPTA, all factors other than price are evaluated on an *acceptable* or *unacceptable* basis without consideration given to higher levels of quality. Observers note that, in circumstances where there is no appreciable benefit to DOD for exceeding its stated minimum technical requirements, the use of LPTA can potentially result in savings.

Accelerated Time Frames

In certain circumstances, LPTA may offer a more streamlined and simplified approach to procuring certain goods and services. Firms bidding for a contract know the specific thresholds and can sometimes submit proposals more quickly. Award decisions require little subjective analysis, potentially accelerating decisionmaking.

Fewer Bid Protests

Contracts awarded on the basis of lowest price are considered easier to defend against bid protests. In 2015, then Under Secretary of Defense for Acquisition, Technology, and Logistics Frank Kendall acknowledged this 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?

LPTA is considered best suited for situations 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.

As such, LPTA is more likely to be effective when contract requirements are clearly and comprehensively spelled out. Recent changes to statute and regulation have set forth specific requirements for the use of LPTA, as well as circumstances where DOD should generally avoid the use of LPTA. Section 813 of the FY2017 National Defense Authorization Act (NDAA) (as amended; see 10 U.S.C. §2305 note) mandates that DOD can 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 have been enacted in subsequent NDAAs.

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 stated that the LPTA source selection process was used as the requirements for the service were well defined and noncomplex. The risk and consequences of poor performance were considered 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. Observers have drawn attention to the perceived correlation between increased use of LTPA and budget constraints.

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 also expressed concern regarding the misuse of LPTA for source selection. As noted in the FY2016 NDAA Conference Report (H.Rept. 114-270), Congress has been "concerned that an overarching 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. The committee expressed concerns in part over the high degree of expected development work.
- **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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