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FEATURE COMMENT: Myth-Busting The LPTA Conundrum

As fiscal pressures grow and agency budgets shrink, contractors are increasingly facing lowest-price, technically acceptable (LPTA) procurements. Yet the procurement community has not found common ground on when and how LPTA should be used. All too often, the contracting industry, outside legal counsel, and procuring agencies are in express conflict. Consider the following:

Contractors. Industry-oriented letters and white papers criticize agencies for using LPTA to procure sophisticated, vaguely defined, mission-essential supplies and services. E.g., "The Challenge of Applying the LPTA Process to the Procurement of Complex Services" (November 2012) (TASC White Paper); Letter from Stan Soloway, President and CEO, Prof'l Servs. Council, to Hon. Frank Kendall, Undersec'y of Def. (Acquisition, Technology and Logistics) (Sept. 26, 2012).

Outside legal counsel. Representing frustrated contractors, outside counsel use bid protests to challenge LPTA methodologies—an adversarial tactic that can backfire, harming clients' customer relations and setting bad precedent for the industry. E.g., *Grant Thornton, LLP*, Comp. Gen. Dec. B-408464, 2013 CPD ¶ 238; *PDL Toll*, Comp. Gen. Dec. B-402970, 2010 CPD ¶ 191; *Crewzers Fire Crew Transport, Inc.*, Comp. Gen. Dec. B-402530, 2010 CPD ¶ 117.

Procuring agencies. On the one hand, agencies might acknowledge that LPTA has limitations. E.g., "Implementation Directive for Better Buying Power 2.0—Achieving Greater Buying Efficiency and Productivity in Defense Spending," Memorandum from Under Sec'y of Def. (AT&L) (April 24, 2013) (Better Buying Power, April 2013 Directive), at 10 ("Well-defined standards of performance and quality of services should be available to support the use of LPTA."); Guidance on Developing Technical Evaluation Criteria, U.S. Dep't of State Foreign Affairs Manual Vol. 14, Handbook 2, H-363.1 (June 24, 2011) (State Acquisition Handbook), at 7 ("[LPTA] criteria will be more detailed than those used under the tradeoff method."). At the same time, however, agencies continue to use LPTA inappropriately. E.g., H. Comm. on Armed Servs., 113th Cong., National Defense Authorization Act for Fiscal Year 2014, H. Rep. 113-102 (June 7, 2013) (HASC Report), at 53–54 ("The committee encourages the Department to consider adhering to 'best value' performance standards in soliciting and evaluating proposals ... rather than using [LPTA] contract vehicles."); id. at 228–29 ("The committee is concerned that the scope, scale, complexity and mission criticality ... is inappropriate for an LPTA source selection."); "Special Report on Embassy Security Contracts: Lowest-Priced Security Not Good Enough for War-Zone Embassies," Commission on Wartime Contracting (CWC) Special Report 2 (Oct. 1, 2009) (CWC Report), at 2 (describing use of LPTA for contingency contracts as having "negative consequences for security, wartime mission objectives, and America's image").

Breaking this impasse is possible, but it requires creativity, communication and cooperation. In this regard, the House Armed Services Committee would have the U.S. Comptroller General "conduct a review of [DOD's] use of source selection processes, including LPTA"—and, "[i]n conducting the review, ... to obtain the views of defense contractors to gain insight into how the use of LPTA source selection procedures affects business decisions and to identify the unintended consequences, if any, resulting from the use of this approach." HASC Report at 232–33. Further, the HASC Report "directs the Comptroller General to provide the findings of the review, along with recommendations to improve the Department's contracting practices, to the congressional defense

committees by June 30, 2014." Id. at 233.

Notably, this HASC guidance recalls two recent memoranda from the Office of Management and Budget: (1) " 'Myth-Busting': Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process" (Feb. 2, 2011) (Myth-Busting #1); and (2) " 'Myth-Busting 2': Addressing Misconceptions and Further Improving Communication During the Acquisition Process" (May 7, 2012) (Myth-Busting #2). As part of OMB's 25-point implementation plan to reform federal IT management, these memoranda endorse "*productive interactions* between federal agencies and ... industry partners." Myth-Busting #1 at 1 (emphasis added). Upending conventional wisdom, the memoranda identify and refute common misconceptions that unnecessarily complicate "complex, high-risk procurements." Id.

In like manner, however, complex, high-risk procurements are where LPTA methodologies cause the greatest discord, as well. So by extension, a new "myth-busting" effort seems necessary. Yet with respect to the current impasse concerning LPTA, myth-busting means disabusing the procurement community of the orthodox LPTA thinking that frustrates contractors, discourages creative business solutions, and inhibits constructive engagement between industry and agencies.

1. **General Misconception:** "By using an LPTA methodology, an agency is not procuring the best-value product or service." **Fact:** When LPTA is appropriately, rationally used, an agency can obtain a best-value product or service.

In reality, LPTA is a best-value methodology. Describing a "best-value continuum," the Federal Acquisition Regulation states in full,

> An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

FAR 15.101.

In practice, of course, this "best-value continuum" more closely resembles a binary choice: either the "trade-off process" or LPTA. Compare FAR 15.101-1 (trade-off process), with FAR 15.101-2 (LPTA). But both still are best-value methodologies.

On occasion, only trade-offs can ensure a best-value award—say, in a complex, high-risk procurement. Conversely, an LPTA evaluation can lead to a best-value award under different circumstances, as in a procurement for "more prosaic consumables," as the HASC recently noted. See HASC Report at 53–54 (contrasting body armor and essential "warfighter equipment" with "socks and undershirts"); see also CWC Report at 2 (LPTA "makes sense in cases when the government is buying a routine product or simple service that does not require special attributes and where a competitive base of acceptable contractors exists, as with office supplies or cleaning services.").

All in all, a reasonable best-value award depends on whether the trade-off process or LPTA reasonably fits the circumstances. When an agency inappropriately, irrationally uses the trade-off process to procure "prosaic consumables," it flouts the probable best value of the lowest-priced offeror. See *The Clay Group, LLC*, Comp. Gen. Dec. B-406647, 2012 CPD ¶ 214. As described in *The Clay Group*, for instance, the Department of Veterans Affairs inexplicably used a convoluted, multi-factor trade-off process to procure toilet tissue. Id.

GAO did not consider the rationality of using the trade-off process, but instead sustained the protest because the agency failed to properly conduct its trade-offs. Id. All the same, *The Clay Group* typifies an unreasonable, wasteful use of the trade-off process. But of greater concern here, in complex, high-risk procurements, agencies have unreasonably employed LPTA methodologies. And here there is no shortage of blame. DOD, the Department of State and the U.S. Agency for International Development are responsible for recent, high-profile examples. See Gansler, "Shop for 'Best Value,' Not 'Lowest Price,' " *Federal Times* (June 12, 2010) (addressing DOD); CWC Report (addressing State); Knauth, "USAID's Use of Lowest-Price Contracting Draws Critics," Law360 (Aug. 26, 2013).

2. **Counsel-Specific Misconception:** "A pre-award bid protest is my client's best chance to challenge an LPTA methodology." **Fact:** A comprehensive, creative strategy might include a pre-award bid protest, but

not to the detriment of a successful business outcome for the client.

Orthodox lawyering too often leads to bid protest litigation that promises contractors a pyrrhic victory, at best. More often than not, bid protests fail. In turn, they harm customer relations and set bad precedent for the contracting industry. In truth, OMB has advised that "[a]gencies *appreciate* industry's valuable input into their acquisition strategies and solicitation packages because it may result in a better solution to their requirements." Myth-Busting #2 at 8 (emphasis added).

As such, a contractor's outside counsel often can promote constructive engagement with an agency as a more realistic and effective method for reaching an amicable business solution on the inappropriate use of LPTA. Procurement law permits a contractor to engage an agency in many other ways—participating in industry days, submitting white papers, commenting on draft requests for proposals, responding to requests for information and comment, and engaging in discussions, to name a few. A bid protest might only be a last resort.

To be sure, bid protest litigation may be necessary, and it can be successful. But when outside counsel litigates a bid protest that is plainly destined for an adverse GAO decision, it only perpetuates another LPTA-related misconception: that an agency's use of LPTA is above reproach. Indeed, consider three recent decisions by GAO: (1) *Crewzers Fire Crew Transp., Inc.*, Comp. Gen. Dec. B-402530, 2010 CPD ¶ 117; (2) *PDL Toll*, Comp. Gen. Dec. B-402970, 2010 CPD ¶ 191; and (3) most recently, *Grant Thornton, LLP*, Comp. Gen. Dec. B-408464, 2013 CPD ¶ 238. In each, GAO denied a protest that challenged the use of an LPTA methodology. But even so, under the adage "bad facts make bad law," these cases hardly presented GAO with ripe opportunities to overturn these agencies' uses of LPTA.

- In *Crewzers*, the Department of Agriculture was acquiring "crew carrier bus services"—essentially, buses with well-defined "minimum equipment" requirements. See 2010 CPD ¶ 117.
- In *PDL Toll*, the Navy was acquiring "husbanding" services for watercraft—essentially, basic, discrete tasks, such as sewage removal and cargo holding. See 2010 CPD ¶ 191.
- In *Grant Thornton*, the Defense Logistics Agency was acquiring auditing services—a professional service, but one that GAO found to be undergirded by strict professional and educational standards and certifications, which DLA had considered. See 2013 CPD ¶ 238.

To be fair, we can evaluate these cases based only on the facts included in GAO's written decisions, not the range of facts and arguments presented by counsel. But even so, contractors and their counsel now must allow for these decisions if they consider filing a bid protest to challenge the use of LPTA.

3. **Agency-Specific Misconception:** "The LPTA methodology should be used more frequently because it simplifies the source selection process and cuts costs." **Fact:** The LPTA methodology offers neither advantage when it is inappropriately, irrationally used, as may be the case with a complex, high-risk procurement.

The LPTA methodology is no panacea. On the one hand, it can successfully simplify the source selection process and cut costs when it is used as the FAR prescribes—"where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal." FAR 15.101. As noted above, it would have been the more sensible source selection approach in *The Clay Group*. See Comp. Gen. Dec. B-406647, 2012 CPD ¶ 214. But when the converse is true, LPTA's appeal is specious. Put differently, the LPTA methodology is unfit for complex, high-risk procurements—or, as the FAR advises, when solicitation requirements are less definitive, when more development work is required, and when the consequences of poor performance are greater. See FAR 15.101; see also CWC Report at 2 ("When the requirement is more complex or the environment more troublesome, the best value may not always be achieved through the LPTA technique.")

As a threshold matter, the LPTA methodology is deceptively difficult. The FAR is prosaic, stating only that "[t]he evaluation factors and significant subfactors that establish the requirements of acceptability shall be set forth in the solicitation." FAR 15.101-2(b)(1). The FAR is not forthcoming with any guidance as to how an agency should define "technical acceptability." See id. A "technical" factor apparently can be any "non-cost/price" factor, id., and an agency is not required to consider past performance, see id. ("[P]ast performance need not be an evaluation factor in lowest price technically acceptable source selections."). Of course, permit-

ting an agency to ignore past performance as an evaluation factor, or even to treat past performance merely as a pass/fail criterion, hardly promotes responsible, good award decisions.

If anything, LPTA's criteria for technical acceptability must be explicit, exacting and unwavering. Indeed, DOD has advised that "[w]here LPTA is used, the Department needs to define [technical acceptability] appropriately to ensure adequate quality." "Better Buying Power 2.0: Continuing the Pursuit for Greater Efficiency and Productivity in Defense Spending," Memorandum from Under Sec'y of Def. (AT&L) (Nov. 13, 2012); see also Better Buying Power, April 2013 Directive, at 10 ("Well-defined standards of performance and quality of services should be available."). Similarly, State's guidance is unequivocal:

> The criteria under this process must be *specific to the work requirements* of each RFP, and they must *clearly state what constitutes technical acceptability in measurable terms* (e.g., length of experience, type of experience, any required qualifications, training or certification of staff, any required licenses, etc.)[.] *[These] criteria will be more detailed than those under the tradeoff method*. This is because they prescribe the minimum standards that offerors must meet to be determined to be acceptable under each factor.

State Acquisition Handbook at 7 (emphasis added).

What is more, the inappropriate, irrational use of the LPTA methodology is penny-wise, pound-foolish. When CWC studied State's use of LPTA to award overseas contingency contracts, it concluded that "passing up offers from firms offering higher quality and better experience" would result in "negative consequences for security, wartime mission objectives, and America's image." CWC Report at 1.

With LPTA, less-qualified, inexperienced companies " 'buy-in' with unrealistically low prices," which has "two serious unintended consequences." Id. at 2. First, the awardee "may be motivated to use every means possible to limit costs afterwards." To illustrate, "[s]uch post-award cost-cutting may include hiring a less qualified workforce, skimping on the quantity and quality of needed materials and equipment, and obtaining inexpensive and poor-quality subcontractors." Id. ("Most importantly, under-bidding may also involve reduced levels of management oversight.") Second, "the most highly qualified contractors often decide not to expend their limited resources on responding to LPTA solicitations—a de facto restriction of competition." Id. at 3. For similar reasons, the HASC recently warned that "pursuing the lowest cost in the short term can result in significant operational and financial costs in the long term." HASC Report at 232.

Conclusion—In sum, the LPTA source selection process will remain popular for as long as there are demands for fiscal austerity. Which is to say, the LPTA process is here to stay. But for all that, a more appropriate, reasonable, and constructive use of LPTA is possible, if the procurement community—including contractors, their counsel, and agencies—can fully appreciate the realities discussed in this paper.

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