

November 20, 2018

The Honorable Kevin M. Fahey  
Assistant Secretary of Defense for Acquisition  
3600 Defense Pentagon, Room 3E185  
Washington, DC 20301-3600

Assistant Secretary Fahey:

On behalf of the nearly 400 member companies of the Professional Services Council (PSC), I am writing to express our serious concerns regarding the Department's continued delay of overdue and statutorily mandated regulations restricting the use of lowest price technically acceptable (LPTA) source selection criteria for DoD services contracts.

Section 813 of the National Defense Authorization Act for Fiscal Year 2017 (P.L. 114-328), as amended by Section 822 of the FY18 NDAA (P.L. 115-91), prohibits the Department from using LPTA unless eight defined criteria are met, and it specifically requires DoD to avoid, to the maximum extent practicable, using LPTA predominantly for the acquisition of information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, or other knowledge-based professional services. The FY17 NDAA required a DFARS revision to implement the changes within 120 days of enactment, by April 2017.

Yet, in the Government Accountability Office's (GAO) November 13 report on implementation of the law (GAO-19-54: DOD Should Clarify Criteria for Using Lowest Price Technically Acceptable Process), DoD disclosed that it does not intend to revise its regulations or issue additional guidance until the fourth quarter of Fiscal Year 2019.

PSC understands that there are additional considerations relating to issuing regulations, but we believe those with a statutory foundation should get the highest priority. Accordingly, PSC respectfully urges you to prioritize, finalize, and issue the Section 813 LPTA regulation as expeditiously as possible and prior to the end of this calendar year.

PSC acknowledges that LPTA has a place in the acquisition toolbox and when appropriate can achieve desired outcomes. However, applying LPTA to complex professional or IT services where higher-level technical capabilities and innovation are often sought, and where the contracting requirements are often difficult to accurately define, is particularly ill-advised. LPTA misuse can produce subpar results and increase long-term costs to the government. Promoting value and reducing long-term costs were key reasons Congress enacted this mandate, yet without the Department's implementing guidance, these benefits remain unrealized. The rule-making process needs to keep up with the pace of legislation and the needs of the users.

As the GAO report notes from conversations with a DPC official: “until the DFARS is updated, DOD contracting officials are not required to consider the Section 813 criteria.” For statutory requirements that are nearly two years old, this should be, and is, unacceptable.

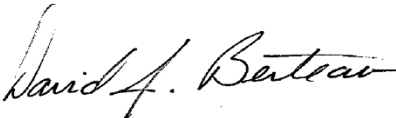
Additionally, GAO found that contracting officers “were confused” or “did not understand” how to apply certain criteria and cautioned that, absent clarification, “DOD increases the risk that its contracting officials will not consistently implement the requirements in Section 813.”

Finally, PSC is concerned with comments on page 18 of the GAO report from a DPC official stating: “DOD plans to address whether the Section 813 criteria are applicable to [the issuance of competitive orders under multiple-award IDIQ contracts] when DOD revises the DFARS.”

Excluding task orders from the LPTA restrictions would be inconsistent with the procurement and acquisition definitions contained in the Federal Acquisition Regulation and with the Congressional intent behind Section 813. It would further eliminate a large amount of contracts and dollars from compliance with the restrictions on LPTA. As the GAO report states, DOD obligated approximately \$133 billion—40 percent of its total Fiscal Year 2017 contract obligations—through such orders. We respectfully urge you to follow the letter and intent of this law by specifying that contracts and task orders are subject to the regulation.

Again, PSC respectfully urges you to finalize these DFARS regulations as expeditiously as possible and ensure that they are consistent with FAR definitions and Congressional intent. Thank you for your attention to this important issue. PSC looks forward to continuing to work with you and stands ready to assist you and your office on any questions or comments.

Sincerely,

A handwritten signature in black ink that reads "David A. Berteau". The signature is written in a cursive style with a large initial 'D' and 'B'.

David Berteau  
President and CEO