



NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

MBA PROFESSIONAL PROJECT

LOWEST PRICE TECHNICALLY ACCEPTABLE (LPTA): A STAKEHOLDER PERSPECTIVE

December 2020

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REPORT DOCUMENTATION PAGE			<i>Form Approved OMB No. 0704-0188</i>	
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1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE December 2020	3. REPORT TYPE AND DATES COVERED MBA Professional Project	
4. TITLE AND SUBTITLE LOWEST PRICE TECHNICALLY ACCEPTABLE (LPTA): A STAKEHOLDER PERSPECTIVE			5. FUNDING NUMBERS	
6. AUTHOR(S) Irina Jarreau, Carl A. Segerstrom, and Seth W. Harlan				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A			10. SPONSORING / MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.				
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release. Distribution is unlimited.			12b. DISTRIBUTION CODE A	
13. ABSTRACT (maximum 200 words) For years, Department of Defense (DOD) acquisition professionals have used the lowest price technically acceptable (LPTA) source selection strategy to obtain goods or services in budget-constrained environments. In 2019, source selection guidance in DFARS 215.101-2-70 was updated with new requirements that appear to limit the usage of LPTA. Industry feedback on the new source selection guidance suggests that the update overcorrects prior guidance, which contributed to the DOD's prevalent usage of the LPTA strategy in prior years. New DFARS 215.101-2-70 guidance is also widely criticized for containing high levels of ambiguous language that industry experts believe could create both confusion at contracting agencies and an increase in protests from defense contractors. The purpose of this research is to apply stakeholder theory to source selection strategies used in government acquisitions. Specifically, this research explored the consequences of ambiguous language found in current and prior source selection guidance and aimed to determine the potential impacts on DOD acquisition stakeholders when the LPTA strategy is overused and underutilized.				
14. SUBJECT TERMS Department of Defense, DOD, lowest price technically acceptable, LPTA, trade-off, source selection, obligation, fiscal responsibility, best value, stakeholder, stakeholder theory			15. NUMBER OF PAGES 69	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UU	

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PERSPECTIVE**

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF BUSINESS ADMINISTRATION

from the

**NAVAL POSTGRADUATE SCHOOL
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ABSTRACT

For years, Department of Defense (DOD) acquisition professionals have used the lowest price technically acceptable (LPTA) source selection strategy to obtain goods or services in budget-constrained environments. In 2019, source selection guidance in DFARS 215.101-2-70 was updated with new requirements that appear to limit the usage of LPTA. Industry feedback on the new source selection guidance suggests that the update overcorrects prior guidance, which contributed to the DOD's prevalent usage of the LPTA strategy in prior years. New DFARS 215.101-2-70 guidance is also widely criticized for containing high levels of ambiguous language that industry experts believe could create both confusion at contracting agencies and an increase in protests from defense contractors.

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LIST OF ACRONYMS AND ABBREVIATIONS

BBP	Better Buying Power
BES	Budget Estimate Submission
CAPE	Cost Assessment and Program Evaluation
CICA	Competition in Contracting Act
CJCS	Chairman of the Joint Chiefs of Staff
CMBOK	Contract Management Body of Knowledge
CPARS	Contractor Performance Assessment Reporting System
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DPG	Defense Planning Guidance
EVM	Earned Value Management
FAR	Federal Acquisition Regulation
FY	Fiscal Year
FYDP	Future Years Defense Program
GAO	Government Accountability Office
HTRO	Highest Technically Rated Offer
NDAA	National Defense Authorization Act
NDS	National Defense Strategy
NMS	National Military Strategy
NSS	National Security Strategy
LPTA	Lowest Price Technically Acceptable

OMB	Office of Management and Budget
PALT	Procurement Administrative Lead Time
POM	Program Objective Memorandum
POTUS	President of the United States
PPBE	Planning, Programming, Budgeting, and Execution
RFP	Request for Proposal
SBA	Small Business Act
SBA	Small Business Administration
SECDEF	Secretary of Defense
SSA	Source Selection Authority
USDP	Under Secretary of Defense for Policy
USDT	United States Department of the Treasury
VATEP	Value Adjusted Total Evaluated Price

ACKNOWLEDGMENTS

We would like to acknowledge and extend our gratitude to Professor Chong Wang for proposing the research topic and trusting us with its development. Professor Wang's support and guidance throughout the entire thesis writing process was crucial to our success. We also wish to thank Professor Kelley Poree for joining as a co-advisor. His perspective on the topic and the guidance he provided was exceptionally valuable. We are indebted to both professors for the vast amounts of time each invested into helping us create a quality product. They helped us craft an initial idea into a thesis that addresses research gaps and brings value to our readers.

We must also acknowledge each of our families for putting up with late nights, reduced family outings, and elevated levels of stress, all-knowing and understanding that there was a greater good and method to the madness. For this, we will be indebted for decades to come.

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I. INTRODUCTION

Government acquisition professionals use a broad range of source selection processes and techniques to achieve the best value when acquiring essential supplies and services for the Department of Defense (DOD). These methods include the Lowest Price Technically Acceptable (LPTA) approach, the subjective tradeoff and Value Adjusted Total Evaluated Price (VATEP) approaches, as well as the Highest Technically Rated Offer (HTRO) approach. The LPTA process emphasizes that the lowest price will deliver best value, so long as minimum technical specifications are satisfied. The tradeoff process allows procurement officials to analyze both cost and non-cost factors when evaluating proposals, so that contract award can be made to the contractor with the best overall proposal and not necessarily to the lowest bidder. The VATEP approach places emphasis on specific enhanced characteristics and allows the Source Selection Authority (SSA) to determine if best value will be achieved by paying for such enhanced benefits. When using the VATEP approach, the government quantifies the value of increased performance in the Request for Proposal (RFP), which increases the objectivity of the source selection process. The final approach, HTRO, is used when contract award will be made to the contractor offering the best performance, as long as the price of the goods or services is deemed reasonable.

One of the most challenging tasks for acquisition professionals using the subjective tradeoff approach is to determine the relative importance of evaluation factors and subfactors for each requirement. According to FAR 15.304, non-cost evaluation factors include past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. Challenges with the LPTA approach center on establishing the appropriate levels of technical acceptability, and for the VATEP approach, quantifying the value of better performance. For these reasons, the government must conduct both risk assessments and market research to determine the most appropriate source selection method for each requirement. As such, a one size fits all source selection strategy will not reliably provide a quality solution. Failure

to correctly identify the appropriate source selection method and corresponding evaluation factors can have serious consequences for a wide range of acquisition stakeholders.

A. BACKGROUND

Usage of the LPTA process has fluctuated significantly over time. In the last ten years, the Department of Defense's multiyear Better Buying Power (BBP) initiatives have routinely called for an increase in efficiency and a decrease in acquisition costs. In order to meet these initiatives, DOD procurement officials appear to have relied heavily on the LPTA strategy. In 2014, a Government Accountability Office (GAO) report found the DOD increased its use of the LPTA strategy by eleven percent between fiscal year (FY) 2009 and 2013 for contracts valued at \$25 million or more (DiNapoli, 2014). Additionally, according to a September 2019 GAO review of orders valued at \$5 million or more, DOD usage of the LPTA process exceeded that of its non-DOD federal agencies (DiNapoli, 2019). DOD components used the LPTA process for 25 percent of competitive contracts compared to just 7 percent for civilian agencies (DiNapoli, 2019). The DOD has drawn criticism for what appears to be the overuse of the LPTA process and as a result, Congress included limitations on the use of LPTA procedures in both FY 2017 and FY 2018 National Defense Authorization Acts (NDAA). In response to Congress, the DOD released updated LPTA guidance in Defense Federal Acquisition Regulation Supplement (DFARS) 215.101-2-70, which was made effective on 1 October 2019.

B. OBJECTIVES OF THE STUDY

The purpose of this research is to apply stakeholder theory to determine the unintentional loss in social welfare and measure the implications on defense acquisition system stakeholders, when the LPTA source selection strategy is used sub-optimally. The researchers wish to identify issues, that when summed, destroy value for society. Those issues could impact various stakeholders including procurement officials, customers, defense industry contractors, suppliers, and economic markets. Additionally, this research seeks to determine if ambiguous language and/or biases exist in past and current guidance on source selection methods. We believe that the most recent update to DFARS 215.101-2-70 was an overcorrection to the overuse of LPTA contracts previously mentioned. We

aim to identify the potential consequences faced by defense acquisition system stakeholders as a result of the most recent update to DFARS 201.101-2-70. In summary, our research issues caution to policy makers and provides recommendations.

C. RESEARCH QUESTIONS

The following questions form the basis for this research:

1. Does new DFARS section 215.101-2-70 contain overly restrictive or ambiguous language?
2. Is the Department of Defense unintentionally undermining efforts to promote public policy objectives through government contracting by publishing overly restrictive and/or ambiguous language in Source Selection Procedures and/or DFARS instruction?
3. What impact does improper policy on LPTA usage have on the following stakeholders:
 - i. DOD Contracting Agencies
 - ii. DOD Customer
 - iii. Defense Contractor Industry and Employees

D. RESEARCH BENEFITS AND LIMITATIONS

This research may provide the stakeholders of DOD contracting with long-term social welfare benefits. The level of control over source selection strategies should continue to align with current DFARS 215.303(b)(2) guidance which requires the SSA to approve a source selection plan before issuing a solicitation for high-dollar value acquisitions. For all other acquisitions, the local agency contracting officer should be permitted to make the source selection strategy determination independently and free from the concerns of ambiguous language. Adoption of this practice would realize benefits for many stakeholders.

The Federal Acquisition System highly values optimal public policy, as it is included in the guiding principles under FAR 1.102. Beneficiaries of good public policy

include large and small businesses alike. A significant goal of the government is to encourage small business participation in the DOD acquisitions through public policy. Specifically, encouraging the participation of small businesses, veteran-owned small businesses, and small-disadvantaged businesses through the Small Business Act of 1953, which ensured the protection of small business concerns and guaranteed small businesses would receive a fair portion of government contracts (Small Business Administration [SBA], 2020). Additionally, each taxpayer is a stakeholder, as balanced source selection guidelines may result in less government spending than what is experienced during times when LPTA is underused. Ensuring the optimal and wise spending of taxpayer money in government contracting helps maximize social welfare for all stakeholders.

Additionally, solidifying source selection procedures for the long term and removing language ambiguity in current policy, positions procurement officials in the DOD for success and helps them become subject matter experts. The Government Accountability Office consistently criticizes the performance of DOD contracting. Since 1992, the DOD has been on the GAO's high-risk list because of challenges with the acquisition workforce, service acquisitions, and operational contract support (Government Accountability Office [GAO], 2020). We believe these DOD contracting performance struggles can be directly linked to frequently changing policies and guidance. A stable, well-defined set of procedures could help the acquisition community become a more proficient, compliant, and capable workforce. In turn, this could allow the contracting community to better balance the four guiding principles set forth in FAR Part 1. The guiding principles are to "satisfy the customer in terms of cost, quality, and timeliness, minimize administrative operating costs, conduct business with integrity and openness, and fulfill the public policy objectives and goals established by Congress and the President" (FAR 1.102).

In addition to the potential benefits of this research, limitations also exist. The main limitation was the scope of this research was adversely impacted by the world-wide COVID-19 pandemic. Our original plan to collect data and travel to various contracting offices, was cancelled. Therefore, the research was strictly limited to literature review and analysis of existing reports and surveys concerning DOD LPTA usage.

E. ORGANIZATION OF THE REPORT

The remainder of the report is organized as follows: Chapter II will be a literature review, Chapter III is analysis and findings, Chapter IV is recommendations, and Chapter V is our conclusion and areas for further research.

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II. LITERATURE REVIEW

This part reviews stakeholder theory, prior LPTA research, the contract management process, and DOD source selection strategies. Current federal regulations relevant to source selection are discussed as well. Finally, the DOD Planning, Programming, Budgeting, and Execution (PPBE) process is explained.

A. STAKEHOLDER THEORY

Stakeholder theory is the practice of considering more than just the business itself, when making business decisions. It is a management philosophy that stresses the importance of creating value for both a business and society. According to Blackburn, “stakeholder theory addresses business ethics, morals, and values when managing stakeholders involved with a project or organization. It seeks to optimize relations with stakeholders, thereby improving efficiencies throughout the project or organization” (Blackburn, 2019).

In competitive acquisitions, the DOD finds value in a variety of ways. Some acquisitions value quality, technical specifications, timeliness of performance, and/or contractor experience while other requirements find value at the lowest price. Either way, the value is always determined by the government. For external stakeholders, the value they receive in a transaction, is not a factor in award or the source selection strategy used.

1. Stakeholder Qualifications

A stakeholder is anyone affected by the decisions or actions of others. Stakeholders can be directly involved or not involved at all, with the enterprise affecting them. An entity practicing stakeholder theory considers individuals and groups beyond the business itself. Stakeholders can include employees of the business and the supplier or contractor, customers, marketplace competition, community, and more.

2. Application Benefits

When stakeholder theory is applied, a larger portion of society has the opportunity to benefit. According to Wright (2018), the application of stakeholder theory has the power to increase employee satisfaction, increase investment opportunities from financiers, help talent management, increase scientific progression and innovation, elevate the socio-economic status of the local community, and promote healthy competition in the marketplace.

3. Theory Limitations

Competing interests will always impose limitations on the application of stakeholder theory. Companies must make tough decisions that do not always offer a benefit for each stakeholder involved. In certain situations, an evaluation of alternatives will reveal that the deciding organization is the primary beneficiary of the transaction. This is acceptable, so long as other stakeholders were considered beforehand. According to Blackburn, the implementation of stakeholder theory can create discord amongst stakeholders. A power struggle will ensue where stakeholders try to find ways to gain more influence (Blackburn, 2019). As a result, cohesiveness between stakeholders is likely to diminish, which may ruin any efficiency gained from the application of stakeholder theory in the first place.

For the DOD, the application of stakeholder theory within the acquisition system will have to be done on a case-by-case basis but could at least be a consideration. The taxpayer and the warfighter will always have the highest priorities but that does not mean that all other stakeholder priorities cease to exist. The DOD has the power to not only receive value in its acquisitions, but it has the power to distribute value as well.

B. PRIOR LPTA RESEARCH

Multiple Naval Postgraduate School (NPS) theses that were written in the last five years have analyzed source selection procedures. We believe existing LPTA research displays a gap in analysis, as the perspective has been predominately from that of the DOD.

This study reviews LPTA through the lens of stakeholder theory to provide lessons learned to the acquisition community.

1. Previous Objectives

A review of published theses detailing the source selection procedures used in competitive acquisitions revealed similar objectives throughout. Almost exclusively, the objective of past NPS theses was to compare contract performance with the source selection strategy used, between LPTA and subjective trade-off. Researchers predominately measured contract performance using Contractor Performance Assessment Reporting System (CPARS) ratings, Earned Value Management (EVM) outcomes, and Procurement Administrative Lead Times (PALT). Using these measurements, the research sought to identify if a relationship existed between the source selection strategy and the resulting contract performance outcomes.

For their thesis, Bastola et al. (2015) examined U.S. Navy contract files from Naval Air Systems Command and Naval Sea Systems Command to determine whether or not the use of CPARS ratings and PALT metrics could assist in the efficacy of source selection methods and subsequent outcomes. Their research questions focused on making connections between source selection methods and both pre-award (PALT) metrics and post-award (CPARS) outcomes. Additionally, Bastola et al. questioned whether the findings concerning contract outcomes would be significant enough to influence contract method selection decisions in future acquisitions. Research methodology consisted of literature review as well as data collection and analysis. Bastola et al. research was limited by the number of contracts that were available for review. Due to time constraints, 36 contracts were reviewed in total so the small sample size might not have been sufficient to draw definitive conclusions. Also, the sample consisted of contract files from only two commands so any findings may not be indicative of all DOD contracting agencies.

In the same year, Watson (2015) examined procurement methods and contract outcomes on U.S. Army contracts, using CPARS data to inform decisions. Watson's research questions, methodology, and limitations mirrored that of Bastola et al (2015). Building on the works of Bastola et al. (2015) and Watson (2015), Hill et al. (2016) and

Paulk et al. (2016) each wrote a thesis continuing the research from the prior year. Both theses again reviewed U.S. Navy contract files from major systems commands to determine if relationships existed between contract type and contract performance metrics. The finding of both theses aligned with the theses from 2015 and drew the same conclusions, as described below.

2. Findings of Prior Theses

The research performed in the theses discussed above delivered similar but valuable information to the DOD acquisition community. Bastola et al. was able to conclude that the LPTA source selection strategy led to significantly shorter lead times (2015). Watson was also able to determine a strong relationship exists between source selection strategy and lead time but gathered inconclusive evidence to effectively link CPARS ratings to a particular strategy (Watson, 2015). Both theses performed in 2016 performed by Hill and Baker respectively, came to the same conclusions as Watson.

3. Research Gap

By only considering the DOD's perspective, previous research does not evaluate the total, or societal, value that source selection strategies have to offer. The overarching goal of previous theses and research conducted at NPS, was to help procurement officials make source selection decisions that delivered the best value and experience for the DOD.

a. Intent of New Research

Our research intends to reveal value not previously discussed in past theses. The value will be examined from a wider range of DOD acquisition stakeholders, than just the DOD itself. This research will raise discussions and invoke further research to determine if the DOD can realize significant benefits by increasing social welfare via the application of stakeholder theory.

C. CONTRACT MANAGEMENT PROCESS

In this section, we will detail the three major phases of the DOD contract management process.

1. Pre-Award Phase

The pre-award phase is the first of three major phases in a contract life cycle. According to Wilkinson (2017), pre-award includes the processes for buyers to produce solicitations and sellers to prepare offers. These processes are defined in two domains known as ‘Develop Solicitation’ and ‘Develop Offer’. To satisfy a new government requirement, the acquisition team confirms the requirement specifications, conducts market research, evaluates risk, then develops a solicitation. Adequately defining the requirement takes considerable time and requires the acquisition team to carefully construct their solicitation to accurately translate the need for potential offerors. An acquisition team’s failure to fully understand what is required or failure to clearly articulate it, can result in severe consequences in later life cycle phases. Failures may include protests, wasting funds on wrong products and/or services, and may result in the need to resolicit potential offerors, thereby, delaying delivery of essential supplies and services to the government.

a. Domain A: Develop Solicitation

The buyer is primarily responsible for the develop solicitation domain. It is the buyer’s responsibility to determine, describe, and explain their customer’s requirement to the seller.

(1) Acquisition Planning

According to Wilkinson (2017), acquisition planning includes all the “activities and events required for both buyers and sellers to prepare for, negotiate, and form a binding contractual arrangement” (p. 118). All stakeholders concerned with the requirement should be involved in plan formation. The stakeholders include the acquisition team, program manager, finance, and budget personnel, legal, the customers and the potential offerors. Wilkinson (2017) states, the level of detail provided in the acquisition plan will vary depending on the anticipated dollar value, level of complexity, degree of significance, and other appropriate factors (p. 118). Simple acquisitions of low complexity may not need to be in writing, but still require stakeholders to have a common understanding and consensus concerning the plan to move forward.

A major decision made in the acquisition planning step is to determine if a requirement would be best satisfied by contracting for a contractor to make a product or if it is in the government's best interest to purchase an existing product. This decision requires thorough market research to determine if an item is commercially available or if a defense industry-specific company already produces a suitable product. Failure to correctly determine make-or-buy decisions, as highlighted in FAR 15.407-2, may result in increased costs to the government and delayed delivery to the customer.

The *Contract Management Book of Knowledge* (CMBOK) lists eight requirements or concerns that every acquisition plan must address (Wilkinson, 2017). The eight requirements and concerns are as follows:

- 1) The acquisition plan must provide a concise, yet thorough, explanation of what the need is and how it came to existence. This portion of the plan should also cover the history of the need, if it was ever a previous requirement, and explain how the need was previously satisfied.
- 2) A thorough review of all possible constraints must be performed. This includes a requirements condition or need for compatibility with existing equipment or systems, implementation constraints, budget constraints, and other known constraints that could influence cost, schedule, capability, or performance.
- 3) The acquisition team must establish target costs for the requirement. This requirement should cover the make-or-buy decision, life cycle costs, design-to-cost, should-cost, and any other cost issues of significance.
- 4) The acquisition plan must include specific required capabilities or performance. Acquisitions for tangible goods should include pertinent performance factors and service acquisition plans should discuss the required performance standards or knowledge requirements. The performance requirements must satisfy the government's need.

- 5) The delivery date or performance period must be determined in acquisition planning. The dates selected must correlate with the requirement. Emergency timelines should also be considered.
- 6) Trade-offs that impact cost, schedule, or performance must be considered in acquisition planning. The acquisition team must realize how trade-offs may impact the acquisition plan.
- 7) Acquisition plans should account for risk associated with the technical, cost, schedule, and other pertinent aspects of the plan. The plan should identify all risks and ways either the buyer or seller can mitigate those risks.
- 8) A contract management plan of action should consider the previous seven requirements and give recommendations on proposed sources, competition, availability of commercial products, contract type, source selection process, milestones or target dates, and any other issues of concern.

(2) Request Offers

Once the acquisition team has a contract management plan in place, they can move forward with requesting offers. According to Wilkinson (2017), the requesting offers process includes developing an overall strategy for the purchase, conducting market research, drafting a solicitation, and selecting a seller.

Before requesting offers, an acquisition team can utilize several options to fortify their solicitation package. The team can allow an independent reviewer to evaluate their solicitation for accuracy and completion. Independent reviewers can be technical or field experts, other contracting personnel not on the team, or legal counsel. A second option available to the acquisition team is to submit a draft solicitation to potential offerors for feedback. Depending on the feedback received, the team can clarify requirements that were deemed too ambiguous or make other corrections, as necessary. Finally, in compliance with FAR 5.101 guidance, the acquisition team needs to publicize the solicitation for the supply or service. By doing so, the acquisition team will give their solicitation package the

exposure necessary to facilitate maximum responses. By utilizing the publication to gain responses, the team can better ensure the best value is achieved.

b. Domain B: Develop Offer

The develop offer domain is a function of the seller. According to Wilkinson (2017), the seller's primary purpose in this domain is to respond to solicitations with the intent of winning contracts and meeting performance requirements.

(1) Business Development

Business Development is the seller's commitment to conducting their market research, assessing competition likely to bid against them, and establishing lines of communication with the buyer. Market research allows for understanding industry capabilities in the event the supplier needs to conduct its make-or-buy analysis. Meaningful communication is vital throughout the contract life cycle (Wilkinson, 2017). Without communication with the buyer, the seller has an increased risk of failing to meet all requirements found in the solicitation, rendering their offer inadequate. A common way to communicate with buyers is through industry days. Industry days offer panel discussions where acquisition teams and industry can discuss opportunities, contracting processes, and innovations (Fort Meade Alliance, n.d.).

In addition to understanding both the market and specifics of the solicitation, the seller must understand the risks they will encounter should they win the contract. The seller must calculate their level of risk by taking performance standards, deadlines, their capabilities, financing, and more into account. After review, solicitations that are determined to offer low opportunity and have high risks of failure should be avoided by potential offerors. The ideal scenario for an offeror is a high opportunity, low-risk contract (Wilkinson, 2017).

(2) Develop Win Strategy

According to Wilkinson (2017), a seller develops a winning strategy that focuses on executing their business development plan to compile an offer that will win business (p. 156). A critical aspect of the winning strategy includes identifying the correct team with

the knowledge and experience to best respond to a solicitation. The team must collectively be able to understand the entire solicitation and the instructions provided within it. An often-overlooked part of solicitations is the instructions to offerors. Instructions to offerors commonly set deadlines for replying, maximum page limits, or detail key factors, such as experience, that must be discussed.

2. Award Phase

The second of the three major phases in a contract life cycle is the award phase. Wilkinson (2017) states the award process involves all the work by both the buyer and seller that produces an awarded contract. In the CMBOK text, the award phase consists of one domain known as form contract.

a. Domain C: Form Contract

The form contract domain is primarily the responsibility of the buyer. In this domain, required tasks include cost or price analysis, negotiations, source selection, and the management of legal conformity.

(1) Cost or Price Analysis

One of the primary functions of contracting professionals is to determine fair and reasonable prices (Wilkinson, 2017). According to Loyola University Chicago, “a determination that a price is fair and reasonable is a conclusion that the proposed price is fair to both parties, considering the quality, delivery and other factors” (Loyola, 2020). Contracting team members have two methods to determine what is fair and reasonable, cost or price analysis. A cost analysis is performed when the seller can provide a detailed breakdown of costs relevant to contract performance. Costs the seller and buyer must go over include fixed, direct, indirect, and variable costs as well as labor hours, materials, profits and fees. When cost breakdowns are not available, price analysis is preferred. Price analysis determines fair and reasonable prices based on previous contracts for similar requirements, published price lists, or market prices.

(2) Conduct Negotiations

According to Wilkinson, negotiations are a communication process where two parties attempt to reach an agreement and despite having separate interests, they share the common goal of reaching a fair and reasonable price given the requirements in the contract (Wilkinson, 2017).

(3) Source Selection

Source selection is the process in which sellers use evaluation factors listed in their solicitation to determine which offeror can best satisfy the requirement. Considerations that are commonly used to determine which offeror will win a contract include price, technical, management, and past performance.

(4) Manage Legal Conformity

Acquisition teams spend a considerable amount of time preparing solicitations and defining requirements as clearly as they can. Despite their efforts, contract disputes are sometimes inevitable due to differences in interpretation. Contract managers should seek to resolve differences as soon as they are identified in the least formally and most collaboratively manner possible (Wilkinson, 2017).

3. Post-Award Phase

Post-award is the final of three major phases in a contract life cycle. Contract administration is the main focus of the post-award phase. Second only to the buyer properly defining the requirement, contract administration is critical to a contract's overall success. Overseeing the performance of the contract must be a priority for both the buyer and seller. According to Wright (2007), "the degree of monitoring and surveillance of risk areas will vary depending upon the credentials, past performance, and experience of the selected proponent" (p.11).

a. Domain D: Perform Contract

The perform contract domain is the process of establishing and maintaining communications, and tracking and documenting contract performance (Wilkinson, 2017).

Construction Week Online describes the importance of early and thorough contract administration as follows:

To be effective, contract administration must be prioritized from the outset of the project. Knowing and understanding where your risks lie under a contract enables a party to ensure, or at least endeavor to ensure compliance with contractual obligations and manage risks. However, contract administrators are often appointed later in the project than they should be, at which point a party may have already failed to comply with numerous obligations under the contract. (Kelly, 2015)

There are four subparts to the perform contract domain listed in the CMBOK. They are as follows:

(1) Administer Contract

Responsibility of both the buyer and seller, contract administration ensures all terms, conditions, and specifications prescribed in the contract are satisfied. Overseeing and documenting performance is of the utmost importance.

(2) Ensure Quality

Before products being delivered to the buyer, a seller should ensure they meet the buyer's specifications. The level of quality assurance will vary for each contract and the technical level of the requirement. Buyer's also ensure quality by performing acceptance testing. Acceptance testing requirements such as location, method, and manner must be clearly defined in a contract.

(3) Subcontract Management

As defined by FAR Part 52, "subcontract means any contract, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders" (FAR 52.244-2).

According to the Small Business Administration (SBA), they promote contracting officers to include contractual requirements allowing subcontractors falling into a variety of small business categories, to be included in contract performance efforts. The SBA's

goal is to help small businesses get an opportunity to subcontract on federal prime contracts (SBA, 2020).

The government only has privity of contract with the prime contractor. In order to ensure proper contract administration, the seller must maintain proper oversight on subcontractor performance. Buyers noticing deficiencies in subcontractor performance must address their concerns with the prime contractor.

(4) Manage Changes

A contract change is necessary when the existing contract does not reflect what needs to be accomplished (Wilkinson, 2017). When requirements change or unforeseen circumstances require a contract to be altered, the change must be managed and documented. There are three types of changes that can occur during contract administration. First, bilateral changes, are changes agreed upon by both the buyer and seller. Second, a constructive change is a change that occurs because a government employee other than the contracting officer, directed a contractor to perform work not in the contract. Finally, a cardinal change is a change that completely alters the nature of the contract and is deemed beyond the contract scope.

b. Domain E: Close Contract

According to Wilkinson, contract closeout is the process of ensuring all performance has been accomplished, the final payment has been made, and the contract has been reconciled (Wilkinson, 2017). It is important for contracting officers to quickly close out contracts so that any pending issues and/or discrepancies can be rectified promptly. A proactive approach, where contracting officers run reports of contracts set to end soon, is recommended.

D. SOURCE SELECTION STRATEGIES

The DOD uses three primary source selection strategies, LPTA, subjective tradeoff, and VATEP, while the fourth strategy, HTRO, is rarely used.

1. LPTA

LPTA is the source selection strategy used when the government reasonably expects to achieve “best value” by making an award decision based on the lowest cost or price. Minimum specifications are established for the requirement but contractors bidding on LPTA solicitations, so long as their proposals are found to be technically acceptable, will compete based on the lowest cost/price. LPTA best compliments the acquisition of goods and services with easily definable requirements correlating with a low risk of unsuccessful contract performance (Peters, 2020).

2. Subjective Tradeoff

Subjective tradeoff is a source selection strategy that evaluates a broader multitude of selection factors. Factors for selection may include, but are not limited to, price/cost, past performance, quality, and timeliness. Award of a “best value” or tradeoff approach contract can be made based on any of the above factors so long as the contracting agency lists them in their solicitation.

3. VATEP

The VATEP source selection strategy is a variation of the traditional tradeoff approach. The VATEP method allows the government to place a monetized amount on its valuation of higher rated performance. The value is defined in the solicitation so potential offerors know exactly which performance enhancements the government values, thus increasing the objectivity of the source selection process.

4. HTRO

HTRO is a source selection technique that disregards all other criteria and selects the contractor who submits a bid claiming the highest level of performance. Cost is considered but is considered binary in the sense of reasonable or unreasonable.

E. BEST VALUE CONTINUUM

Contracting agencies use the source selection strategy they believe best aligns with factors they determine will deliver the best value. These factors fall into two main categories, cost or price, and non-cost factors.

1. Non-Cost Factors

According to Wilkinson, the relative importance of cost or price varies significantly amongst acquisitions (2017). FAR Part 15 states that “evaluation factors and significant subfactors must represent the key areas of importance and emphasis to be considered in the source selection decision” (FAR 15.304). In many acquisitions, non-cost factors take priority over cost or price. Non-cost factors may include, but are not limited to, experience, schedule, and past performance. Acquisitions that are not clearly defined and require development work or innovation, come with a higher level of performance risk. Therefore, acquisitions that are not clearly defined tend to benefit from the prioritization of non-cost factors (See Figure 1). In times when LPTA is strictly enforced, relevant non-cost factors may get overlooked.

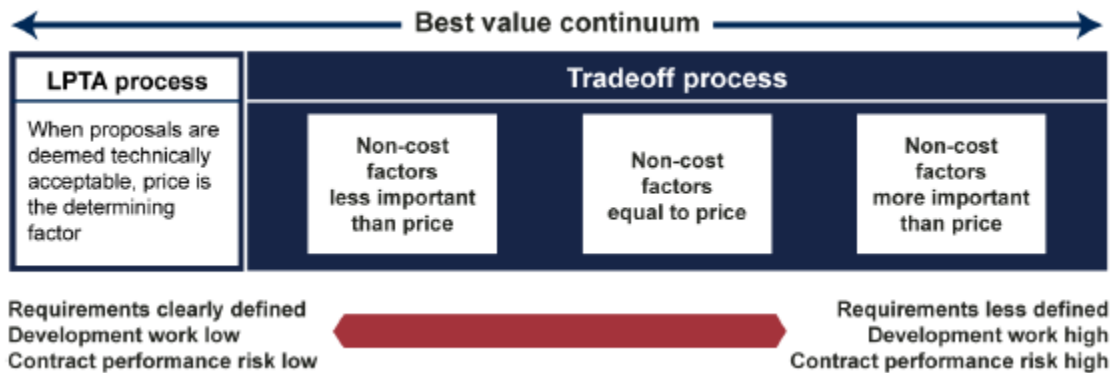


Figure 1. Best Value Continuum. Source: GAO (2018).

F. CONTRACT MANAGEMENT REGULATIONS

Various regulations exist in DOD contracting to promote and facilitate government socio-economic goals. These regulations impact and shape source selection decisions.

1. Better Buying Power

Over the last ten years three versions of Better Buying Power (BBP) have been released, 1.0, 2.0, 3.0, respectively. The intention is to control costs and re-emphasize existing policies. The most desirable outcome of Better Buying Power is affordability and the establishment of affordability as a requirement. Better Buying Power also worked on reducing or eliminating bureaucracy, circumstances where costs outweigh benefits, and reduction of risks. The Better Buying Power initiative brought acquisitions into the 21st century specifically by focusing on efficiency and uniformity (Lamoureux et al., 2015).

2. Truthful Cost or Pricing Data

If a company desires to fulfill an RFP and there is no marketplace for the product, either by nature of an emerging technology or the company is the sole builder of a product, the government requires that cost and pricing data be submitted and that it must be true, accurate and complete. This is the purpose of the Truth in Negotiations Act of 1962. Furthermore, Truthful Cost or Pricing Data (41 USC 35) defines what cost and pricing data is defined as. Before the introduction of Truthful Cost or Pricing Data, the government would be at the mercy of an offeror to provide accurate information rather than inflated costs. Truthful Cost or Pricing Data also applies directly to subcontractors if the work to be performed costs over \$2 million (FAR 15.403-4).

3. Small Business Act

Emerging out of the great depression and shaped by WWII and the Korean war was a desire to shift funds and business to smaller business. The Small Business Act of 1953 was an act that set aside work that was able to be accomplished by small businesses. In 1978 the Act was amended to allow any contract under \$25,000 to strictly be given to small businesses. Giving business to small businesses accomplishes many desirable outcomes. For example, it localizes the money to certain regions and allows for smaller businesses to gain momentum not only from the private sector but the public sector as well (Lamoureux et al., 2015). This practice of using small businesses also can work hand in hand with preserving an industrial base where a business might have dried up because they were not dominant in the field.

4. CICA

The Competition in Contracting Act (CICA) was signed into law in 1984 for the purpose of promoting competition. The intention of CICA is to reduce costs by an increase of competition. The idea is to receive as many bids as the government can in order to hopefully reduce the amount of money spent on receiving a service or product required and to elevate quality of the acquisition. CICA does not ban all noncompetitive contracts however a situation must fall into one of seven categories: single source for good or service, unusual or compelling urgency, for the purpose of maintaining the industrial base, international agreement requires, procurement of brand-name items for resale, national security, and public interest necessity. CICA gives companies who are looking to do business with the government a chance to compete against one another to secure business. According to the Congressional Research Service, CICA also attempts to eliminate favoritism by promoting merits-based decisions rather than preconceived relationships between contracting officers and companies (Manuel, 2011).

5. FAR

The Federal Acquisition Regulation is the regulation by which all contracts made by the federal government shall use enacted in 1984. It provides an in-depth roadmap as to how a contracting officer should purchase certain products and services for use by the federal government. Businesses looking to conduct business with the government can review the FAR in order to know what conduct is and is not tolerated as well as how to better tailor their style to one conducive of earning a contract with the government. New sections of the FAR have been proposed to include when contracting officers can and when contracting officers cannot use LPTA (Scalzo, 2019). The FAR continues to be the primary source of information for contracting officer in shaping the way the United States government conducts not only contract source selection but contract administration.

G. DEPARTMENT OF DEFENSE FUNDING PROCESS

Here we provide an overview of the Planning, Programming, Budgeting, and Execution (PPBE) funding process which is one of three processes supporting defense acquisitions. The PPBE process provides the overarching strategic guidance and direction

that ultimately reveals prioritization for programs followed by budgeting allowances. Understanding the PPBE process and the level of scrutiny involved during each step is important to understanding our desire to limit further influence on contracting officers as they merely try to act upon and execute what the PPBE process has already directed for them.

1. Planning

The planning phase of the PPBE process starts with the President's National Security Strategy (NSS). In 1947, the National Security Act passed by Congress required the president to provide an annual NSS report. The NSS identifies major national security priorities, concerns, provides recent adversarial environment updates, and within limitation, describes how the administration plans to deal with stated threats and deficiencies. This initial guidance propels the Secretary of Defense's (SECDEF) National Defense Strategy (NDS) and the Chairman of the Joint Chiefs of Staff's (CJCS) National Military Strategy (NMS). Overall responsibility for the planning phase lies with the Under Secretary of Defense for Policy (USDP) who, in conjunction with the CJCS, SECDEF, and combatant commanders, prepares the Defense Planning Guidance (DPG) which is the final product of the planning phase. The USDP ensures the DPG aligns with the President's goals and gives DOD planners in the second phase of the PPBE process a single overarching document to use for guidance.

2. Programming

The programming phase of the PPBE process is where DOD programmers review the DPG established in the planning phase to determine force structure capabilities, identify capability gaps, analyze weapon systems, and the support systems needed to satisfy national strategic goals. The prioritization of programs within each service required to achieve national strategic goals is thoroughly conducted. Previously funded programs are reviewed first for existing relevance followed by current unfunded programs. New requirements are then filtered through. This process is led by the director of the Cost Assessment and Program Evaluation (CAPE) office. An important product derived from the programming phase is a Program Objective Memorandum (POM), submitted by each

branch of service. Each POM prioritizes force, manpower, and funding resource requirements. CAPE then uses the individual service POM to collectively update the Future Years Defense Program (FYDP), which acts a supporting document for the budgeting phase of the PPBE process.

3. Budgeting

In the budgeting phase, led by the Under Secretary of Defense (Comptroller), each branch of service prepares a Budget Estimate Submission (BES) for the first year of the FYDP. The Comptroller then performs budget reviews and identifies any major issues. Once complete, the Comptroller submits the final product to the Office of Management and Budget (OMB) in December. This submission feeds into the President’s annual budget request to Congress.

4. Execution

The final phase of the PPBE process is execution. In the execution phase budgets are distributed and program requirements begin to be satisfied. The execution phase continues from here with a review of both program performance and budget execution. Program performance is evaluated based on achieved results and the budget execution review is conducted by comparing actual spending to budgeted allowances. The execution phase concludes with the fiscal year closeout.

H. SUMMARY

The explanation of the PPBE process reveals high levels of control. In the planning and programming phases, the questions “What” and “How” are answered. Governing guidance and strategy (What) are provided in the planning phase and requirements (How) to satisfy the guidance are identified in the planning phase. From here, DOD service departments consider the new requirements and prepares incremental budgets. The prepared budgets are then further scrutinized before funds are allocated. The scrutiny found in the PPBE process highlights the thought that government contracting officers already have enough guidance in place to conduct their day to day contracting operations. When presidential administrations push agendas that lead to one-sided source selection usage,

particularly LPTA usage, the level of scrutiny goes too far negatively impacting their ability to perform their job. It is always in the best interest of the United States to keep source selection tools widely available to contracting officers.

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III. ANALYSIS AND FINDINGS

In this chapter, we review language found within past and present Department of Defense Source Selection Procedures and current DFARS language about the Lowest Price Technically Acceptable source selection strategy. We discuss the potential impact of the language and bring in outside data from Government Accountability Office reports and independent surveys to further identify the impact on stakeholders of DOD contracting. Finally, we review the advantages and disadvantages of LPTA contracting from the defense contractor perspective and attempt to answer the research questions raised in Chapter I.

A. PREVIOUS DOD SOURCE SELECTION PROCEDURES

In this section, we analyze the language of previous source selection procedures. We seek to identify procedural language that suggests a preference for a particular source selection strategy. We also identify language we believe to be ambiguous.

1. Department of Defense Source Selection Procedures, 2016

The objective of the 2016 DOD Source Selection Procedures, is to “ensure the Department’s source selection process delivers quality and timely products and services to the Warfighter and the Nation at the best value to the taxpayer” (Grady, 2016). Appendix C of the 2016 Source Selection Procedures we learn the specific requirements for using the LPTA strategy. LPTA is to be used when the best value is expected to derive from the lowest price and no other factors such as performance or quality. The LPTA strategy is suited to easily definable minimum requirements and non-complex acquisitions.

Technical requirements and past performance are two non-price factors listed in the 2016 DOD source selection procedures LPTA appendix. Both factors are to be rated as only either acceptable or not acceptable. A more detailed rating is not to be assigned to these factors or any other factors in LPTA acquisitions. Technical acceptability focuses on the determination of the minimum requirement that is satisfied with the proposal. Past performance acceptability is determined using recency and relevancy criteria. Determination of what constitutes recency and relevancy is not established in the source

selection procedures and is instead left to the contracting agency to determine. For offerors with zero or insufficient past performance, the source selection procedures state that a neutral rating may be assigned to the offeror, but that neutral rating must be considered acceptable.

Two other portions of Appendix C of the 2016 DOD source selection procedures were found to help answer our research questions. First, the appendix states that the inclusion of small businesses is not a hard requirement. A contracting agency may include business size if they wish and if so, should evaluate offerors based on the acceptable/not acceptable rating scale previously mentioned. Second, the appendix describes the best value decision process and documentation requirements. This paragraph describes how a contracting officer may create a competitive range of offerors and hold discussions with them. The intention of holding discussions is to ensure minimum requirements are understood and can be satisfied by the offeror. However, regardless of discussions, non-cost/price factors must only be evaluated on an acceptability basis.

2. Criticism of Language Found in Prior DOD Source Selection Procedures

As we searched for a correlation between prior source selection procedures and the expansive use of LPTA contracts from 2008 to 2016, we found the following procedural language to be a possible contributing factor.

First, we review prior source selection procedures for ambiguity. Ambiguous language leads contracting officials to interpret the procedures differently. In turn, this can influence the usage rate of LPTA contracts. In 2012, an online editorial described the source selection procedure framework as “unworkably vague” with “no firm standard for when LPTA can and cannot be used” (Weckstein, 2012). The author pointed to the terms “complex” and “risk,” claiming the measurements to be subjective. As a result, prior source selection procedures could not establish a limit on complexity and risk for contracting officers to use in their decision-making process. Weckstein argued that “there must be some limit to a contracting officer’s discretion, a point at which the decision to use LPTA

sourcing becomes unreasonable in relation to agency needs and the government's interest" (Weckstein, 2012).

Second, the purpose statement of the prior source selection procedures mentions three key words or phrases that can be viewed as overlying objectives. The key phrases are quality, timeliness, and best value. Having quality in the purpose statement suggests the DOD highly values this non-cost factor, and that is certainly true. The DOD regularly has requirements that call for high-quality goods and services in order to best take care of our warfighters. The phrase military-grade comes to mind as well as items relating to personal safety and aviation parts. However, when two out of the three keywords, timeliness and best value, are most synonymous with LPTA contracts, we can interpret, and so may the defense contractor industry, that the DOD is showing its preference towards LPTA contracts. We also question whether this preferential language influenced DOD contracting officer's decisions when selecting a source selection strategy.

Third, we noted that the 2016 source selection procedures LPTA appendix instructed contracting officers to review the past performance of offerors in terms of the recency and relevancy of their experience. This is a logical approach that we agree with, but we note the requirement to give offerors with zero experience a neutral rating. The alarming part is that according to the LPTA appendix, this neutral rating must be considered as acceptable.

We question whether this logic promotes the best interests of the DOD. Under this source selection procedures guidance, contracting agencies are forced to assume unnecessary risk regarding the likelihood of successful contract performance. While this policy promotes this introduction of more competition into the defense contractor industry, it also raises the question of why an agency would only be receiving one offer from an inexperienced contractor. An agency choosing the LPTA strategy implies that they believed the requirement to be easily definable and non-complex. The answer may lie in a 2017 survey conducted by government contracting and program magazine, Washington Technology. In their survey of over 300 people representing a mix of small, medium, and large business size defense contractors, Washington Technology found that 39.4 percent of respondents said their experiences with LPTA contracts made them leery of bidding on

them in the future. Even more alarming, 28 percent of respondents claimed that they outright refuse to bid on LPTA contracts. The results of the Washington Technology survey may imply that the DOD is eliminating competition quicker than they are generating it through their language requiring the inclusion of new contractors with zero experience. The desire to use LPTA contracting to simply be the best stewards of taxpayer's dollars might be getting out of hand and costing the DOD more through unintended consequences.

Next, we review the language in the LPTA appendix concerning the inclusion of small businesses. The appendix clearly states there is not a requirement to include business size as an evaluation factor. The appendix does say that when an agency wishes to include business size as a subfactor, they must use the acceptability rating. The lack of a requirement for, or a quota on small business participation that aligns with U.S. Small Business Administration (SBA) goals, may imply that the DOD is not fully invested in the promotion of socio-economic initiatives. An SBA initiative one would expect to see in source selection procedures but is not mentioned is the government's goal of awarding at least twenty three percent of all prime contract dollars to small businesses. Questions from the Washington Technology survey highlight and further reveal this problem. Most survey respondents claimed that small businesses bear the brunt of LPTA contract over-usage. Respondents stated that large businesses with their scale and cost efficiencies can almost always deliver the lowest bids. The respondents labeled LPTA contracts as "small business killers." We will further elaborate on the negative impact LPTA contracts have had on the defense contractor industry later in this chapter.

The final criticism of the 2016 source selection procedures stems from the language covering both best value determinations and discussions with offerors for LPTA contracts. Best value determination and discussions with offerors are covered in Appendix C of the source selection procedures. This appendix does not detail the action contracting officers have at their disposal if during discussions information comes up that reveals awarding to the offeror with the lowest bid rated as "acceptable" is not in the best interest of the DOD. Instead, the appendix reiterates that no matter the circumstances, non-cost/price factors must continue to be evaluated on an acceptability basis only and that they cannot become the primary factor in the best value determination. We believe the appendix should remind

contracting officers that in these unique situations, the solicitation can be rescinded when a more appropriate source selection strategy exists.

Overall, we believe our review of the 2016 source selection procedures has revealed at best a marginal explanation as to why LPTA contracts were used at a high rate in 2016. We believe the overall level of ambiguity found within the language is moderate. Minor issues with the language and the possibility that DOD's choice of language showed a slight preference for LPTA contracts was revealed in our evaluation. However, we mostly attribute the rate of usage for LPTA contracts in prior years to defense budget cuts, sequestration, and fear of future sequestrations.

3. Benefits of LPTA

Before we go ahead with our analysis, we must first recognize the benefits of LPTA as a source selection strategy. As we gain an appreciation of the benefits, we begin to understand why the usage of LPTA contracts was prevalent throughout the last decade.

First and foremost, the potential of cost savings for the DOD is the most obvious benefit of the LPTA strategy. Striving to save funding is a necessity everyone appreciates, as limited funds can be used elsewhere or stretched as far as possible to satisfy the greatest number of requirements. Costs savings are a driver in the current environment of uncertainty and are, undeniably, a factor when considering current and future budgets. According to the U.S. Department of the Treasury (USDT), the U.S. closed the fiscal year 2020 with a national debt of \$26.9T (2020). The national debt surged by \$4.2T in 2020 alone due to the government's pandemic response measures and the Coronavirus Aid, Relief, and Economic Security (CARES) Act (USDT, 2020). As the U.S. moves forward, it must face the unprecedented growth of the national debt level and take meaningful actions to address it. The last time the U.S. witnessed a comparable surge in the national debt was after the economic recession, bank bailout, and debt crisis between 2007 and 2011 (Amadeo, 2020). In response to these major events and the subsequent rise in the national debt, government contracting agencies became cost-conscious and mindful of the importance of fiscal responsibility and increased their usage of the LPTA strategy to help curb any unnecessary spending. While the national debt total increased every year between

2011 and 2016, the DOD's effective use of the LPTA strategy during the same period can be at least partially accredited for lessening the rate of increase.

The ability to help DOD program managers meet cost objectives is another LPTA strategy benefit that is of increasing importance. Keeping a close eye on how the taxpayers' money is utilized is an art of prioritization as well as a legal requirement. Cooley and Ruhm state program managers have several factors they must balance and pay attention to be successful. These factors include cost, schedule, performance, and risk (2014). Effective cost management, combined with varying degrees of success across the other factors, can lead to positive assessments by Congress. Congress, in turn, as a steward of taxpayer funds, is more likely to allocate funds to programs with favorable metrics. Thus, if a program is on the verge of collapse, mismanagement, or extreme over-run (not on budget, not on schedule), Congress is obligated to intervene and demand corrective action. For DOD programs to survive, they must achieve satisfactory ratings in more than just one of Cooley and Ruhm's factors, but the cost is often the most scrutinized metric. The LPTA strategy is a tool that when used appropriately, allows contracting officers to assist their fellow program managers to meet increasingly important cost objectives.

Another benefit of using the LPTA source selection strategy is the efficiency of the strategy itself, which directly translates to an increased likelihood of satisfying customer requirements on time (Peters, 2020). When a contracting agency is only required to establish the minimum technical requirements that need to be satisfied on an acceptability rating basis, they avoid the need to fully evaluate the array of more complicated non-cost factors. So long as an offeror's proposal meets minimum requirements, the contracting agency need merely review the proposals to find the lowest bidder before awarding the contract. This simplicity creates an efficient and streamlined approach which helps accelerate time frames making LPTA a proven and preferred source selection strategy for easily definable requirements.

In DOD contracting, the importance of efficiency cannot be overstated. Personnel staffing shortfalls have been identified throughout the DOD, including the acquisition community, for years. Severe contracting field manning shortfalls addressed in the 2007 Acquisition Advisory Panel report are still an issue today, 13 years later. Therefore, use of

the LPTA strategy, which accelerates acquisition timeframes, helps a distressed contracting community with a personnel capacity issue support the warfighter and satisfy mission requirements.

Last, according to the Congressional Research Service contracts awarded based on the lowest price have historically led to fewer protests and protests that are easier to defend against, although we believe new DOD source selection procedures and an updated DFARS 215.101 may potentially disrupt this trend (Peters, 2020). The historically lower protest rate is a result of the simplicity of the solicitation and resulting offers. Offerors bidding on an LPTA contract know that the determining factor for the award is cost/price, which is not subject to variations in measure or determination. In contrast, the best value or tradeoff approach uses cost/price as one of several determining factors. When protests do occur, the non-cost factors have historically been the source of dispute as the value placed of those factors and how that value is measured, is far more subjective and harder to measure than cost/price.

4. Unintended Consequences of LPTA Misuse

While there are not any inherent or outright disadvantages associated with LPTA contracts when properly used, there are several unintended consequences that can negatively impact the social welfare of stakeholders within government contracting. Additionally, if the LPTA strategy is misused, or erroneously used when the best value would have been the better strategy, disadvantages begin to arise as well.

The efficiency and simplicity benefits of LPTA contracts sometimes leads procurement officials to use the contract type when it is not appropriate. The previously mentioned manning shortfalls in the government contracting community, only exacerbate this tendency. When a requirement has increased complexity and procurement officials erroneously utilize the LPTA strategy, they are forced to award a contract based on cost or price and miss out on the ability to award based on other factors that may be more impactful to best value. This leads to the government getting what they paid for, but not what they needed. This issue was first addressed in the Better Buying Power (BBP) 2.0 initiative from 2013. BBP 2.0 emphasized the need for procurement officials to adequately determine

which factors, whether they were cost or non-cost factors, would be prioritized based on the resulting likelihood of achieving the best value. The initiative also stressed the importance of an adequate understanding of technical acceptability for procurement officials. For the defense contractor responding to an LPTA solicitation, offering any value exceeding the minimum requirement is detrimental to their chances of winning a contract award, as unnecessary value often comes with increased costs. Therefore, when technical specifications and the resulting technical acceptability are not fully understood or expressed in the solicitation, the risk of the government receiving an inferior good or service is drastically increased. When this happens, there is an increased probability that the government will need to contract for the same requirement again, likely expending funds that go beyond their original allocation. Valuable time is also lost in these scenarios. Depending on the urgency of the requirement, the lost time can have devastating consequences for the end-user.

The issues addressed in the BBP initiatives of 2013 appear to have continued to be a problem through 2017, as similar issues with LPTA contracting were found in the Washington Technology survey from that year. In the 2017 survey, defense contractors stated they believed the DOD erroneously used LPTA contracts for various services, complex requirements, and critical IT purchases. Another reoccurring theme amongst the contractors was that the DOD did not understand how to properly determine the best value when using a tradeoff approach, leading procurement officials, to in the end, base their award decision on the lowest price. When asked if in their opinion and from their experience with LPTA contracts, the winning LPTA contractor was able to satisfactorily perform the contract, 92.3 percent of the respondents replied no. This implies that many contractors are aware that their customer, the DOD, is not getting what they paid for when using LPTA. Finally, a staggering 68.6 percent of contractors reported they were aware of a winning LPTA contractor needing price relief within the first year of contract award. This implies that LPTA contracts frequently end up costing the DOD more than originally contracted for and potentially more than if the DOD utilized a best value or tradeoff approach from the beginning.

a. Negative Impact on Defense Contractor Industry

Of all the conclusions the previously mentioned Washington Technology survey of 2014 and 2017 made, the strongest conclusion was that many defense contractors despise LPTA contracts. The 2017 survey of over 300 contractors, revealed 84.9% believed LPTA contracts had some form of negative impact on their company. See the below figure for the complete breakdown of contractor responses.

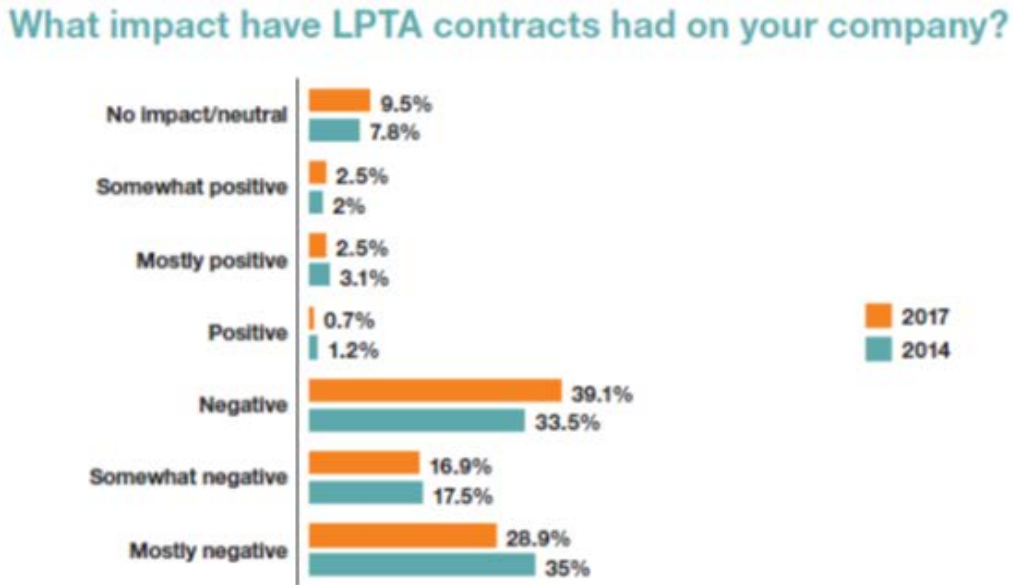


Figure 2. LPTA Impact on the Defense Contractor. Source: Washington Technology (2017).

According to the survey, negative opinions from defense contractors towards LPTA contracts stem from the lack of profits, but do not end there. Contractors reported that they were not comfortable providing what they believed to be a subpar product or service that would have been necessary to be the lowest bidder. The companies did not want to risk their reputation by cutting corners to reduce costs. The contractors also reported that the overuse of LPTA contracts forced them out of certain markets because they could not be competitive with their prices. This is a common issue for small and medium-size businesses that are trying to compete with larger companies that can buy in bulk, spreading capital

investments, and generally use their scale and cost efficiencies to beat out competitors on cost.

While the Washington Technology survey revealed that contractors have a predominately negative opinion of LPTA, it did highlight some benefits. These benefits are worth noting as they will likely be less impactful under the new DFARS 215.101-2-70 guidance, which imposes more restrictions on LPTA usage. Figure 3 shows the benefits of LPTA procurements includes an increase in cost-consciousness, efficiency, communication with customers, and an increase in awareness amongst contractors of contract type.

Has competing for LPTA procurements had a silver lining for your company?

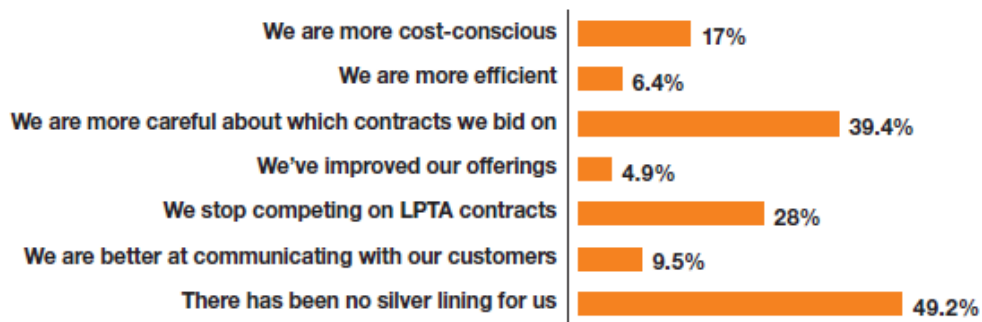


Figure 3. Survey Responses. Source: Washington Technology (2017).

The responses in Figure 3 also reveal more of the discontent for LPTA contracts as well. Most respondents, 49.2%, stated there was no LPTA procurement silver lining or benefit for the contractor. The 28% of respondents stating they stopped competing on LPTA contracts suggests that the DOD is losing out on and unintentionally decreasing competition in markets when LPTA is overused.

b. Trickle Effect on Social Welfare

The general public's social welfare is also increased when the government does not overuse or misuse LPTA. It is no secret that the more money that flows into the public

sector, the more state and local economies thrive. When economies thrive, citizens often see more certainty in their ability to pay for everyday necessities. When used appropriately, DOD contracting can create a seemingly endless ripple effect of social-welfare benefits.

To highlight the positive power government contracting can have in the ability to influence social welfare we look at Boeing Corporation. In 2019, America's second-largest defense contractor donated over \$48 million to charities (Boeing, 2019). Boeing is also ranked as the 38th best place to work in America, according to a 2015 Business Insider report (Martin et al., 2020). Like many of the other top 50 companies in the Business Insider report, good pay and extensive employee benefits at Boeing were significant factors in the company's positive evaluation. Boeing was able to provide charitable donations and create a positive work environment that employees love partly because of the revenue they earned in 2019. In 2019, the U.S. Air Force awarded Boeing a contract to deliver a fifth lot, consisting of 15 KC-46 tanker aircraft. The \$2.6 billion contract was awarded using the best value source selection strategy as opposed to LPTA (Gertler, 2020). We make the connection that Boeing's contracts with the DOD are critical to their ability to sustain not only the company itself, but the well-being of countless individuals throughout society as well.

In sharp contrast to the positive power, DOD contracting can also have a substantial negative impact on the overall social well-being of society. Negative social welfare is experienced when DOD procurement officials misuse and subsequently overuse the LPTA source selection strategy. In both the 2014 and 2017 Washington Technology surveys, contractors reported that due to what they perceived as government overuse and misuse of LPTA contracts, they were not able to employ as many people and pay their employees fairly. Also noted in the survey comments, was that employee benefits were frequently cut to reduce labor costs to remain competitive for LPTA contracts. Finally, another reported tactic frequently used to reduce costs when competing for LPTA contracts was to lay off more experienced senior employees in favor of younger, less experienced, and cheaper labor. The ripple effect of these actions goes deep into our society and has the potential to do great harm.

B. CURRENT DOD SOURCE SELECTION PROCEDURES

DOD acquisition professionals are currently guided by procedures released in 2019.

1. DFARS 215.101-2-70

On October 1, 2019, DFARS 215.101-2-70 was updated to reflect guidance established in FY 17 and FY18 NDAAAs. The updated guidance now includes eight conditions that must be satisfied before the LPTA source selection strategy can be used. The eight conditions listed in DFARS Part 215 are as follows:

1. Minimum requirements can be described clearly and comprehensively, and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;
2. No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;
3. The proposed technical approaches 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 source selection authority 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;
5. No, or minimal, additional innovation or future technological advantage will be realized by using a different source selection process;
6. Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf-life;
7. The contract file contains a determination that the lowest price reflects full life-cycle costs of the product(s) or service(s) being acquired; and
8. The contracting officer documents the contract file describing the circumstances justifying the use of the lowest-price technically acceptable source selection process. (DFARS 215.101-2-70)

In addition to the eight conditions above, DFARS 215.101-2-70 calls for the strict limitation of LPTA to the "maximum extent possible" as the source selection technique for a wide array of knowledge-based services, personal protective equipment, and all knowledge-based training or logistics services in contingency or overseas operations. This section in DFARS also now expressly prohibits LPTA to be used for personal or aviation safety items whose failure could result in combat casualties, any engineering and manufacturing for a major defense acquisition program, and all auditing services. Finally, per DFARS 215.101-2-70(a)(1)(viii), when contracting officers do find a situation where

they believe LPTA will deliver the best value to the government, they must now document their rationale for issuing a solicitation on a LPTA basis.

2. Industry Feedback and Criticism of Updated DFARS 215.101-2-70

Industry response to new guidance in DFARS 215.101-2-70 has been almost unanimous. The overall belief is that new procedures are an over-correction designed to address the previous overuse of LPTA and that this over-correction is likely to lead to the underuse of LPTA going forward.

The conditions that “no, or minimal value” will be achieved and “no, or minimal innovation” will be realized are subjective to wide degrees of interpretation. More important to our research, however, is the impact this subjective and ambiguous language will have on our stakeholders. From the defense contractors’ perspective, the literature review indicates that they believe they have been given a weapon that will enable them to protest a decent percentage of LPTA contracts. Given the defense contractors dislike for LPTA contracts that we previously mentioned, we expect to see a sharp spike in future protests.

The defense contractor industry finds the new guidance welcoming. To them, this signals an end to LPTA contracts and the beginning of contracts that they assess to be “fair and reasonable” for all parties. If this is true, the social welfare of employees should be positively affected through increased pay and benefit packages. However, to the taxpayer, the potential decrease in LPTA contracts may be alarming and raise budgetary concerns. Customers of procurement officials, to include warfighters, will likely feel the impact as well. New guidance in DFARS 215.101-2-70 appears to place strong emphasis on protecting the warfighter and ensuring their safety. Perhaps an improvement in the quality of goods and services provided to customers will have measurable improvements. The customer may also be negatively impacted should restrictive LPTA conditions result in budget overruns. If procurement officials do not proceed with caution, their budgeting skills are likely to be tested. Those failing to budget accordingly may not be able to deliver all of the goods and services their customers need.

3. Protests on the Rise?

As we state later in our section titled, ‘Areas for Further Research’, we suggest that due to ambiguous language found in new LPTA guidance, protests may rise, and a thesis could measure such topic once data is available. At present, we were not able to find data fully substantiating the theory that protest frequency is increasing in comparison to prior years. However, we did find examples of protests that have occurred where one or more of the eight conditions for LPTA, recently published in DFARS 215.101-2-70, were cited as grounds for protest. This supports our theory that ambiguous language exists and is already degrading efficiency within DOD contracting.

In May of 2020, Verizon filed a protest claiming the government illegally used the LPTA strategy in direct violation of DFARS 215.101-2-70-i. This DFARS section states that LPTA should not be used for information technology services or cybersecurity services. To the common person, information technology typically means having to do with computers or computer networking and this is not far off the correct definition. Information technology officially is defined as a system that stores or sends information digitally, especially in the realm of computers. Verizon filed their protest with GAO who ultimately sided with the SSA’s decision to use the LPTA strategy. This protest occurred because DFARS 215.101-2-70-i does not adequately define information technology nor does it explain what types of procurements apply or do not apply. Due to the ambiguous language found in the DOD’s source selection procedures, Verizon lost the Enterprise Infrastructure Solutions telecom and network modernization contract costing them business in the form of \$50 billion (Nyczepir, 2020).

C. SUMMARY

A review of past and present language found in source selection procedures and DFARS 215.101 reveals varying levels of ambiguity and control of source selection strategies. Current guidance, found mostly in DFARS 215.101, reveals what we determined to be too much ambiguity and excessive control over contracting strategies. Specifically, language limiting LPTA usage is likely to take away a valuable tool that contracting officers should be trusted with.

IV. RECOMMENDATIONS

A. STANDARDIZED SOURCE SELECTION STRATEGY POLICY

It would be beneficial to stop overly promoting and then overly restricting the usage of LPTA, since a wild swing of policy does more harm than good. The selection of LPTA versus tradeoff should be solely based on what the procurement is, and relatively independent of the switch of political power. Instead of enforcing a preferred source selection method, the DOD's first step towards resolving this issue should be to trust its experienced contracting officers to effectively execute their allotted budgets. Allow individual contracting officers to purchase lowest-priced goods or services when they deem necessary and the requirement is fitting of the LPTA strategy. Allow the contracting officers themselves to decide to utilize the tradeoff approach when the additional benefits received through non-cost factors warrant the expenditure.

Contracting officers should be trusted to adequately explain the rationale behind their source selection in the contract documentation. By allowing the source selection strategy to be determined on an individual requirement basis, the defense market will experience a more natural supply and demand that will benefit both the DOD and defense industry. The DOD will eventually be able to realize all the benefits of a free-market economy. These benefits could include economic growth and transparency, more competition, increased diversity of services and products, more innovation at a lesser cost to taxpayers, and an increase in the performance and quality of military products and services.

B. ACQUISITION WORKFORCE TRAINING

Once standardized, concrete, and unambiguous source selection procedures are established, the acquisition community workforce should be thoroughly trained with the intention of increasing familiarity with the new procedures. Increasing the proficiency of the acquisition community must be the end state. To create new source selection guidelines without a corresponding training manual would likely result in significant delays in awareness. As a community that is used to seeing drastic changes within its operating

guidelines, the acquisition workforce is at least used to change and more likely to be receptive to change. This is especially true if the change is intended to be concrete and no longer influenced by political powers. As training is conducted, proficiency will increase along with the maturity of DOD contract management processes.

V. CONCLUSION AND AREAS FOR FURTHER RESEARCH

In Chapter V, we draw conclusions from our research, answer our initial research questions, and recommend ways our research could be expanded upon in the future.

A. CONCLUSION

Current DFARS 215.101-2-70 is a drastic over-correction to previous source selection policy, which led to increases in LPTA contract usage between 2008 and 2016 (DiNapoli, 2019). As a result of this over-correction, the usage of LPTA has declined since source selection procedures were updated in October of 2019 and this is creating budget concerns across the DOD (Peters, 2020). Current DFARS source selection policy is overly restrictive towards LPTA and contains ambiguous language that is creating increased risk of protest. This increased risk further reduces a contracting officer's incentive to use LPTA, even when such use is optimal. The new policy will likely misguide contracting officers to incorrectly use tradeoff for otherwise LPTA-suitable acquisitions. This will lead to a welfare loss due to an unnecessary increase in costs to the taxpayer.

In government contracting, a fair and reasonable price is a commonly used phrase. It is important to understand that to be reasonable, the price must be fair to both the government and the contractor, meaning the government must allow the contractor to earn a fair profit. Fairness promotes a healthy relationship between the DOD and its suppliers while ensuring viable competition exists in the various markets the DOD buys from. However, our research reveals the defense contractor community does not believe they are receiving fair profit margins when LPTA contracts are overused by the government. It is in the best interest of National Security for contracting agencies and procurement officials to carefully balance the fairness of contracting amongst all its stakeholders. We must find a way to exhibit fairness to the taxpayers that fund us, as well as the contractors that supply us.

B. RESEARCH ANSWERS

We wrap up our conclusion by answering the research questions posed in Chapter I.

- (1). Does new DFARS section 215.101-2-70 contain overly restrictive or ambiguous language?

Our review of DFARS 215.101-2-70 concluded that a significant level of ambiguous language does exist. Our finding is supported by the opinion of numerous third-party entities that have performed a similar review and drawn the same conclusion. We claim a significant level of ambiguity exist because of key phrases found within two out of the eight newly established rules in DFARS 215.101-2-70.

First, we take issue with the requirement that “no, or minimal value” will be realized by selecting a proposal that exceeds minimum requirement thresholds. This phrase is almost entirely subjective in how it is to be measured. It is highly likely that customers, procurement officials, and contractors will often find themselves having differing opinions on whether an additional value exists and if that value justifies an additional expense.

Second, we believe the requirement that “no, or minimal innovation” is to be realized with the use of a different source selection approach to also be highly subjective. The subjective measurement of what constitutes additional innovation makes the language ambiguous for what should be as much of a guiding document as it is a governing document.

- (2). Is the Department of Defense unintentionally undermining its own efforts to promote public policy through government contracting by publishing overly restrictive and/or ambiguous language in Source Selection Procedures and/or DFARS instruction?

While LPTA contracts certainly have their place and offer benefits that must not be overlooked, when misused they have the potential to exert a disproportional amount of harm on the disadvantaged, certain socio-economic, and small businesses that various DOD regulations aim to protect. Both past and present source selection procedures have, to some degree, varying levels of ambiguity that influence source selection decisions. Furthermore, we believe our review found a slight bias in previous source selection procedures in favor of LPTA and a strong bias in current source selection procedures against LPTA. The ambiguity and bias we discovered promote uneven use of LPTA. By

undermining procurement official's abilities to make their source selection strategies independent of these biases, the DOD is also at the same time undermining its public policy approach to contracting.

(3). What impact does disproportionate LPTA usage have on the following stakeholders?

i. DOD Contracting Office

A DOD contracting office that overuses or misuses LPTA may be failing to properly include non-cost factors. In doing so, they are increasing the likelihood of having to perform the acquisition again, should the initial product or service not satisfy the requirement. Additionally, excessive overuse of LPTA can, over time, reduce competition in markets by driving small and midsize businesses out of the market. As a result, DOD contracting offices receive fewer bids in response to solicitations and are potentially not receiving the best products or services available.

Contracting offices that fail to use LPTA when they should, or underutilize the strategy, are likely to see increased spending. During times of budget constraint, these offices are more susceptible to realizing funding shortages and not being able to satisfy all their customer's requirements. In the rollout of the first Better Buying Power initiative, Ashton Carter emphasized the need to "do more without more" (Carter, 2010). Precise management of LPTA contract usage is a valuable tool contracting officers can use to satisfy Better Buying Power initiatives.

When LPTA is inappropriately used for high risk and complex requirements, DOD customers are prone to receiving products or services that do not satisfy their needs. This can lead to costly schedule delays, mission failure, safety issues, and even frustration or distrust with the acquisition community.

ii. Defense Contractor Industry and Employees

As seen in the Washington Technology survey, the defense contractor industry believes LPTA overuse degrades their ability to receive a fair profit, pay employees fairly,

offer employee benefits, invest in R&D and create innovative and improved products for customers. Survey respondents had a shared belief that small and mid-size defense contractors were disproportionately impacted by LPTA overuse. These problems are exacerbated by defense budget cuts and when procurement officials rely heavily on LPTA contracts to make up for lost funding, the defense contractor industry suffers the most. In 2014, Perkins reported that in response to defense spending cuts, companies in the defense industry were forced to take drastic measures including laying off employees and reducing salaries (Perkins, 2014). Of all stakeholders in DOD acquisitions, the defense contractor industry may have the most to lose and/or gain depending on the source selection strategy used.

Like many stakeholder analyses, depending on the depth of the analysis and who is determined to qualify as a stakeholder, the list can be never-ending. To simplify this research, we focused less on expanding stakeholder depth, instead choosing to concentrate our efforts to determine if the over application of LPTA contracts did more harm than under application or vice versa. We believe our analysis shows a greater impact on the defense contractor industry and their employees exist when LPTA contracts are overused. Contrarily, when LPTA contracts are underutilized, we believe our research indicates that the taxpayer suffers the greatest impact. Also, during times of constrained budgets, the DOD, to include contracting agencies and war fighters, are likely to see requirements go unfulfilled due to excessive spending across the board as a result of the current DFARS 215.101 language.

C. AREAS FOR FURTHER RESEARCH

The following ideas were identified for the future expansion of our research. Due to the recency of changes to DFARS 215.101.2.70 at the time this thesis was written, sufficient data does not exist. However, future research in the following areas could be highly beneficial when attempting to measure the potential negative effects of new source selection procedures.

1. Monitor DOD Contracting Protests Levels

As previously addressed by this thesis, current DFARS language covering source selection strategies impose strict limitations on the usage of LPTA. As contracting officers utilize LPTA in the future, it is worth measuring the number of protests and tracking the figure as a percentage of total contracts as well as by contract type. Should future measurements indicate that protests are increasing as a result of the ambiguous language of DFARS 215.101, then the government must consider the resulting consequences that come with protests and how they may be bogging down the efficiency of contracting offices. Additionally, a specific focus on the amount of pre-award versus post-award protests levels could reveal more data beneficial to the government. An increase in the amount of pre-award contracts may point to an increase in the number of contractors taking issues with LPTA solicitations. This additional research may further validate that DFARS 215.101 language is too ambiguous and restrictive towards LPTA to be practically implemented even when the LPTA strategy is justified. By calculating the protest levels and subsequent time lost, valuable statistics can be presented to justify the need for a rewrite of source selection guidance.

2. Monitor DOD Spending Growth Trajectory Compared to Previous Years

While it is inevitable that DOD spending will almost always be on an upwards trend, the growth rate trajectory should be closely tracked in the years to come. Research comparing the annual growth rate that eliminates unique variables, such as times of war or pandemics, could shed valuable light on the unintended consequence of rapidly increased spending that DFARS 215.101 is potentially creating.

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