

Legal Update

Fast Rope Meeting 18 January 2019

Taft Stettinius & Hollister LLP
Suzanne Sumner, Esq.

LPTA in DoD Procurements

- Congress passed limitations and prohibitions on use of LPTA as part of 2017 and 2018 NDAAAs
 - Purpose: to give agencies discretion to weigh the “benefits of cost and technical tradeoffs” and increase innovation and industry responsiveness to support the warfighter.
- DoD proposed amendment to DFARS on 4 December 2018
 - Proposed to limit/prohibit use of LPTA source selection process in certain circumstances.

LPTA in DoD Procurements

- **DoD has proposed new DFARS §215.101-2-70**
 - Addresses limitations and prohibitions on use of LPTA as source selection process
- **LPTA shall be used only when:**
 - Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;
 - No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

LPTA in DoD Procurements

DFARS §215.101-2-70

- **LPTA shall be used only when:**
 - Proposed technical approaches will require no/minimal, subjective judgment by the SSA as to the desirability of one offeror's proposal versus a competing proposal;
 - The SSA has a high degree of confidence that reviewing all of the technical proposals would **not** result in the identification of characteristics that could provide value or benefit;
 - No/minimal additional innovation or future technological advantage will be realized by using a different source selection process;

LPTA in DoD Procurements

DFARS §215.101-2-70

- **LPTA shall be used only when:**
 - Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life;
 - The contract file contains a determination that the lowest price reflects full life-cycle costs of the product(s) or service(s) being acquired; and
 - The contracting officer documents the contract file to describe the circumstances justifying the use of the LPTA source selection process.

LPTA in DoD Procurements

DFARS §215.101-2-70

- **Avoid using LPTA when procurement is predominately for acquisition of:**
 - IT services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, other knowledge-based professional services;
 - Items designated as personal protective equipment; or
 - Knowledge-based training or logistics services in contingency operations or other operations outside the U.S., including Afghanistan or Iraq.

LPTA in DoD Procurements

DFARS §215.101-2-70

- DoD Contracting Officers prohibited from using LPTA when procuring:
 - Items designated as personal protective equipment or an aviation critical safety item, *if the level of quality or failure of the item could result in combat casualties*;
 - Engineering and manufacturing development (EMD) of a major defense acquisition program (MDAP); or
 - Auditing services.

LPTA in DoD Procurements

LPTA limitations and prohibitions apply to:

- FAR Part 15 Contracting by Negotiation
- FAR Subpart 8.4 Federal Supply Schedules,
- FAR Part 12 Acquisition of Commercial Items,
- FAR Part 13 Simplified Acquisition Procedures, and
- FAR 16.505 (Indefinite Delivery Contracts – Ordering).

DoD will release cross-reference updates to the FAR and DFARS.

Comments accepted through 4 Feb 19 at:

[https://www.federalregister.gov/documents/2018/12/04/2018-26306/defense-federal-acquisition-regulation-supplement-restrictions-on-use-of-lowest-priced-technically.](https://www.federalregister.gov/documents/2018/12/04/2018-26306/defense-federal-acquisition-regulation-supplement-restrictions-on-use-of-lowest-priced-technically)

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- Signed into law by President on 17 December 2018.
- Changes calculation period for revenue-based size standards from a 3-year period to a 5-year period.

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- SBA designates size standards for industries under the North American Industry Classification System (NAICS) based upon two primary factors:
 - a firm's number of employees over the past twelve months, or
 - a firm's average annual receipts over a specified period.

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- Prior to the Act, a firm's 3 most recently completed fiscal years was the period used to calculate its average annual receipts.
- The Act changes the calculation period for revenue-based size standards from a 3-year period to a 5-year period.
- Purpose of the change: allow more firms to qualify as small for federal procurements, for a longer period of time.

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- Act does not contain a date so should be effective immediately, but
- SBA issued an Information Notice issued on 21 December 2018 stating the Act not effective until the implementing regulations (13 CFR Part 121) revised.
- SBA office of Government Contracting and Business Development (GCBD) currently drafting revisions to the regulations.
- Until SBA changes its regulations, businesses should continue reporting receipts based on 3-year average.

QUESTIONS?