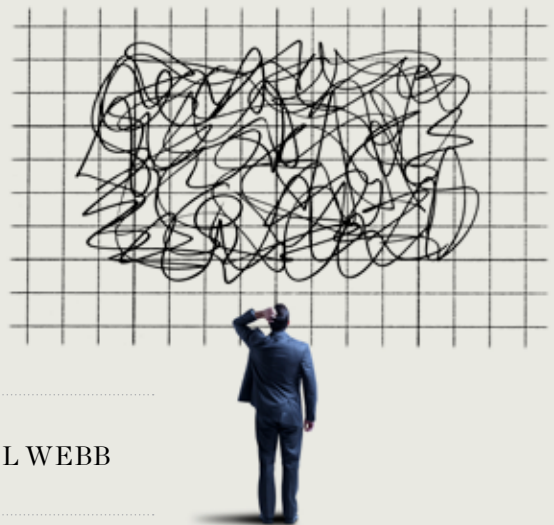




Clause Confusion

How a seemingly innocuous *FAR* clause can cause protest trouble for agencies and contractors alike on the issue of professional employee compensation.



BY STEPHEN L. BACON AND ALEXANDRIA TINDALL WEBB

The Service Contract Act of 1965 (SCA) was intended to ensure fair compensation for blue-collar service workers who perform government contracts, but it did not cover “professional employees.”¹ Although professional employees are excluded from SCA coverage, the federal government has a longstanding policy that “[a]ll professional employees shall be compensated fairly and properly.”²

This policy is implemented by requiring contracting officers to “insert the provision at FAR 52.222-46,

Evaluation of Compensation for Professional Employees, in solicitations for negotiated contracts when the contract amount is expected to exceed \$750,000 and services are to be provided, which will require meaningful numbers of professional employees.”³ The clause recognizes that “[r]ecompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished to professional employees” which, in turn, “can be detrimental in obtaining the quality of professional

services needed for adequate contract performance.”⁴

To mitigate this risk, FAR 52.222-46 requires agencies to conduct an evaluation of the offerors’ “total compensation plan” that sets forth the “salaries and fringe benefits proposed for the professional employees who will work on the contract.”⁵ The purpose of this review “is to evaluate each offeror’s ability to provide uninterrupted, high-quality work, considering the realism of the proposed professional compensation and its impact upon recruiting and retention.”⁶

In recompetitions, FAR 52.222-46(b) specifically requires the agency to compare the offerors' proposed compensation to the compensation paid to the incumbent contractor's professional employees. If an offeror proposes compensation levels that are below the incumbent, the agency may find that the offeror lacks an understanding of the requirement. Subsequently, its proposal may be rejected as unrealistic.⁷

In the last decade, FAR 52.222-46 has generated dozens of bid protest decisions. These cases suggest there is substantial confusion among agencies and offerors regarding when and how FAR 52.222-46 applies to the evaluation of proposals. The decisions issued by the Government Accountability Office (GAO) identify several key issues that contractors and agency officials should understand when negotiating contracts that involve professional employees.

Comparing Proposed and Incumbent Rates Is Critical

GAO "has identified two required analyses that the agency must perform under FAR provision 52.222-46, one based on the price realism of the compensation plan and the other considering whether the compensation plan will allow for program continuity through the retention of professional contractor employees."⁸ The first part of the analysis is akin to a traditional realism evaluation for either a fixed-price or cost-reimbursement contract.

The second part of the analysis, however, exceeds the requirements for conducting a realism analysis. As GAO has explained, the requirements

of FAR 52.222-46 "go beyond" a typical realism evaluation because "even proposed compensation levels that might be considered 'realistic' – but are lower than incumbent compensation levels – may cause staff turnover and associated disruption."⁹

For this reason, GAO has noted that an agency's comparison of proposed compensation rates to incumbent rates is especially "critical when a proposed approach is based on retaining all, or nearly all, of the incumbent personnel."¹⁰ GAO repeatedly has sustained protests where an agency fails to perform this required comparison.¹¹

A comparison between an offeror's proposed rates and a government estimate, for example, is not adequate to comply with FAR 52.222-46 where information regarding the incumbent's actual rates is readily available.¹² In GAO's view, a comparison between proposed compensation levels and the incumbent's compensation levels is "a necessary step" under FAR 52.222-46.¹³

Comparison of Unburdened Rates Generally Required

Agencies generally may perform the analysis required under FAR 52.222-46 by comparing the offerors' proposed rates to the incumbent's rates. But GAO's decisions make clear that the comparative analysis should focus on unburdened rates as opposed to fully burdened rates.¹⁴

Burdened rates includes salaries, fringe benefits, and indirect costs such as overhead, general and administrative, and fee/profit. Unburdened rates encompass the

offeror's proposed salaries and fringe benefits, but exclude other indirect cost categories.

As noted above, the focus of FAR 52.222-46 is employee *compensation*, which includes salary and fringe benefits. GAO has held that an agency may not base its evaluation "on burdened labor rates that do not provide insight into the actual salary and fringe benefits to be paid."¹⁵ Indeed, the use of burdened rates can produce "a misleading conclusion" because those rates include cost elements that are not part of employee compensation.¹⁶

Alternative Comparison Methods May Be Permissible

Although a comparison of unburdened rates generally is preferred, GAO has recognized that agencies may use alternative methods to comply with FAR 52.222-46 in certain circumstances. Specifically, "when a traditional comparison between proposed compensation and incumbent compensation is not possible or meaningful, the agency may instead use other measures to assess how compensation compares."¹⁷

For example, in *Obsidian Solutions Group, LLC*, GAO concluded that it was reasonable for the agency to compare the offerors' proposed compensation to "GS-equivalent compensation rates" where the incumbent contract was a fixed-priced contract, and the "incumbent salary and fringe rates were not available."¹⁸ Similarly, in *Systems Implementers, Inc.*, GAO found that the agency reasonably determined that the fully burdened rate information available for the

incumbent contract was insufficient to use to conduct a meaningful comparison.¹⁹ As a result, it was reasonable for the agency to compare the offerors’ proposed rates to a salary baseline created using market survey data in addition to the incumbent’s proposed rates in the recompetition under protest.²⁰

When an agency uses an alternative method to assess compensation rates, the method selected must be a reasonable proxy for assessing whether the proposed compensation is lower than the incumbent. In *Guidehouse LLP*, the agency did not have access to incumbent compensation levels. It compared proposed rates to market rates that were its “best estimate of incumbent compensation under the circumstances.”²¹ GAO did not object to the agency’s use of an estimate. However, it did hold that the agency’s evaluation was unreasonable because it “only flagged rates that were more than 20% lower” than the incumbent estimate.²²

Professional Employee Compensation Categories Must Be Evaluated

FAR 52.222-46 expressly invokes the definition of “professional employees” under 29 C.F.R. § 541, which codifies the standards applicable to SCA exemptions.²³ Accordingly, GAO has held that FAR 52.222-46 “unambiguously requires the agency to evaluate the compensation plan for all proposed employees meeting the definition of ‘professional employees’ as defined in subpart D of part 541.”²⁴

When an agency uses an alternative method to assess compensation rates, the method selected must be a reasonable proxy for assessing whether the proposed compensation is lower than the incumbent.

Under this definition, a “professional employee” is any employee:

- (1) Compensated on a salary or fee basis ... at a rate of not less than \$684 per week ... and
- (2) Whose primary duty is the performance of work:
 - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300(a). In *Sabre Systems, Inc.*, GAO sustained a protest challenging the agency’s evaluation under FAR 52.222-46 where it

excluded numerous labor categories from its total compensation plan analysis that satisfied the definition of a “professional employee.”²⁵

GAO also has rejected a protester’s argument that an agency was obligated to evaluate nonprofessional labor categories under FAR 52.222-46 where the solicitation included both professional and nonprofessional categories.²⁶ GAO’s decision in *MicroTechnologies, LLC* confirms that “this clause applies to only the evaluation of professional employees” and does not extend to SCA-covered labor categories.²⁷

Offerors Must Object Timely to Solicitation Inconsistencies

In several cases, GAO has conclud-

ed that a protester was untimely in raising a claim under FAR 52.222-46 where the inclusion of that clause conflicted with language in the solicitation at issue. These cases underscore the need for contractors to identify and resolve such inconsistencies during the question and answer phase of a procurement. Or, if necessary, these inconsistencies should be raised in a pre-award protest filed prior to the deadline set for receipt of proposals.

In *Arch Systems, LLC; KEN Consulting*, the protester alleged that the agency failed to evaluate price realism under FAR 52.222-46, which was incorporated into the solicitation.²⁸ However, because the solicitation required offerors to submit

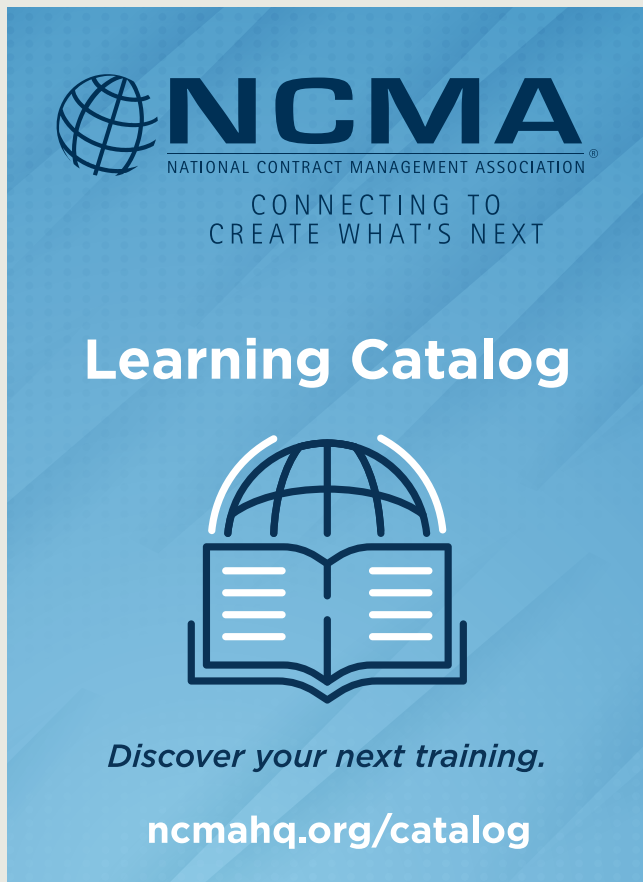
fixed prices and did not require a compensation plan with unburdened rates, GAO ruled that the protester’s argument amounted to an untimely challenge to the solicitation.²⁹

Similarly, in *Bionetics Corp.*, GAO concluded that the protester waived its challenge to the agency’s realism evaluation under FAR 52.222-46 because there was a patent ambiguity in the solicitation. Specifically, although FAR 52.222-46 requires a realism analysis, the solicitation expressly stated that the agency would “not be conducting a realism analysis of any kind.”³⁰

Given this patent inconsistency, GAO dismissed the protester’s realism challenge under FAR 52.222-46. GAO did, however, decide the protester’s


“non-realism” claim under FAR 52.222-46. It sustained the protester’s argument that the agency failed to perform the required comparison between the awardee’s proposed rates and those paid to the incumbent personnel.³¹

Finally, in *Criterion Systems, Inc.*, GAO again dismissed a protest under FAR 52.222-46 as untimely. In this case, the solicitation explained that the agency prepared an estimate of incumbent labor rates because it did not have insight into actual incumbent rates.³² The protester was the incumbent contractor and had refused to provide the actual labor category base rates to the agency during the solicitation phase. GAO concluded that the protester’s claim



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was untimely because “the solicitation explicitly informed offerors that the agency did not have the actual labor rates or benefit information of the incumbent contractor necessary to conduct such a comparison” and provided a government estimate of the incumbent rates instead.³³

Conclusion

Given the frequency of protests involving FAR 52.222-46, many of which have been sustained, contractors and agencies should pay special attention to the treatment of professional employee compensation in solicitations and evaluations. The decisions issued by GAO offer important guidance that should be understood whenever this clause is incorporated into a solicitation. Below is a checklist of issues for contractors and agencies to consider.

- ▶ **Contractors should carefully review the solicitation to determine whether it includes any language that conflicts with the requirements of FAR 52.222-46.** To the extent the solicitation states or implies that a price realism evaluation *will not* be conducted, despite the inclusion of FAR 52.222-46, the contractor should request clarification from the agency or file a timely pre-award protest to resolve the inconsistency.
- ▶ **Contractors should consider filing a protest if it appears that the agency did not perform the required analysis under FAR 52.222-46.** A reasonable basis for protest may be present where, for example, an incumbent contractor

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- loses a recompetition and the awardee’s price appears to rely on compensation rates that are significantly below those paid to the incumbent’s employees.
- ▶ **Agencies must apply FAR 52.222-46 to all labor categories that fit the definition of a “professional employee” under 29 C.F.R. § 541.300.** If a procurement includes professional and SCA-covered labor categories, to avoid confusion the agency should consider identifying which categories in the solicitation are “professional” (and therefore which labor categories FAR 52.222-46 will apply to).
- ▶ **Agencies should determine how they will assess professional employee compensation from the outset of the procurement and, specifically, whether it is feasible to compare the offerors’ proposed rates to the incumbent’s rates.** If incumbent rates are not available, agencies should consider disclosing that in the solicitation and identifying the alternative method that will be used to comply with FAR 52.222-46.
- ▶ **Agencies should use unburdened rates to perform the required analysis under FAR 52.222-46.** If the incumbent’s unburdened rates are not available for comparison, the agency should develop a reasonable estimate

of compensation paid to the incumbent personnel. **CM**

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ENDNOTES

- 1 FAR 21.1101; see also 41 U.S.C. § 6701(3)(C).
- 2 FAR 22.1103.
- 3 Id.
- 4 FAR 52.222-46(a).
- 5 Id.
- 6 The Bionetics Corp., B-419727, July 13, 2021, 2021 CPD ¶ 259 at 5.
- 7 FAR 52.222-46(b)-(d).
- 8 The Bionetics Corp., 2021 CPD ¶ 259 at 5.
- 9 ManTech Advanced Sys. Int'l, Inc., B-419657, et al., 2021 WL 10362508, at *5 (Comp. Gen. Jun. 17, 2021).
- 10 Id.
- 11 The Bionetics Corp., 2021 CPD ¶ 259; ManTech Advanced Sys. Int'l, Inc., 2021 WL 10362508; SURVICE Eng'g Co., LLC, B-414519, July 5, 2018, 2017 CPD ¶ 237; Target Media Mid Atlantic, Inc., B-412468, Dec. 6, 2016. 2016 CPD ¶ 358.
- 12 SURVICE Eng'g Co., LLC, 2017 CPD ¶ 237.
- 13 Id.
- 14 MicroTechnologies, LLC, B-413091, B-13091.2, Aug. 11, 2016, 2016 CPD ¶ 219; Inquiries, Inc., B-417415.2, Dec. 30, 2019, 2020 CPD ¶ 54; NextGen Fed. Sys., LLC, B-420456, et al., Apr. 14, 2022, 2022 CPD ¶ 99.
- 15 MicroTechnologies, LLC, 2016 CPD ¶ 219 at 12.
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- 17 Guidehouse LLP; Jacobs Tech., Inc., B-420860.1, et al., Oct. 13, 2022, 2022 CPD ¶ 257 at 12.
- 18 Obsidian Sols. Grp., LLC, B-416343, Aug. 8, 2018, 2018 CPD ¶ 274 at 9.
- 19 Sys. Implementers, Inc., B-418963.5, et al., June 1, 2022, 2022 CPD ¶ 138.
- 20 Id.
- 21 Guidehouse LLP; Jacobs Tech., Inc., 2022 CPD ¶ 257 at 12.
- 22 Id.
- 23 FAR 52.222-46(a).
- 24 Sabre Sys., Inc., B-420090.3, June 1, 2022, 2022 CPD ¶ 137 at 6.
- 25 Id.
- 26 MicroTechnologies, LLC, 2016 CPD ¶ 219.
- 27 Id. at 8.
- 28 B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379.
- 29 Id.
- 30 The Bionetics Corp., 2021 CPD ¶ 259 at 3, 6.
- 31 Id. at 6-7.
- 32 Criterion Sys., Inc., B-419749, et al., July 21, 2021, 2021 CPD ¶ 259 at 10.
- 33 Id.



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