



November 25, 2019

General Services Administration  
Regulatory Secretariat Division (MVCB)  
ATTN: Lois Mandell  
1800 F Street NW, 2nd Floor  
Washington, DC 20405

Submitted via Regulations.gov

Subject: FAR Case 2018-016

Dear Ms. Mandell:

The Project On Government Oversight (POGO) provides the following public comment regarding FAR Case 2018-016, “Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process.”<sup>1</sup> POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

The Federal Acquisition Regulatory Council is proposing to amend the Federal Acquisition Regulation to implement section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.<sup>2</sup> This section sets out the criteria that must be met in order to implement the lowest price technically acceptable (LPTA) source selection process, requires contracting officers to document in writing the justification for using it, and requires procurements for certain goods and services “to avoid the use of LPTA to the maximum extent practicable.”<sup>3</sup>

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<sup>1</sup> 84 Fed. Reg. 52,425 (proposed October 2, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-10-02/pdf/2019-20798.pdf>

<sup>2</sup> Pub. Law No. 115-232 (2018).

<sup>3</sup> 84 Fed. Reg. 52,425 [see note 1]. Note that section 880 does not apply to the Department of Defense (DOD). Instead, provisions in prior National Defense Authorization Acts established similar LPTA criteria for DOD procurements (see Pub. Law No. 114-328 § 813 and Pub. Law No. 115-91 § 822).

The Federal Acquisition Regulation states that the LPTA “source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.”<sup>4</sup> In this process, the contract is awarded to the offeror who submits the lowest price and whose proposal satisfies the government’s technical requirements. In other words, if several offerors are deemed qualified to perform the work, the agency must go with the cheapest option. This is in contrast to the “best value tradeoff” source selection method, in which price is weighed against other, non-monetary factors such as past performance, quality, reliability, and innovation.<sup>5</sup>

POGO supports the proposed rule. For many years, it has been our position that LPTA must be used “in a more thoughtful and considered manner,” which “requires the contracting agency to carefully consider its specifications and requirements.”<sup>6</sup> The rule will help in this regard by setting stricter standards and requirements for LPTA, which will enhance accountability and transparency in the contracting process. However, we hope that future guidance will emphasize the need for clear technical and performance requirements, and that the new rule is not a complete ban on the use of LTPA.

LPTA is a tool that can help the government buy smarter, but it must be used sensibly. Ideally, it simplifies and streamlines the source selection process, reducing costs for the government and making better use of agencies’ limited manpower and resources. It is generally regarded as best suited for procurements in which requirements are well defined, the product or service is commercial or non-complex in nature, and the risk of poor performance is minimal.<sup>7</sup>

However, placing price above all other factors can lead to bad outcomes. The most notorious example of this occurred when the State Department selected ArmorGroup North America to provide security at the U.S. Embassy in Kabul, Afghanistan.<sup>8</sup> The contract became ensnared in scandal in 2009 when photographs surfaced showing ArmorGroup embassy guards engaged in “lewd,” drunken

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<sup>4</sup> 48 C.F.R. § 15.101-2(a) (2019). <https://www.law.cornell.edu/cfr/text/48/15.101-2>

<sup>5</sup> 48 C.F.R. § 15.101-1 (2019). <https://www.law.cornell.edu/cfr/text/48/15.101-1>

<sup>6</sup> Danielle Brian, “CWC Findings on Embassy Guards Fiasco Amount to ‘Blame Shifting,’” Project On Government Oversight, October 6, 2009. <https://pogoblog.typepad.com/pogo/2009/10/cwc-findings-on-embassy-guards-fiasco-amount-to-blame-shifting.html>

<sup>7</sup> Government Accountability Office, *DOD’s Use of Lowest Price Technically Acceptable Source Selection Procedures to Acquire Selected Services*, GAO-18-139 (November 2017), 5-6. <https://www.gao.gov/assets/690/688680.pdf>

<sup>8</sup> Robert Brodsky, “Race to the Bottom: Cheapest might not always be best when awarding contracts to protect overseas buildings,” *Government Executive*, December 1, 2009. <https://www.govexec.com/magazine/magazine-news-and-analysis/2009/12/race-to-the-bottom/30423/>.

behavior.<sup>9</sup> It was later determined that ArmorGroup significantly underbid its competitors to win the contract and cut costs by understaffing the guard force and hiring underqualified workers, among other performance problems.<sup>10</sup> Other criticisms of LPTA are that it can stifle innovation and reduce competition.<sup>11</sup>

We hope this rule will lead to smarter, more effective use of the LPTA source selection process and cost savings for the government. But clearer LPTA guidelines alone will not guarantee this outcome. There government also must effectively convey contractual requirements and provide robust oversight.

If you have any questions, I can be reached at [ngordon@pogo.org](mailto:ngordon@pogo.org) or (202) 347-1122.

Sincerely,



Neil Gordon  
Investigator

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<sup>9</sup> “U.S. embassy in Kabul fires guards for lewd acts,” Reuters, September 4, 2009.

<https://www.reuters.com/article/idUSISL471509>. Some of the photographs referenced in the article are posted here: <http://getinvolved.pogo.org/site/PageNavigator/KabulPhotos.html>

<sup>10</sup> Majority Staff of Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, 111<sup>th</sup> Cong., *New Information About the Guard Force Contract at the U.S. Embassy in Kabul*, 2 (2009).

<https://www.hsgac.senate.gov/imo/media/doc/Staff%20analysis%20submitted%20by%20McCaskill.pdf>

<sup>11</sup> Nick Wakeman, “Is this the end of LPTA as we knew it?,” *Washington Technology*, September 27, 2019. <https://washingtontechnology.com/blogs/editors-notebook/2019/09/lpta-dod-final-rule.aspx>