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Lowest Price Technically Acceptable

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Much has been written recently about the wisdom of the Federal Government's new emphasis on Lowest Price Technically Acceptable ("LPTA") source selection especially for professional services and technology contracts. "Would you select your surgeon based on lowest price?" is a rhetorical question popular with critics of the use of LPTA. The Federal Government, however, must do more with less and increasingly is relying on LPTA solicitations to control spending. It is therefore important for government contractors to understand how LPTA source selections are run and the bases on which LPTA awards can be challenged.

LPTA Is a Type of Best Value

Lowest Price Technically Acceptable is commonly viewed as an alternative to best value. The FAR, however, makes clear that LPTA is, in fact, a *type* of best value. As stated in FAR 15.101-2, source selection based on LPTA is appropriate "when best value is expected to result from the selection of the technically acceptable proposal with the lowest evaluated price." Unlike source selection based on a best value continuum, however, there is no tradeoff between price and non-price factors. LPTA requires the agency to award the contract to the offeror submitting the lowest price proposal that meets the technical requirements.

Non-price Factors Are Evaluated on Pass/Fail Basis

The non-price evaluation factors in an LPTA competition vary by solicitation. Among the factors that may be included are the capability of the offeror, the proposed performance approach, the management plan, quality control, key personnel and staffing, and corporate experience. Under LPTA, non-price factors are of equal importance and are evaluated on a pass/fail (go/no go) basis. There is no ranking of proposals based on non-price factors and no higher value is earned by proposals exceeding RFP requirements. While this is how LPTA procurements should be run, in our experience, some solicitations are issued with best value tradeoffs language even if the agency intends a LPTA procurement. This is likely to create some confusion, and may be an issue to raise in a pre-bid protest, to the extent it is unclear how proposals will be evaluated.

Past performance need not be an evaluation factor in an LPTA source selection process. When it is included, however, it cannot be utilized for the purpose of making a comparative

assessment. Rather, it is to be determined solely on a pass/fail basis. FAR 15.101-2. One issue is how an agency should consider a neutral past performance rating in the context of a pass/fail evaluation. Under FAR 15.305(a)(2)(iv), a neutral evaluation is not to be treated favorably or unfavorably. Most agencies consider a neutral past performance to warrant a rating of “acceptable.”

The FAR permits discussions in LPTA source selection. Thus, the agency can expand the number of offerors eligible for award by holding discussions to give offerors the opportunity to address those areas of their initial proposals that do not meet the minimum requirements needed to achieve an acceptable rating. If the agency opens discussions with one offeror, it must engage in discussions with all offerors in the competitive range. The law provides that if an Agency chooses to engage in discussions, it must identify all aspects of an offeror’s proposal that, unless corrected, would prevent it from being in line for award. *MacAulay-Brown, Inc.*, B-292515, B-292515.2, 2003 CPD ¶ 190 at 6. Thus, in an LPTA procurement, it would seem that once discussions are opened any offeror in the competitive range must be told of any aspect of its proposal that might be deemed technically unacceptable. However, if an offeror’s proposal is rated technically acceptable and thus could not be further improved, discussion with that offeror is not required.

Although non-price factors are evaluated on a pass/fail basis, RFPs usually require offerors to describe *how* they intend to meet the technical requirements of the RFP, not merely state that it will meet the technical requirements. Indeed, an offeror risks an unacceptable rating if its proposal merely represents that it will comply with RFP requirements without providing any further detail regarding how it intended to comply. *Main Building Maintenance, Inc.*, B-406615, 2012 CPD at ¶ _____. Offerors should not include technical enhancements in describing how they will meet the technical requirements of the RFP, as would be appropriate in a traditional best value competition. The objective in an LPTA competition is to score a “pass” – a technically superior proposal has no competitive advantage and may result in an unwarranted higher price.

Once Technical Acceptability is Determined, Award is Made to Low Price Offeror

Once the agency determines which proposals are technically acceptable based on meeting the stated evaluation factors, low price becomes the determining factor for award.

A variation of this approach is possible. Rather than first determining the pool of technically acceptable proposals and then awarding based on price, an agency may decide to first identify the low price offeror, and then determine if its proposal is technically acceptable. If yes, award is made to that offeror. If no, the agency moves to the next low price proposal to determine if it is technically acceptable, and so on until award is made. See FAR 15.305.

A determination of which offeror has offered the lowest price, however, may be somewhat complex. For example, in *Hawaiian Tel. Co.*, B-187871, 77-1 CPD ¶ 298, award was made to the technically acceptable proposal with the lowest total discounted life-cycle cost. The RFP should advise offerors as to how the agency intends to determine low price.

Challenging the Agency's Decision to Use LPTA

Under the FAR, where the requirement is “clearly definable and the risk of unsuccessful contract performance is minimal,” the agency may determine that price should play a dominant role in source selection. FAR 15.101. In such cases, the best value approach is LPTA. When LPTA is used by the agency, the minimal technical requirements are specified in the solicitation and, after the agency determines which offerors meet or exceed the technical requirements, the award decision is made based on price.

On occasion, a prospective offeror may attempt to challenge the agency's decision to issue a solicitation in which award will be made based on LPTA. The GAO again affords agency acquisition officials “broad discretion” in selecting the evaluation criteria to be used in an acquisition. As long as the agency's determination is reasonable and consistent with applicable law, it will not be disturbed.

In *Crewzers Fire Crew Transport, Inc.*, B-402530, *et al.*, May 17, 2010, Crewzers protested that the agency should provide for an evaluation of the quality of equipment offered by each vendor. The protest was dismissed by GAO after the agency established that it has considered various alternatives but determined LPTA would satisfy its needs.

Challenging the Agency's “No-Go” Evaluation of a Proposal

LPTA solicitations commonly instruct offerors to clearly demonstrate in their proposals their ability to meet all of the RFP requirements and caution that the failure to meet a solicitation requirement could render the proposal technically unacceptable.

The GAO has decided many protests in which an offeror challenges the agency's rejection of its proposal as technically unacceptable. In such cases, the GAO will review the agency's evaluation to ensure that it was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. If the agency's determination meets that standard, its decision that a proposal was not technically acceptable will not be disturbed.

Challenging the Awardee's Price

In an LPTA competition, the RFP may provide that the offerors' prices will be evaluated for reasonableness and/or realism. Under the FAR, such an evaluation is limited to “measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal.” The GAO views the nature and extent of an agency's price realism analysis as a matter of agency discretion. *AMEC Earth & Envtl., Inc.*, B-404959.2, 2011 CPD ¶ 168.

Challenging the Awardee's Technical Proposal

Where a protestor can establish that the awardee's proposed approach does not satisfy the RFP requirements, the protest should be sustained. To prove such a claim, the protestor will need access to the awardee's proposal under a protective order issued by GAO. Moreover,

this type of claim often requires a detailed analysis of both the RFP's technical specifications and the offeror's technical proposal.

In *Carson Helicopter Services, Inc.*, B-299720, *et al.*, July 30, 2007, a protest was filed against the proposed award of a fire suppression services contract on the basis that the awardee's proposed helicopter did not satisfy the RFP's payload limitations. After a detailed technical discussion, the GAO found that the calculations included in the awardee's proposal to demonstrate compliance with the RFP requirements were inappropriately based on the manufacturer's "in ground effect" performance chart. The GAO also found that had the applicable "out of ground effect" performance chart been used, the proposed helicopter would not satisfy the RFP's payload requirement. The GAO noted that the agency did not recognize the issue during evaluation and that the agency's technical proposal evaluator had no specific aviation experience. Thus, it was left to the protestor, presumably through the efforts of legal counsel and expert consultants, to establish that the awardee's proposal was non-compliant with the RFP requirements in order to sustain the protest.

Directed Award

A successful protest of an LPTA contract award may afford the protestor the opportunity to obtain a remedy that is usually impossible to obtain when protesting a traditional best value source selection – the remedy of a directed award. In traditional best value protests, when a protest is sustained, the GAO commonly recommends that the agency set aside the award and either reopen the competition for new proposals or reevaluate submitted proposals. It is very rare in a traditional best value procurement for the GAO to direct the agency to award the contract to a specific offeror after a protest is sustained. Demonstrating that the low-priced offeror was technically acceptable will not always lead to a directed award, however, as GAO affords agencies broad discretion and agencies have, in our experience, canceled a successfully protested LPTA procurement in order to reassess their minimum needs.

How RJO Can Help

RJO has had significant success in bid protests concerning LPTA procurements. Our experience in this area enables us to provide pre-bid and post-bid advice to our clients. Whether protesting or defending an award, RJO's attorneys are adept at applying long-standing bid protest case law to the unique circumstances of LPTA. [Patricia Meagher](#) and RJO have decades of commitment to public contracting matters. If you have questions on LPTA procurements or other public contracting issues, please contact Pat or another RJO attorney.