



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 15, 16, and 37

[FAC 2021-03; FAR Case 2018-016; Item II; Docket No. FAR-2018-0016, Sequence No. 1]

RIN 9000-AN75

Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 that applies criteria for and limitations on the use of the lowest price technically acceptable source selection criteria in solicitations.

DATES: *Effective:* [Insert date 30 days after date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 or Michaelo.jackson@gsa.gov for clarification of content. For

information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at (202) 501-4755 or *GSARegSec@gsa.gov*. Please cite FAC 2021-03, FAR Case 2018-016.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 84 FR 52425 on October 2, 2019, to implement section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note). Section 880 specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires solicitations predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable. Nine respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

A. Summary of significant changes from the proposed rule.

No changes were made to the final rule as a result of public comments. Minor edits were made to the final rule to account for baseline updates and to add the full name of the applicable statute. A discussion of the comments is provided as follows:

B. Analysis of public comments

Comment: Respondents expressed support for the rule and advised that the rule is beneficial to the small business community and provides them with a greater opportunity to compete in the Federal marketplace.

Response: The Councils acknowledge support for the rule.

Comment: Respondents expressed support for using the LPTA source selection process, when its use is appropriate and the selection criteria can be well-defined.

Response: The Councils agree that use of the LPTA source selection process is a valuable part of the best value continuum and an acceptable and appropriate source selection approach for many acquisitions.

Comment: Respondents expressed concern that the rule will be considered a complete ban on the use of the LPTA source selection process. A respondent is specifically concerned that the use of the LPTA source selection process is prohibited for a significant number of information technology (IT) supplies and services that can be appropriately purchased using the process. As a result,

the respondent recommends that the rule not be implemented, or be revised to narrow the scope of IT products and services to which the rule applies, because the rule, as proposed, will result in increased acquisition lead times and higher prices without a corresponding increase in quality of services.

Response: It is not the intent of the rule to prohibit the use of the LPTA source selection process. Instead, the intent of the rule is to implement the statutory language, which aims to identify circumstances that must exist for an acquisition to use the LPTA source selection process and certain types of requirements that will regularly benefit from the use of tradeoff source selection procedures. Specifically, section 880 requires use of the LPTA source selection process to be avoided, to the maximum extent practicable, in acquisitions for various services and/or supplies, including acquisitions for "information technology services" or "telecommunications devices and services." The statute does not further define or narrow these categories; as such, the rule implements the law, as written. With the exception of telecommunications devices, the rule does not preclude buying IT supplies on an LPTA basis.

Comment: Respondents recommended that sections 813, 822, and 880, to the maximum extent practicable, be harmonized in the FAR and the DoD-unique requirements be

addressed in the Defense Federal Acquisition Regulation Supplement (DFARS). Another respondent recommended revising the proposed FAR rule text to add cross-references to the DFARS, when DoD-unique requirements exist, in order to avoid confusion for individuals that are unaware of the DFARS requirements.

Response: The intent of this rule is to implement section 880 of the NDAA for FY 2019 in the FAR. Sections 813 of the NDAA for FY 2017 and 822 of the NDAA for FY 2018, which prescribe limitations on the use of the LPTA source selection process for DoD, are implemented in the DFARS. These statutes, as codified, are similar, but not identical, in text. As such, the statutes are implemented separately, and in their entirety, in the FAR and DFARS, respectively, in order to provide contracting officers with a single, complete, clear, and uniform policy on the use of the LPTA source selection process, as it applies to their agency. Contracting officers are responsible for being aware of and complying with acquisition policies and procedures, including the FAR and other applicable agency regulations; therefore, it is not necessary to make cross-references to agency supplements in the FAR.

Comment: Respondents asserted that section 880(c) applies to DoD because the term "executive agencies" does not appear in that paragraph of the statute; as such, the DoD should also be excluded from using the LPTA source

selection process to acquire health care services and records and telecommunications devices and services, as directed in section 880(c). Respondents advised that because section 813, as amended by section 822, existed at the time section 880 was written, it is the intent of section 880 to clarify and/or add to the limitations of section 813, which apply only to DoD.

Response: Section 813 (Pub. L. 114-328, enacted December 23, 2016) and section 822 (Pub. L. 115-91, enacted December 12, 2017) apply to DoD and are codified at 10 U.S.C. 2305 note. Section 880 (Pub. L. 115-132, enacted August 13, 2018) applies to executive agencies, other than DoD, and is codified at 41 U.S.C. 3701 note. The text of sections 813 and 822 are implemented in the DFARS as they currently appear in law. 10 U.S.C. 2305 note has not been revised, via subsequent legislation, to amend the list of procurements for which the use of LPTA should be avoided to the maximum extent practicable.

Comment: A respondent suggested that future Federal acquisition guidance emphasize the importance of effectively conveying clear technical and performance requirements.

Response: The Councils agree that it is important to clearly identify and communicate the functional, performance, and physical requirements of a supply or service being acquired by an agency. To facilitate this

goal, guidance, tools, and training are available to acquisition personnel on a variety of acquisition topics (e.g., market research techniques, describing agency needs, and encouraging competition) to support the requirements outlined in the FAR. Additionally, agencies have internal controls and procedures to monitor and evaluate contract performance and compliance.

Comment: A respondent advised on the importance of robust oversight of contract performance when services are provided on a contract awarded using the LPTA source selection process.

Response: The Councils agree that it is essential to exercise appropriate and adequate oversight of contractor performance on all contracts. Contracting officers are responsible for ensuring compliance with the terms of the contract, while safeguarding the interests of the United States in its contractual relationships. In addition, agencies are required to establish effective management practices to monitor and evaluate contract performance and compliance, and prevent fraud, waste, and abuse in service contracting.

Comment: A respondent recommended establishing adequate monitoring systems to ensure LPTA is applied appropriately and only when the requirements of a contract meet the rule's criteria. The respondent also suggested that public accountability should be established, possibly

through the System for Award Management (SAM) at SAM.gov contract opportunities notice, when a contracting officer uses the LPTA source selection process.

Response: Contracting officers are responsible for ensuring that the requirements of this rule are met when issuing a solicitation that includes the LPTA source selection process. Agencies have internal controls and procedures to monitor and evaluate their compliance with acquisition rules, regulations, and policies. To maintain public accountability, the respondent suggests that agencies publish the LPTA determination in the SAM.gov contract opportunities notice. However, section 880 does not require public notice or publication of the documented determination to use LPTA source selection criteria, and the Councils do not believe additional oversight protocols are required at this time.

Comment: A respondent expressed concern that the rule is not being applied to the GSA Federal Supply Schedules (FSS) Program and recommends aligning the Program with the rule to avoid inconsistent application and use of LPTA source selection criteria across the Federal and contractor communities when placing orders under FSS contracts.

Response: GSA will separately address, outside of this rule, the applicability of section 880 to the GSA FSS Program.

Comment: A respondent advised against using LPTA source selection criteria in solicitations for multiple award IT supply contracts that require contractors to bid on a notional supply list. The respondent advised that this approach leads to unrealistically low-priced offers for the items on the initial supply list, but substantially higher-priced offers for supplies added to the contracts or refreshed after contract award. As a result, the Government does not realize the cost savings that is implied during the initial contract award.

Response: Contracting officers are responsible for ensuring that the requirements of this rule are met when issuing a solicitation that includes the LPTA source selection process. Section 880 does not prohibit the use of the LPTA source selection process when issuing multiple-award indefinite-delivery, indefinite-quantity contracts. Section 880 does require contracting officers to 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 telecommunications devices and services. The rule reflects this statutory requirement.

In addition, contracting officers consider price or cost when issuing or modifying multiple-award indefinite-delivery indefinite-quantity supply contracts, or placing orders under these contracts in accordance with FAR subpart

16.5. When issuing or modifying these contracts, contracting officers must evaluate the reasonableness of the offered prices, in accordance with the procedures of FAR part 13 or 15, as applicable. When placing orders under these contracts, FAR subpart 16.5 requires contracting officers to consider price or cost as part of their selection decision for each order. These procedures help to ensure that the contracted price and the price paid under each order is fair and reasonable to the Government.

Comment: One respondent recommended that the DoD budget be reduced by 30%.

Response: This comment is outside the scope of this rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This final rule does not create any new provisions or clauses, nor does it change the applicability or burden of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is necessary to implement section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). The objective of this rule is to avoid the use of lowest price technically acceptable (LPTA) source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. No public comments were received in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that do or do not specify the use of the LPTA source selection process. However, the Federal

Procurement Data System (FPDS) provides the following information for FY 2018:

- Federal competitive contracts and orders awarded using FAR parts 13, 15, or subpart 16.5 procedures. In FY 2018, the Federal Government, excluding DoD, awarded approximately 82,337 new contracts and orders using the competitive procedures of FAR parts 13, 15, or subpart 16.5. This data excludes acquisitions for the supply/service categories identified in section 880(c) of the NDAA for FY 2019. Of the 82,337 contracts and orders, approximately 69 percent (or 56,622 contracts and orders) were awarded to approximately 27,029 unique small businesses. It is important to note that FPDS does not collect data on solicitations. FPDS can identify contracts that are awarded using competitive procedures, but did not begin collecting data on the source selection process used to award those contracts until 2020. Therefore, the data described above represents all competitively awarded contracts, including those using other than the LPTA source selection process.

- Federal competitive contracts and orders awarded for specific services and supplies. In FY 2018, the Federal Government, excluding DoD, awarded approximately 22,581 new contracts and orders potentially for the supplies and services identified in section 880(c) of the NDAA for FY 2019 using the competitive procedures of FAR parts 13, 15, and subpart 16.5, of which approximately 63 percent (or 14,285 contracts and orders) were awarded to approximately 10,129 unique small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements on any small entities.

There are no known significant alternative approaches to the rule that would meet the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act.

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 12, 13, 15, 16, and 37

Government procurement.

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Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 15, 16 and 37 as set forth below:

1. The authority citation for 48 CFR parts 12, 13, 15, 16 and 37 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Revise section 12.203 by redesignating the text as paragraph (a) and adding paragraph (b) to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * * *

(b) Contracting officers shall ensure the criteria at 15.101-2(c) are met when using the lowest price technically acceptable source selection process.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

3. Amend section 13.106-1 by adding paragraphs (a) (2) (v) and (a) (2) (vi) to read as follows:

13.106-1 Soliciting competition.

(a) * * *

(2) * * *

(v) Except for DoD, contracting officers shall ensure the criteria at 15.101-2(c) (1)-(5) are met when using the lowest price technically acceptable source selection process.

(vi) Except for DoD, avoid using the lowest price technically acceptable source selection process to

acquire certain supplies and services in accordance with 15.101-2(d).

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4. Amend section 13.106-3 by-

a. In paragraph (b) (3) introductory text, removing "statements-" and adding "statements, when applicable-" in its place;

b. In paragraph (b) (3) (i), removing "; or" and adding ";" in its place;

c. In paragraph (b) (3) (ii), removing "supplier." and adding "supplier; and"

d. Adding paragraph (b) (3) (iii).

The addition reads as follows:

13.106-3 Award and documentation.

* * * * *

(b) * * *

(3) * * *

(iii) Except for DoD, when using lowest price technically acceptable source selection process, justifying the use of such process.

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PART 15-CONTRACTING BY NEGOTIATION

5. Amend section 15.101-2 by adding paragraphs (c) and (d) to read as follows:

15.101-2 Lowest price technically acceptable source selection process.

* * * * *

(c) Except for DoD, in accordance with section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note), the lowest price technically acceptable 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 the contract file describing the circumstances that justify the use of

the lowest price technically acceptable source selection process.

(d) Except for DoD, in accordance with section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable 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, health care 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 or Iraq.

PART 16—TYPES OF CONTRACTS

6. Amend section 16.505 by—

a. Removing from the end of paragraph (b)(1)(ii) “must—” adding “shall—” in its place;

b. Removing from paragraph (b)(1)(ii)(D) “contract; and” and adding “contract;” in its place;

- c. Removing from paragraph (b) (1) (ii) (E) "decision." and adding "decision;" in its place;
- d. Adding paragraphs (b) (1) (ii) (F) and (b) (1) (ii) (G); and
- e. Adding paragraph (b) (7) (iii).

The additions read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101-2(c) (1)-(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

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7. Amend section 37.102 by adding paragraph (j) to read as follows:

37.102 Policy.

* * * * *

(j) Except for DoD, see 15.101-2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

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