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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Professional Employee Compensation Under FAR 52.222-46

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The prescription for the solicitation provision at Federal Acquisition Regulation (FAR) 52.222-46, "Evaluation of Compensation for Professional Employees," states: "All professional employees shall be compensated fairly and properly."¹ When it applies, FAR 52.222-46 instructs offerors to submit as part of their proposals a total compensation plan setting forth salaries and fringe benefits for the professional employees who will furnish the services under the contract.²

FAR 52.222-46 calls for an evaluation of each offeror's compensation plan to ensure that it reflects a sound management approach and understanding of the contract requirements.³ The FAR provision states: "This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be evaluated in terms of its impact upon recruiting and retention, its *realism*, and its consistency with a total plan for compensation."⁴

The U.S. Government Accountability Office (GAO), the most prominent governmental decisional authority on federal procurements, has issued numerous opinions construing FAR 52.222-46. GAO has elaborated that the gist of the provision is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance and to assess whether offerors understand the nature of the work.⁵ In the same vein, as Professor Ralph C. Nash has observed, "the purpose seems to be very clear in preventing competitors for service contracts from winning a competition by proposing low salaries that destabilize the workforce and thereby create the risk of poor performance."⁶ FAR 52.222-46 covers contracts for both new services and recompletions for prior-acquired services.⁷

The Prescription For FAR 52.222-46

FAR 22.1103, the prescription for FAR 52.222-46, directs inclusion of the provision in solicitations for negotiated contracts—except for commercial services procurements subject to FAR Part 12⁸—when the agency expects the contract amount (inclusive of options) to exceed \$700,000 and the services will require "meaningful numbers" of professional employees.

This standard could be difficult for both offerors and agencies to apply when the

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proposed contract would be a hybrid of services/construction or of services/supplies. The analogous answer comes from Defense Federal Acquisition Regulation Supplement (DFARS) 222.402-70 which deals with installation support contracts—the rules on professional employee services still apply when the services are segregable from the accompanying construction/supplies and the services piece is expected to exceed \$700,000.

FAR 52.222-46 is a solicitation provision and not a contract clause.⁹ The difference is significant. As a provision, FAR 52.222-46 pertains solely to the evaluation of proposals and instructs offerors how to submit a professional employee compensation plan. FAR 52.222-46 does not create postaward rights or duties.¹⁰ Under the Uniform Contract Format used for most solicitations and contracts, agencies will incorporate this FAR provision by reference in the Section L of the Request for Proposals (RFP), which section contains the instructions for proposal preparation.¹¹ Provisions included by reference are just as binding on offerors during proposal preparation as FAR provisions carried in full text.¹²

Unfortunately, offerors and agencies alike can easily overlook the applicability and importance of FAR 52.222-46 especially when it is included by reference along with dozens of other boilerplate proposal preparation instructions, provisions, and clauses.¹³ If the agency in rating proposals disregards the included FAR 52.222-46, a significant risk exists for a miscalculation because of the missing information on professional employee compensation. Thus, agencies should consider including FAR 52.222-46 in full text and highlighting this provision in the Uniform Contract Format Section L proposal preparation instructions.

A reading of the decisions reveals that contracting officials are not of the same mind on where the results of the FAR 52.222-46 analysis specifically fall under the evaluation criteria. Some procuring officials make it an element of the price or cost factor.¹⁴ Other contracting agencies have made it a stand-alone factor.¹⁵ Still other agencies have made it a subfactor under a technical¹⁶ or management approach factor.¹⁷ Some agencies

make it a pass/fail factor,¹⁸ and others rate it comparatively among the offerors.¹⁹ This factor also could fit within an evaluation factor related to understanding of the work or performance risk.²⁰ In still other acquisitions, the agency has applied the proposed plan under more than one evaluation factor.²¹ The agency may alternatively decide to consider the plan under the responsibility determination.²²

With one qualification, the diverse approaches on the evaluation of professional employee compensation, while potentially confusing, raise no legal concerns. The qualification is that where the agency rates a small business concern's proposed price on a fixed-price contract on a strict pass/fail type basis as unacceptably low, the agency is actually challenging the offeror's responsibility, i.e., the offeror's ability and capacity to successfully perform the contract at its offered price.²³ When an agency rates an offeror unacceptable on a pass/fail (or similar) basis for a traditional responsibility factor, the offeror is essentially deemed to be non-responsible. If the offeror is small business concern and is otherwise in line for award, the agency may not unilaterally reject the offeror but must refer the offeror to the Small Business Administration for the issuance of a possible certificate of competency to allow the award to be made to that offeror.²⁴

Regarding the proper criterion for professional employee compensation, the agency consistent with the RFP and FAR 52.222-46 has broad discretion in selecting any relevant evaluation factor. This position also follows GAO's general view of evaluation criteria: "Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of particular evaluation criteria or an evaluation scheme so long the criteria used reasonably relate to the agency's minimum needs in choosing a contractor that will best serve the government's interests."²⁵

FAR Documentation Requirements

FAR 52.222-46 extensively covers the documentation requirement for a professional employee compensation plan, which the

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cases have construed as mandating a realism analysis.²⁶ First, FAR 52.222-46(a) summarizes the perspective regarding the recompetition of service contracts:

Recompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance. It is therefore in the Government's best interest that professional employees, as defined in 29 CFR 541, be properly and fairly compensated. As a part of their proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract. The Government will evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation. Supporting information will include data, such as recognized national and regional compensation surveys and studies of professional, public and private organizations, used in establishing the total compensation structure.

Among other matters, FAR 52.222-46(b) emphasizes the need to compare the compensation levels for the proposed and predecessor contracts for the same (or essentially the same) work:

The compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep suitably qualified personnel to meet mission objectives. The salary rates or ranges must take into account differences in skills, the complexity of various disciplines, and professional job difficulty. Additionally, proposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees. Offerors are cautioned that lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement.

FAR 52.222-46(c) summarizes the essential purpose for considering professional employee compensation:

The Government is concerned with the quality and stability of the work force to be employed on this contract. Professional compensation that is unrealistically low or not in reasonable relationship to the various job categories, since it may impair the Contractor's ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements.

In supplementing the detailed instructions in FAR 52.222-46(a) and (b), FAR 52.222-46(d) states a single standard for the consequences for a failure to comply with FAR 52.222-46: "Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal." As GAO stated in a different context regarding a similar statement of the grounds for

rejection of an unsatisfactory proposal, "[t]he use of the word 'may' means that the agency has the option, but not the obligation, to reject a proposal that it finds unsatisfactory."²⁷

FAR 52.222-46 And Realism

General Principles

When the agency makes a realism review under FAR 52.222-46, this concept comes in two forms: cost realism and price realism. In a "cost realism" analysis, the agency independently evaluates specific elements of each offeror's proposed cost estimate to determine whether those estimated proposed cost elements "are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal."²⁸

"Price realism" pertains to whether an agency appropriately determined whether prices are too low, such that there may be a risk of poor performance.²⁹ Generally, a positive finding of price realism in the context of a fixed-price contract is a useful predictor of successful performance when the agency assesses the technical understanding of the offeror and, as applicable, considers the risk inherent in an offeror's proposal.³⁰ Because FAR 52.222-46 issues arise most frequently in price realism cases, this BRIEFING PAPER will employ the same emphasis.

When the Government knows the employees' salaries and types and amounts of fringe benefits, and the offeror documents its proposal in accordance with FAR 52.222-46, an agency has all the proposal information it needs to generate a realism analysis on professional employee compensation.³¹ An agency's determining that the salaries and fringe benefits are realistic depends upon a finding that an offeror would be able to recruit and retain qualified personnel at the proposed amounts.³²

Strictly construed, FAR 52.222-46 does not evaluate overhead and other burdens commonly associated with labor rates, such as a prime contractor's charges for subcontractor management. Another crucial aspect of FAR 52.222-46 is that it evaluates only salaries and fringe benefits. It does *not* consider the mix and number of professional employees. As Professor Ralph C. Nash has emphasized, "RFP evaluation factors assessing the adequacy of the proposed staff are not, in themselves, a requirement for price realism analysis even though the result of the assessment is that the offeror has a low cost because it has not proposed sufficient staff."³³ Thus, the mix and number of professional personnel on staff can be part of realism but only where the RFP outside of FAR 52.222-46 calls out this topic as a distinct evaluation issue.³⁴

On matters of realism, the procurement tribunals will not

substitute their judgment for that of the agency. Instead, these bodies will question the Government's realism evaluations only where they are inconsistent with the solicitation evaluation criteria; they are undocumented; or the agency's conclusions are unreasonable.³⁵ The protester's disagreement with the agency's realism assessments for the awardee or the protester, without more, would not provide a basis to sustain the protest.³⁶ The party challenging the agency's evaluation bears the burden of proof for cost credibility.³⁷

Possible Price Realism Pitfalls

A low or no profit price, or even a below-cost fixed-price offer, is not necessarily an unrealistically low price.³⁸ Many reasons can justify an apparently unduly low price, such as where an offeror has a unique method to meet contractual requirements; its technical approach allows the offeror to perform at a lower cost; the offeror has the financial resources to perform the contract (and can more readily absorb a loss contract); the work is less demanding for a particular firm than its competitors; and the firm has significant experience doing the kind of work.³⁹ A frequent circumstance explaining a perceived low price is the impact of competitive market pressures on even the most qualified offerors—which could include the incumbent—that might induce lower labor costs.⁴⁰ Because of the above variables, and others like them,⁴¹ Contracting Officers should usually seek to verify a proposed price as being the offer actually intended before the agency rejects what might be an (erroneously) perceived below-cost or mistaken offer.⁴²

Usually, price realism is a discretionary evaluation factor only where a special need exists for the agency to assess performance risk or to evaluate the offerors' understanding of the proposed contract.⁴³ FAR 52.222-46(a) goes one step beyond the usual discretionary rule on fixed price contracts because of the policy need to assess professional employee compensation.

Importantly, where the RFP addresses price realism under only FAR 52.222-46, the analysis relates solely to professional employee compensation. It would be improper for the agency to perform a price realism analysis beyond the above FAR provision.⁴⁴ Another improper technique for price realism under FAR 15.404-1(d)(3) would be for the agency to adjust a firm fixed price to derive an estimated most probable cost for making an award to a particular offeror as would be the case in cost-reimbursement contracting.⁴⁵ In reviewing protests challenging price realism evaluations, GAO's and the courts' focus is on whether the agency acted reasonably and consistently with the solicitation's requirements.⁴⁶

Indicia Of Unduly Low Rates?

The mere fact that an offeror's price is lower than an indepen-

dent Government cost estimate, or that of a competitor, including the incumbent, does not require the agency to conclude that the price is unrealistically low.⁴⁷ Similarly, the mere presence of assumptions in an offeror's technical proposal does not compel the agency to find the proposed price unrealistic.⁴⁸ In this regard, an agency's concern that a proposer's technical approach is inefficient or inadequately explained does not automatically mean the offeror lacks the ability and the resources to perform the effort.⁴⁹

FAR 52.222-46 Subtopics

Defective RFP Instructions

The most fundamental RFP error in this area is an *omission* where FAR 22.1103 required use of FAR 52.222-46, but where the agency fails to do so. Under these cases, absent a preaward RFP amendment, the agency may not properly implement FAR 52.222-46 in a postaward challenge to an RFP. The reason is that where the RFP is facially defective, a protest on the absence of this provision must be filed before the closing time set for receipt of proposals for GAO to consider the issue on the merits under GAO's Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1).⁵⁰

Another type of solicitation problem is where the RFP has an *ambiguity* on the applicability of the RFP provision. In one GAO decision, *People's Accident Information Service, Inc.*,⁵¹ the RFP on its face contained FAR 52.222-46 but the solicitation did not call for the services of any professional employees. GAO ruled a protester's postaward challenge to the particular agency's failure to apply FAR 52.222-46 encompassed a patent RFP ambiguity that rendered the protest allegation untimely under 4 C.F.R. § 21.2 (a)(1).

In *Arch Systems, LLC*,⁵² GAO encountered yet another type of RFP ambiguity. In this case, the RFP included FAR 52.222-46 but the RFP did not otherwise instruct offerors to submit their professional employment compensation plans and no offeror submitted a plan. Moreover, the RFP required offerors to submit fixed unit prices and did not require offerors to submit the unburdened labor rates which would have allowed a FAR 52.222-46 evaluation. (See the section later in the PAPER, "Comparison of Burdened vs. Unburdened Rates," discussing the disfavored practice of comparing burdened rates). Because the RFP did not require offerors to submit information concerning professional compensation, GAO in *Arch Systems* agreed with the agency that no requirement existed for a conventional FAR 52.222-46 evaluation.

If the RFP contains FAR 52.222-46 but the aggrieved party discovers only after the award did not apply the provision during the evaluation, a protest to be timely on this oversight under 4 C.F.R. § 21.2(a)(2) must be filed not later than 10 days after the

protester knew or should have known of the asserted grounds for challenge, whichever is earlier.⁵³ Under a similar logic, where a protester initially files a timely protest and supplements it with new and independent grounds, the new allegations must independently satisfy these timeliness requirements. The reason is that GAO's Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation of protest issues.⁵⁴

An argument exists that agencies may assess the risk attendant with an offeror's unduly low price even without the inclusion of FAR 52.222-46 or an express evaluation factor for price realism. In broad language that went beyond the facts of the case, GAO has stated: "In evaluating proposals, an agency's consideration of the risks associated with unrealistically low rates *is always* a proper consideration, and in evaluating the risks associated with proposed labor rates, an agency may properly consider the rates an offeror is charging, or has recently charged, for similar services under other contracts."⁵⁵ In another decision where GAO went beyond the operative facts, GAO commented: "The consideration of the risk involved in an offeror's proposed approach is *inherent* in the evaluation of proposals."⁵⁶

The quoted language in the latter decisions cannot be readily squared with equally settled case law principles that when the RFP does not call for a price realism evaluation, it is improper to consider a low price as part of the evaluation of an offeror's technical approach.⁵⁷ Indeed, no cases were found that used this "inherent risk" doctrine to evaluate comparative levels of professional employee compensation when the RFP was missing FAR 52.222-46. Based on the discrepant decisions, GAO (and the courts) should take up the above suggestion to reconcile the case law.

Recompetitions vs. New Requirements

While agencies must fully and fairly consider FAR 52.222-46 in all covered acquisitions, contracting officials must perform more in-depth professional employee compensation analysis in a subsequent recompetition for the same or essentially the same work.

FAR 52.222-46(a) observes that unduly low professional employee compensation can be particularly detrimental for contracts arising from recompetitions of service contracts. Nevertheless, lower compensation levels for the same work as furnished under predecessor contractors are not automatically disqualifying. Instead, FAR 52.222-46(b) explains that such reductions "will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees."

In *CRAssociates, Inc. v. United States*,⁵⁸ the U.S. Court of Federal Claims contrasted the link between FAR 52.222-46(a) and 52.222-46(b):

[T]he mere existence of paragraph (b) suggests that the drafters of the FAR intended agencies to perform more analysis when a recompetition of an existing contract occurs, with the obvious goal of promoting a smooth transition from one contract to the next. In particular, unlike paragraph (a), paragraph (b) importantly requires the agency to consider the impact of lowering salaries on "maintaining program continuity."⁵⁹

To satisfy FAR 52.222-46(b), and the principles governing recompetitions for the same or essentially the same effort, the agency generally must compare the actual professional salaries and fringe benefits of the incumbent contractor and the offerors under the new procurement and determine whether the latter's compensation levels are below the incumbent's rates.⁶⁰ If necessary, another offeror could seek to obtain an incumbent's compensation figures where public information to make comparisons to a proposer's intended compensation levels.⁶¹ This comparison process does not require "impeccable rigor."⁶²

In further guidance for FAR 52.222-46 (b), the provision requires the agency to evaluate for every proposer (and not just those vendors proposing lower professional compensation), a total compensation plan to assure that it reflects "sound management" and an understanding of the contract requirements. Both FAR 52.22-46(b) and (c), moreover, require the agency to assess the offeror's plan to provide "uninterrupted high-quality work," as well as the impact the proposed compensation will have on recruitment and retention.⁶³

Accordingly, FAR 52.222-46(b) cautions offerors that "lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement."⁶⁴ The regulation does not, however, ban lowered compensation in all instances as long as the offeror can establish the lowered compensation is still realistic for the offeror's particular approach.⁶⁵

Oddly, FAR 52.222-46 has no specific reference to new contract programs but it appears that FAR 52.222-46(c) sufficiently spells out this coverage. The provision broadly advises: "The Government is concerned with the quality and stability of the work force to be employed on this contract." The same provision cautions offerors that compensation that is unrealistically low or not in reasonable relationship to the various categories "[m]ay be viewed as evidence of failure to comprehend the complexity of the contract requirements."⁶⁶

"Professional Employees" Defined

"Professional employees" are any persons that meet the definition of 29 C.F.R. Part 541 for an employee employed in a bona fide professional capacity.⁶⁷ These employees have a recognized status based upon acquiring professional knowledge through prolonged study.⁶⁸ To qualify as a professional employee for a

contract, this person's effort must be furnished essentially in a professional capacity.⁶⁹ However, no requirement exists that the proposal identify the specific persons who will fill these positions unless the RFP mandates otherwise.⁷⁰

Issues have arisen regarding the distinction between professional and non-professional workers. Contractor personnel performing non-professional services covered by the Service Contract Act (SCA), 41 U.S.C.A. Chapter 67, on the one hand, and professional employees performing professional services essentially covered by FAR 52.222-46, on the other hand, are mutually exclusive.⁷¹ At the same time, as the Court of Federal Claims has recognized,⁷² the provision is designed to afford professional services employees similar protections mirroring those afforded workers under the SCA.⁷³ However, FAR 52.222-46 applies only to evaluation of professional employees. Thus, in *People's Accident Information Service, Inc. d/b/a Securit*,⁷⁴ GAO dismissed a protest alleging that the agency did not evaluate proposals in accordance with FAR 52.222-46, which was incorporated into the solicitation, but where the RFP did not include any professional labor categories.

"Meaningful Number" Of Professional Employees

FAR 22.1103(a) limits inclusion of FAR 52.222-46 to when the contract will require "meaningful numbers of professional employees" but gives no further criteria for making this calculation. Case law commonly uses the dictionary to explain otherwise undefined legal terms.⁷⁵ The dictionary definition of "meaningful" is "significant" or "of value."⁷⁶ The difficult interpretive issue for agencies and industry is whether "meaningful" for purposes of FAR 52.222-46 is to be construed in absolute or relative numbers. Thus, if the contract calls for about 25 personnel and only three professional employees under any rational measure are needed to execute the contractual objectives, then the use of professional employees would not be "meaningful" under FAR 52.222-46. By contrast, if the RFP calls for about 25 personnel and 20 professional employees under any rational basis would be needed to execute the contractual objectives, then the use of professional employees would surely be "meaningful" under FAR 52.222-46. What result if the necessary cadre of professional employees under any rational measure would be more in the gray zone, such as 10 such persons? How far does agency discretion reach in these circumstances?

No cases were found substantially exploring these issues. The U.S. Court of Appeals for the Federal Circuit has only briefly indicated that the Contracting Officer under the "meaningful numbers of professional employees" standard has discretion to include the provision in the RFP and the contract.⁷⁷ Thus, resort must be made to other precepts of regulatory construction.

One possible solution for defining the concept of "meaningful

numbers" comes from the Office of Federal Procurement Policy Letter 78-2, the May 2, 1978 precursor to FAR 52.222-46, which protects against wage busting for professional employees.⁷⁸ The goal here for FAR 52.222-46 is very close to the goal of the SCA and its main implementing regulation, FAR 52.222-41, which protects against wage busting for workers covered under the SCA when the "principal purpose" of the contract encompasses non-professional contractor employees.⁷⁹ Thus, the SCA and its regulations provide a helpful analogy for deciding the standard for "meaningful numbers" under FAR 52.222-46.

Commentators indicate the SCA applies to a contract when 20% of the work force is covered by the SCA.⁸⁰ Thus, given the parallel policies between the two programs, a credible argument exists that a similar 20% test should apply for FAR 52.222-46. A word of caution is order, however, because it must be remembered that the suggested 20% dividing line is not a mechanical test. Special factors under a particular contract could place the percentage above or below the suggested threshold. This caution finds its roots in an overriding principle of the federal contracting system. As GAO has held, "each procurement stands on its own" merits.⁸¹

Fringe Benefits

The total compensation plan must address any employee "fringe benefits," which are defined as an "an employment benefit (such as paid holidays) granted by an employer that has a monetary value but does not affect basic wage rates."⁸² Although an agency has no obligation to award a contract to an offeror with fringe benefits identical with those of the incumbent's,⁸³ the agency must still conclude that the new contractor's overall compensation package is realistic.⁸⁴

In *Target Media Mid Atlantic, Inc.*,⁸⁵ the protester challenged what it termed the agency's inadequate and "conclusory" evaluation of the awardee's proposed fringe benefits. In this decision, GAO responded that FAR 52.222-46 does not require separate agency findings or analysis that an offeror's proposed fringe benefits and salary are independently realistic or comparable to the awardee's fringe benefits.⁸⁶ Instead, the FAR provision requires only that agencies assess whether an offeror's overall total compensation package, including the fringe benefits, is realistic. GAO also ruled the agency sufficiently had considered the impact of the awardee's fringe benefits upon the awardee's recruitment and retention efforts. These awardee benefits included an employee bonus plans, paid time off, 401(k) matching and retirement programs, employee stock ownership plan, tuition assistance, health insurance, and long term career path. GAO in *Target Media* concluded that the plan was realistic because the awardee's proposed benefits were comparable to, or in excess of, the incumbent's and the protester's fringe rates.⁸⁷

Comparison Of Burdened vs. Unburdened Rates

Where a solicitation requests unburdened labor rates, the agency may generally not rely upon fully burdened labor rates to evaluate offerors' compensation under FAR 52.222-46. The reason is that fully loaded rates include direct labor as well as indirect costs; therefore, a loaded labor rate without a breakdown does not provide a verifiable basis to evaluate and compare employee salaries and fringe benefits.⁸⁸ More specifically, where an offeror simply lumps together a burdened rate with no breakdown for burdens such as overhead rate, general and administrative rate, and profit, it would be impossible to isolate the unburdened labor rates and fringe benefits.

By contrast, as GAO explained at length in *MicroTechnologies, LLC*,⁸⁹ where a solicitation expressly provides that offerors shall provide only burdened labor rates, and advises that those rates would be compared to Bureau of Labor Standards rates, there is no basis to sustain a protest challenging the agency's reliance on the burdened rates for purposes of assessing the realism of professional compensation under FAR 52.222-46. In essence, GAO's decisions hold that an offeror has no basis to expect the agency would perform any analysis other than what was set forth in the solicitation. On this last point, GAO in *MicroTechnologies* summarized its holding:

We conclude that none of the decisions by our Office stand for the proposition argued by the agency: that where an agency includes FAR clause 52.222-46 and requests unburdened rates, the agency may base its evaluation of professional compensation on burdened labor rates that do not provide insight into the actual salary and fringe benefits to be paid to those employees. Because the burdened rates evaluated by the agency included cost elements that are not provided to employees in the form of salary or benefits, the use of burdened rates could have led to a misleading conclusion regarding the realism of the awardee's professional compensation.⁹⁰

Therefore, these other lines of GAO precedents do not undermine the usual need for a comparison of unburdened rates.

Unrealistic Compensation For Particular Employees

As suggested above, price realism analysis is intended "to ensure that an offeror understands the solicitation requirements and actually can perform those requirements prescribed in the [RFP] in the manner that it proposes."⁹¹ Although it is common that an awardee will propose one or more professional employees whose compensation appears unrealistic to the Contracting Officer, the agency's job is not simply to do a tally of the labor categories to see how many employees are within the group being suitably compensated.⁹² Instead, the analysis should be on whether the offeror's professional employee compensation as a whole is realistic.

A hypothetical situation with extreme (but not impossible)

facts illustrate some of the challenges in this area. Where only a handful of professional employees out of 50 such personnel are below the desired adequate compensation level, then absent some important basis to reject the offer, that shortfall should not be a proposer's disqualifying RFP deficiency. This reasoning has full support from FAR 52.222-46 itself, whose consistent theme is on the risk of overall performance failure. Absent an invalid explanation from the offeror, FAR 52.222-46(d) gives the agency an avoidance mechanism from automatically being compelled to render an offer deficient. It will be recalled that a failure to comply with FAR 52.222-46 "may constitute sufficient cause to justify rejection of a proposal."⁹³

On the other hand, if only three employees out of the 50 needed personnel meet the test for realistic compensation, that fact should be concerning to the agency as constituting grounds for rejection under FAR 52.222-46(d). From a holistic standpoint, it would be quite unlikely that such an overall underqualified professional work force could succeed on the project. Again, each acquisition stands on its own merits.

Comparable Projects

Agencies commonly use information from prior contracts for assessing the realism of proposed professional employee compensation. Both the FAR and GAO accept that an agency may use prices for the same or similar services in determining whether the price for an offered service is realistic. Thus, FAR 15.404-1(b)(2) permits the comparison of previously proposed prices and previous Government or commercial contract prices with current proposed prices for the same or similar services. GAO approved use of a variation on this technique in *Information Spectrum, Inc.*,⁹⁴ where the agency used the salaries of comparable civil service employees to assess the realism of a private sector offeror's proposed salaries.⁹⁵

Even when the work under the compared contracts is similar, certain features could render them dissimilar for special reasons. Thus, in *Systems Plus, Inc.*,⁹⁶ GAO observed that two previously issued task orders were not comparable because the agency issued one of the task orders as a sole-source contract in which the contractor was not required to submit a compensation plan or to identify the salaries and rates it would pay to key personnel.

Use Of Statistical Techniques

In *Dalpar Corporation*,⁹⁷ the agency's cost analyst indicated that the threshold for significantly high or low salaries in a procurement for tactical air traffic control training services would be a salary more than two standard deviations away from the average salary data. Because the awardee's proposed salaries were within one standard deviation, the agency analyst determined that the awardee's salaries represented fair and proper

compensation for the professional employees under the contract, and that awardee's proposal was realistic based on the awardee's management approach and understanding of the requirements of the contract.

Although GAO in *Dalpar* denied the protest against the alleged misapplication of FAR 52.222-46, it overlooked an opportunity to caution agencies and offerors about overly mechanical or arbitrary methods of cost evaluation—here, the potentially automatic rejection of a proposed price merely because it was two standard deviations above the norm.

GAO has indicated it disfavors “overly mechanical” methods of conducting price realism evaluations.⁹⁸ Thus in *Lifecycle Construction Services, LLC*,⁹⁹ GAO did not decide whether a percentage range above or below a median of offered prices is an appropriate method for an agency to use in determining price realism. GAO in *Lifecycle Construction* strongly indicated, however, that “mechanical approaches to evaluation and source selection are generally disfavored,” except where the RFP announces, and the procuring activity implements, a mechanical price evaluation approach.¹⁰⁰

In particular, GAO has criticized the mechanical comparison of employee compensation to Government estimates. GAO commented in *Hughes STX Corporation*:

While a reasonably derived agency estimate of direct, unburdened labor rates for comparable labor categories, based upon historical experience, can provide an objective standard against which proposed rates may be compared, an agency may not mechanically apply that estimate to determine evaluated costs. It may well be that in some instances an estimate has limited applicability to a particular company, and in those instances, any absolute reliance upon estimates could have the effect of arbitrarily and unfairly penalizing the firm and depriving the government of the benefit available from such a firm.¹⁰¹

Indeed, no absolute requirement exists that the agency compare an offeror's proposed costs with the Government estimate.¹⁰² A practical and flexible use of evaluation techniques based on the proposal as a whole, including, but not limited to, the use of sound independent Government estimates, would facilitate a more discriminating price evaluation.

Effect Of Inconsistent Proposal Information/Agency Selective Use Of Data

In *Dalpar Corporation*,¹⁰³ the protester argued that the agency's salary comparison analysis was unreasonable because the agency had used what Dalpar conceded was incorrect salary data from Dalpar's proposal. According to Dalpar, the agency should have used the higher annual salaries from the company's proposal's price narrative instead of the lower compensation levels in the Dalpar's proposal price worksheets. Because the so-

licitation informed offerors that the Air Force would use only the proposal worksheets for comparison purposes, GAO ruled it was immaterial the protester also had provided higher inconsistent narrative salary information.

In analyzing this point about the conflicting proposal content, *Dalpar* was correctly decided based on the rule stated in other cases that “the government is not required to search throughout [a] proposal for information demonstrating compliance with specific requirements, where the solicitation instructed offerors to identify the location of the information.”¹⁰⁴ GAO's decision indicates, however, that the agency made the award on initial proposals without discussions. If the agency had held discussions with Dalpar, and considering that the agency knew conflicting information was in the correct section of the proposal even if on the wrong page, there might have been a failure of meaningful discussions had the agency failed to point out the offeror's proposal ambiguity on price.¹⁰⁵ The fact remains the agency did not hold discussions in *Dalpar* and so GAO's rejection of the proposal was justified.

Inability To Compare Incumbent/Offeror Labor Rates

In *Target Media Mid Atlantic, Inc.*,¹⁰⁶ the agency in applying FAR 52.222-46 argued that it was unable to compare incumbent personnel rates on the current contract with the protester because the categories were not a one-for-one match between the incumbent and the protesting offeror on the title, description, and skill level of the labor categories. Based on the limited cost information available to the agency, GAO approved the Navy's alternative method of evaluating another incumbent contractor's associate, intermediate, and lead level personnel on a similar contract to the proposed effort.

In justifying this alternative approach, GAO reasoned that no requirement exists for scientific certainty in an agency's cost realism evaluation.¹⁰⁷ This principle is consistent with other GAO decisions that have ruled an agency may rely on information contained in offerors' cost proposals in performing a cost evaluation without seeking additional independent verification of each item of proposed costs.¹⁰⁸ The reason is the extent to which an agency decides to analyze proposed costs is generally a matter for the agency's reasonable discretion in view of other cost information reasonably available during the evaluation.¹⁰⁹

In another GAO case encountering a similar problem, an awardee proposed to staff a substantial portion of its personnel from external sources, but the agency limited its analysis to the awardee's internal cost data and did not assess the realism of the proposed rates through such methods as comparison of the questioned offeror's rates either to the prevailing market rates, the rates paid to incumbent employees, or the rates proposed by other offerors. GAO held the agency approach was unreasonable and sustained this protest ground.¹¹⁰

Use Of Compensation Surveys And Studies

FAR 52.222-46(a) requires offerors to include supporting information for the total compensation plan. Supporting information under the provision can include recognized national and regional compensation surveys and studies of professional, public, and private organizations. In this respect, GAO has approved the use of such data analysis sources, such as, but not limited to, salary.com, glassdoor.com, and indeed.com.¹¹¹ Government-generated information from the U.S. Department of Labor, Bureau of Labor Statistics can be valuable as well.¹¹² Indeed, an agency can prescribe in the RFP that it will use a particular survey or study to perform the compensation analysis.¹¹³

Often, a procuring activity will perform a particularly thorough job in vetting a proposed professional compensation plan for FAR 52.222-46 compliance. For example, in a procurement for aircraft training services, the agency compared the awardee's proposed salaries against pricing for instructors from the existing contract, used a compensation survey from SalaryExpert.com, employed the independent Government estimate, and relied upon the other offerors' proposed salaries for their instructors at each geographic location for the services identified in the RFP.¹¹⁴ Other instances exist where the agency performed a thorough review of a proposed professional employee compensation plan.¹¹⁵

Choice Of Midpoint Range

In *Scope Infotech, Inc.*,¹¹⁶ the agency determined that the awardee's labor mid-point was the 75th percentile salary range. Based on this analysis, the agency concluded that there was no evidence to suggest the awardee's professional compensation plan salaries were unduly low or otherwise not competitive. The protester argued the agency's evaluation of the awardee should have compared the awardee's 50th percentile range to the incumbent's rate. GAO rejected the protester's argument, reasoning that price realism analysis is a matter within the sound exercise of the agency's discretion and nothing in the RFP required the agency to select the 50th percentile range.

Non-Incumbent Offeror Claims To Retain The Incumbent Employees

Perhaps the most sensitive and potentially controversial issue in professional employee compensation protests is where non-incumbent offerors claim the ability to recruit and retain incumbent contractor employees to work on the proposed contract. This issue is particularly stressful for the incumbent employees who might feel pressure to hedge their bets and to commit to work for both the incumbent contractor if the latter decides to compete once again for the contract and also to commit separately to a competitor to the incumbent who also desires the award.

This issue becomes especially pressing where the non-incumbent offeror plans to pay these former incumbent personnel lower salaries or fringe benefits than those they enjoyed in their prior employment. Most professional employees would resent being asked to take a pay cut in performing the essentially same work while wearing a different badge. The potential difficulty for the employees can become even more pronounced when a limited number of professionals have superior expertise in the subject matter and whatever offeror proposes such personnel would likely enjoy a major advantage in the competition at both the prime and task order level when these personnel sign a commitment letter with just one offeror. If the procurement is for a multiple award task order contract (MATOC) program, and the same personnel commit to more than offeror, the agency should hold discussions with the involved offerors on whether their teams would fully available to perform orders during the life of the MATOC.

In a comprehensive decision, GAO addressed a similar challenge (and sustained a protest) in *A-P-T Research, Inc.*¹¹⁷ In *A-P-T*, the record failed to support the agency's conclusion that the non-incumbent awardee would be able to retain a high percentage of the incumbent's employees at significantly lower compensation levels as compared with these individuals' current salaries. Even though the agency had engaged the awardee on this point during discussions, GAO faulted the agency for accepting the awardee's conclusory and general statements asserting the ability to recruit and retain the incumbent's professional employees.

GAO did acknowledge, however, that a valid explanation could exist for such low rates as supported by the facts in a procurement. Indeed, the mere fact the RFP requires a realism evaluation does not bar an offeror from proposing—and an agency from reasonably deciding to accept—a below-cost, fixed-price offer.¹¹⁸ For instance, these reasons could exist where the record evidenced that the incumbent's engineers would switch employers and agree to lower-than-average compensation levels, such as where the work was relatively simple, an abundance of eligible candidates existed in the market, thereby keeping compensation levels low, or if the offeror had counterbalancing fringe benefits.¹¹⁹ Because these exceptions were missing, GAO found that the source selection decision in *A-P-T* lacked a rational basis and sustained the protest.¹²⁰

Use Of Blended Prime/Sub Rates

In *Dalpar Corp.*,¹²¹ the solicitation's instructions for the total compensation plan did not require salary and fringe benefit information separately for each employee. The RFP also did not require offerors to identify whether the professionals were subcontractor or prime employees. (Both categories fall within

FAR 52.222-46.) The awardee's price proposal provided a blended salary and fringe benefit rate for all proposed employees. GAO rejected for lack of evidence the protester's contention that the awardee could have concealed overhead in this rate; notably, the RFP did not require offerors to eliminate this possible issue in their proposals. Therefore, GAO approved the reasonableness of the agency's reliance on the awardee's blended rate. By contrast, GAO also intimated it would have been permissible to evaluate to evaluate prime and subcontractor professional employee compensation through separate rate information submissions from the proposed prime contractor and its subcontractor.¹²²

Level Of Employee Commitment To Project

FAR 52.222-46 does not require offerors to present letters of commitment from proposed professional employees. However, requiring such letters for such personnel is a common RFP practice. These guarantees can become especially valuable from incumbent employees whom the offeror would like to lure from the incumbent contractor (which firm would also likely compete for the award).¹²³

GAO has indicated that when an offeror includes such letters, even when not required by the RFP, this submission can bolster an agency's documented ability to retain and recruit qualified personnel.¹²⁴ In fact, to preclude any protest arguments concerning the level of employee commitment it would be a good idea for the individual professional employee to write a commitment letter affirming unconditionally that the employee willingly is on board to perform for the salary in the offeror's price proposal.

On the other hand, as indicated above, some professional employees might push back on signing such a letter because they could be uncomfortable in the knowledge that there are letters floating around in the business world they have signed stating a public willingness to leave their current employers for a better deal. Another cautionary note for offerors is to avoid bait and switch tactics on the availability of key personnel.¹²⁵

Relation To Uncompensated Overtime

Under 10 U.S.C.A. § 2331 and FAR 37.115-2(a), the use of uncompensated overtime "is not encouraged." FAR 37.101 defines "uncompensated overtime" as "the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act."

As part of the above statutory and regulatory policy, FAR 37.115-2(c) instructs Contracting Officers to ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the

level of technical expertise required to fulfill the Government's requirements. When acquiring these services, Contracting Officers must conduct a risk assessment and evaluate any proposals received that reflect factors such as: "(1) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and (2) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions."¹²⁶

Finally, as provided in FAR 37.115-2(d), whenever there is uncompensated overtime, "the adjusted hourly rate (including uncompensated overtime) (see definition at [FAR] 37.101), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours."

Based on the above FAR guidance, where the RFP requires offerors to propose costs using an estimated number of man-hours, an offeror that can credibly state that certain of its employees will work more than 40 hours per week without additional compensation can, other things being equal, propose lower costs.¹²⁷ In addition, although the methodology for using uncompensated overtime may vary, offerors are permitted to calculate their costs using an effective rate that is lower than the employee's standard hourly rate.¹²⁸

In *Systems Integration & Research, Inc.*,¹²⁹ the RFP did not prohibit the use of uncompensated overtime, but the agency was still concerned that uncompensated overtime could still potentially lead to unrealistically low proposed rates that could impair an offeror's ability to attract and retain qualified professional employees. Therefore, the agency included the following provision in section L of the RFP:

Briefly summarize the compan[y's] policy on [uncompensated overtime] and state what if any impact it may have on this effort. If [uncompensated overtime] is included in any of the cost estimates used it should be clearly identified with an explanation as to why it is needed and how it is consistent with the RFP [§] L clause, 'Requirements Concerning Work Week' and RFP [§] I-1 clause, DFARS 252.237-7019 Identification of Uncompensated Overtime. Contractor and subcontractors shall provide five years of history of salary rates and retention, by employee, for those employees who have performed and are proposed to perform using [uncompensated overtime]. Explain any salary increases and/or breaks in employment for these employees. Contractor and subcontractors shall provide a company-wide retention rate for the last five years where [uncompensated overtime] was employed.¹³⁰

During the source selection, the Government agency enforced the above RFP's provision as written and found none of the undue dangers of uncompensated overtime present in the awardee's proposal. The procuring activity also gave proper weight to a Defense Contract Audit Agency (DCAA) report verifying that no professional employee rates actually being paid were unrealistically low.¹³¹ Accordingly, GAO denied a protest

that the agency had misapplied the provision regarding the awardee's reasonable use of uncompensated overtime for specific, long-tenured professional employees.¹³²

Documentation Of The Evaluation

The record must reflect an "adequate contemporaneous evaluation" by the agency of the realism of offerors' proposed prices.¹³³ Where an agency fails to do so, it runs the risk that GAO will be unable to determine whether the agency's price realism evaluation was reasonable.¹³⁴ Notwithstanding a brevity of documentation, it will suffice as long as it adequately reflects the core of the agency's conclusion, *i.e.*, the awardee's proposed price was commensurate with the technical requirements.¹³⁵

GAO will carefully review the quality of documentation that the agency has generated in compiling the agency report; this point can be the deciding issue in a protest.¹³⁶ It will not suffice for purposes of documentation that the agency based its finding of price realism based exclusively on the independent Government estimate and the results of the competition and did not consider supporting surveys or studies.¹³⁷ An example of a failure of adequate documentation occurred in *Wackenhut International, Inc.*,¹³⁸ where GAO sustained a protest that the RFP contemplated the agency's reviewing compensation plans in comparison with current wages but the agency failed to perform such a review. A second example would be where an awardee considered salaries for current employees, but failed to consider salaries for new hires, did not consider the awardee's salary reductions each year of the contract, and ignored the awardee's drastically lower compensation rates for low-density, harder to fill, positions.¹³⁹

While GAO generally gives little or no weight to reevaluations and judgments prepared in the heat of the adversarial process,¹⁴⁰ if the moving party submits a post-protest (post hoc) explanation that provides a detailed rationale for contemporaneous conclusions, and simply fills in previously unrecorded details, GAO will generally consider the latter explanations when credible and consistent with the contemporaneous record.¹⁴¹ These post-protest explanations most commonly include individual agency personnel sworn statements or declarations and any hearing testimony.¹⁴²

The Court of Federal Claims follows a slightly less generous approach to GAO regarding the admissibility of post hoc reasons and evidence for earlier evaluation decisions. In *CRAssociates v. United States*,¹⁴³ a protest successfully challenging the agency's evaluation under FAR 52.222-46, the court observed that its statutory jurisdiction under the Administrative Procedure Act (APA) forbids after-protest agency "post hoc rationalizations":

Even if the CO's statement was not contradicted by the record,

this court would be loath to afford it any weight in determining whether the agency complied with the FAR. Other courts conducting APA reviews have limited their consideration of an agency's decision to the analysis and rationale appearing in the administrative record as of the time of the decision, holding that "[a]ny *post hoc* rationales an agency provides for its decision are not to be considered." This approach serves to reinforce the agency's obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" And the agency must discharge this duty before, not after, it renders a decision.¹⁴⁴

A good example from the Federal Circuit of impermissible post hoc evidence occurred in *OMV Medical, Inc. v. United States*.¹⁴⁵ In *OMV*, the court rejected the Air Force's determination of minimum acceptable salary requirements on the ground that they were generally consistent with salaries set forth in the Occupational Outlook Handbook. The court's rationale was that the Air Force did not use the Occupational Outlook Handbook for that purpose contemporaneously during the evaluation of proposals.

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance (reasonable likelihood) of receiving the award, there is no basis for finding prejudice, and the courts and GAO will not sustain the protest.¹⁴⁶ The policy here is that it is wasteful of Government resources to overturn an award on immaterial or de minimis errors where the awardee's proposal otherwise met the agency's needs and the agency's erroneous action did not reasonably displace the protester as the awardee.

An example shows the competitive prejudice doctrine in action. In *Target Media Mid Atlantic, Inc.*,¹⁴⁷ the protester asserted it was prejudiced by the agency's failure to adequately evaluate the awardee's professional employee fringe benefits. The protester argued that this analysis would have resulted in further upward adjustments to the awardee's proposed cost and the risks associated with the awardee's technical proposal. However, GAO concluded that agencies have no duty to perform a separate realism evaluation of fringe benefits but even if one were required, the awardee's proposed fringe rate here would not have meaningfully impacted the source selection decision. In this respect, GAO noted that awardee's proposal was rated superior to the protester's proposal in the significantly more important non-cost factors and the awardee's price was more than \$13 million less expensive than the protester's proposal.¹⁴⁸

Critique Of FAR 52.222-46

FAR 52.222-46 allows, and even strongly encourages, recog-

nized “national and regional” compensation surveys and studies of professional, public, and private organizations, used in establishing the total compensation structure.¹⁴⁹ The problem with this evidence is that it sweeps too broadly. A national or regional survey could likely contain salaries and fringe benefits much higher than the going market rate for particular companies operating in those U.S. jurisdictions where such compensation is lower.

Such a comparison to national or regional studies or surveys could lead to a misleading determination that an offeror’s compensation is unrealistically low. For example, a survey of compensation paid to professional employees who live and work in the high cost Northeastern Corridor (Boston, Washington D.C., or New York City) would be an inappropriate tool for evaluating the lower level of professional employee compensation paid to these employees living and working in lower cost Alabama, Mississippi, or Louisiana.

The analogous rules for assessing executive compensation under FAR 31.205-6, “Compensation for personal services,” provide an apt basis for the FAR Councils to give FAR 52.222-46 a more discriminating focus in considering professional employee compensation. This point is especially valid with regard to narrowing the documentation comparison to employees that perform similar work in a similar geographical vicinity.¹⁵⁰ As one commentator observed about the closely related topic of executive compensation under FAR 31.205-6:

In selecting the appropriate survey, one should consider all of the factors—such as size, revenues, industry, geographic area, and whether the firm is closely or publicly-held—that are relevant to the contractor’s labor market. For example, if a contractor competes for employees with other firms in the same geographic area, surveys of firms in that area should be used. The [Armed Services Board of Contract Appeals] has consistently rejected surveys, whether proffered by the Government or the contractor, that analyze compensation practices during years other than the year in dispute. The Board has also rejected surveys that fail to use firms closely related to the contractor’s business.¹⁵¹

Indeed, a strong likelihood exists (particularly with small business concerns that often have dual hatted personnel) that the same person could be both a professional employee and an executive. This overlap strongly favors applying the same rules about FAR 52.222-46 surveys and studies to both sets of employees.

Guidelines

These *Guidelines* are intended to assist you in understanding the legal and practical issues that Government agencies and offerors face related to FAR 52.222-46. They are not, however, a substitute for professional advice and representation in particular circumstances.

1. Both agencies and offerors can easily overlook the presence of FAR 52.222-46 in the solicitation for an upcoming negotiated contract expected to exceed \$700,000 where the solicitation merely incorporates the provision in a one-line reference. As part of their initial solicitation review, prospective offerors should carefully note the presence or absence of FAR 52.222-46 and prepare their proposals accordingly.

2. FAR 52.222-46 contains detailed instructions for what offerors and agencies “should,” “will,” or “must” do for the submission and evaluation of a total compensation plan. Both the offeror’s proposal preparation team and the agency’s evaluation team should highlight—and address—each “should,” “will,” or “must” FAR 52.222-46 reference in performing their duties. The term “should” as used in the FAR means “an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.”¹⁵² “Will” in a contract should reflect only the future tense (not create obligations to perform). It can be paraphrased as “has the duty to” and refers only to capable subjects.¹⁵³

3. The solicitation may paraphrase or supplement the guidance from FAR 52.222-46. Offerors should carefully review such language to ensure that non-standard terms do not conflict with FAR 52.222-46. With a conflict, these extra terms refining or expanding upon FAR 52.222-46 could constitute FAR deviations as proscribed by FAR 1.401. For all of these reasons, agencies and offeror should be watchful of, and timely bring to the Contracting Officer’s attention before the closing time for receipt of proposals, RFP gaps, omissions, defects, or ambiguous solicitation terms. One particularly egregious example of a solicitation defect would be where the RFP simply includes FAR 52.222-46 but does not contain explicit guidance on the contents of a proper compensation plan.

4. The inclusion of FAR 52.222-46 does not permit contracting officials to perform a full-fledged price realism evaluation on the entire proposal. Instead, FAR 52.222-46 authorizes only a price realism evaluation of the compensation plan and not the mix and number of professional employee staff members.

5. An apparently unduly low overall proposal can have numerous valid explanations. Such a discrepancy could (and often should) be readily resolved through a price verification or even competitive range discussions if the acquisition gets to that stage of the procurement.

6. FAR 52.222-46 adopts the empirically untested position that unrealistically low rates are a strong predictor of such issues as an unsound management plan and an inability to execute uninterrupted high-quality work. Low salaries do not ipso facto result in unsound management or poor execution of the work. There can be numerous reasons why projects fail, even with

proper employee compensation, such as a misunderstanding (for good reasons or bad) of the scope of work, contractor undercapitalization, or contractor reliance on obsolete technology or other methods. Therefore, it is too simplistic without empirical evidence to blame unduly low professional pay and benefits as major root causes of performance issues.

ENDNOTES:

¹FAR 22.1103.

²FAR 52.222-46(a). The (since-rescinded) precursor to FAR 52.222-46 is Office of Federal Procurement Policy Letter No. 78-2, Preventing Wage Busting for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts, 43 Fed. Reg. 18805 (May 2, 1978). See also Joule Tech. Corp., Comp. Gen. Dec. B-192125, 58 Comp. Gen. 550, 79-1 CPD ¶ 364 (explaining “wage busting” under OFPP Policy Letter 78-2).

³FAR 52.222-46(a); see Innovation Mgmt., Inc., Comp. Gen. Dec. B-292818, 2003 CPD ¶ 209.

⁴FAR 52.222-46(a) (emphasis added); cf. *tg Bauer Assocs., Inc.*, Comp. Gen. Dec. B-228485, 87-2 CPD ¶ 189 (GAO will dismiss a bid protest that an awardee will not comply with FAR 52.222-46 because the awardee’s actual compliance with its plan is a non-protestable matter of contract administration).

⁵ELS Inc., Comp. Gen. Dec. B-283236 et al., 99-2 CPD ¶ 92 at 10–11. But see FAR 52.222-46(b) (stating purpose is to assure “high quality work”).

⁶Nash, “Realism of Professional Services Salaries: A Mandatory Evaluation,” 31 *Nash & Cibinic Rep. NL* ¶ 4 (Jan. 2017).

⁷NASA is the only Executive Branch agency that has supplemented FAR 52.222-46. See 48 C.F.R. 1852.231-71.

⁸CRAssociates, Inc., Comp. Gen. Dec. B-414171, 2017 CPD ¶ 92; see also FAR 1.108(c) (the dollar threshold for the purpose of applicability under the FAR is the final anticipated dollar value of the action, inclusive of the dollar value of all options).

⁹FAR 22.1103. But see *MicroTechnologies, LLC* Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219 (citing *People’s Accident Info. Serv., Inc. d/b/a Securit*, Comp. Gen. Dec. B-404211, 2012 CPD ¶ 82 at 5 (GAO erroneously referred to FAR 52.222-46 as a “clause”).

¹⁰See FAR subpt. 52.1 (“Instructions for Using Provisions and Clauses”); FAR 52.252-1 (“Solicitation Provisions Incorporated by Reference”) (explaining “provisions”).

¹¹See FAR 52.301; FAR 52.222-46; see also FAR 15.204-1 (explaining Uniform Contract Format); FAR 15.204-5 (explaining representations and instructions).

¹²FAR 52.252-1 (stating rule).

¹³For an example of such an agency oversight, see *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 372 (2010).

¹⁴E.g., *Signal Corp.*, Comp. Gen. Dec. B-275502.3, 98-2 CPD ¶ 86 (including FAR 52.222-46 in price section of the RFP).

¹⁵E.g., *Arctic Slope Mission Servs. LLC*, Comp. Gen. Dec. B-417244, 2019 CPD ¶ 140; *Serco, Inc.*, Comp. Gen. Dec. B-298266, 2006 CPD ¶ 120.

¹⁶SETA Support Servs. Alliance, Comp. Gen. Dec. B-401754.3 et al., 2010 CPD ¶ 10 (subfactor under recruitment/

retention subfactor of the technical/management factor).

¹⁷SEEMA, Inc., Comp. Gen. Dec. B-277988, 98-1 CPD ¶ 12; *Comarco, Inc.*, Comp. Gen. Dec. B-258204 et al., 96-1 CPD ¶ 12.

¹⁸*Arctic Slope Mission Servs. LLC*, Comp. Gen. Dec. B-417244, 2019 CPD ¶ 140 (plan was rated for “acceptability”); *Maxim Healthcare Servs., Inc.*, Comp. Gen. Dec. B-412967.9 et al., 2018 CPD ¶ 230; *ITT Corp., Sys. Div.*, Comp. Gen. Dec. B-310102 et al., 2010 CPD ¶ 12 (pass/fail).

¹⁹*Joule Eng’g Corp.—Recons.*, Comp. Gen. Dec. B-217072, 64 Comp. Gen. 540, 85-1 CPD ¶ 589 (plan had weaknesses based on likely hiring difficulties, the absence of detail regarding medical and disability benefits, and a lack of a pension plan).

²⁰*Global Language Center*, Comp. Gen. Dec. B-413503.8, 2017 CPD ¶ 238; *Arora Group, Inc.*, Comp. Gen. Dec. B-277674, 98-1 CPD ¶ 64.

²¹See *A-P-T Research, Inc.*, Comp. Gen. Dec. B-413731.2, 2017 CPD ¶ 112 (management approach subfactor and cost realism); *National Med. Staffing, Inc.*, Comp. Gen. Dec. B-240181 et al., 70 Comp. Gen. 505, 91-1 CPD ¶ 486 (plan evaluated under price and several technical evaluation subfactors, recruitment and retention); *Comarco, Inc.*, Comp. Gen. Dec. B-258204 et al., 96-1 CPD ¶ 12 (cost factors of realism and reasonableness and staffing approach under the management factor).

²²See *Milani Constr. LLC*, Comp. Gen. Dec. B-401942, 2010 CPD ¶ 87.

²³See *Cromartie Constr. Co.*, Comp. Gen. Dec. B-271788, 96-2 CPD ¶ 48 at 5.

²⁴See *KWR Constr., Inc. v. United States*, 124 Fed. Cl. 345 (2015); *Phil Howry Co.*, Comp. Gen. Dec. B-291402.4, 2003 CPD ¶ 33; Nash, “Price Realism Analysis: A Tricky Issue,” 12 *Nash & Cibinic* ¶ 40 (July 1998)

²⁵*Leon D. Dematteis Constr. Corp.*, Comp. Gen. Dec. B-276877, 97-2 CPD ¶ 36 at 3–4.

²⁶*Apptis Inc.*, Comp. Gen. Dec. B-403249, 2010 CPD ¶ 237.

²⁷*Orbital Scis. Corp.*, Comp. Gen. Dec. B-414603 et al., 2017 CPD ¶ 249; see *Tech. Mgmt. Co.*, Comp. Gen. Dec. B-409976, 2014 CPD ¶ 294 at 3–4 (explaining that “it is within the agency’s discretion to reject [a proposal] as unacceptable” where the RFP advised that an offeror “may have its proposal rejected” if its proposal lacks certain items). An unanswered question under FAR 52.222-46 is whether a proposal is awardable under FAR 52.222-46 if the offer has left out mandatory labor categories of its professional employee compensation plan. Cf. *Business Integra, Inc.*, Comp. Gen. Dec. B-407273.22, 2014 CPD ¶ 88 at 4 (failure to provide rates for all labor categories made proposal unacceptable for award) (non-FAR 52.222-46 case).

²⁸FAR 15.404(d)(1).

²⁹*Deco Sec. Servs.*, Comp. Gen. Dec. B-401024, 2009 CPD ¶ 104; *Grove Res. Solutions, Inc.*, Comp. Gen. Dec. B-296228 et al., 2005 CPD ¶ 133.

³⁰*General Dynamics-Ordnance & Tactical Sys.*, Comp. Gen. Dec. B-401658 et al., 2009 CPD ¶ 217 at 3.

³¹See *Sparksoft Corp. v. United States* 141 Fed. Cl. 609, 625 (2019); *ManTech Envtl. Tech., Inc.*, Comp. Gen. Dec. B-271002 et al., 96-1 CPD ¶ 272.

³²See *ManTech Envtl. Tech., Inc.*, Comp. Gen. Dec. B-271002 et al., 96-1 CPD ¶ 272; *Comarco, Inc.*, Comp. Gen. Dec. B-258204 et al., 96-1 CPD ¶ 12; *Arctic Slope Mission*

Servs. LLC, Comp. Gen. Dec. B-417244, 2019 CPD ¶ 140.

³³Nash, “Postscript IV: Price Realism,” 33 Nash & Cibinic Rep. NL ¶ 37 (July 2019) (citing Octo Consulting Group, Inc., Comp. Gen. Dec. B-416097.3, 2018 CPD ¶ 339, recons. denied, Comp. Gen. Dec. B-416097.5, 2019 CPD ¶ 99).

³⁴See J.A. Farrington Janitorial Servs, Comp. Gen. Dec. B-296875, 2005 CPD ¶ 187 at 4; Emergint Techs., Comp. Gen. Dec. B-407006, 2012 CPD ¶ 295.

³⁵SURVICE Eng’g Co., LLC, Comp. Gen. Dec. B-414519, 2017 CPD ¶ 237.

³⁶LOGC2, Inc., Comp. Gen. Dec. B-416075, 2018 CPD ¶ 204; Sys. Plus, Inc., Comp. Gen. Dec. B-413323.3 et al., 2017 WL 2570951.

³⁷ORBIS Sibro, Inc., Comp. Gen. Dec. B-415714.2, 2018 CPD ¶ 100.

³⁸Optex Sys., Inc., Comp. Gen. Dec. B-408591, 2013 CPD ¶ 244 at 5–6 (“[N]othing about an obligation to review prices for realism bars an offeror from proposing—and an agency from reasonably deciding to accept—a below-cost, fixed-price offer.”).

³⁹See Nash, “Postscript: Price Realism,” 29 Nash & Cibinic Rep. NL ¶ 43 (Aug. 2015); Nash, “Price Realism: A Tricky Issue,” 12 Nash & Cibinic Rep. ¶ 40 (July 1998); Tibbets, “‘There Is No Way They Can Do It at That Price’: How and When the Concept of Price Realism Can Benefit Disappointed Bidders,” 49 Procrmt. Law. 9 (Fall 2013); Bernstein, “Price Realism Analysis in Fixed Price Contracting: Improving the Evaluation Process,” 42 Pub. Cont. L.J. 793 (Summer 2013).

⁴⁰Maxim Healthcare Servs., Inc., Comp. Gen. Dec. B-412967.9 et al., 2018 CPD ¶ 230.

⁴¹See A-P-T Research, Inc., Comp. Gen. Dec. B-413731.2, 2017 CPD ¶ 112.

⁴²See FAR 15.306(a)(1) (allowing such an exchange between agencies and offerors).

⁴³Triad Int’l Maint. Corp., Comp. Gen. Dec. B-408374, 2013 CPD ¶ 208 at 6 (citing principles).

⁴⁴MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219; Apptis Inc., Comp. Gen. Dec. B-403249 et al., 2010 CPD ¶ 237 at 9.

⁴⁵See FAR 15.404-1(d)(3) (stating that with fixed price contracts “the offered prices shall not be adjusted as a result of the analysis”); cf. ORBIS Sibro, Inc., Comp. Gen. Dec. B-415714.2, 2018 CPD ¶ 100 (making upward adjustment for an unrealistically low professional employee labor rate under a proposed cost-reimbursement contract).

⁴⁶General Dynamics One Source, LLC, Comp. Gen. Dec. B-400340.5 et al., 2010 CPD ¶ 45; see also *Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 358 (2009) (“[T]he nature and extent of a price realism analysis is ultimately within the sound exercise of the agency’s discretion, unless the agency commits itself to a particular methodology in a solicitation.”).

⁴⁷Arrington Dixon & Assocs., Inc., Comp. Gen. Dec. B-409981, 2014 CPD ¶ 284; Arch Sys., LLC, Comp. Gen. Dec. B-415262 et al., 2017 CPD ¶ 379.

⁴⁸Arrington Dixon & Assocs., Inc., Comp. Gen. Dec. B-409981, 2014 CPD ¶ 284.

⁴⁹Vinnell Corp., Comp. Gen. Dec. B-270793 et al., 96-1 CPD ¶ 271 (“The fact that there is some risk associated with an aspect

of a proposal does not mean that the agency cannot regard the costs of performance, as proposed, as realistic inasmuch as risk is simply a reflection of the degree to which what is proposed may or may not happen.”).

⁵⁰Jefferson Consulting Group, LLC, Comp. Gen. Dec. B-417555 et al., 2019 CPD ¶ 293; Belzon, Inc., B-404416 et al., 2011 CPD ¶ 40; Lockheed Eng’g & Mgmt. Servs., Inc., B-212858, 84-1 CPD ¶ 18, aff’d on recons., Comp. Gen. Dec. B-212858 et al., 84-1 CPD ¶ 193. The Federal Circuit follows the GAO waiver rule for challenges to apparent RFP deficiencies. See *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313–14 (Fed. Cir. 2007).

⁵¹People’s Accident Info. Service, Inc., d/b/a Securit, Comp. Gen. Dec. B-404211, 2012 CPD ¶ 82.

⁵²Arch Sys., LLC, Comp. Gen. Dec. B-415262 et al., 2017 CPD ¶ 379.

⁵³See ARP Scis., LLC, Comp. Gen. Dec. B-415318.5 et al. 2018 CPD ¶ 302 (protester had notice of the issue through receipt of the agency report but waited more than 10 days to raise the ground with GAO).

⁵⁴Litton Sys., Inc., Amecom Div., Comp. Gen. Dec. B-275807.2, 97-1 CPD ¶ 170 at 4 n.1.

⁵⁵See Signal Corp., Comp. Gen. Dec. B-275502.3 et al., 98-2 CPD ¶ 86 at 6 (citing decisions) (emphasis added). In Signal, the RFP included FAR 52.222-46.

⁵⁶DIGICON Corp., Comp. Gen. Dec. B-275060, 97-1 CPD ¶ 64, at 3 (quoting *Commc’ns Int’l Inc.*, Comp. Gen. Dec. B-246076, 92-1 CPD ¶ 194) (emphasis added). In Digicon, the RFP included FAR 52.222-46.

⁵⁷Triad Int’l Maint. Corp., Comp. Gen. Dec. B-408374, 2013 CPD ¶ 208 at 6 (“Agencies therefore may not conduct a price realism analysis without first advising offerors that the agency intends to do so.”).

⁵⁸*CRAAssociates, Inc. v. United States*, 95 Fed. Cl. 357 (2010).

⁵⁹*CRAAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 370–71 (2010).

⁶⁰See SURVICE Eng’g Co., LLC, Comp. Gen. Dec. B-414519, 2017 CPD ¶ 237 (the agency’s use of estimated rates for proposer’s professional employees rather than their actual rates precluded a rational assessment of whether the incumbent’s employees would be offered lower compensation under a new contract; also noting the agency’s rate comparison might not inform the agency of the risk that incumbent employees might attrite after being offered a salary reduction).

⁶¹*CTA, Inc. v. United States*, 44 Fed. Cl. 684, 701–02 (1999).

⁶²*CRAAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 371 (2010).

⁶³*CRAAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 371 (2010).

⁶⁴See *Target Media Mid Atlantic, Inc.* Comp. Gen. Dec. B-412468.6, 2016 CPD ¶ 358 (agency failed to make this analysis).

⁶⁵*CRAAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 719 (2012).

⁶⁶FAR 52.222-46(c).

⁶⁷See FAR 22.1102.

⁶⁸FAR 22.1101; FAR 22.1102 (citing “accountancy, actuarial

computation, architecture, dentistry, engineering, law, medicine, nursing, pharmacy, the sciences (such as biology, chemistry, and physics), and teaching” as examples of professions); Research Mgmt. Corp., Comp. Gen. Dec. B-237865, 69 Comp. Gen. 368, 90-1 CPD ¶ 352.

⁶⁹FAR 22.1102.

⁷⁰See Target Media Mid Atlantic, Inc. Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208; Target Media Mid Atl., Inc., Comp. Gen. Dec. B-412468.6 2016 CPD ¶ 358 (approving as “reasonable” information what the average worker, located in the same geographic market with skills that matched the RFP labor category requirements, would be paid.). But see DKW Commc’ns, Inc., Comp. Gen. Dec. B-414476 et al., 2017 CPD ¶ 206 at 9 (deeming protestable an offeror’s bait and switch on key personnel whereby (1) the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish performance; (2) the misrepresentation was relied on by the agency; and (3) the agency’s reliance on the misrepresentation had a material effect on the evaluation results).

⁷¹See Relief Servs., Inc., Comp. Gen. Dec. B-252835.3 et al., 93-2 CPD ¶ 116 (rejecting protester’s assertion that SCA workers could be covered under FAR 52.222-46); cf. CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 370 (2010) (FAR 52.222-46 is designed to afford professional services employees protections mirroring those afforded other workers under the SCA).

⁷²CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 370 (2010).

⁷³41 U.S.C.A. § 6701 et seq.

⁷⁴People’s Accident Info. Serv., Inc., d/b/a Securit, Comp. Gen. Dec. B-404211, 2012 CPD ¶ 82.

⁷⁵See, e.g., Int’l Bus. Machs. Corp. v. United States, 201 F.3d 1367, 1372 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001) (Federal Circuit); Dan J. Carney, Controller, Federal Bureau of Prisons, Comp. Gen. Dec. B-259926, 1995 WL 147499 (GAO).

⁷⁶<https://www.dictionary.com/browse/meaningful#>.

⁷⁷Statistica, Inc. v. Christopher, 102 F.3d 1577, 1583 (Fed. Cir. 1996); cf. Americorp, Comp. Gen. Dec. B-231644, 88-2 CPD ¶ 331 (ruling the standard applies to the entire contract term inclusive of options); CRAssociates, Inc., Comp. Gen. Dec. B-414171, 2017 CPD ¶ 92 (declining to explain “meaningful numbers” of professional employees under FAR 52.222-46 because GAO denied the protest on other grounds).

⁷⁸See Office of Federal Procurement Policy Letter No. 78-2, Preventing Wage Busting for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts, 43 Fed. Reg. 18805 (May 2, 1978); see also Joule Tech. Corp., Comp. Gen. Dec. B-192125, 58 Comp. Gen. 550, 79-1 CPD ¶ 364 (explaining “wage busting” under OFPP Policy Letter 78-2).

⁷⁹See FAR 22.1003-1 (stating “principal purpose” rule); Am. Waste Removal Co. v. Donovan, 748 F.2d 1406, 1410 (10th Cir. 1984) (SCA designed to preclude wage busting among competitors); CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 370 (2010) (same).

⁸⁰See Cibinic & Nash, Formation of Government Contracts 997 (2d. ed. 1986) (citing 48 Fed. Reg. 49743 (Oct. 27, 1983)).

⁸¹See Complete Packaging & Shipping Supplies, Inc., Comp. Gen. Dec. B-412392 et al., 2016 CPD ¶ 28 at 7.

⁸²https://www.merriam-webster.com/dictionary/fringe_benefit.

⁸³AT & T Gov’t Solutions, Inc., Comp. Gen. Dec. B-413012 et al., 2016 CPD ¶ 237 (“As long as the agency reasonably concludes that the overall compensation package is realistic, we see no requirement for the agency to match every element.”).

⁸⁴AT & T Gov’t Solutions, Inc., Comp. Gen. Dec. B-413012 et al., 2016 CPD ¶ 237.

⁸⁵Target Media Mid Atlantic, Inc., Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208.

⁸⁶Accord Sys. Dynamics Int’l, Inc. v. United States, 130 Fed. Cl. 499 (2017) (FAR 52.222-46 does not require that an agency weigh salary rates and fringe benefits equally and does not prohibit an agency from considering salary and fringe benefits independently); see also Dalpar Corp., Comp. Gen. Dec. B-414285, 2017 CPD ¶ 135 (an assessment of indirect rates as a whole does not represent an assessment of fringe benefits as compensation).

⁸⁷Cf. SURVICE Eng’g Co., LLC, Comp. Gen. Dec. B-414519, 2017 CPD ¶ 237 (absent an agency’s documented comparison of proposed benefits to actual fringe benefits, GAO will not find reasonable the agency’s FAR 52.222-46 compensation evaluation).

⁸⁸Obsidian Solutions Group, LLC, Comp. Gen. Dec. B-416343 et al., 2018 CPD ¶ 274.

⁸⁹MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219.

⁹⁰MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219.

⁹¹Erinys Iraq Ltd. v. United States, 78 Fed. Cl. 518, 531 (2007); see also DMS All-Star Joint Venture v. United States, 90 Fed. Cl. 653, 663 (2010) (agency discretion is also constrained by the evaluation criteria stated in the RFP and any other methodology to which the agency commits to in the solicitation).

⁹²See, e.g., Obsidian Solutions Group, LLC, Comp. Gen. Dec. B-416343 et al., 2018 CPD ¶ 274 (agency decided that although one out of the 70 full time positions were determined unrealistic, this issue did not render the overall compensation plan unrealistic).

⁹³FAR 52.222-46(d) (emphasis added).

⁹⁴Info. Spectrum, Inc., Comp. Gen. Dec. B-256609.3 et al., 94-2 CPD ¶ 251.

⁹⁵See also Info. Spectrum, Inc.—Recons., Comp. Gen. Dec. B-256609.6, 95-2 CPD ¶ 150 (RFP provided that the price realism evaluation “may include consideration of actual salaries being paid for similar work under other [Naval Air Systems Command] contracts, salaries being paid for comparable civil service employees, excessive amounts of competitive time [uncompensated overtime], DCAA [Defense Contract Audit Agency] audit information, and evaluation of compensation for professional employees”).

⁹⁶Sys. Plus, Inc., Comp. Gen. Dec. B-413323.3 et al., 2017 WL 2570951.

⁹⁷Dalpar Corp., Comp. Gen. Dec. B-414285, 2017 CPD ¶ 135.

⁹⁸America’s Pride, Comp. Gen. Dec. B-401114, 2009 CPD ¶ 116.

⁹⁹Lifecycle Constr. Servs., LLC, Comp. Gen. Dec. B-406907, 2012 CPD ¶ 269.

¹⁰⁰See also Credence Mgmt. Solutions, LLC, Comp. Gen. Dec. B-415960 et al., 2018 CPD ¶ 294 (“While our Office generally disfavors mechanical evaluations of proposals, where, as here, the solicitation placed offerors on notice that the agency did not intend to look beyond a comparison between an offeror’s and the government’s proposed . . . labor rates, we have no basis to find the agency’s evaluation unreasonable.”).

¹⁰¹Hughes STX Corp., Comp. Gen. Dec. B-278466, 98-1 CPD ¶ 52 at 5 (citation omitted) (a proper realism evaluation requires that the agency independently analyze an offeror’s proposed costs based upon its particular approach, personnel, and other circumstances).

¹⁰²See EDAW, Inc., Comp. Gen. Dec. B-272884, 96-2 CPD ¶ 213 at 5–6; Energy & Envtl. Servs. Corp., Comp. Gen. Dec. B-258139.4, 95-2 CPD ¶ 32 at 4.

¹⁰³Dalpar Corp., Comp. Gen. Dec. B-414285, 2017 CPD ¶ 135.

¹⁰⁴NXP USA, Inc., Comp. Gen. Dec. B-417311, 2019 CPD ¶ 176; see also LS3 Inc., Comp. Gen. Dec. B-401948.11, 2010 CPD ¶ 168 (“An agency has no duty to correct or seek to correct errors in offerors’ proposals, nor is an agency required to adapt its evaluation to comply with an offeror’s submission.”).

¹⁰⁵Eastern Med. Prods. & Fabricators, Inc., Comp. Gen. Dec. B-235701, 89-2 CPD ¶ 239 (“[A]ny ambiguities in a proposal should also be brought to the offeror’s attention, in order to give the offeror an opportunity to revise its proposal.”); cf. Comarco, Inc., Comp. Gen. Dec. B-258204 et al., 96-1 CPD ¶ 12 (agency’s meaningful discussions helped awardee cure its issues on professional employee compensation); Nat’l Med. Staffing, Inc., 70 Comp. Gen. 505, Comp. Gen. Dec. B-240181, et al., 91-1 CPD ¶ 486 (where the Government seeks revised proposals the agency is required to hold meaningful discussions about concerns over the offeror’s professional employee compensation).

¹⁰⁶Target Media Mid Atlantic, Inc., Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208.

¹⁰⁷Target Media Mid Atlantic, Inc., Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208 at 4.

¹⁰⁸Allied Tech. Group, Inc., Comp. Gen. Dec. B-271302, 96-2 CPD ¶ 4 at 5.

¹⁰⁹Target Media Mid Atlantic, Inc. Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208; see also Orbital Scis. Corp., Comp. Gen. Dec. B-414603 et al., 2017 CPD ¶ 249; Pac. Architects & Eng’rs, Inc., Comp. Gen. Dec. B-274405.2 et al., 97-1 CPD ¶ 42 at 7; Ferguson-Williams, Inc., B-232334 et al., 88-2 CPD ¶ 630 at 6 (an agency may reasonably rely on statements in an offeror’s proposal which demonstrate the realism of its proposed costs, without independently verifying each item of proposed costs).

¹¹⁰Target Media Mid Atlantic, Inc., Comp. Gen. Dec. B-412468.6, 2016 CPD ¶ 358. For a decision where both the procuring agency and the protested awardee struggled mightily (and ultimately failed) to find a basis for analyzing the cost realism of proposed labor rates for specialty engineering work, see A-P-T Research, Inc., Comp. Gen. Dec. B-413731.2, 2017 CPD ¶ 112.

¹¹¹Scope Infotech, Inc., Comp. Gen. Dec. B-414782.4, 2018 CPD ¶ 116.

¹¹²ORBIS Sibro, Inc., Comp. Gen. Dec. B-415714.2, 2018 CPD ¶ 100.

¹¹³See ENMAX Corp., Comp. Gen. Dec. B-281965, 99-1

CPD ¶ 102 (RFP announced the Government’s intent to use Department of Labor, Bureau of Labor Statistics data in support of FAR 52.222-46 to ensure that the offeror would be able to attract and retain quality professionals).

¹¹⁴Dalpar Corp., Comp. Gen. Dec. B-414285, 2017 CPD ¶ 135.

¹¹⁵E.g., I Sys. Plus, Inc., Comp. Gen. Dec. B-413323.3 et al., 2017 WL 2570951 (agency compared awardees unburdened salaries against three sources: “(1) compensation data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS) within the metropolitan statistical area of Augusta—Richmond County, GA-SC, (2) similar data from the commercial website, Salary.com, for Augusta, Georgia, and (3) compensation levels of the other acceptable offerors”); Apptis Inc., Comp. Gen. Dec. B-403249 et al., 2010 CPD ¶ 237 (concluding that agency’s evaluation of the awardee’s proposed recruitment and training plans, and its Federal Supply Schedule labor rates demonstrated that the proposed compensation plan was realistic); Tech. Concepts & Design, Inc., Comp. Gen. Dec. B-403949.2 et al., 2011 CPD ¶ 78 at 11 (comparison of offerors loaded labor rates to each other, the Government estimate, and Federal Supply Schedule rates satisfied RFP’s realism analysis requirement).

¹¹⁶Scope Infotech, Inc., Comp. Gen. Dec. B-414782.4, 2018 CPD ¶ 116.

¹¹⁷A-P-T Research, Inc, Comp. Gen. Dec. B-413731.2, 2017 CPD ¶ 112.

¹¹⁸Optex Sys., Inc., Comp. Gen. Dec. B-408591, 2013 CPD ¶ 244 (citing decisions).

¹¹⁹A-P-T Research, Inc., Comp. Gen. Dec. B-413731.2, 2017 CPD ¶ 112. Apparently, the RFP in A-P-T did not require new hire employee letters of commitment and the non-incumbent awardee did not supply such letters in any event.

¹²⁰See also Lewis-Price & Assocs., Inc. Comp. Gen. Dec. B-409851 et al., 2014 CPD ¶ 263 (protester’s proposal asserted that proposed employee salaries and benefits “will be at or above the salary paid for the same labor category under the current contract” but the protester provided no evidence that it had conducted any analysis of the incumbent workforces’ salary and benefits or if the protester had sufficient assurances that its compensation were likely to capture that workforce).

¹²¹Dalpar Corp., Comp. Gen. Dec. B-414285, 2017 CPD ¶ 135.

¹²²See MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219.

¹²³Americorp, Comp. Gen. Dec. B-231644, 88-2 CPD ¶ 331 (approving legality of these letters).

¹²⁴Scope Infotech, Inc. Comp. Gen. Dec. B-414782.4, 2018 CPD ¶ 116.

¹²⁵See DKW Commc’ns, Inc., Comp. Gen. Dec. B-414476 et al., 2017 CPD ¶ 206 at 9 (deeming protestable an offeror’s bait and switch on key personnel whereby (1) the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish performance; (2) the misrepresentation was relied on by the agency; and (3) the agency’s reliance on the misrepresentation had a material effect on the evaluation results).

¹²⁶FAR 37.115-2(c).

¹²⁷ROH, Inc., Comp. Gen. Dec. B-261132, 95-2 CPD ¶ 169; Sys. Research & Applications Corp., Comp. Gen. Dec. B-225574.2, 87-1 CPD ¶ 540.

¹²⁸ROH, Inc., Comp. Gen. Dec. B-261132, 95-2 CPD ¶ 169; cf. NKF Eng'g, Inc., Comp. Gen. Dec. B-232143 et al., 88-2 CPD ¶ 497 (approving RFP where it stated that uncompensated overtime was not to be used "in any manner" to reduce the proposed hourly rates of professional employees). For an argument that the FAR policies on uncompensated overtime and cost realism in FAR 52.237-10 are ambiguous regarding the reasons for adjusting the hourly rate, Nash, "Uncompensated Overtime: A Bad Practice?," 33 Nash & Cibinic Rep. NL ¶ 46 (Aug. 2019) (critiquing Trident Techs., LLC, Comp. Gen. Dec. B-412020.16 et al., 2018 CPD ¶ 65).

¹²⁹Sys. Integration & Research, Inc., Comp. Gen. Dec. B-279759.2 et al., 99-1 CPD ¶ 54.

¹³⁰Sys. Integration & Research, Inc., Comp. Gen. Dec. B-279759.2 et al., 99-1 CPD ¶ 54 at 6.

¹³¹DCAA audit recommendations are advisory; the degree to which agencies use them are within the discretion of the Contracting Officer. OAO Corp., Comp. Gen. Dec. B-228599.2, 88-2 CPD ¶ 42. While agencies may ordinarily rely on the advice of DCAA when performing a realism analysis, see NKF Eng'g, Inc., Comp. Gen. Dec. B-232143 et al., 88-2 CPD ¶ 497, this process does not mean that contracting officials are thereby insulated from responsibility for error. See Am. Mgmt. Sys., Inc., Comp. Gen. Dec. B-241569, 70 Comp. Gen. 510, 91-1 CPD ¶ 492; PAI, Inc., Comp. Gen. Dec. B-230610, 67 Comp. Gen. 516, 88-2 CPD ¶ 36.

¹³²Cf. JWK Int'l, Comp. Gen. Dec. B-256609 et al., 95-1 CPD ¶ 166 (Navy concluded based on JWK's low salaries and excessive uncompensated overtime that JWK's proposed price was unrealistic and that its proposal presented a serious concern that JWK would be a high performance risk unable to retain its personnel).

¹³³Arch Sys., LLC., Comp. Gen. Dec. B-415262 et al., 2017 CPD ¶ 379.

¹³⁴Cf. MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219 (sustaining protest on this ground).

¹³⁵Team BOS/Naples—Gemmo S.p.A./DelJen, Comp. Gen. Dec. B-298865.3, 2008 CPD ¶ 11 (an agency's assessment of price realism requires consideration of the offeror's technical approach).

¹³⁶Compare MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., 2016 CPD ¶ 219 (sustaining protest where professional compensation evaluation was not adequately documented and relied on data that did not support a meaningful analysis), with MicroTechnologies, LLC, Comp. Gen. Dec. B-413091.4, 2017 CPD ¶ 48 (denying subsequent protest where reasonable reevaluation of professional compensation had been documented).

¹³⁷See FAR 52.222-46(a) (referencing, inter alia, supporting information such as public and private studies of professional employee compensation).

¹³⁸Wackenhut Int'l, Inc., Comp. Gen. Dec. B-286193, 2001 CPD ¶ 8.

¹³⁹L-3 Nat'l Sec. Solutions, Inc., Comp. Gen. Dec. B-411045

et al., 2016 CPD ¶ 233.

¹⁴⁰Boeing Sikorsky Aircraft Support, Comp. Gen. Dec. B-277263.2 et al., 97-2 CPD ¶ 91.

¹⁴¹AT & T Gov't Solutions, Inc., B-413012.2, 2016 CPD ¶ 237.

¹⁴²AT & T Gov't Solutions, Inc., Comp. Gen. Dec. B-413012.2, 2016 CPD ¶ 237 (GAO rejected evaluator declarations as being insufficient); Walden Sec., Comp. Gen. Dec. B-407022, 2012 CPD ¶ 291; Remington Arms Co., Comp. Gen. Dec. B-297374 et al., 2006 CPD ¶ 32.

¹⁴³CRAssociates v. United States, 95 Fed. Cl. 357, 368 (2010) (applying 28 U.S.C.A. § 1491(b)(4)) (citing APA standard of review under 5 U.S.C.A. 706(2)(A)).

¹⁴⁴CRAssociates v. United States, 95 Fed. Cl. 357, 376 (2010) (citations omitted). But see CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 376 n.15 (2012) (noting tension between case law doctrines disallowing the agency from preparing a new reason for a prior decision but allowing further explanation for a decision already made to avoid frustrating judicial review) (analyzing U.S. Supreme Court decisions).

¹⁴⁵OMV Med., Inc. v. United States, 219 F.3d 1337, 1343 (Fed. Cir. 2000).

¹⁴⁶Engility Corp., Comp. Gen. Dec. B-413120.3 et al., 2017 CPD ¶ 70 at 17; Lockheed Martin Integrated Sys., Inc., Comp. Gen. Dec. B-408134.3 et al., 2013 CPD ¶ 169 at 8; see also OMV Medical, Inc., 219 F.3d 1337, 1342 (Fed. Cir. 2000); Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996).

¹⁴⁷Target Media Mid Atlantic, Inc., Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208.

¹⁴⁸See also Hughes STX Corp., Comp. Gen. Dec. B-278466, 98-1 CPD ¶ 52 (protester competitively prejudiced by agency's conducting misleading discussions); cf. Orbital Scis. Corp., Comp. Gen. Dec. B-414603 et al., 2017 CPD ¶ 249 ("Where, as here, the agency has waived the requirements for any missing information [in the professional employee compensation plan, but the agency was able to acquire the missing information from other sources], we need not address these issues to resolve the protest ground. As with the allegations of waiver discussed above, [the protester] fails to articulate how it was prejudiced by any waiver or relaxation of solicitation requirements in the agency's evaluation of [the awardee's] proposal. This protest ground is denied.").

¹⁴⁹FAR 52.222-46(a).

¹⁵⁰Target Media Mid Atlantic, Inc, Comp. Gen. Dec. B-412468.8, 2017 CPD ¶ 208 (approving procuring activity's limitation to a comparison to professionals in the same geographical area).

¹⁵¹Manos, 1 Government Contract Costs & Pricing § 13:21 (June 2019).

¹⁵²FAR 2.101 (defining term).

¹⁵³<https://english.stackexchange.com/questions/3389/shall-and-will-in-legal-requirements>.

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BRIEFING PAPERS