I'm not a big fan of just linking to proposed and/or final rule changes, nor am I a big fan of simply recapping what they say. My thought is: You all can do that. You can read the rule and grasp what's going on. Thus, I don't normally just tell you what's happening because you can all do that for yourselves.

Instead, I want to express a point of view about the regulatory change. I want to tell you what's happening and then opine on why it matters—or should matter—to you. That's the goal of this blog (even if it sometimes gets me into trouble.) I want to tell you what's going on and why you should care.

With that being said, let's discuss some recent regulatory rule changes.

1.

Effective 01 October 2019, the DFARS was changed via **final rule** to limit the use of Lowest-Price, Technically Acceptable (LPTA) source selection procedures. Going forward, the LPTA process can only be used when—

(i) 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;

(ii) No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

(iii) 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;

(iv) 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;

(v) No, or minimal, additional innovation or future technological Start Printed Page 50789advantage will be realized by using a different source selection process;

(vi) Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life (See PGI 215.101-2-70(a)(1)(vi) for assistance with evaluating whether a requirement satisfies this limitation) ….

And the LPTA process must be avoided “to the extent practicable” in the following circumstances:

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services;

(ii) Items designated by the requiring activity as personal protective equipment (except see paragraph (b)(1) of this section); or

(iii) Services designated by the requiring activity as knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

And the LPTA process is “prohibited” in the following circumstances:

… items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties. See 252.209-7010

for the definition and identification of critical safety items.

… to acquire engineering and manufacturing development for a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

All of the above changes were driven by legislation—i.e., language found in the FY2017 and FY2018 National Defense Authorization Acts (NDAAs).

What was Congress thinking?

Well, we think Congress was reacting to the recent trend by the DOD in awarding major defense procurements to companies who are willing to "invest" in them by offering prices below estimated costs. See, for example, **this article** discussing Boeing's ability to "invest" (in the words of its executives) "to create long-term valuable products and services franchises." In that same article, we discussed news reports stating that Marilyn Hewson (Lockheed Martin's CEO) had said that her company didn't have the same cash resources as Boeing had, and that it could not compete if the competition is based on the size of the contractor investment. More explicitly, Lockheed Martin's CFO was quoted as saying "Those [losses] were disappointing for a lot of reasons. But the fact they really decided, all three, on an LPTA (lowest price technically acceptable) basis, didn't help the situation."

Thus, we reckon that Congress heard those complaints (whether from reading them in the press, or via testimony at hearings, or via whispers of lobbyists into the right ears) and decided to tell DOD to knock it off.

And how is Boeing's strategy working out for the company?

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It's **winning** orders for new aircraft.

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It's got **continuing** technical problems.

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Deployment may be **delayed** .

So: a mixed bag. In the long run, Boeing's strategy likely makes sense for the company and its shareholders (of which I am one). However, in the short-term Boeing has had to take literally billions of dollars in financial reserves to cover its cost growth on the program. As we have pointed out before, if the DOD's penchant for awarding to the low-bidder were to continue, then only the very largest of contractors will end up with any future awards. Thus, we are pleased to see Congressional action in this area.

Speaking of Congressional action, as the result of a 2017 NDAA requirement, the FAR definition of *commercial item* was recently revised via **final rule** . The revised definition adds the following situation to the definition at FAR 2.101:

A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

That should be helpful to a few folks out there.

There have been a number of proposed rules published recently. In the interest of brevity we won't list them all. But one was "interesting" and we think worth bringing to your attention. See link **here** .

The proposed rule, if implemented as drafted, would provide notification to contractors doing business in Afghanistan that there are exemptions from liability for Afghanistan taxes, customs, duties, fees or similar charges. The rule does not add any new requirements for contractors; however, it is providing unified guidance for contractors performing in Afghanistan. The DFARS already has such language, but now it's being proposed for inclusion in the FAR.

Regulatory changes continue to happen. For a long time, the rule-making process seemed paralyzed, but now it seems to be getting back on track.