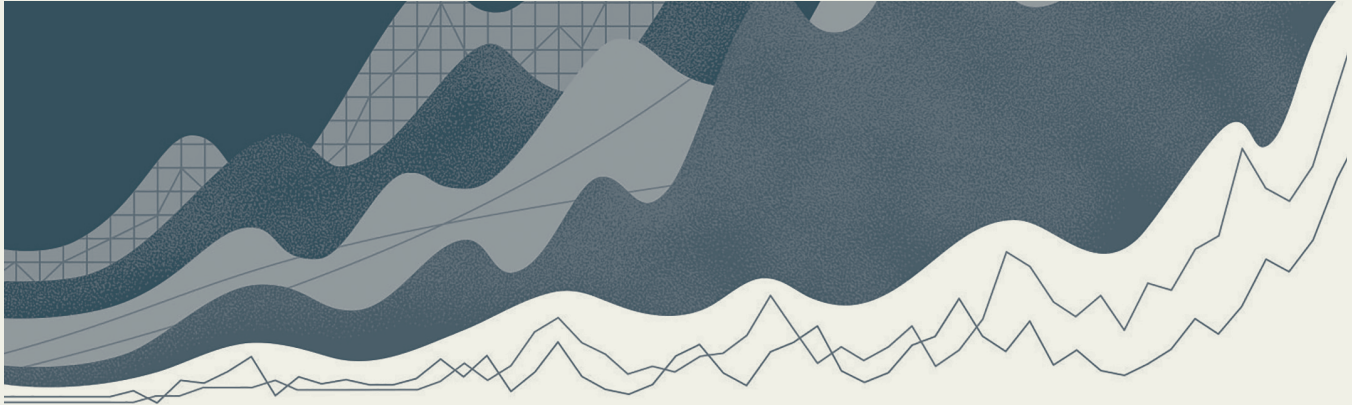


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COUNSEL COMMENTARY



Price Risk Assessments: A New Protest Ground?

Government Accountability Office (GAO) rules that DFARS 252.204-7024 mandates a reasonable evaluation of “price risk” based on a comparison of offers and historical prices.

BY STEPHEN L. BACON

A price realism analysis considers whether an offeror’s proposed price is too low. This evaluation technique is used when low prices may create a risk of poor performance or indicate that the offeror does not adequately understand the contract’s requirements.

However, agencies are generally not required to conduct a price realism evaluation for fixed-price contracts. In fact, agencies are *prohibited* from performing a price realism analysis for fixed-price contracts unless the solicitation expressly states that this type of evaluation will be conducted.

This means that unless a solicitation specifically calls for a price realism analysis, an unsuccessful offeror typically cannot challenge an awardee’s price for

being too low. However, a pair of recent bid protest decisions suggest that an awardee’s price can be challenged as being too low if the agency fails to consider “price risk” pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.204-7024.

As a matter of first impression, the Government Accountability Office (GAO) ruled that DFARS 252.204-7024 (7024 clause) requires agencies to perform a reasonable “price risk” analysis. That analysis resembles a price realism assessment and must include a comparison of the offerors’ proposed prices to historical prices paid for similar work.

Contractors and acquisition personnel for the Department of Defense (DoD) should understand this relatively new

solicitation clause, which has broad application to DoD procurements and potentially significant implications for contractor pricing strategies and agency proposal evaluations.

SPRS Price Risk Assessments

The Supplier Performance Risk System (SPRS) is a DoD enterprise application used by the DoD acquisition community to retrieve supplier and product performance information. In 2020, DoD proposed to amend the DFARS “to enhance the use of SPRS in the evaluation of a supplier’s performance through the introduction of SPRS system-generated item, price and supplier risk assessments.”¹

The proposed rule was intended to require “contracting officers to use the

supplier risk assessments available in SPRS as a factor in determining responsibility at DFARS 209.105-1.”² This includes assessments for item risk, supplier risk, and price risk.

To support price risk assessments, “SPRS collects historical pricing data from government sources and applies a common statistical method to calculate the average price paid for a product or services.”³ The price risk assessment considers whether “a proposed price is consistent with historical prices paid for that item and is depicted as high, low, or within range.”⁴

In March 2023, DoD issued a final rule to amend the DFARS.⁵ Most notably, the final rule created the new solicitation provision at DFARS 252.204-7024, Notice on the Use of Supplier Performance Risk System.

The clause provides that “[t]he contracting officer will consider SPRS risk assessments during the evaluation of quotations or offers received in response to this solicitation” and, specifically, “[p]rice risk will be considered in determining if a proposed price is consistent with historical prices paid for a product or service or otherwise creates a risk to the government.”⁶

The 7024 clause is broadly applicable to DoD solicitations for supplies and services, including solicitations for commercial products and services, except for a limited number of supplies and services exempted by DoD Instruction 5000.79.⁷ The final rule added a section to the DFARS procedures related to responsibility determinations to require contracting officers to consider SPRS risk assessments when determining responsibility.⁸

GAO Decisions

GAO recently interpreted the requirement to assess “price risk” under DFARS 252.204-7024 in two separate protests filed by SMS Data Products Group, Inc. (SMS) and MicroTechnologies LLC (MicroTech) involving the same solicitation.⁹ The protests challenged the U.S. Air Force’s decision to award a task order to Trace Systems, Inc. (Trace) for communications support services.

The protesters challenged various aspects of the evaluation, including the price evaluation. The solicitation called for the evaluation of professional compensation plans in accordance with FAR 52.222-46 and it incorporated DFARS 252.204-7024.

Trace Systems proposed a price of \$121,396,298, which was significantly lower than MicroTech’s price of \$151,254,337 and SMS’ price of \$199,589,312. Both protesters alleged that the agency violated FAR 52.222-46 and DFARS 252.204-7024.

Professional Compensation Plan Evaluation

GAO first concluded that the agency failed to evaluate the offerors’ professional compensation plans in a manner consistent with FAR 52.222-46. That clause requires agencies to compare the offeror’s proposed compensation to the compensation paid to the incumbent contractor’s professional employees.



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If an offeror proposes compensation levels that are below the incumbent's rates, the agency must evaluate whether the offeror's proposed compensation is sufficient to "maintain program continuity, uninterrupted high-quality work, and availability of required competent professional service employees."¹⁰ Rates that are "unrealistically low or not in reasonable relationship to the various job categories...may be viewed as evidence of failure to comprehend the complexity of the contract requirements."¹¹

GAO determined that the agency deviated from these requirements. In evaluating proposals, the agency flagged direct labor rates if they were more than 8% lower than the incumbent rates to determine if there was a concern about realism.

But the agency failed to analyze the potential impact on program continuity, high-quality work, and availability of employees if they were paid rates up to 8% less than what the incumbent employees were being paid. The agency also failed to compare the offerors' proposed fringe benefits to the incumbent's fringe benefits. Thus, GAO sustained the protesters' challenge to the agency's evaluation under FAR 52.222-46.

Price Risk Analysis Under DFARS 252.204-7024

GAO also agreed with the protesters that the agency's evaluation did not comply with the requirement to assess "price risk" under DFARS 252.204-7024. Given that "this is a relatively new requirement, GAO requested the parties to brief the mechanics of the DFARS risk assessment for services."¹²

The agency explained that SPRS does not include the data needed for a price

risk assessment for services contracts. Although services are included within the requirement to consider "price risk" under DFARS 252.204-7024, the agency maintained that relevant data points do not currently exist in SPRS for services.¹³

Due to the lack of a price risk assessment generated by SPRS, the agency relied on the evaluation of professional compensation under FAR 52.222-46 and its price evaluation of non-professional employee rates to comply with DFARS 252.204-7024. But GAO concluded that the agency could not rely on its unreasonable price evaluations to satisfy the requirements of DFARS 252.204-7024 and sustained the protest on that basis.

Price Realism Requirement or Responsibility Matter?

GAO's decisions could be interpreted as treating DFARS 252.204-7024 as the equivalent of a requirement for the agency to evaluate price realism. But a closer examination of the 7024 clause and

For fixed-price contracts, GAO will generally not review an allegation that an awardee should have been deemed not responsible for proposing a price that was too low unless the solicitation contains a requirement to evaluate price realism.

its origins show that the issue is perhaps more complicated.

As noted above, the 7024 clause was introduced as a mechanism to support the contracting officer's risk evaluation when determining contractor responsibility.¹⁴ In the absence of a price realism requirement, whether an offeror can perform at its proposed price is addressed as a matter of responsibility.¹⁵

Importantly, an agency's affirmative responsibility determination is generally *not* subject to challenge in a bid protest at GAO.¹⁶ As a result, for fixed-price contracts, GAO will generally not review an allegation that an awardee should have been deemed not responsible for proposing a price that was too low unless the solicitation contains a requirement to evaluate price realism.¹⁷

In the protests filed by SMS and MicroTech, the solicitation required an assessment of realism under FAR 52.222-46 for professional employee compensation and a separate realism

analysis for non-professional employee labor rates. It is not clear how the “price risk” assessment requirement under the 7024 clause would be interpreted in a fixed-price procurement where the solicitation does not contain an express price realism requirement.

Conceivably, in the absence of an express price realism requirement, the “price risk” assessment under the 7024 clause could be viewed as only part of the requirement to determine that the awardee is a responsible contractor.

Conclusion

Whether the price risk assessment requirement under the 7024 clause functions as the equivalent of a price realism requirement or is merely part of the requirement to assess contractor responsibility has significant consequences. If the clause is treated as imposing a price realism-like requirement, there will likely be many more protests challenging awards based on allegedly unrealistic low pricing.

On the other hand, if the price risk assessment requirement under the 7024 clause is confined to responsibility determinations, its impact on bid protests could be more limited because GAO generally does not review affirmative responsibility determinations absent special circumstances.

This issue may be resolved in future protests if GAO and the U.S. Court of Federal Claims have the opportunity to address the requirements of the 7024 clause in the context of different solicitations. Contractors and agencies should carefully monitor these developments, as the interpretation of this requirement could continue to evolve and may have substantial impacts on DoD procurements. **CM**

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The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

- 1 85 Fed. Reg. 53748 (Aug. 31, 2020).
- 2 Id. at 53748-49.

- 3 Id. at 53748.
- 4 Id.
- 5 88 Fed. Reg. 17336 (Mar. 22, 2023)
- 6 88 Fed. Reg. at 17340 (codifying DFARS 252.204-7024(c)(2)).
- 7 DFARS 204.7604. DoD Instruction 5000.79 exempts cryptologic special component information systems and classified cryptographic products, DoD military treatment facilities, medical or dental, and DoD healthcare practitioners who are involved in the delivery of healthcare services to eligible beneficiaries, and bulk petroleum products, natural gas, and coal.
- 8 DFARS 209.105-1(2)(iii).
- 9 See SMS Data Products Group, Inc., B-423197.4, Mar. 4, 2025, 2025 CPD ¶ 64; MicroTechnologies LLC, B-423197.2, et al., Mar. 4, 2025, 2025 CPD ¶ 55.
- 10 FAR 52.222-46(b).
- 11 FAR 52.222-46(c).
- 12 MicroTechnologies, 2025 CPD ¶ 55 at 11.
- 13 Id.
- 14 88 Fed. Reg. 17336.
- 15 See, e.g., JCMCS, B-409407, Apr. 8, 2014, 2014 CPD ¶ 125.
- 16 4 C.F.R. § 21.5(c).
- 17 See, e.g., VetPride Services, Inc., B-419622, Jun. 7, 2021, 2021 CPD ¶ 226 at 5, n.5.



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