November 26, 2019

Via Regulatory Portal

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


Dear Ms. Mandell,

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service.1 The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch and Douglas Mickle, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Acquisition Reform and Emerging Issues.”
I. COMMENTS

The Section is pleased to offer comments on the FAR Council’s proposed rule concerning limitations on the use of the lowest price technically acceptable (“LPTA”) source selections. The proposed rule is intended to implement requirements established in Section 880 of the Fiscal Year (“FY”) 2019 National Defense Authorization Act (“NDAA”). As directed by Section 880(b), proposed FAR 15.101-2(c) would create a six-part test that must be met before a procurement could be conducted using LPTA criteria. 84 Fed. Reg. at 52427. Likewise, proposed FAR 15.101-2(d) would add a list from Section 880(c) of industries/services for which the use of LPTA shall be avoided to the “maximum extent practicable.” Id.

The proposed rule excludes the Department of Defense (“DoD”) from application of both these proposed FAR provisions, leading off both FAR 15.101-2(c) and 15.101-2(d) with the phrase “Except for DoD.” Id.

In its preamble, the proposed rule’s notice states that FY19 NDAA § 880 does not apply to DoD because of prior NDAA provisions applying LPTA restrictions to DoD more directly:

[S]ection 880 does not apply to DoD. Instead, section 813 of the NDAA for FY 2017 (10 U.S.C. 2305 Note) and section 822 of the NDAA for FY 2018 (10 U.S.C. 2305 Note) establish a similar, but not the same, set of criteria for DoD procurements to meet in order to use LPTA source selection criteria in solicitations. These sections are being implemented in a separate Defense Federal Acquisition Regulation Supplement case (2018–D010). Id. at 52426.

Although this explanation may support a DoD exclusion from the six-part test under proposed FAR 15.101-2(c), the FY19 NDAA § 880 text did not completely exclude DoD from application of the LPTA restrictions for the industries/services that the FAR Council proposes to implement as FAR 15.101-2(d). Accordingly, the Section recommends that the broad DoD exclusion (“Except for DoD”) be deleted from proposed FAR 15.101-2(d).

Removing the DoD exclusion, and applying the FY19 NDAA as written, does make a substantive difference. Section 880(c) not only restricts LPTA procurements for the products and services that were already subject to restriction under FY17 NDAA § 813(c) (i.e., in the 10 U.S.C. § 2305 note), but Section 880(c) expands the restriction to “health care services and records [and] telecommunications devices and services.” The Section takes no position on the merits of the FY19 NDAA’s applying LPTA restrictions to more types of services than did the FY17 NDAA. But because Congress passed the FY19 NDAA without excluding DoD from the expanded restrictions, the Section recommends that the proposed FAR 15.101-2(d) reflect that direction.
A. **Background of Relevant Legislation**

The plain language of the legislation underlying this proposed rule not only shows that Congress did not exclude DoD from application of Section 880(c), it also reflects that Congress did not intend to create any such broad-reaching exemption.

1. **Section 813 of the FY17 NDAA.**

This background starts with the FY17 NDAA. See Pub. L. No. 114-328, 130 Stat. 2000. Section 813 restricted the use of LPTA source selection criteria through a “Note” to 10 U.S.C. § 2305. Section 813 included four parts:

(a) a policy statement directing DoD to avoid using LPTA in certain circumstances;

(b) a directive for the Secretary of Defense to revise the DFARS to include a six-part test that must be met in order for LPTA source selection criteria to be used by DoD;

(c) a list of industries/services for which the use of LPTA shall be avoided to the “maximum extent practicable” in purchases predominantly for those industries/services; and

(d) a requirement that the Comptroller General of the United States submit a report to Congress on the use of LPTA.

Section 813(c) set forth the following text directing that LPTA procurements “shall be avoided” to the “maximum extent practicable” for certain types of purchases as noted above:

(c) **AVOIDANCE OF USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION CRITERIA IN CERTAIN PROCUREMENTS.—** To the maximum extent practicable, the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—

(1) 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;

(2) personal protective equipment; or
(3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

Id. DoD issued a final rule implementing these requirements, as amended by the FY18 NDAA,\textsuperscript{3} on September 26, 2019. 84 Fed. Reg. 50785 (Sept. 26, 2019) (finalizing DFARS 215.101-2-70).

2. Congress Passes Section 880 of the FY19 NDAA.

Section 880 of the FY19 NDAA is identified in the bill as a Note to 41 U.S.C. § 3701. Section 880 includes subsections (a) through (d) that generally parallel the corresponding sections from FY17 NDAA Section 813, with some modifications.

Section 880 also includes a subsection (e), in which a definition has the effect of excluding DoD from some but not all of the Section 880’s requirements. Section 880(e) defines the term “executive agency” as used the section to have the same “meaning given that term in section 102 of title 40, United States Code, except that the term does not include the Department of Defense” (emphasis added).

The term “executive agency” appears multiple times in Section 880(b), which prescribes regulations governing when LPTA may be used in procurements. The use of “executive agency” indicates that Section 880(b) does not apply to DoD, leaving DoD subject to parallel restrictions passed in FY17 NDAA § 813(b).

In contrast, “executive agency” does \textbf{not} appear in Section 880(c), which like its counterpart FY17 NDAA § 813(c) uses the passive-voice “shall be avoided” without identifying the agencies that shall avoid using LPTA in procurements predominantly for the listed types of products and services—and, just as importantly, without excluding agencies from these limitations as is done in Section 880(b) via use of the defined term “executive agency.”

As noted above, Section 880(c) repeats but also expands the FY17 NDAA § 813(c) list of products and services for which LPTA purchase types “shall be avoided,” adding procurements predominantly for “health care services and records [and] telecommunications devices and services” to those for which LPTA “shall be avoided.”

B. The Section Recommends that the “Except for DoD” Language be Removed from Proposed FAR 15.101–2(d) Because Congress Did Not Provide Such a Broad Exclusion in Section 880(c) of the FY19 NDAA.

FY19 NDAA § 880(c)’s plain language does not completely exclude DoD. Under “well-settled principles of statutory interpretation[,] . . . Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.” Republic of Sudan v.

\textsuperscript{3} FY18 NDAA § 822 amended sub-sections (b) and (d) of FY17 NDAA § 822 but made no change to sub-section (c).

Had Congress intended for DoD to be excluded completely from the provisions of Section 880(c), it would have so stated—as it did in Section 880(b). That Congress defined a DoD exclusion (in Section 880(e)) that it used multiple times in Section 880(b) but not once in Section 880(c) shows that DoD is not excluded from Section 880(c)’s coverage.

Additional statutory-interpretation principles show that Congress did not intend to exclude DoD from Section 880(c).

First, Section 880 included a policy statement at subsection (a) indicating application to the United States Government, a broad scope:

(a) STATEMENT OF POLICY.—It shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process.

The policy statement did not use the narrower, specially defined “executive agency” or otherwise carve DoD out of the policy, notwithstanding a comparable DoD-specific policy statement in FY17 NDAA § 813(a).

A statement of purpose included in a statute, wherever it resides, is an appropriate guide to the meaning of the statute’s operative provisions. See, e.g., Gundy v. United States, 139 S. Ct. 2116, 2126–27 (2019). And “[a]n exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision.” Maracich v. Spears, 570 U.S. 48, 60 (2013) (internal quotation omitted). Given these principles, reading Section 880(c) to exclude DoD implicitly when other Section 880 provisions use a DoD exclusion explicitly would run counter to Section 880(a)’s staking out a broad, government-wide policy application.

Second, when Congress enacted FY19 NDAA § 880(c), it was presumably aware of FY17 NDAA § 813(e), which included a similar “maximum extent practicable” limitation on LPTA contracting that applied to DoD (via the “Note” to 10 U.S.C. § 2305) and included all but two of the industries listed in Section 880(c)). As the Supreme Court has recognized, the presumption is that Congress is aware of existing law when it passes legislation. See Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 169-70 (2014) (internal quotation omitted).

Thus, had Congress intended for only the narrower FY17 NDAA § 813(c), and not FY19 NDAA § 880(c), to set limitations on LPTA contracting by DoD, Congress would have had all the more reason to use express language in Section 880(c), such as using the specially defined term “executive agency,” to make the distinction clear.4

4 In addition, it should be noted that until recently, the Army had a class deviation in place that specifically recognized the application of Section 880(c) to the Army. See Former AFARS 5115.101-2 (rev. 14 Feb 2019) (“See Army Class Deviation 2019-PP01 – Lowest price technically acceptable source selection process dated November 30, 2018 for certain procurements. This deviation implements, on an interim basis, section 1002(g) of the National...
Unlike Section 880(b), Section 880(c) is not a directive to revise the FAR or DFARS. Nor does Section 880(c) state that implementing regulations are required before it can become effective. Instead, Section 880(c) should be read consistent with FY19 NDAA’s general direction that provisions such as Section 880 “shall take effect on the date of the enactment of this Act.” 132 Stat at 1825, § 800(a)(2). This is so especially since “absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.” Gozlon–Peretz v. United States, 498 U.S. 395, 404 (1991).

Because DoD is not excluded from Section 880(c), and because Congress intended that Section 880(c) take effect directly, the Section recommends that the FAR Council delete “Except for DoD” from proposed FAR 15.101-2(d) to make the proposed rule consistent with the statutory text passed by Congress.

C. The Section Recommends that a Cross-Reference to DFARS 215.101-2-70(a) Be Included in Proposed FAR 15.101-2(c).

Although the FAR Council is correct that Congress excluded DoD from portions of FY19 NDAA § 880, using the introductory phrase “Except for DoD” in Proposed FAR 15.101-2(c) has the potential to confuse the contracting community. DoD is not truly excluded from the requirements set forth in proposed FAR 15.101-2(c) because nearly identical rules already apply to DoD under DFARS 215.101-2-70(a). Readers may be unaware of DFARS 215.101-2-70(a) and assume (incorrectly) based on the “Except for DoD” language in proposed FAR 15.101-2(c) that the rules in that provision have no application to DoD. Accordingly, to avoid confusion, the Section recommends that proposed FAR 15.101-2(c) include a cross-reference to DFARS 215.101-2-70(a).

II. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,
/s Linda Maramba
Chair, Section of Public Contract Law

cc:
Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
Patricia H. Becker

Defense Authorization Act for Fiscal Year 2018 (NDAA 2018) and section 880(c) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA 2019). This class deviation remains in effect until the subject NDAA restrictions are incorporated into the FAR or Defense FAR Supplement (DFARS), or this deviation is otherwise rescinded.”), available at https://webcache.googleusercontent.com/search?q=cache:Lngxw6E_VnAJ:https://www.acquisition.gov/afars/afars-part-5115+&cd=1&hl=en&ct=clnk&gl=us.
Amy Conant Hoang
Council Members, Section of Public Contract Law
Co-Chairs, Small Business and Other Socioeconomic Programs Committee
Craig Smith
Samantha S. Lee