

Cost-Focused Contract Limits May Drive Bid Protest Spike

By **Daniel Wilson**

Law360 (February 16, 2021, 7:44 PM EST) -- A new rule clamping down on federal agencies' use of price-focused contracts may prompt fresh bid protests, with uncertainty over definitions and other restrictions that could be interpreted in multiple ways.

The new Federal Acquisition Regulatory Council rule, which went into effect Tuesday, discourages federal civilian agencies from using the lowest price, technically acceptable, or LPTA, model for certain types of complex acquisitions.

LPTA deals make price the only distinguishing factor between bids as long as bidders meet a certain minimum technical standard, unlike best value deals where agencies may pay more for superior services by weighing cost against technical factors, such as computer speed or the experience of technical support staff.

Disputes over the rule's implementation could arise with contracts that are not explicitly included in the regulation, such as unusual technology deals that don't clearly fall under the rule's "information technology services" category. The full scope of the limited circumstances under which the rule still allows the use of LPTA contracts could also be tested, said Aron Beezley, co-leader of Bradley Arant Boult Cummings LLP's government contracts practice group.

"Agencies are still trying to figure out how this all works, whether they can still use LPTA procurements in certain situations; was it adequately documented; the justification for using it when they do," he said.

The almost inevitable result is a spike in related bid protests over the next few months, touching on issues such as whether an agency can properly justify an exception to the rule, Beezley said.

Although the rule covers several broad categories of procurements where LPTA contracts shouldn't be used, it isn't a blanket ban. Instead, it directs agencies to avoid using LPTA "to the maximum extent practicable," which still allows those contracts to be used if an agency provides a written justification.

"If you're able to document that, and it's compelling, the [Federal Acquisition Regulation] gives you a little bit of wiggle room to do that," Beezley said.

Agencies don't have to make their justifications public, and if they choose not to share the information, that could be another avenue for bid protests by companies that have no other practical way to find out

why an agency chose an LPTA deal.

While the rule lays out several broad categories of acquisitions that shouldn't use the LPTA model, including cybersecurity services and "health care services and records, telecommunications devices and services or other knowledge-based professional services," it doesn't include specific definitions and it isn't always obvious what fits under those categories, Covington & Burling LLP partner Kayleigh Scalzo said.

"They're not absolutely and obviously self-defining, especially in 2021, where technology is baked into pretty much anything we touch on a daily basis," she said.

Agencies may also try to make an end run around the rule, for example turning to "almost, but not quite, LPTA" selection procedures, which could also prompt protests, Scalzo said.

"Solicitations, for example, that have a bunch of pass-fail technical criteria," she said. "And then have a best value trade-off selection decision at the very end, but ... very narrow, for example between price and some kind of ostensibly minor technical subfactor, or between price and past performance."

Contractors and lawmakers will be keeping a close eye on implementation of the rule, with both groups having long argued that LPTA has been used inappropriately for complex procurements where differences in technical approach between bidders are significant, or where the government's specific requirements aren't clear, for reasons such as making a contract harder to protest.

"Congress has really made an effort over the past several years to really limit [LPTA procurements], I think for good reason," said Matt Schoonover, managing member of Schoonover & Moriarty LLC. "You don't necessarily want [agencies], for certain types of procurements, awarding contracts to the bare minimum technically acceptable offeror."

The issue has become more prominent as the government purchases more and more complex services, and fewer supplies, according to Crowell & Moring LLP senior counsel Eric Ransom. Buying a computer, for example, is no longer just buying a computer, but buying a whole comprehensive IT system including a helpdesk and other support services, he said.

"Even though, fundamentally, you still want to get a computer to a desk, it's a lot harder to clearly describe minimum requirements for a comprehensive IT technology support solution," Ransom said. "So there's sensitivity about whether or not you can appropriately judge 'technically acceptable' or know what it is you're missing."

The 2019 Defense Federal Acquisition Regulation Supplement, or DFARS, rule, is a **recent analog** to the FAR rule, albeit restricted to U.S. Department of Defense contracts, and with some specific prohibitions that aren't in the FAR rule. But there are no collated numbers available so far from federal contract databases or watchdog reports specifying whether the DFARS rule has reduced the use of LPTA deals in defense, so contractors can't yet make an educated guess as to how civilian agencies might react to the new rule.

For Schoonover and Beezley, their anecdotal experience is that the DFARS rule appears to have reduced the use of LPTA deals by the Defense Department, but Scalzo and Ransom said they have not perceived much of a change so far as part of their practice, with the caveat that the rule has only been in effect for a relatively short period of time.

But by offering "a new tool in the toolbox" for contractors to urge agencies to use best-value procurements, it's reasonable to expect that the FAR rule will at least "put a downward pressure on the use of LPTA across the board," Ransom said.

One aspect of the new rule that has taken on a heightened level of importance amid the COVID-19 pandemic that it didn't have when a proposed version of the rule was issued in 2019 is a clause discouraging LPTA procedures for buying personal protective equipment.

"When you think about when this rule was being debated, it's almost kind of prophetic in some ways," Schoonover said. "Unfortunately, there's news stories all around over the last year about various items of PPE not matching the expectations. And certainly when the federal government is buying ... those kind of vital, life saving items, making sure that you're getting the best quality product makes a lot of sense."

--Editing by Breda Lund.