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ASSESSING THE EFFECTIVENESS OF PROFESSIONAL EMPLOYEE COMPENSATION EVALUATIONS IN DOD SERVICE CONTRACTS

December 2018

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COMPENSATION EVALUATIONS IN DOD SERVICE CONTRACTS**

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Submitted in partial fulfillment of the
requirements for the degree of

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from the

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December 2018**

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ABSTRACT

Today's military relies on contractors, chiefly contracted services, at all levels—strategically, operationally, and tactically—to execute its mission more than it has at any other point in the history of the United States. Over the last decade, the Department of Defense (DoD) has consistently obligated the majority of its annual budget toward contracted services. One commonality across these service contracts is the inclusion of professional employees in the performance of many of these contracts. Over the same time period, the DoD has realized a protest loss rate of 50% at the U.S. Court of Federal Claims and of 43% at the Government Accountability Office related to the evaluation of compensation for professional employees. The purpose of this research is to conduct the first comprehensive analysis of the protest decisions to determine if a pattern of evaluations errors exists and to deepen the DoD's understanding of the influencing factors that must be considered. The research identifies three distinct areas in which the DoD consistently erred in evaluations: (1) The evaluation was either inadequately documented or never conducted, (2) the data relied upon did not provide a meaningful basis to evaluate compensation, and (3) the analysis compared incorrect data from salary surveys. The research provides several actionable recommendations that may help decrease protest losses, including the use of the Streamlined Professional Employee Compensation Tool for Employee Realism (SPECTER).

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LIST OF ACRONYMS AND ABBREVIATIONS

AFFARS	Air Force Federal Acquisition Regulation Supplement
BLS	Bureau of Labor Statistics
C.F.R.	Code of Federal Regulations
COFC	Court of Federal Claims
DoD	Department of Defense
DPAP	Defense Procurement Acquisition Policy
FAR	Federal Acquisition Regulation
FY	Fiscal Year
GAO	Government Accountability Office
GSA	General Services Administration
IDIQ	Indefinite Delivery/Indefinite Quantity
KSA	Knowledge, Skills, Abilities
TCP	Total Compensation Plan
NAICS	North American Industry Classification System
NASA	National Aeronautics and Space Administration
NCMA	National Contract Management Association
OASIS	One Acquisition Solution for Integrated Services
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
SAIC	Science Applications International Corporation
SCA	Service Contract Act
SOC	Specialized Occupational Classification System
SSP	Source Selection Procedures
SPECTER	Streamlined Professional Employee Compensation Tool for Employee Realism

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I. INTRODUCTION

A. BACKGROUND

“The Department of Defense (DoD) is, by far, the single largest contracting agency in the federal government, typically accounting for about two-thirds of all federal contracting activity” (Government Accountability Office [GAO], 2017, p. 483). Currently, DoD spending to acquire services “represents nearly half of all DoD acquisition spending” (Kelly, Earle, Lippitz, Shapiro, & Van Atta, 2015, p. 1). Figure 1 displays DoD obligations over the past eight years, categorized by type. Kelly et al. (2015) note,

In recent years, the DoD has paid increased attention to achieving efficiencies in contracting for services. This involves understanding where money is spent, assessing underlying strategies and principles employed across DoD components, and using contract management approaches that have been demonstrated to improve both effectiveness and efficiency. (p. 1)

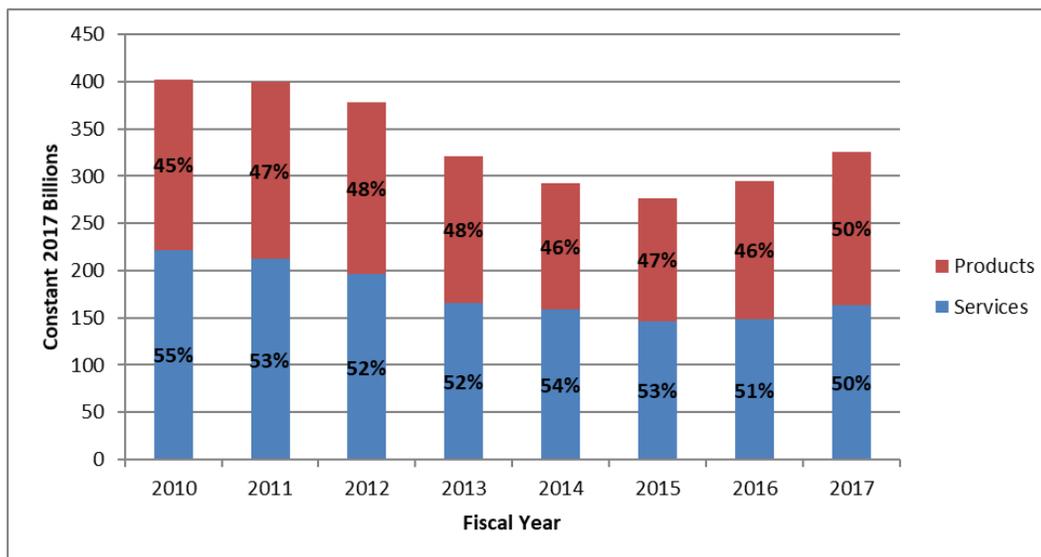
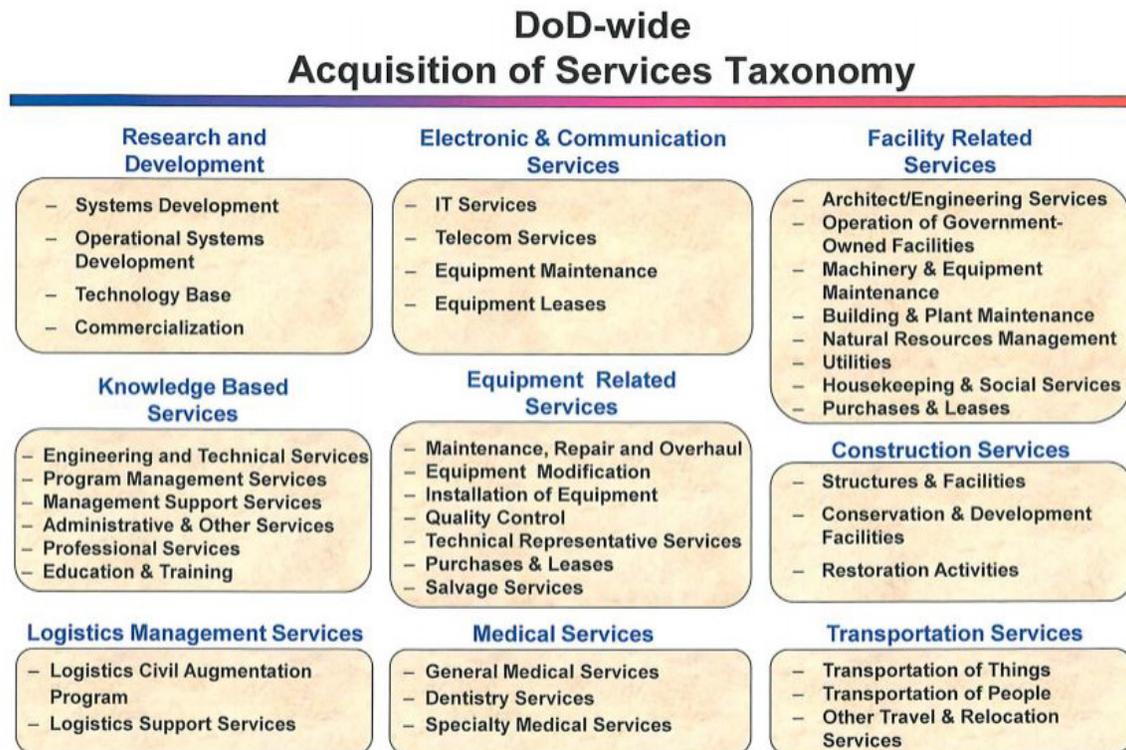


Figure 1. Overall Defense Contract Obligations, Fiscal Years 2010–2017.
Adapted from DPAP (n.d.).

The DoD uses a portfolio group taxonomy to categorize its spending on services; there are nine services portfolio groups, as shown in Figure 2 (Assad, 2012). One commonality across these portfolio groups is the inclusion of professional employees in the performance of services. For example, a cardiologist would be considered a professional employee on a medical services contract. Professional employees perform in each of the nine groups, but primarily in Knowledge Based Services, Research and Development, Facility Related Services, Medical Services, Logistics Management Services, and Electronic & Communication Services. These groups account for over 77%, or \$126 billion, of the DoD’s fiscal year (FY) 2017 service contract obligations, as shown in Figure 3 (Defense Procurement Acquisition Policy [DPAP], n.d.).



9 Services Portfolio Groups, 40 Services Portfolios

Figure 2. DoD-Wide Acquisition of Services Taxonomy. Source: Assad (2012).

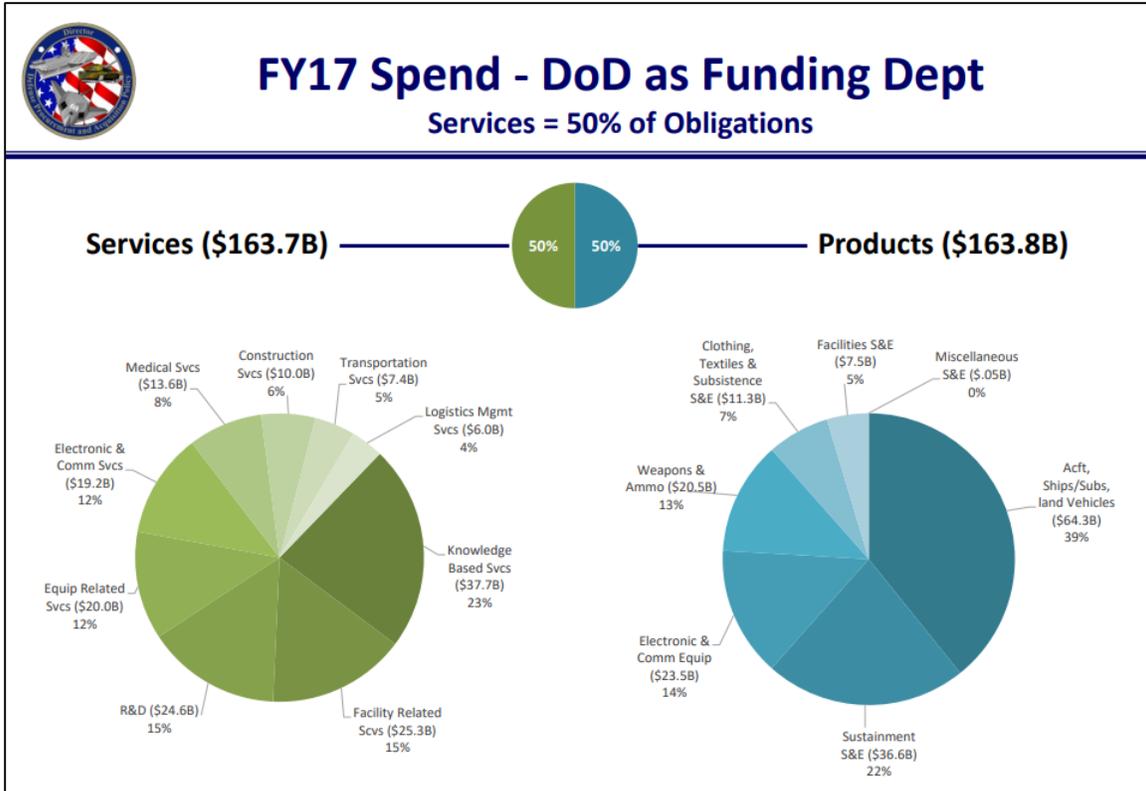


Figure 3. Fiscal Year 2017 Defense Contract Obligations by Type. Source DPAP (n.d.).

Over the past decade the DoD has realized a 50% and 43% protest loss rate over the last decade at the U.S. Court of Federal Claims (COFC) and the Government Accountability Office (GAO) respectively related to Federal Acquisition Regulation (FAR) 52.222-46 evaluations. The determination of realistic compensation of professional employees is critical to ensure “the quality and stability of the workforce” that comprises over 77% of the DoD’s annual obligations (FAR 52.222-46). Given the prevalence of professional employees in DoD service contracts and the high loss rate in federal courts, the DoD must give greater attention to the adequate evaluation of professional employees.

This need for greater attention is compounded by the austere fiscal environment the DoD currently operates within and its mandate to do more without more. One approach the DoD has taken to address this mandate is through the implementation of the Better Buying Power (BBP) initiatives. As the third iteration of this initiative, BBP 3.0 emphasizes “achieving dominant capabilities through innovation and technical excellence” (Kelly et

al., 2015, p. 3). Former Secretary of Defense Ashton Carter underscored the importance of maximizing every dollar in the defense budget to Congress:

If we're asking taxpayers to not only give us half a trillion of their hard-earned dollars, but also give us more than we got last year, we have to demonstrate that we can be responsible with it.

We must do all we can to spend their money more wisely and more responsibly. We must reduce overhead, and we must curb wasteful spending practices wherever they are.

DoD has sought to continuously improve our acquisition processes over the past five years, and I am proud myself to have been a part of that effort. Today, I am recommitting the Defense Department to working both with Congress, and on our own, to find new and more creative ways of stretching our defense dollars to give our troops the weapons and equipment they need.

The department's Better Buying Power initiative is now on its third iteration since I established it in 2010, with Better Buying Power 3.0 focused on achieving dominant capabilities through technical excellence. I know well and very much appreciate the strong support for acquisition reform demonstrated by the Senate and House Armed Services Committees, and their Chairmen, and I share their deep desire to achieve real, lasting results that benefit both America's security and taxpayers. (Carter, 2015, pp. 4-5)

Further connecting Secretary Carter's comments, procurement professionals have the potential of achieving real, lasting results and maximizing the value of each dollar spent by improving their technical competence in evaluations of compensation for professional employees.

B. PROBLEM

Over the past decade, 50% of COFC and 43% of GAO protests related to DoD evaluation of compensation for professional employees were either sustained or resulted in corrective action. These losses cause significant impacts on the cost, schedule, and performance of affected acquisition programs. To date, no comprehensive analysis has been conducted to determine if a pattern of evaluation errors exists in these protest decisions that can help elucidate the influencing factors in such evaluations.

C. PURPOSE

In this research, the researcher argues that the DoD needs to implement a structured approach to its evaluation of compensation for professional employees in order to stem protest losses. By developing a comprehensive understanding of the pattern of evaluation errors in these protests, a structured evaluation approach can be developed to address these issues. The research introduces the Streamlined Professional Employee Compensation Tool for Employee Realism (SPECTER), which will provide the DoD the capability to conduct structured evaluations of compensation for professional employees in an effective and streamlined manner. The author of this research originated and coined the term *SPECTER* as used in this research in April 2017, and its use is assumed to be the ownership of the author.

The following research questions help to further refine the purpose of this research and focus the research efforts:

1. What patterns of evaluation errors can be identified from the analysis of court decisions related to sustained and corrective action protests involving the evaluation of compensation for professional employees?
2. If patterns of evaluation errors are identified, how could source selection teams avoid similar evaluation errors in future source selections?
3. How can SPECTER effectively identify unrealistically low compensation during proposal evaluations?

D. PROJECT SCOPE

In this research, the researcher reviews relevant federal procurement policy letters and federal acquisition regulations regardless of date of issuance. The review of federal court protest decisions will be limited to the past 10 years due to the significant number of decisions within that period, with the exception of a few key decisions that were handed down before the last decade, which provide information for a foundational understanding. In addition, this research uses service contract proposals requiring the evaluation of

compensation for professional employees from contracting squadrons to test and refine the functionality and effectiveness of SPECTER.

E. METHODOLOGY

The data used in this report was planned to be acquired through review of federal court decision databases, federal procurement policy archives, and actual proposal data from Air Force contracting squadrons. Review of federal court decisions over the past 10 years allowed for the identification of patterns or consistencies among protests. The analysis of these factors shaped the development of SPECTER. For this research, the researcher attempted to collect compensation data of professional employees from applicable service contract proposals to test the functionality and effectiveness of SPECTER.

F. BENEFITS OF RESEARCH

Realizing the austere fiscal environment within which the DoD currently operates, as illustrated by the DoD mandate to do more without more, innovative solutions that save valuable acquisition time and dollars are needed more than ever to help maximize every dollar within the defense budget. Expanding upon Secretary Carter's words, in today's military, every procurement professional must strive to achieve dominant capabilities through technical excellence in order to "achieve real, lasting results that benefit both America's security and taxpayers" (Carter, 2015, p. 4). The primary benefit of this research is to increase the technical competence of procurement professionals by providing them with a better understanding of the complexity of evaluations of compensation for professional employees. It also provides source selection teams with a functional tool, SPECTER, that empowers them to contribute to efforts to maximize every dollar within the DoD budget by conducting effective and efficient evaluations of compensation for professional employees. This research will help source selection teams negotiate realistic compensation amounts for professional employees. This research will help identify deficiencies in conducting evaluations of compensation for professional employees in DoD service contracts. Ultimately, this first comprehensive analysis on evaluations of compensation for professional employees in DoD service contracts will benefit the Air

Force, the DoD, and the federal government, and it will help ensure the government is negotiating fair and reasonable prices and maximizing every dollar spent.

G. DATA COLLECTION

Data collection efforts consisted of gathering redacted compensation data from one Air Force contracting squadron. Collection efforts from more contracting squadrons were attempted, but there were limitations in collecting additional data from these squadrons as described below. Collection efforts were conducted with care to ensure no source selection sensitive information was compromised. The following criteria were used to filter solicitations to identify only those applicable proposals for data collection efforts: (1) service contracts only and (2) contract values of \$700,000 or greater. The researcher located 120 solicitations that met these criteria. Each solicitation was then analyzed to determine whether the provision FAR 52.222-46 had been incorporated into the solicitation.

H. DATA LIMITATIONS

Upon review of the 120 solicitations that met filtering criteria, no solicitations contained the provision FAR 52.222-46. The primary reason for the provision's exclusion from solicitations appears to be that the solicitations were determined to be for commercial services; thus, the provision is not required to be included. Though the provision FAR 52.222-46 is not required for commercial service contracts, as discussed in Chapter II, the provision's inclusion can be beneficial to the DoD and properly provide the DoD with the ability to analyze the compensation of professional employees by conducting a limited cost realism analysis.

Senior acquisition leadership from numerous contracting squadrons across the DoD expressed interest in a tool like SPECTER and acknowledged the need for training on the topic of evaluations of compensation for professional employees and the need for such a tool, but efforts to collect data from these squadrons failed. Even though middle managers expressed the need for such training and for such a tool, they were reluctant to provide contract data, which stifled collection efforts.

I. STRUCTURE OF REPORT

In Chapter I, the need for the DoD to perform more effective evaluations of professional employee compensation in its service contracts is detailed through a discussion of the current problems and benefits of this research. The chapter also discusses data collection efforts and limitations. The remaining four chapters build upon this introduction. In Chapter II, a literature review of relevant federal procurement policy letters, federal acquisition regulations, and federal court protest decisions is provided. In Chapter III, an overview of the SPECTER tool and evaluation considerations are presented. Finally, in Chapter IV, a research summary, findings and recommendations, and further research opportunities which can improve the effectiveness and efficiency of DoD evaluations of compensation for professional employees, are presented.

J. SUMMARY

This chapter provided an overview of the purpose, problem, and scope of this research by detailing the reliance of today's military on service contracts and employment of professional employees in executing its national security objectives. The chapter discussed the research benefits, research methodology, research data collection efforts and limitations, and provided an overview of the report's structure. The next chapter provides a literature review that supports this research.

II. LITERATURE REVIEW

A. INTRODUCTION

The purpose of this literature review is to elucidate an understanding of the evolutionary history of the evaluation of compensation for professional employees. It begins with an overview of the contract management lifecycle, then reviews applicable federal procurement policy and federal acquisition regulations. It concludes with a discussion of relevant federal court protest decisions to date.

B. CONTRACT MANAGEMENT LIFE CYCLE

“Contracts have a distinct beginning and end, and the contract life cycle defines these parameters” (National Contract Management Association [NCMA], 2018, p. 5). The contract management life cycle consists of three phases, (1) pre-award, (2) award, and (3) post-award. Within each of these phases, there are specific contract management activities performed by contract managers (NCMA, 2018). Potentially surprising to some, activities related to the evaluation of compensation for professional employees are involved in all of the contract management life cycles phases. Considerations begin in the pre-award phase.

1. Pre-award Contract Management Life Cycle Phase

The NCMA (2018) defines the pre-award phase as follows:

Pre-Award is the first phase of the contract life cycle. The preaward process for the buyer includes assisting in defining the customer requirements for products or services, and then developing a comprehensive acquisition plan to fulfill those requirements in a timely manner at a reasonable price. This includes developing and executing an overall strategy for the purchase, which is accomplished through researching the marketplace, developing contracting strategies, preparing solicitations, and requesting offers. (p. 6)

As is discussed later in this research, there are several important considerations during the pre-award phase that source selection teams must consider when requirements will include professional employees. These considerations include, but are not limited to: determining if the Service Contract Act is applicable, defining professional employees, establishing labor categories, crafting instructions to offerors and evaluation criteria

language, developing an understanding of current market compensation data, and deciding in which section of the source selection the evaluation of compensation for professional employees will be conducted. Proper attention to these pre-award considerations will assist source selection teams in developing and executing a sound acquisition strategy, solicitation, and prepare the team to effectively and efficiently operate in the next phase, award.

2. Award Contract Management Life Cycle Phase

The NCMA (2018) defines the award phase as follows:

The second contract life cycle phase is Award. The award process involves all the work by both the buyer and seller that produces an awarded contract. The value added by this process is to mitigate or eliminate contract performance risk by selecting the best source and negotiating prices and terms and conditions. (pp. 7–8)

Some major activities within the award phase include; “price or cost analysis, conduct negotiations, select source, and manage legal conformity” (NCMA, 2018, p. 7).

Price and cost analysis activities, referred to as “proposal analysis” in FAR 15.404, are extremely important to any source selection, as they will directly influence the government negotiation outcomes. “The objective of the proposal analysis is to ensure that the final agreed-to price is fair and reasonable” (FAR 15.404-1(a)). The extent of the proposal analysis depends on several factors including contract type and source selection method used. During proposal analysis, different price or cost elements such as direct labor, fringe benefits, overhead, general and administrative, and profit, can be analyzed. The evaluation of compensation for professional employees is one activity that may be performed during proposal analysis if applicable. This evaluation is considered a limited cost realism analysis, and specific considerations as provided by 29 C.F.R. 541, FAR 22.11 and FAR 52.222-46, regarding the scope and purpose of the evaluation must be understood by source selection teams in order to conduct an adequate evaluation of compensation for professional employees.

During the award phase, source selection teams will generally know whether proper consideration of pre-award activities were adequate if they are able to successfully conduct

an adequate evaluation of professional employee compensation. Previous research conducted by Rendon (2015) suggests that the DoD's process capability across all the contract management life cycle phases is suboptimal and determined that the contract administration phase maturity level, also known as the post-award phase, was rated as "basic" (p. 12). This was primarily driven by an inadequate process capability, lack of management support, and lack of established well-structured processes. This lack of process capability directly contributes to a potential perfect storm of sorts. This perfect storm scenario occurs when no protest is submitted and the source selection team only realizes the evaluation of professional employee compensation was inadequate during the post-award phase by degraded operational performance levels, high turnover, or the inability to fill positions.

3. Post-award Contract Management Life Cycle Phase

The NCMA (2018) defines the post-award phase as follows:

Once the Award phase is completed, the Post-Award contract life cycle phase begins. This involves all of the contract management functions known as "contract administration." The contract administration functions will vary greatly depending on the complexity of the contract. Both the buyer and seller are actively involved in contract administration to ensure satisfactory performance and to bring the contract to a successful conclusion. (p. 9)

While considered the final contract management life cycle phase, the post-award phase is arguably the most important phase as this is where contract performance happens and the success or failure of a contract can have a direct impact on the DoD's ability to effectively and efficiently execute its missions. Activities during the post-award phase, commonly referred to as "contract administration," include monitoring and evaluating contractor performance and compliance to the contract terms, executing contract modifications, managing payment(s), and closing out the contract (NCMA, 2018). During this phase, government must monitor contract performance related to the compensation of professional employees and if issues arise, such as high employee turnover, performance degradation, or the inability to fill vacancies (which may be indicators of inadequate compensation levels), the government must communicate with the contractor to determine

an appropriate remedy. As discussed earlier, source selection teams must begin considering this evaluation during the pre-award phase and this starts with an understanding of the applicability of the Service Contract Act of 1965 (currently referred to as the Service Contract Labor Standards in the FAR).

C. MCNAMARA-O'HARA SERVICE CONTRACT ACT OF 1965

The McNamara-O'Hara Service Contract Act (SCA) of 1965 “was enacted for the purpose of protecting prevailing labor standards by preserving the wages and benefits of service employees working for contractors or subcontractors under federal service contracts” (Kalban & Tanner, 2016, p. 1). The SCA

requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. (Department of Labor, n.d.)

Matsushima (1980) noted, the SCA Amendment of 1976, P. L. 94-489, provided clarification regarding the scope of the term *service employee*:

The amendment simply makes it clear that both ‘blue collar’ and ‘white collar’ employees engaged in the performance of government service contracts, other than bona fide executive, administrative and professional employees are to be considered ‘service employees’ for purposes of the act. (p. 20)

While the act protected the compensation, working conditions, and other labor standards for some types of workers, it did not provide any kind of protections for professional employees (Fettig, 1978). Furthermore, it is important to understand that service employees who do not fall under the SCA are not automatically considered executive, administrative, or professional employees. Put simply, the purpose of the SCA is to protect blue collar and some white collar government contractor service employees—not professional employees—from wage busting. Keller (1979) defines *wage busting* as “the practice of lowering employee wages and fringe benefits by incumbent or successor contractors, in an effort to become the low bidders or offerors on Government service contracts, when the employees continue to perform the same jobs” (p. 11).

By early 1977, recognizing that wage busting practices were occurring in recompetition of service contracts, and professional employees were being negatively affected because of their exclusion from the SCA, the government introduced legislation that would extend SCA protections to professional employees. Concurrently, the chairman of the Senate Subcommittee on Federal Spending Practices and Open Government directed the Office of Federal Procurement Policy (OFPP) and the Comptroller General of the United States to review the source selection procedures used by NASA and the Air Force to determine if those agencies' procedures would provide benefit during the development of the legislation. The OFPP presented their findings to a congressional committee:

At about that same time in 1977, you, Mr. Chairman, asked us to review the impact of special procurement procedures used by NASA and the Air Force to prevent service contract wage busting for professional employees in the Cape Canaveral area. Our review confirmed that those procedures helped prevent wage busting of noncovered employees during the 1977 recompetition of several major service contracts. We concluded that the procedures had demonstrated that a procurement policy directed toward discouraging wage busting in service contracts was a viable alternative to the proposed legislation, and recommended that the Administrator of OFPP establish a Government wide policy along the same lines.

OFPP agreed, and on March 29, 1978, the Administrator issued a policy letter (No. 78-2) which directed that Federal procurement procedures be developed to assure equitable compensation for all professional service contract employees. The letter provided appropriate language for inclusion in all future solicitations whenever professional employees are expected to be needed to perform the services. (Keller, 1979, pp. 12–13)

This review resulted in the cancellation of the legislation in favor of a government-wide procurement policy letter issuance that reflected the procedures used by NASA and the Air Force to prevent wage busting of professional employees (Comptroller General of the United States, 1978).

D. OFFICE OF FEDERAL PROCUREMENT POLICY—POLICY LETTER 78-2

The Office of Federal Procurement Policy (OFPP) Policy Letter 78-2 was the first official federal procurement policy directive since the passing of the SCA of 1965 to directly address wage busting practices affecting professional employees, and it served as

the genesis to curbing this practice in federal procurements. The policy letter expressed OFPP's concern with unrealistically low professional compensation and its negative impacts on the federal government and directed the extension of protective policies of the SCA to professional employees. An attachment to the policy letter provided procurement professionals with mandatory language to include in solicitations when professional employees were to perform under the contract. This attachment is located in Appendix B.

OFPP Policy Letter 78-2 did not prohibit government agencies from realizing cost reductions and savings from lowering compensation, as long as there are no detrimental impacts associated with accepting a lower price. As the COFC noted, "Far be it from being disqualifying, the notion that competition might produce savings in terms of professional compensation is wholly in accord with the aims of the Competition in Contracting Act of 1984" (CRAssociates, Inc. v. U.S., p. 18).

The policy letter was rescinded on September 19, 1983, with the enactment of 48 C.F.R. 42478 and the establishment of FAR 22.11, Professional Employee Compensation, and the provision FAR 52.222-46, Evaluation of Compensation for Professional Employees.

E. FAR 22.11, PROFESSIONAL EMPLOYEE COMPENSATION

FAR 22.11 provides the applicability, definition, policy, and procedures for use in determining whether the incorporation of FAR 52.222-46 is required:

All professional employees shall be compensated fairly and properly. Accordingly, the contracting officer shall insert the provision at 52.222-46, Evaluation of Compensation for Professional Employees, in solicitations for negotiated contracts when the contract amount is expected to exceed \$700,000 and services are to be provided which will require meaningful numbers of professional employees. This provision requires that offerors submit for evaluation a total compensation plan setting forth proposed salaries and fringe benefits for professional employees working on the contract. 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. Plans indicating unrealistically low professional employee compensation may be assessed adversely as one of the factors considered in making an award.

Four key distinctions need to be made upon reviewing the provision. First, the phrase “a meaningful number of professional employees” affords contracting officers the discretion to determine whether the provision will be used over the \$700,000 threshold. Determining what constitutes a meaningful number of professional employees is in the sole discretion of the government. It is recommended that the source selection teams consider the number of professional employees the government anticipates will be needed to perform the effort, as well as the criticality of the work functions those professional employees will perform. At times, a relatively low number of professional employees may be required to perform work on the requirement, but the nature of the work that is performed by the professional employees is of such criticality to overall success of the requirement that it is appropriate to conduct an evaluation of compensation for professional employees to ensure the offeror’s understanding of the requirement and ability to obtain and retain a qualified, stable workforce. Second, the applicability of this provision transcends the spectrum of fixed-price and cost-reimbursable contract types. Third, while not required for commercial service solicitations, the provision can be included in a commercial solicitation and evaluated if the source selection team determines it appropriate. Fourth, the provision states that offerors will submit a Total Compensation Plan (TCP). “As 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” (FAR 52.222-46). It is important to understand that the government is not buying the TCP or placing it on contract. Rather, the government evaluates the TCP to ensure that the offeror understands the contract requirements and has proposed a realistic TCP to recruit and retain a qualified and stable professional employee workforce. FAR 22.11 is implemented by the inclusion of the provision FAR 52.222-46.

F. FAR 52.222-46, EVALUATION OF COMPENSATION FOR PROFESSIONAL EMPLOYEES

FAR 52.222-46 details four distinct paragraphs regarding the evaluation of compensation for professional employees. The provision places prospective offerors on notice of the purpose, scope, and potential consequences of the evaluation. The provision is located in Appendix B.

A review of FAR 52.222-46 paragraphs (a), (b), and (c) provide an array of different perspectives from which the proposed TCPs will be evaluated. While a wide breadth of evaluation considerations is useful, this researcher argues that the provision's language is not as plain as it could be, which causes confusion among evaluators on what exactly the evaluation should address. With multiple perspectives to consider during evaluations, evaluation teams can be confused as to what must be evaluated and documented. This confusion can lead to undesirable results in the form of sustained protests or the need to take corrective action. Such issues, addressed by the U.S. Court of Federal Claims (COFC), will be discussed in the next section.

G. U.S. COURT OF FEDERAL CLAIMS PROTEST DECISIONS

There are three U.S. Court of Federal Claims protest decisions that provide insights of how the court interprets FAR 52.222-46 and have significant influence on the conduction of evaluations of compensation for professional employees.¹ Appendix A provides a summary of these decisions.

1. OMV Medical, Inc. v. U.S., 1999

The OMV decision is the leading case on how the COFC interpreted FAR 52.222-46 evaluations and established the precedence of a two-pronged approach towards the evaluation of compensation for professional employees. In this bid protest case, OMV argued that the Air Force's Family Advocacy Program West contract award decision was flawed "because the Air Force analyzed the submitted proposals in an arbitrary and irrational manner" with respect to its evaluation of compensation for professional employees (OMV Medical, Inc. v. United States, 1999, p. 1).

We disagree with the trial court's analysis in one important respect. As provided in the RFPs, there were two components to the Air Force's review of the offerors' compensation packages: (1) a determination of whether each offeror's compensation package was generally consistent with the salaries

¹ The OMV decision is included in the review, even though it is out of the 10-year range of protest decisions, as it was the COFC's leading case addressing the evaluation of compensation for professional employees.

being paid by the incumbent contractor; and (2) a determination of whether each offeror's compensation plan was realistic, i.e., whether it indicated that the offeror understood the scope of the work. (OMV Medical, Inc. v. United States, 1999)

Thus, the decision established the precedence that the evaluation was to be a two-pronged approach:

(1) A determination of whether each offeror's compensation package was generally consistent with the salaries being paid by the incumbent contractor; and

(2) A determination of whether each offeror's compensation plan was realistic based upon current market compensation data. (OMV Medical, Inc. v. United States, 1999, p. 4).

The design of the approach under the first prong is to "ensure that the incoming contractor would not experience a large turnover in the program workforce because of a significant reduction in salary levels" (OMV Medical, Inc. v. United States, 1999, p. 4). This prong relates to the latter half of paragraph (b) of FAR 52.222-46. The design of the approach under the second prong is "to determine the general level of compensation for equivalent positions" in the local market (OMV Medical, Inc. v. United States, 1999, p. 4). This prong relates to paragraph (a) of FAR 52.222-46 and requires the evaluation of each offeror's total compensation plan, not just those which proposed lower compensation amounts, "to assure that it reflects a sound management approach and understanding of the contract requirements" (FAR 52.222-46).

2. CRASSOCIATES, Inc. v. U.S., 2010

The CRAssociates Inc. (CRA) decision builds upon the OMV's establishment of a two-pronged approach and provides a comprehensive analysis of what FAR 52.222-46 is envisioning agencies to evaluate.

CRA brought a protest to the COFC to the effect that the Army did not evaluate the awardee's "professional employee compensation plan in accordance with FAR 52.222-46" (CRAssociates, Inc. v. U.S., 2010 p. 11). CRA contends that had the Army actually performed the required evaluation, serious deficiencies would have been discovered in the awardee's compensation plan (CRAssociates, Inc. v. U.S., 2010). COFC found that "a

careful search of the contemporaneous administrative record reveals no indication whatsoever that anyone at the Army focused upon the requirements of this professional services clause during the evaluation process” (CRAssociates, Inc. v. U.S., 2010, p. 15).

The court established that an analysis shall be performed on all proposals following the guidance in FAR 52.222-46 (a), regardless of whether or not the compensation is lowered, “to assure it reflects a sound management approach and understanding of contract requirements” (FAR 52.222-46). Additional analysis shall be performed on proposals with lowered compensation in accordance with FAR 52.222-46 (b), with the perspective of how lower compensation levels may affect the contractor’s ability “of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees” (FAR 52.222-46). This additional analysis would require the government to obtain the incumbent’s current compensation levels for professional employees in order to perform an adequate analysis. The Court continued,

Plaintiff asserts that the “plain language” of this clause “required the Army to compare the offerors’ proposed compensation levels to those paid under the predecessor contract.”

Although not exactly plain, the clause’s language certainly infers the need for such a comparison as it requires the agency to perform additional analysis when an offeror’s compensation levels are lower than those paid by the incumbent. Paragraph (b) of the clause thus indicates that “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.” 48 C.F.R. § 52.222-46(b). To be sure, these requirements overlap somewhat with those in paragraph (a). The latter, after all, requires the agency to evaluate for every proposal (and not just those proposing lower professional compensation), an offeror’s compensation plan to assure that it reflects “sound management” and an understanding of the contract requirements. Both paragraphs, moreover, require the agency to assess the offeror’s ability to provide “uninterrupted high-quality work,” as well as the impact the proposed compensation will have on recruitment and retention.

That said, the 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.” Accordingly, on balance, it appears that an agency is obliged to make the threshold comparison described in paragraph (b), in order to determine whether it must conduct the further analysis of compensation plans required only for recompetitions.

This view finds support in *OMV Medical, Inc. v. United States*, 219 F.3d 1337 (Fed. Cir. 2000), where the Federal Circuit interpreted a predecessor version of the clause in question, see 48 C.F.R. § 52.222-46 (1998). (*CRAssociates, Inc. v. United States*, 2010, pp. 12–13)

3. CSC Government Solutions LLC v. U.S., 2016

CSC Government Solutions LLC (CSC) brought a protest to the COFC on the grounds that the Air Force “failed to evaluate the offerors’ compensation plans under FAR § 52.222-46” (*CSC Government Solutions LLC v. United States*, 2016, p. 16). CSC contends that the Air Force needed to follow a two-prong analysis in assessing the awardee’s compensation plan as decided in the *OMV Medical, Inc. v. United States*, 2000 and *CRAssociates Inc. v. United States*, 2010 (*CSC Government Solutions LLC v. United States*, 2016). The COFC disagreed with the notion that FAR 52.222-46 required a two-pronged approach:

That decision does not lay out a mandatory two-prong framework for all analyses to be conducted under FAR § 52.222-46. Rather, the two-step analytical method addressed in *OMV* was advanced by the Air Force in the RFP for the procurement at issue in that case. See *OMV Med.*, 219 F.3d at 1343 (“As provided in the RFPs, there were two components to the Air Force’s review of the offerors’ compensation packages.”). The RFP here contained no such instruction. Therefore, USSTRATCOM was obliged to follow the requirements of FAR § 52.222-46 itself, not also additional criteria set out in the RFP. ... *OMV* thus does not superimpose a requirement on FAR § 52.222-46 to compare incumbent salary rates with proposed rates. Rather, based on the text of the regulation, the procuring agency must conduct a rational analysis of the realism of the offerors’ proposed salaries with regard to program continuity, retention, and “uninterrupted high-quality work. (*CSC Government Solutions LLC v. United States*, 2016, pp. 16–17)

This researcher contends that the COFC viewed the *OMV* decision too narrowly when stating the *OMV* decision “does not lay out a mandatory two-prong framework for all analyses to be conducted under FAR 52.222-46. Rather, the two-pronged analytical

method addressed in *OMV* was advanced by the Air Force in the RFP” (CSC Government Solutions LLC v. United States, 2016, pp. 16–17). The COFC is trying to establish that the Air Force, not FAR 52.222-46, had envisioned a two-prong analysis of compensation for professional employees. This is clear in their argument when the court states,

See *OMV Med.*, 219 F.3d at 1343 (“As provided in the RFPs, there were two components to the Air Force’s review of the offerors’ compensation packages.”). The RFP here contained no such instruction. Therefore, USSTRATCOM was obliged to follow the requirements of FAR § 52.222-46 itself, not also additional criteria set out in the RFP. ... *OMV* thus does not superimpose a requirement on FAR § 52.222-46 to compare incumbent salary rates with proposed rates. (CSC Government Solutions LLC v. United States, 2016, p. 17)

However, a review of the preceding paragraphs of the *OMV* case provides that the Air Force had only included a provision titled “L-95” in the RFP, which was the FAR 52.222-46 provision, to put offerors on notice that the provision would be used in assessing compensation for professional employees. No additional criteria or evaluation criteria were provided by the Air Force.

Moreover, such a comparison is a necessary step in the evaluation of compensation for professional employees and is precisely one component of the evaluation that the OFPP Policy Letter 78-2 envisioned and FAR 52.222-46(b) instructs to be performed. Paragraph (b) instructs a comparison must be made between incumbent rates and proposed rates by the mere fact that that the government evaluators must have incumbent rates at hand to be able to compare “proposals envisioning compensation levels lower than those of predecessor contractors” (FAR 52.222-46). Furthermore, the latest sustained DoD protest decision related to FAR 52.222-46 evaluations, *Survive Engineering Company, LLC v. Air Force*, 2017, was sustained on the basis that the evaluation did not contain any documentation to show that an analysis of proposed rates to incumbent rates was performed. The next section discusses the much larger volume of court decisions related to this subject addressed by the Governmental Accountability Office (GAO).

H. GOVERNMENT ACCOUNTABILITY OFFICE PROTEST DECISIONS

There are 22 Government Accountability Office, grouped by the GAO into 16, protest decisions relevant to the scope of this research.² The discussion below focuses on the sustained protests or corrective action taken by the government as each of these have a significant influence on understanding and conducting evaluations of compensation for professional employees. Appendix A provides a summary of these decisions.

1. ENMAX Corporation v. U.S. Air Force, 1999

The ENMAX decision is important not only because it is the leading case within the DoD regarding the evaluation of compensation for professional employees, but also because it provides a simple and concise framework for agencies to follow, which the federal court interprets as reasonable.

ENMAX Corporation brought a protest to the GAO on the grounds that the U.S. Air Force had failed to perform an adequate evaluation of professional employee compensation because the Air Force only compared proposed labor rates with labor rates compiled by the government (ENMAX Corporation v. United States, 1999). “According to ENMAX, this approach, without more, was insufficient to determine the realism of proposed prices” (ENMAX Corporation v. United States, 1999, p. 9). However, the GAO found that the Air Force’s RFP provided adequate guidance on the government’s evaluation intent:

In accordance with FAR 52.222-46, “Evaluation of Compensation for Professional Employees,” [the] cost realism evaluation will include a review of salary and fringe benefit information provided in the proposal. It is the Government’s intent to use Department of Labor, Bureau of Labor Statistics (BLS) data in support of the Professional Clause, 52.222-46, to ensure that it is reasonable for the offeror to attract and retain quality professionals. If salaries and fringe benefits proposed appear unrealistically

² While the review of cases will be primarily limited to key decisions during the past decade, the ENMAX Corporation protest decision of 1999 is included in the review as it is the leading case issued by a federal court concerning compensation for professional employees related to the Department of Defense.

low, the proposal may be rejected. (ENMAX Corporation v. United States, 1999, p. 10)

This paragraph not only put offerors on notice that an evaluation of compensation for professional employees would be conducted in accordance with FAR 52.222-46, it explicitly provided offerors with the data source the government would use in conducting its evaluation. While the courts have established that the agencies do not need to list explicitly what sources will be used to conduct their realism evaluations, in this case, the agency, in effect provided offerors with the answer key.

In addition, the RFP directed offerors to a website where the BLS data could be found. Id. § L.F.4. Offerors were advised that the website contained a cross-referenced matrix linking the labor categories in the RFP to the BLS labor hour rates.

We also do not view the agency's conclusions as inconsistent with the review anticipated by the FAR clause. By comparing an offeror's proposed hourly rates with the BLS rates, the agency was able to reasonably conclude that the offeror was not endangering successful performance by taking liberties with professional compensation. In addition, the agency was also able to conclude that the offeror understood that the complexity of the effort requires paying appropriate professional rates. Little more was needed to allow the agency to make a judgment about proposed prices—especially in light of the competitive, and fixed-price nature of this procurement, and in light of the fact that an offeror's understanding was also gauged by the technical proposal. Accordingly, we conclude that the agency's price evaluation was reasonable and was not an abuse of its discretion. (ENMAX Corporation v. United States, 1999, pp. 10–11)

It should be noted that there is no discussion regarding evaluating proposed compensation to incumbent compensation. It is not clear whether there was no discussion because ENMAX did not explicitly raise the issue in their protest, whether such a comparison was ever conducted by the government, or whether the GAO did not consider that a comparison was required by FAR 52.222-46. This component of the evaluation will be extensively discussed in future protests, and less than a year after this protest, the COFC established, in another protest decision, the precedent that FAR 52.222-46 envisions a two-pronged approach to evaluating compensation for professional employees. Furthermore, the decision provides that compensation data from the Bureau of Labor Statistics provides a reasonable basis for evaluating proposed compensation.

2. L-3 National Security Solutions, Inc. v. U.S. Air Force, 2015

The L-3 protest decision supports the old contracting adage “Document. Document. Document.” The GAO found that “the record reflects that the Agency did not in fact evaluate CACI’s proposed compensation for nearly half of its workforce” (L-3 National Security Solutions, Inc. v. United States, 2015, p. 7). Furthermore,

L-3 also argues that the agency failed to reasonably evaluate CACI’s ability to retain qualified personnel because the agency did not consider CACI’s proposed reductions to its salaries for all labor categories in each successive year of contract performance. ... While the agency evaluators concluded that CACI’s (awardee) total compensation plan was adequate, the comparative analysis of CACI’s salaries was limited to only the base year (and only for incumbent hires). Thus, we fail to see, and the record fails to adequately document, how the agency determined that CACI would be able to retain its incumbent hires when their total compensation would be reduced each year. The record does not indicate that the agency evaluators reasonably considered this aspect of CACI’s compensation plan or how they reasonably concluded that CACI’s ability to retain qualified personnel was adequate in light of continuous salary reductions. (L-3 National Security Solutions, Inc. v. United States, 2015, pp. 8–9)

The agency in this case not only failed to adequately document their evaluation, it failed to conduct a comprehensive evaluation. A realism determination regarding professional employee compensation is not limited to just the base year proposal, it is a comprehensive evaluation of compensation data for all periods of performance. Evaluating compensation data from only the first of five years of performance does not provide the agency with conclusive evidence that proposed professional employee compensation was indeed realistic over the life of the contract. With no evaluation and documentation of the out years data, while unlikely, professional employee compensation could have been reduced by half, and the agency would not have known until performance issues arose or prior to the exercise of the first option year.

3. MicroTechnologies, LLC & BTAS v. U.S. Air Force, 2016

The MicroTechnologies protest decision provides several distinct, but related, examples of evaluation flaws that can occur during the evaluation of professional employee compensation—all of which were sustained by the GAO. In addition, the GAO combined

the BTAS protest (B-413091.3) into this protest decision, though the Air Force opted to take corrective actions to address that protest's specific issues. The protest's digest states,

Protest challenging the agency's evaluation of the awardee's proposed professional employee compensation plan is sustained where the evaluation was not adequately documented, the data relied upon by the agency did not provide a meaningful basis to evaluate the awardee's proposed compensation, and the agency acknowledges that it mistakenly relied upon incorrect data from a salary survey. (*Microtechnologies, LLC v. United States*, 2016, p. 1)

a. Agency evaluation was not adequately documented

During the GAO's review of the Air Force's contemporaneous record, the GAO submitted requests for information to the Air Force in order to for the Air Force to better explain some of its conclusions. The Air Force's response to these requests contained new, substituted information and analyses that were not contained within the Air Force's contemporaneous records:

Agencies are required to adequately document their evaluations, and, where an agency fails to do so, it runs the risk that our Office will be unable to determine whether the agency's evaluation was reasonable. *DKW Commc'ns, Inc.*, B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 9. Additionally, where an agency's response to a protest relies on new post-hoc analyses and does not explain why the new analyses are consistent with the contemporaneous record, we similarly cannot find the evaluation reasonable. *Boeing Sikorsky Aircraft Support*, supra. Here, in light of the agency's failure to provide documentation showing the basis for its contemporaneous evaluation, and the agency's unsupported substitution of a new evaluation, we cannot find the agency's evaluation to be reasonable. (*Microtechnologies, LLC v. United States*, 2016, p. 10)

b. Agency relied upon data that was not meaningful

The protestor in this case successfully argued that the Air Force's evaluation of professional employee compensation relied upon data that did not provide a meaningful basis of comparison. The Air Force performed a comparison between each offeror's proposed professional employee compensation using burdened labor rates. "The protestor contends that the agency's use of burdened rates to evaluate the awardee's ECP was improper because the burdened rates include cost elements unrelated to compensation and

fringe benefits” (Microtechnologies, LLC v. United States, 2016, p. 11). The GAO determined,

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. On this record, we cannot conclude that the agency’s evaluation was reasonable. (Microtechnologies, LLC v. United States, 2016, p. 12)

c. Agency relied upon incorrect salary data

The final evaluation flaw at hand was the Air Force’s comparison of dissimilar compensation data elements.

As the protester notes, this flawed comparison was not an “apples to apples” comparison of BTAS’s proposed compensation to the salary.com compensation survey data. Instead, it resulted in a comparison of BTAS’s proposed salary, fringe, and indirect costs (e.g., fee/profit, overhead, G&A) to the salary.com compensation survey data that reflected only salary information. (Microtechnologies, LLC v. United States, 2016, p. 13)

Agencies must afford great attention to detail when selecting, retrieving, and evaluating compensation data from both compensation surveys such as salary.com, Bureau of Labor Statistics (BLS), and compensation data contained within cost volumes of proposals to ensure the correct data is used.

As previously illustrated in this research, there exists a distinct difference between burdened and unburdened labor rates. Agencies that do not comprehend the differences between these two rates risk outcomes similar to this protest decision. Furthermore, in order to perform the realism analysis envisioned by FAR 52.222-46, the provision instructs offerors to “submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract” (FAR 52.222-46). Salaries and fringe benefits being the two components of unburdened labor rates, thus requiring evaluations to be conducted between unburdened labor rates, not burdened labor rates.

d. Agency took corrective action

In its effort to address the protest arguments, the corrective action taken by the agency resulted in amending its RFP language related to how it would evaluate professional employee compensation. While the GAO noted, “We dismissed the protest as academic based on the agency’s corrective action,” the RFP amendment only essentially added that the agency would use salary.com as its compensation survey to conduct its FAR 52.222-46(a) evaluation (*MicroTechnologies, LLC v. United States*, 2017, pp. 5–6). While the agency does not have to explicitly state within the RFP what sources of data it will use in its evaluation, in this case, a specific source was given to provide complete transparency to offerors.

BTAS filed a protest with our Office (B-413091.3), arguing that the agency improperly evaluated its ECP, and that the agency failed to conduct meaningful discussions. On September 21, the Air Force advised our Office that it would take the following corrective action in response to BTAS’s protest: “[A]mend the solicitation to more specifically describe how it will evaluate offerors’ ECPs, reopen discussions with the technically acceptable offerors regarding the realism of their ECPs, request final proposal revisions, and make a new award determination in accordance with the solicitation. (*MicroTechnologies, LLC v. United States*, 2017, p. 8)

4. Target Media Mid Atlantic, Inc. v. U.S. Navy, 2016

The Target Media protest decision is similar to the previous L-3 protest decision, in which case no evaluation of professional employee compensation was conducted on nearly half of the proposed workforce. However, in the protest decision at hand, the agency’s record does not “contain any documentation of such an analysis performed as part of the Navy’s evaluation of offerors’ professional employee compensation plans” (*Target Media Mid Atlantic, Inc. v. United States*, 2016, p. 7).

The GAO also discusses the inadequacy of the Agency’s cost realism evaluation regarding non-professional employees. While different from a regulation perspective, from a technical perspective, evaluations of professional and non-professional employees are conducted using the same methods. As such, the GAO’s discussion here provides supporting evidence for the conduct of a comprehensive two-pronged evaluation approach:

The agency's cost realism analysis did not analyze the realism of the proposed rates through such methods as comparing Imagine One and CACI's direct labor rates to prevailing market rates or to the salaries paid to incumbent staff. Instead, the agency examined internal payroll data provided by Imagine One and CACI to verify their proposed rates. (Target Media Mid Atlantic, Inc., v. United States, 2016, p. 5)

The agency's record only documents an examination of internal payroll data of the two companies. This seeming matching of numbers between proposed rates and actual rates paid does not adequately address potential variances in the prevailing market or incumbent compensation amounts. The need to conduct this two-pronged approach is further supported in the section that follows these non-professional employees. The GAO notes, "Here, as discussed above, the record reflects that the agency's cost evaluation did not compare Imagine One's direct labor rates to those paid to incumbent personnel on the NMMES requirement or to the prevailing market rate" (Target Media Mid Atlantic, Inc. v. United States, 2016, p. 6).

5. SURVICE Engineering Company, LLC v. U.S. Air Force, 2017

In the most recent DoD protest decision containing a FAR 52.222-46 issue, the GAO sustained the protest based on the agency's evaluation record lacking sufficient documentation. The record did not reflect that a comprehensive evaluation of professional employee compensation was conducted. The protest decision further supports the need for a two-pronged evaluation approach.

While the agency did evaluate proposed professional employee compensation against "Government estimates," thus satisfying FAR 52.222-46(a), the record does not reflect any comparison between the proposed compensation to incumbent compensation, thus not satisfying FAR 52.222-46(b) (SURVICE Engineering Company, LLC v. United States, 2017, p. 6). The "record contains a list of the agency's estimated labor rates by labor category, there is nothing in the record documenting how these rates were compared to ERC's rates" (SURVICE Engineering Company, LLC v. United States, 2017, p. 6). While the government's estimates are a satisfactory data point to use in evaluating compensation under FAR 52.222-46(a), it provides no material relevance when conducting the evaluation required under FAR 52.222-46(b). The GAO concludes,

In sum, the record does not demonstrate that the agency considered ERC's proposed compensation plan under FAR provision 52.222-46(b). Specifically, the Air Force did not reasonably compare ERC's salaries to incumbent salaries, a necessary step to determine whether the proposed salaries are lower than incumbent salaries. *Id.* Accordingly, we find that the agency failed to reasonably evaluate whether ERC offered "lowered compensation for essentially the same professional work," as envisioned by FAR provision 52.222-46. (*SURVICE Engineering Company, LLC v. United States*, 2017, p. 7)

6. Systems Research and Applications Corporation v. U.S. Navy, 2013

This protest decision provides only a small amount of information about the issue at hand. The protestor asserted that the agency "unreasonably evaluated Science Applications International Corporation's (SAIC) proposal by failing to evaluate the realism of SAIC's proposed costs and failing to evaluate SAIC's proposal in accordance with the clause at FAR § 52.222-46" (*Systems Research and Applications Corporation v. United States*, 2013, p. 3). The GAO submitted a request for information to the agency as its record of the evaluation was unclear. The agency responded to the GAO "that it intended to take corrective action consisting of reevaluating the proposals in accordance with the solicitation and applicable regulations (including the clause at FAR § 52.222-46)" (*Systems Research and Applications Corporation v. United States*, 2013, p. 4). While the protest decision does not provide definitive information of what was lacking in the agency's documentation or evaluation, it must be assumed that the record sufficiently lacked adequate documentation of the agency's evaluation and was indefensible, thus requiring corrective action to be taken.

I. IMPLICATIONS OF LITERATURE REVIEW FINDINGS

As the DoD has continued to grow increasingly reliant on services performed by professional employees over the past decade, unrealistically low professional compensation and its negative impacts are just as much of a concern today as they were in 1978. However, maintaining a 50% and 43% protest loss rate over the last decade at the COFC and the GAO respectively, it is evident that there is a need for the DoD to improve its technical excellence in conducting evaluations of compensation for professional employees. A review of the contract management life cycle depicts the importance of

activities related to the evaluation of compensation for professional employees as they are involved in each phase of the contract management life cycle. Considerations begin in the pre-award phase and continue to be relevant throughout the post-award phase.

The review of relevant COFC and GAO protest decisions indicates patterns of evaluation errors in three distinct areas: (1) The evaluation was either inadequately documented or never conducted, (2) the data relied upon did not provide a meaningful basis to evaluate compensation, and (3) the analysis compared incorrect data from salary surveys. These patterns support the need to use a structured evaluation methodology. The use of such a methodology would remedy these evaluation errors and provide the DoD with a mechanism to conduct comprehensive evaluations of compensation for professional employees in an effective and efficient manner.

Furthermore, this researcher argues that there is indeed an imperative need to perform a two-pronged analysis of compensation for professional employees to ensure the proper level of due diligence is conducted, an argument that finds support in the latest GAO protest decision, *SURVICE Engineering Company, LLC v. Air Force* (2017). The DoD would be negatively impacted by not conducting such evaluations, because an evaluation lacking either prong does not provide the DoD with a complete understanding of the market dynamics shaping compensation.

J. SUMMARY

This chapter provided a literature review to support this research. It began by introducing the contract management life cycle phases, then discussed the evolutionary history of the evaluation of compensation for professional employees that began with the Service Contract Act of 1965 and the OFPP Policy Letter 78-2. It then discussed specific FAR requirements regarding the evaluation of compensation for professional employees. These requirements were found in FAR 22.11 and FAR 52.222-46. The literature review then provided a discussion of relevant GAO and COFC protests decisions. Finally, the chapter identified specific patterns in evaluation errors found in reviewing protest decisions. These patterns can be rectified using SPECTER. The next chapter provides an introduction and overview of SPECTER and discusses specific evaluation considerations.

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III. EVALUATING PROFESSIONAL EMPLOYEE COMPENSATION

A. INTRODUCTION

The literature is clear on the importance of the need for the DoD to improve its evaluations of compensation for professional employees. It revealed a pattern of evaluation errors in three distinct areas: (1) The evaluation was either inadequately documented or never conducted, (2) the data relied upon did not provide a meaningful basis to evaluate compensation, and (3) the analysis compared incorrect data from salary surveys. The purpose of this chapter is to provide an in-depth discussion of the considerations in evaluating professional employee compensation. It begins with an introduction and overview of the SPECTER tool and then discusses topics such as labor category establishment, evaluation placement, and fringe benefit analysis that source selection teams must consider during evaluations.

B. OVERVIEW OF SPECTER

There is no widely available standardized training, tool, or guide which discusses the concepts and considerations of evaluation of compensation for professional employees. Through review of protest decisions, federal procurement regulations, and personal experience, this researcher developed SPECTER to directly combat the increasing number of sustained and corrective action protests the DoD has been affected by in recent years. SPECTER also provides procurement professionals with a tool that provides a structured methodology allowing for a comprehensive evaluation in a streamlined manner with a high level of assurance that it complies with federal regulations, COFC, and GAO decisions. Sections of SPECTER are provided below to illustrate how SPECTER incorporates specific evaluation considerations.

SPECTER is not a substitute for the official cost/price analysis. The intent of SPECTER is to simplify FAR 52.222-46 evaluations of compensation for professional employees. SPECTER is a tool that assists source selection teams with organizing and evaluating professional employee compensation data in order to support the evaluation

requirements of FAR 52.222-46. It creates a visual representation of risk to assist source selection teams in clearly communicating their evaluation findings to stakeholders in a manner that increases the decision-making speed. Ultimately, SPECTER provides a method to document the evaluation and indicators of potential risk areas—it supports the official realism determination.

Of greater concern to this researcher are evaluations that are not adequately performed and are not protested at time of award. This researcher has firsthand experience of recompeting contracts within the first year of performance because the awardee's professional employee compensation, which was unrealistically low and caused severe performance degradation, was not adequately evaluated during source selection. The researcher has firsthand experience of such instances as the one mentioned above costing the Air Force over \$1.2 million in personnel costs to recompute the single contract earlier than anticipated. This results in a significantly more severe impact on program costs, schedule, and performance than sustained protests or corrective action decisions. Thus, everything that can be done to limit such instances must be considered. The next section discusses specific evaluation considerations for source selection teams to be aware of.

C. EVALUATION CONSIDERATIONS

As discussed in Chapter II, planning for the evaluation of compensation for professional employees must begin early during the pre-award phase in order to realize an effective and efficient evaluation. This evaluation is not an afterthought; rather, it will come to shape how performance work statements, instructions to offerors, and evaluation criteria are crafted. Below are several considerations that source selection teams must be aware of when developing source selection strategies and conducting evaluations of compensation for professional employees.

1. Defining a *Professional Employee*

Source selection teams must have a thorough understanding of the definition of a professional employee if they are to determine if there are any applicable labor categories within their requirement. The General Rule for Professional Employees (2018) defines professional employees as follows:

1) Compensated on a salary or fee basis pursuant to §541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to §541.607; 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.

Learned Professionals (2018) elaborates on paragraph (2)(i):

(b) The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

Amount of Salary Required (2018) provides specific salary rate threshold criteria for professional employees

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers

in the lowest-wage Census Region. As of December 1, 2016, and until a new rate is published in the Federal Register by the Secretary, such an employee must be compensated on a salary basis at a rate per week of not less than \$913 (or \$767 per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities.

FAR 22.1102 provides an abbreviated definition of professional employees:

The term “professional employee” includes members of those professions having a recognized status based upon acquiring professional knowledge through prolonged study. Examples of these professions include accountancy, actuarial computation, architecture, dentistry, engineering, law, medicine, nursing, pharmacy, the sciences (such as biology, chemistry, and physics, and teaching).

From this researcher’s experience, there is confusion among procurement professionals on the precise definition of *professional employee*. The Code of Federal Regulations (C.F.R.) provides a legalistic definition, which can make the interpretation of the definition unclear to individuals who do not have a working knowledge of the definition. Upon first review of 29 C.F.R. 541.300, the definition of professional employees appears to be limited to employees of a field of science or learning area of work. However, 29 C.F.R. 541.300(c) expands the scope of professional employees beyond the traditional professions that one would consider, to encompass science and learning areas of work. Paragraph (c) states that “other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type but is not in a field of science or learning” (Labor, 29. C.F.R. §541.300, 2018). This researcher has found through personal experience and review of federal court protest decisions that this can encompass a wide variety of professional labor categories including program managers, information technology professionals, and contracting and acquisition analysts. It is ultimately the responsibility of the source selection team in coordination with industry partners to make the final determination on a case by case basis if labor categories will be classified as professional employees.

2. Establishment of Labor Categories

Once the source selection team has determined if a meaningful number of professional employees will be required and the solicitation will include FAR 52.222-46, the team must determine how labor categories will be established. This researcher has classified three different approaches that can be used to establish applicable labor categories. Use of each is dependent on numerous considerations and the Contracting Officer's business judgment. The following are the three methods:

1. Establish a pool or directory of applicable labor categories from which offerors can choose from in the development of their labor mix. This method allows for the government and offeror to have absolute understanding of what each labor category knowledge, skills, and abilities (KSAs) are. Pre-established labor categories can be leveraged from the Office of Management and Budget's (OMB) Standard Occupational Classification (SOC) or other appropriate labor category directories (e.g., General Services Administration [GSA] Schedule 70, OASIS, etc.).
2. The government defines a specific list of labor categories that the contractor must propose to. In certain situations, the government knows exactly the required labor category and KSAs it requires and simply needs a contractor to provide personnel who meet those KSAs.
3. The government can allow offerors to propose labor categories but requires the offerors to map proposed labor categories to an equivalent national/regional compensation survey, such as the Bureau of Labor Statistics or salary.com.

3. Location of Evaluation within the Source Selection

A common discussion during the development of a source selection plan that will include FAR 52.222-46 is where in the source selection process and by whom the TCP should be evaluated. The source selection team must determine in which part of the overall evaluation timeline the evaluation of compensation for professional employees will be

conducted. The DoD Source Selection Procedures (SSP) 2016 discusses the evaluation under the cost or price evaluation guidance section at 3.1.1.5: “When FAR 52.222-46, Evaluation of Compensation for Professional Employees (February 1993), is included in the contract, the Government shall evaluate whether an awardee understands the contract requirements and has proposed a compensation plan appropriate for those requirements” (p. 24).

Air Force Federal Acquisition Regulation Supplement (AFFARS) Mandatory Procedure (MP) MP5315.3, Source Selection, states,

This evaluation may be accomplished through a technical subfactor to evaluate offerors’ proposed management approach and or/staffing plan, or including the evaluation under the cost/price factor or as a “Volume I” proposal submission and element of proposal compliance and offeror responsibility. (MP5315.3–3.1.1.5, 2018)

It should be noted that the Air Force guidance states that the evaluation can be conducted within the technical evaluation. The placement in the technical evaluation does not preclude the cost/price analysts of participating in the evaluation. Rather, it increases the communication between the cost/price analysts and technical evaluators. Moreover, this is an ideal location to conduct the evaluation because it allows for a performance risk assessment to be made and associated with technical risk ratings. If conducted within the cost/price volume, the evaluation typically results in a go/no-go situation which limits the evaluation team’s ability to communicate the level of cost risks a proposal may present. Cost risk is discussed below in the limited cost realism section. This performance risk assessment as a part of the technical evaluation finds support in FAR 15.404-1(d)(3):

Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors’ proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations.

However, if a source selection team decides to conduct the evaluation as an element of proposal compliance and offeror responsibility, MP5315.3-3.1.1.5.1 (2018) notifies evaluation teams that

when including the professional employee compensation evaluation as a 'Volume I' proposal submission and element of proposal compliance and offeror responsibility in a source selection with small business offerors, a finding of non-responsibility due to an inadequate professional employee compensation plan for an otherwise successful small business offeror requires the PCO to engage the Small Business Administration Certificate of Competency (CoC) process.

The government's solicitation must explicitly state in which factor or proposal volume the evaluation will be conducted. Moreover, for a thorough analysis, communication is critical between the technical team and the cost/price analysis team. The technical team will often be best qualified to assess the offerors' proposed professional employees and determine whether they represent an appropriate mix and skill levels. The assessment of whether the TCP demonstrates an understanding of the contract requirements from a perspective of proposed professional employees is best performed by the technical team. Moreover, the contracting and cost/price analysis teams will often be best qualified to evaluate the proposed salaries and fringe benefits. SPECTER provides a simple and central location in which both teams can easily conduct the evaluation and communicate their findings to ensure a comprehensive evaluation and that proper due diligence is conducted.

4. Difference between Burdened and Unburdened Labor Rates

Compensation, as the term is used in this research, is defined as the sum of employee salary and fringe benefits. Examples of fringe benefits include annual leave, health care, life insurance, 401K offerings, and tuition assistance. Salary and fringe benefits are commonly referred to as unburdened or unloaded labor rates. The employee receives this rate directly, excluding indirect rates such as overhead rates, general and administrative rates, and profit/fee.

A burdened labor rate is comprised of a salary rate, fringe rate (benefits), and indirect rates, such as overheads, general and administrative, and profit/fee. Each of these elements can vary greatly between companies depending on company size, industry, accounting practices, and strategic business decisions. If the government were to evaluate

only fully burdened labor rates, its ability to determine the actual compensation provided to the professional employee would be inhibited by the inclusion of the other cost elements.

With the inclusion of FAR 52.222-46, the government must evaluate the unburdened labor rate cost element as part of its determination of whether realistic professional employee compensation has been proposed. The government would make a fundamental evaluation error if it were to evaluate fully burdened labor rates in an attempt to conduct a proper FAR 52.222-46 evaluation. This error would provide the government with baseless data to make a reasonable evaluation determination of realistic professional employee compensation. Table 1 illustrates the potential differences that can exist between unburdened and fully burdened labor rates, depicting the flaw in evaluating just fully burdened labor rates.

Assume that Offerors A, B, and Incumbent are all small business within the same industry who compete for DoD service contracts specializing in professional employee services. A recompetition of a service contract is being conducted and the government has received two offers, one from Company A and one from Company B. Also, assume that the unburdened rates of the incumbent are consistent with current market rates.

Table 1 displays the great degree to which unburdened labor rates can vary. If the government were to consider only the fully burdened labor rates for each company, the probable evaluation determination would be that both Company A and B provided realistic professional employee compensation rates when compared to the incumbent rate. The example illustrates the significant variation that can exist between unburdened rates even when there is minimal variance in the fully burdened rates.

Table 1. Difference between Unburdened and Fully Burdened Rates

	Company A*	Company B*	Incumbent*
Salary	\$ 50.00	\$ 36.00	\$ 49.00
Fringe Rate (44%, 20%, 50% of Salary)	\$ 22.00	\$ 7.20	\$ 24.50
Total Unburdened Rate	\$ 72.00	\$ 43.20	\$ 73.50
Labor Overhead (100%, 175%, 100% of Salary)	\$ 50.00	\$ 63.00	\$ 49.00
G&A (20%, 46%, 25% of Unburdened Total)	\$ 14.40	\$ 19.87	\$ 18.38
Subtotal	\$ 136.40	\$ 126.07	\$ 140.88
Profit (6%, 15%, 4% of Subtotal)	\$ 8.18	\$ 18.91	\$ 5.64
Fully Burdened	\$ 144.58	\$ 144.98	\$ 146.51

**Assume single employee based on 2,080 hours*

Company A and B Unburdened Rate Difference 40%
Company A and B Fully Burdened Rate Difference -0.28%

Company B’s fully burdened rate would appear realistic when evaluated against the incumbent rate. However, a review of the unburdened rate would suggest that Company B has proposed an unrealistically low rate, which may introduce program continuity issues and show a lack of understanding of the requirement. Many factors would have to be considered to make a thorough determination, but the example illustrates the disparity that can exist between unburdened and fully burdened rates.

5. Limited Cost Realism

In commercial and non-commercial fixed-price-type contracts, the government performs a price analysis when evaluating proposal cost/price volumes. “Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit” (FAR 15.404-1). This price analysis is conducted on the total evaluated price; however, the government must also conduct a limited cost realism analysis, limited to labor rates and fringe benefits, on professional employee compensation. FAR 15.404-1(d)(3) provides,

Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors’ proposed costs have resulted in quality or service

shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations.

It should be noted that *Department of Defense Source Selection Procedures* (DoD, 2016) provides a similar statement regarding cost realism analyses but includes an additional risk assessment *cost risk* without further discussion on how cost risk assessments may be implemented into source selections:

Cost realism analyses may be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts, to assess the offeror's understanding of the requirement. Results of these analyses may be used in cost risk assessments, performance risk assessments and responsibility determinations; they may not be used to establish a Most Probable Cost. (DoD, 2016 p. 23)

This limited cost realism analysis is not an evaluation of the total evaluated price or a determination of an offeror's price being fair and reasonable. While an offeror's proposed TCP will have an impact on the total evaluated price, the scope and purpose of the TCP evaluation is separate from the scope and purpose of a fair and reasonable determination of the total evaluated price.

The GAO coined this evaluation as a "price realism analysis," but this researcher contends that the term "price" introduces ambiguity into which rate is supposed to be evaluated (*Health Net Federal Services v. United States*, 2009). A price realism analysis would indicate that the fully burdened rate (salary, fringe benefits, indirect costs, and profit) should be evaluated. As discussed earlier this can cause serious evaluation issues.

6. Instructions to Offerors

As this researcher has previously argued and the COFC noted, the provision FAR 52.222-46 is not written as clearly as it could have been. This introduces confusion, from both the government's and offeror's perspective, about what exactly the provision is requiring to be evaluated and submitted as a total compensation plan. As such, the government's instruction to offerors should explicitly state that an analysis of compensation for professional employees will be performed and what information is required for submission with offerors' proposals.

The government must state to which level of sub-contractor the evaluation of compensation for professional employees will apply. Beyond the prime, the government may be interested in evaluating first-tier subcontractors; as such the government must explicitly direct the submission of total compensation plans from first-tier subcontractors if determined necessary.

Two examples of sample language that can be used as instructions to offerors are provided below, but in no way is this standard language required for use by source selection teams:

Offerors shall submit a total compensation plan setting forth salaries and fringe benefits proposed for all professional employees who will work under the contract as defined and required by FAR provision 52.222-46. As stated in the provision, the employee compensation plan should represent a sound management approach reflecting a clear understanding of work to be performed, be consistent with the proposed technical solution and should address the capability of the proposed compensation structure to obtain and retain suitably qualified personnel to meet mission objectives. Additionally, where the PWS specifies professional employee labor categories, the offeror shall map their proposed professional employee labor categories to the professional employee labor categories specified in the PWS and provide any supporting documenting supporting the realism of the compensation plan. Total compensation (salaries and fringe benefits) 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 and may result in the rejection of the proposal.

Or

Offerors shall submit a total compensation plan as required by FAR 52.222-46 for evaluation by the Government.

While the second sample language may seem insufficient, this streamlined language enables source selection teams to provide specific and concise instructions to offerors. It avoids potential discrepancies between instructions provided to offerors in the solicitation and the provision, and also emphasizes that both the government and offerors will follow the specific requirements provided by FAR 52.222-46.

7. Evaluation Criteria

Similar to the instructions to offerors language, the government's evaluation language should explicitly state that an analysis of compensation for professional employees will be performed based on specific evaluation criteria. The government is not required to explicitly state in the solicitation what specific evaluation methodology will be used—this provides the government with great flexibility and discretion to use the best sources of compensation data available. Stating a specific methodology (i.e., comparison to BLS rates, GS salary scale, or salary.com rates) will bind the government to use only that methodology and remove any flexibility for the government to use any means necessary.

The following is sample language that can be used for outlining evaluation criteria, but in no way is this standard language required for use by source selection teams:

The Government will subjectively evaluate the proposed total compensation plan in accordance with FAR 52.222-46.

As discussed in the previous section, this streamlined language enables source selection teams to provide specific and concise evaluation criteria to offerors. It avoids potential discrepancies between evaluation criteria provided to offerors in the solicitation and the provision, and also emphasizes that the government will follow the specific evaluation requirements provided by FAR 52.222-46.

8. Evaluation Considerations

In Chapter II, the following were noted as primary patterns of evaluation issues among protests: (1) The evaluation was not adequately documented or did not occur, (2) the data relied upon did not provide a meaningful basis to evaluate compensation, and (3) the analysis compared incorrect data from salary surveys. As such, the adequate evaluation of offeror's TCPs in compliance with FAR 52.222-46 is paramount to decreasing the number of sustained protests and corrective actions. Several evaluation considerations will be discussed below and have been incorporated in the development of SPECTER.

The most prevalent pattern of error in the protests reviewed was inadequately documented or never conducted evaluations. SPECTER was purposely developed to

provide the DoD with the capability of conducting such evaluations using a structured approach that ensures the evaluation is complete, concise, clear, and contemporaneous. SPECTER ensures not only that the two-pronged evaluation of total compensation—salary and fringe benefits—is evaluated; it ensures the two-pronged evaluation of salaries—proposed salaries compared to government’s survey and proposed salaries compared to incumbent salaries.

Offeror’s TCPs must be individually evaluated and determined to meet all requirements of FAR 52.222-46 without comparison to other proposed TCPs. “Nothing in FAR provision 52.222-46 requires the agency to find that both an offeror’s proposed fringe benefits and salary are, independently, realistic. Instead, the provision requires agencies to assess whether an offeror’s proposed ‘total compensation’ is realistic” (MicroTechnologies, LLC v. United States, 2017, p. 9). Each TCP is unique to the company and based on a company’s strategic business decisions. Differences in fringe benefit offerings are expected. The depth of the analysis is within the sound exercise of the government’s discretion, but it must be applied fairly and equally across all offerors (MicroTechnologies, LLC v. United States, 2017, p. 8). Furthermore, it is important to remember that the evaluation of an offeror’s TCP is not an evaluation for the government to choose the best TCP, it is used as an indicator of the offeror’s understanding of the government’s requirements and the offeror’s ability to obtain and retain qualified professional employees for uninterrupted high-quality work.

9. Geographic Location

Salaries can vary greatly across the United States depending on geographic locations and current market conditions in the locale. Source selection teams must ensure that the rates used for evaluation purposes are indicative of the location of where the professional employees will perform work.

It will be helpful to do some local economic research to determine whether there may be some anomalies in pay comparability. For example, if most of the occupations needed for the requirement are in adequate supply in the local economy, this might suggest that target estimates for that occupation can safely be focused on the lower or middle range of professional wages and associated labor rates due to adequate competition for available jobs.

However, if one or more occupations needed for the requirement are in short supply in the local economy, target estimates for that/those occupation(s) are in the higher end of wages and labor rates. Competition for those occupations may not be adequate, leaving the job seekers in the advantageous position to demand higher than usual pay. (GSA, 2014, p. 16)

If work is to be performed at multiple geographic locations by professional employees, salary data from each location must be obtained and used to evaluate the applicable employees. Furthermore, certification and security clearance requirements for professional employees must also be considered, as these increase the value proposition and resulting salary of the professional employee.

10. First Prong of Salary Evaluation

The first prong of the two-pronged evaluation of salaries is to evaluate the proposed labor categories and salaries against comparable labor categories and salaries found in the local economy. The source selection team can use a wide variety of data sources for evaluation such as the Bureau of Labor Statistics, GS civilian rates, salary.com, the Independent Government Estimate, or other salary surveys. A mapping between the labor categories proposed by the offeror to the labor categories used by the evaluators to perform the analysis must be documented. The labor categories used must be comparable, but not necessarily identical. For example, the proposed labor category may be an Acquisition Analyst Journeyman and the government comparable was BLS 13-1111, Management Analyst at the 50th percentile. Table 2 depicts this section in SPECTER, which guides evaluation teams to do such documentation.

Table 2. Proposed Labor Categories Evaluated against Incumbent Labor Categories

Proposed Labor Category & Skill Level	Equivalent Labor Category and Skill Level used by Government
Acquisition Analyst - Journeyman	Management Analyst (BLS 13-1111) at 50th percentile
Data Warehousing Specialist - Senior	Data Warehousing Specialist - Senior

11. Second Prong of Salary Evaluations

The second prong of the two-pronged evaluation of salaries is an evaluation of incumbent’s current professional employee total compensation. This second prong evaluation will only be conducted for follow-on service contracts. If the government is unable to obtain current total compensation data for incumbent professional employees, the evaluation documentation must articulate the reason the data was unable to be obtained and can continue its evaluation using solely the first prong evaluation of salaries and the evaluation of fringe benefits.

Evaluators must note that total compensation lower than the incumbent or the government’s survey data does not automatically indicate unrealistically low compensation. As noted earlier, the OFPP Policy Letter 78-2 did not prohibit government agencies from realizing cost reductions and savings from a lowering of compensation, as long as there are no detrimental impacts associated with accepting a lower price. As the GAO notes, “Far be it from being disqualifying, the notion that competition might produce savings in terms of professional compensation is wholly in accord with the aims of the Competition in Contracting Act of 1984” (GAO, 2010, p. 18). With this in mind, SPECTER

develops a set of business rules and established percentage ranges, which correspond to a risk rating to assist in providing indicators of potentially unrealistically low salaries

12. Risk Ratings

SPECTER creates an intuitive visual representation of risk indicators to assist PCOs in clearly communicating the analysis to stakeholders in a manner that increases the decision speed of the business clearance process. These risk indicators do not replace the official cost or performance risk assessments; they simply serve to indicate areas of potential concern to evaluation teams. The three levels (low, medium and high risk) and their ranges are illustrated in Table 3, and Table 4 illustrates the visual risk indicators in use.

Table 3. SPECTER Risk Rating Definitions

Risk Key:	
Low Risk	Proposed Unburdened Rate is no more than 10% below the respective percentile of the established index for that labor category.
Moderate Risk	Proposed Unburdened Rate is more than 10% but less than 15% below the respective percentile of the established index for that labor category.
High Risk	Proposed Unburdened Rate is more than 15% below the respective percentile of the established index for that labor category.
* Reminder: Risk Rating alone does not provide PCO's realism determination.	

Table 4. SPECTER Visual Representation of Risk Indicators

Proposed Labor Category & Skill Level	Equivalent Labor Category and Skill Level used by Government	Incumbent's Unburdened Rate	Proposed Unburdened Rate	% Rate Difference
Acquisition Analyst - Journeyman	Management Analyst (BLS 13-1111) at 50th percentile	\$ 38.00	\$ 35.00	-8.57%
Data Warehousing Specialist - Senior	Data Warehousing Specialist - Senior	\$ 58.00	\$ 38.00	-52.63%

As discussed earlier, the evaluation of the compensation of professional employees requires the complete evaluation of both salaries and fringe benefits. There may be situations in which proposed salaries appear to be unrealistically low and are identified as moderate or high risk by SPECTER, but the offeror provides significant fringe benefits, which when analyzed from a total compensation perspective indicates that the offeror can successfully recruit and retain qualified professional employees. In such a case, the evaluator would need to adequately document their findings and explain how the salary risk rating is not a detrimental factor from a total compensation perspective. It will be up to the source selection team's knowledge, experience, and business acumen of the requirement at hand and the market to analyze all the relevant factors and document the rationale of their determination in an adequate manner.

13. Fringe Benefits Analysis

The analysis of fringe benefits lends itself to be conducted as a qualitative assessment. This researcher argues in support of a qualitative assessment of fringe benefits because the quantitative approaches have inherent flaws that do not allow for comparable analysis. The two quantitative methods of evaluation that have been promoted by some are to evaluate fringe benefits using the fringe benefits percentage and to monetize the value of fringe benefits.

The first flawed quantitative method is having offerors provide a fringe benefits percentage, say 36%, as a basis of the government's evaluation. That rate is simply an accounting rate that is applied to direct labor rates to allocate the company's provided fringe benefits across its employees. It provides absolutely no insight into the actual proposed fringe benefits the professional employees are afforded. It fails to indicate whether some of the standard fringe benefits—paid time off, 401K offerings, health and life insurance—are provided to the professional employees. This rate could also significantly differ from a small and large business, which both could be competing for the same requirement. This method does not allow the government to conduct proper due diligence.

The second flawed quantitative method is to have offerors monetize the expected value of fringe benefits to professional employees and then add that to the proposed salary to compute a total dollar amount of compensation for the professional employee. This method’s flaw is that there is no structured approach for offerors to use in monetizing the value of each fringe benefit. This will produce wide ranges of amounts, which limits the government’s ability to conduct meaningful analysis of fringe benefit offerings. It also does not provide sufficient insight into the fringe benefit offerings. Table 5 illustrates the differences that may exist among fringe benefits across companies and how fringe benefits are commonly provided to source selection teams.

Table 5. Fringe Benefits Analysis

Fringe Benefits Provided	ABC Corp	XYZ company	ACME Corp
PPO	100%	95%	97%
Health Savings Acct.	100%	95%	98%
Dental	100%/95%/80%	100%/90%/90%	95%/100%/90%
Vision	100%	95%	98%
Life Insurance	1x salary to \$550k max.	1.5x salary to \$350k max.	2x salary to \$600k max.
Supplemental Life Insurance	Yes	No	Yes
Short/Long Term Disability	50% of monthly earnings to \$10k max.	60% of monthly earnings to \$20k max.	60% of monthly earnings to \$10k max.
401K	Yes, 5% matching after 3 years	Yes, 3% matching	Yes, 4% matching
Annual Leave	128 hours/yr.; 168 after 5 yrs.	128 hours/yr.; 168 after 5 yrs.	128 hours/yr.; 168 after 5 yrs.
Sick Leave	Combined with annual leave	Combined with annual leave	Combined with annual leave
Parental Leave	N/A	N/A	N/A
Bereavement Leave	24 hrs./occurrence	24 hrs./occurrence	24 hrs./occurrence
Jury Duty	10 days/yr.	12 days/yr.	Annual Leave
Military Duty	10 Days	Annual Leave	20 Days
Paid Holidays	9	12	10
Tuition Reimbursement	\$2,500/yr.	\$4,500/yr.	N/A
Technical Training	N/A	\$4,500	\$1,000
Professional Training	\$1,500	\$5,000	\$2,500
Awards and Recognition	Up to \$500	N/A	N/A
Referral Bonus	\$5,000	N/A	N/A
Employee Welfare/Life Assistance	N/A	\$100.00	N/A
Credit Union Membership	N/A	N/A	\$250.00
Concierge Services	\$500	N/A	\$100

From experience and personal discussions with price analysts, source selection teams can consider two alternative approaches to evaluating fringe benefits. First, source selection teams can establish a “floor” of expected fringe benefits for professional employees to be offered that is commensurate with the industry and factors of the requirement. This requires the government evaluation team to conduct proper market intelligence for the requirement at hand and the offeror to comprehensively articulate its TCP and rationale for fringe benefits offerings. An example of the government’s evaluation floor of fringe benefits would be “for this industry in which the professional employees are

performing work, the government expects the following fringe benefits to be offered at a minimum. Individual and family health, dental, vision, and life insurance, 401K, short/long term disability, and annual leave.” As long as the floor of fringe benefits is offered, the government may determine the fringe benefits to be realistic. The disadvantage to this method is it does not provide insight into employer contribution to fringe benefits. The second approach provides a remedy. Using the second alternative approach, the source selection team provides explicit instructions to offerors in the solicitation that requires offerors to provide the dollar amount that the employer directly contributes towards the employee’s fringe benefits. This provides an approach of analyzing the dollar amount provided by the employer to the employee towards fringe benefits and would allow the source selection team to sum this total rate with direct labor rate to develop a total compensation rate for the professional employee.

14. Compensation Survey Data Guidance

The BLS and salary.com are two indices of free compensation data that source selection teams can use during evaluations. BLS and salary.com each use a differing basis for developing compensation data and hours that teams need to understand to ensure adequate comparisons are made. For example, salary.com hourly rates are based on 2,055 annual hours not the 2,080 or 2,087 typically used by acquisition offices. BLS hourly rates are based on 2,080 annual labor hours. Moreover, evaluation teams must understand that all rates provided are unburdened rates. As noted in earlier GAO cases, some teams have compared unburdened to burdened rates, thus not realizing an adequate evaluation.

15. OASIS Education and Qualification (E&Q) Level Crosswalk to BLS

The One Acquisition Solution for Integrated Services (OASIS) program office developed the OASIS Estimating Tool to assist in the development of independent government cost estimates (GSA, 2014). During development, the OASIS team

analyzed the BLS wage statistics to establish an estimate of fair and proper compensation levels that would ensure adequate contract performance and not impair the contractor’s ability to attract and retain competent professional service employees That estimate process resulted in a naturally progressing compensation scale. (GSA, 2014, p. 4)

Table 6 depicts the scale developed by the OASIS team.

Table 6. OASIS Education and Qualification Matrix

E&Q Level	E & Q Standard (experience-education)	BLS Wage Percentile
Junior	0-3 years' – BA/BS degree	50 th
Journeyman	3-10 years' - BA/BS or MA/MS	75 th
Senior	Over 10 years – MA/MS	90 th
SME	Recognized industry leader	GSA developed Expert wage level

For evaluation purposes, evaluators should price labor categories one level below what Table 6 depicts. “The assignment of E&Q Level to BLS Wage Percentile for OASIS Labor Categories was done for the establishment of OASIS Not-To-Exceed (ceiling) prices for sole-source task orders. Accordingly, this will likely result in an upper range estimate for requirements” (GSA, 2014, p. 8). If source selection teams are anticipating using an OASIS IDIQ or basing their government salary survey data on BLS wage statistics, SPECTER provides instructions and an adjusted table to facilitate an accurate evaluation.

The above discussion articulates the numerous factors that must be considered by source selection teams during the pre-award and award phases related to the evaluation of compensation for professional employees. It also illustrates how SPECTER provides a structured framework for source selection teams to use in conducting and documenting the evaluation.

D. SUMMARY

This chapter began by providing an introduction and overview of the SPECTER tool and discussed its intent to provide contracting professionals with a tool that streamlines and helps ensure adequate evaluations of compensation for professional employees are conducted. Finally, it discussed and elucidated the significant number of factors that source selection teams must consider when developing requirements and conducting evaluations of compensation for professional employees. The next chapter provides a summary, conclusion, and identifies areas for further research.

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IV. SUMMARY, CONCLUSION, AND AREAS FOR FURTHER RESEARCH

A. INTRODUCTION

The purpose of this chapter is to provide a summary of this research, summarize and answer the research questions, discuss specific findings and recommendations, and identify potential areas for further research.

B. SUMMARY

As the DoD continues to grow increasingly reliant on services performed by professional employees in the execution of its missions, unrealistically low professional compensation and its negative impacts on cost, schedule, and performance must be properly managed and mitigated. Maintaining a 50% and 43% protest loss rate over the last decade at the COFC and the GAO respectively, it is evident there is a need for the DoD to improve its technical competence in conducting evaluations of compensation for professional employees. This research explored the genesis of the subject matter, federal court protest decisions, and numerous factors that influence evaluation of compensation for professional employees in an effort build a deeper understanding of evaluations of compensation for professional employees. A review of the contract management life cycle depicted the importance of activities related to the evaluation of compensation for professional employees as they are involved in all phases of the contract management life cycle. It discussed how considerations begin in the pre-award phase and continue to be relevant throughout the award and post-award phases.

This research has made it clear that the seemingly simple evaluation of compensation for professional employees is in fact a relatively complex evaluation process that involves a significant number of factors evaluation teams must consider. The primary benefit of this research is to increase the technical competence of procurement professionals by providing them with a better understanding of the complexity of evaluations of compensation for professional employees and with a functional tool, SPECTER, that empowers them to contribute to efforts to maximize every dollar within

the DoD budget by conducting effective and efficient evaluations of compensation for professional employees. Moreover, the impact of sustained protests on acquisition programs' cost, schedule, and performance can be costly, even more so if the evaluation flaw occurs and is discovered during the actual performance of the contract — which may cause severe mission degradation. This research argues that the DoD needs to use SPECTER conduct streamlined comprehensive evaluation that comply with the FAR and federal court decisions. Furthermore, this research has identified several findings and proposed realistic and constructive recommendations that if adopted by the DoD, can help it realize second and third-order effects of adequate evaluations of compensation for professional employees — increased lethality, readiness, and mission effectiveness.

C. CONCLUSION

This research was conducted to answer the following questions. Restatements of the research questions and a summary answer for each question is provided. Finally, specific research findings and recommendations are discussed.

- (1) What patterns or consistencies of evaluation errors can be identified from the analysis of court decisions related to sustained and corrective action protests involving the evaluation of compensation for professional employees?**

The review of relevant COFC and GAO protest decisions indicate a pattern of evaluation errors. This pattern of evaluation errors can be grouped into three distinct categories: (1) The evaluation was either inadequately documented or never conducted, (2) the data relied upon did not provide a meaningful basis to evaluate compensation, and (3) the analysis compared incorrect data from salary surveys. This pattern of evaluation errors supports the need to use a structured evaluation methodology and increase training opportunities. The use of such a methodology would remedy these evaluation errors and provide the DoD with a mechanism to conduct comprehensive evaluations of compensation for professional employees.

(2) If patterns of evaluation errors are identified, how could source selection teams avoid similar evaluation errors in future source selections?

Evaluation teams can avoid these evaluation errors in future source selections by following two approaches. First, training both the requirement owners and contracting professionals on the intricacies of evaluations of compensation for professional employees is necessary to avoid future evaluation flaws. Second, by using SPECTER to conduct evaluations, teams will follow a structured, straightforward methodology that is defensible based on COFC and GAO protest decisions and FAR requirements. When implemented together, these approaches will ensure adequate evaluations and proper due diligence during evaluations. Thus, the DoD will win a larger percentage of protest decisions.

(3) How can SPECTER effectively identify unrealistically low compensation during proposal evaluations?

This report suffered from limitations of data collection, which hampered the planned functionality testing of SPECTER. Though SPECTER was not able to be tested on proposals in this research, the foundational concepts and considerations SPECTER is built on indicate that it will be able to effectively identify unrealistically low compensation. However, during initial testing of SPECTER at the researcher's previous assignment, SPECTER identified proposal flaws in eight separate proposals totaling \$21,000,000 in unrealistically low compensation. Future pilot testing of SPECTER in various contracting squadrons will provide further opportunities to test and refine SPECTER's functionality.

D. FINDINGS AND RECOMMENDATIONS

This research identified several findings which are discussed below. Specific actionable recommendations based on the research findings are also provided.

Finding 1: Need for Increased Training across the DoD

The need to develop and deploy additional training on evaluations of compensation for professional employees extends to all military services. With the DoD becoming increasingly reliant on contracted services, specifically professional employees, in executing its mission, the need to conduct adequate evaluations is more imperative than

ever before. During the process of data collection, the researcher presented SPECTER at events such as the annual Air Force Services Acquisition Workshop. During such events, the workforce's call for increased training opportunities on the subject of evaluations of compensation for professional employees has been significant. Many contracting personnel stated they would be conducting such evaluations in the near future and were not confident conducting such evaluations because their knowledge on the subject was minimal. Others noted that they now realize they have been conducting the evaluations incorrectly for several years — they were only considering fully burdened labor rates in their evaluations. The need for SPECTER and associated training was noted by seasoned contracting leaders to junior personnel. There is no widely accessible training material available to the workforce that provides insight on the numerous factors evaluation teams must consider when developing requirements and conducting evaluations. Moreover, the Defense Acquisition University and Air Force Institute of Technology School of Systems and Logistics both requested assistance in developing training modules and deploying SPECTER, as current course offerings do not contain sufficient training materials on the subject.

Recommendation 1: Increase Training across the DoD

The DoD should either develop and deploy training across the DoD or direct each service acquisition executive to do so on the topic of evaluation of compensation for professional employees. If training already exists, then more widely publicized and available training opportunities will help improve the workforce's tradecraft of service acquisitions. Increased training will directly lead to a decrease in sustained protests or corrective actions resulting from flawed evaluations and result in better acquisition outcomes for source selections.

Finding 2: Lack of Clarity in FAR 52.222-46

As the COFC and this researcher have noted, the wording of FAR 52.222-46 is “not exactly plain” (CRAssociates, Inc. v. United States, 2010, p. 13). Confusion over provision's intent has led evaluation teams to conduct inadequate evaluations, and exacerbates misunderstandings on how to conduct such evaluations. Offerors have also

been confused by the provision's requirements and at times have failed to provide adequate supporting documentation to enable the government to conduct adequate evaluations without requesting further information.

Recommendation 2: Revise FAR 52.222-46 to Increase Clarity

The Federal Acquisition Regulation Council should consider a revision of FAR 52.222-46 focused on increasing the clarity of the provision's intent to benefit both the government and industry. This would help government source selection teams better understand the provision's intent when conducting evaluations. A proposed revision of FAR 52.222-46 is provided in Appendix B. The revision reorders and reprioritizes the sequence of requirements, more clearly articulates the government's concerns with respect to professional employee compensation, recompletions, and contractor submission requirements, and outlines the government's evaluation schema.

Finding 3: Confusion Regarding the Definition of a *Professional Employee*

There exists confusion among procurement professionals regarding the definition of a *professional employee*. Individuals may limit their research of the definition of a professional employee to FAR 22.1102, which does not include detailed applicability instructions. A review of the Code of Federal Regulations (C.F.R.) provides a legal definition, which can make the interpretation of the definition unclear to individuals who do not have a working knowledge of the definition. Upon first review of 29 C.F.R. 541.300, the definition of *professional employees* appears to be limited to employees of a field of science or learning area of work, such as teachers. However, 29 C.F.R. 541.300(c) expands the scope of the term *professional employees* beyond the traditional professions that one would consider encompassing science and learning areas of work. Paragraph (c) provides this clarification: "Other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning" (Labor, 29 C.F.R. §541.300, 2018). This research has found that evaluation teams consider a wide variety of labor categories professional employees including, but not limited to, program managers, information technology professionals, logisticians, and contracting and

acquisition analysts. However, many of these labor categories are not technically professional employees. Although to date, there has not been a challenge regarding the C.F.R. or FAR definition of a *professional employee*, this researcher contends that a clearer definition and examples of professional employees are need.

Recommendation 3: Improve Definition of *Professional Employee*

To increase the clarity of what constitutes a professional employee, 29 C.F.R. 541.300, at a minimum, and FAR 22.1101 should be revised. The intent behind these revisions would not be to constrain source selection teams in classifying professional employees, but rather to provide source selection teams and industry partners with better information to ensure proper evaluations and make determinations on a case by case basis. This would assist contracting professionals in making more accurate determinations on the applicability of FAR 52.222-46 to acquisitions, and it would ensure that the DoD conducts proper due diligence for requirements that may have not included the provision due to confusion on the term's applicability.

E. AREAS OF FURTHER RESEARCH

There exist several areas for possible further research. Further research in the areas identified will contribute in developing an improved understanding of evaluations of compensation for professional employees the DoD needs.

1. Obtain Compensation Data from Proposals

With only one contracting squadron participating in the research, the population of possible proposal data to be collected was severely limited. Upon review of the 120 solicitations meeting the filtering criteria at the squadron, no solicitations contained the provision FAR 52.222-46. This was a significant disappointment but provides an excellent area for further research. Obtaining proposal data from multiple locations will allow for researchers to analyze how evaluations are conducted across various organizations. Furthermore, it will provide data inputs in order to use SPECTER and compare evaluation outputs to SPECTER outputs.

2. Conduct Pilot Tests of SPECTER

As identified above, this research suffered from limitations of data collection, which hampered the planned functionality testing of SPECTER. Though SPECTER was not able to be tested on proposals in this research, future pilot testing of SPECTER at multiple contracting squadrons will provide further opportunities to test and refine SPECTER's functionality. This is critical for the continued development of SPECTER as it will provide the needed feedback from the field to develop a more capable tool that can be useful not only to the Air Force, but also to the DoD as a whole and to other federal government entities.

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APPENDIX A. COURT DECISION SUMMARIES

Federal Court	Ruling #	Service	Date	Company Name	Court Decision	Summary of Decision
GAO	B-414519	USAF	05-Jul-17	Survive Eng	Sustained	Agency's evaluation documentation does not show a reasonable evaluation was conducted IAW FAR 52.222-46. The record does not reflect that the agency compared the proposed labor rates to those paid to incumbent personnel.
GAO	B-412468.8	Navy	27-Jun-17	Target Media Mid Atlantic	Denied	Agency did perform and document a reasonable analysis
GAO	B-413323.3,5	USA	11-May-17	Systems Plus	Denied	Agency performed and documented a reasonable analysis IAW FAR 52.222-46.
GAO	B-414285	USAF	24-Apr-17	Dalpar Corp	Denied	Agency performed and documented a reasonable analysis IAW FAR 52.222-46.
GAO	B-414145	Navy	24-Feb-17	Rollout Systems LLC	Denied	Agency performed and documented a reasonable analysis IAW FAR 52.222-46.
GAO	B-413091.4	USAF	03-Feb-17	MicroTech	Denied	Agency performed and documented a reasonable analysis IAW FAR 52.222-46.
GAO	B-412468.6	Navy	06-Dec-16	Target Media Mid Atlantic	Sustained	Agency did not compare proposed rates to prevailing market rates or to incumbent rates.
COFC	16-1000C	Air Force	02-Dec-16	CSC Government Solutions	Denied	Argues that two-prong approach is not mandatory. Argues that the Agency does not need to compare proposed rates to incumbent rates. Rather it needs to review rates and fringe on the impact of program continuity by itself. Unless the Agency states they will compare rates, then it is left to them on how to accomplish analysis. Must document analysis completely.
GAO	B-413091.3	USAF	15-Sep-16	BTAS	Corrective Action	Agency improperly evaluated the TCP. Agency decided to take corrective action to address protest.
GAO	B-413091; B-413091.2	USAF	11-Aug-16	MicroTech	Sustained	Agency did not adequately document the evaluation, data relied upon did not provide meaningful basis, and incorrect data was relied on.
GAO	B-413012; B-413012.2	USAF	28-Jul-16	AT&T Govt Solutions	Denied	Agency did perform and document a reasonable analysis. Nothing in FAR 52.222-46 requires an agency to consider whether an offeror will provide the exact same fringe benefits as the incumbent as protestor alleged it required.
GAO	B-411045	USAF	30-Apr-15	L-3	Sustained	Agency's evaluation documentation does not show a reasonable evaluation was conducted IAW FAR 52.222-46. The record does not indicate that the agency evaluators reasonably considered proposed compensation plan or how salary reductions would impact workforce recruitment and retention.
GAO	B-409851	USAF	26-Aug-14	Lewis Price	Denied	Agency performed and documented a rational analysis IAW FAR 52.222-46. Offeror's disagreement with Government's evaluation has no standing.
GAO	B-408551.3	USA	23-Dec-13	Aplus Tech Inc.	Denied	Agency did perform and document a rational analysis IAW FAR 52.222-46. No requirement to disclose estimate in solicitation
GAO	B-408846; B-408846.4	USAF	12-Dec-13	Portfolio Management	Denied	Agency did perform and document analysis sufficiently, and depth of price realism analysis is a matter within the sound exercise of the agency's discretion.
GAO	B-406775.3	Navy	10-Apr-13	Systems Research Corp	Corrective Action	Agency did not perform analysis IAW FAR 52.222-46, took corrective action to do so
COFC	10-339C	Air Force	20-Oct-10	CRAssociates	Protest Sustained	A review of the contemporaneous administrative record reveals no indication whatsoever that the Army conducted any analysis or evaluation of compensation for professional employees as required by FAR 52.222-46.
GAO	B-401652.3; B-401652.5	DoD Tricare	04-Nov-09	Health Net Federal Services	Sustained	Failed to conduct a reasonable evaluation. Agency did not consider awardee's ability to hire the incumbent workforce with lower compensation rates.

Note. Adapted from COFC (<https://www.uscfc.uscourts.gov/>) and GAO (<https://www.gao.gov/legal/>) court decisions.

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APPENDIX B. SUPPORTING DOCUMENTATION

A. OFPP POLICY LETTER 78-2 ATTACHMENT

The Federal Government has for many years contracted with American industry for a variety of services in support of Federal programs. In most cases the contracts have been entered into as a result of competitive procurement procedures and they normally are subject to periodic recompetition.

Unwarranted reduction in salaries and fringe benefits can occur during competition for Government service contracts. Since the costs of wages and fringe benefits constitute the largest cost element in a service contract, competitors often have driven down wage rates to unrealistically low levels, even though the employees that will perform the work under the new contract are the same performing the work under the predecessor contract.

The Service Contract Act of 1965 (P.L. 89-286), as amended, was enacted to prevent such “wage busting” practices with respect to blue collar and some white collar workers. The Department of Labor sets and maintains wage determinations minimum standards for wages, working conditions, or other employees. In addition, professional employees traditionally have not been represented by union collective bargaining agreements.

The Government shares a deep concern for inequities such as “wage busting” practices generated in our procurement system. The Government should not inadvertently contribute to unwarranted, severe and abrupt reduction in compensation provided to Federal service contract employees. This has happened to some professional employees, especially in areas of concentrated Federal support such as Cape Canaveral, Florida; Houston, Texas; Huntsville, Alabama; and several areas of California. In these and other areas, experience has in some cases been bad; the potential for further problems is worse.

The Federal Government cannot allow the protracted labor instability, loss of morale, and undermined mission performance that comes from the fact or fear of “wage busting.” The human impact on longstanding careers, family dislocations, and personal economic distress makes the problems even more compelling, even if it could be confined to isolated locales.

Therefore, pursuant to the authority vested in me under Public Law 93-400, it is the declared policy of the Federal Government that all service employees, including professional employees, employed by contractors providing services to the U.S. Government, be fairly and properly compensated. Federal procurement procedures shall be developed to assure

equitable compensation for all such employees. This policy clearly recognized the fact that there is a predictable and essential link between personnel compensation and work performance. Therefore, evaluation of bids and proposals for service contract work shall take into account the realism of the offeror's proposed personnel compensation plan to assure that the offeror has a proper understanding of the resources required to perform high quality work on an uninterrupted basis. (Fettig, 1978, pp. 7-8)

B. CURRENT VERSION OF FAR 52.222-46

Evaluation of Compensation for Professional Employees (Feb 1993)

(a) Recompensation 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 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.

(b) 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.

(c) 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.

(d) Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.

C. PROPOSED REVISION OF FAR 52.222-46

Evaluation of Compensation for Professional Employees – (Flansburg, 2018)³

(a) Professional Employees as used in this provision, means - any "employee employed in a bona fide professional capacity" as defined in 29 CFR 541.300. Although professional employees are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act, as amended, not all exempt employees are professional employees. The term professional employee embraces those professionals having a recognized status in the field of science or learning based upon acquiring professional knowledge through prolonged study. Examples of these professions typically include, but are not limited to, accountancy, actuarial computation, architecture, law, medicine, dentistry, engineering, etc. To be a professional employee subject to this provision, a person must not only be a professional but must be involved in discharging professional duties under the contract. It is the responsibility of the offeror to clearly identify professional employees meeting the conditions of 29 CFR 541.300 included in the proposal.

(b) The Government is concerned with the quality and stability of the professional employee work force to be employed on this contract. Total compensation (salaries and fringe benefits) 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. It is therefore in the Government's best interest that professional employees be properly and fairly compensated.

(c) Furthermore, recompetition of service contracts may in some cases result in lowering of the total compensation paid or furnished to professional

³ The text in this section, written by the author, has been heavily adapted from the current FAR. It borrows sentence text verbatim and paraphrases from the FAR to create a streamlined revised version.

employees to unrealistically low levels in order to secure award. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance. Offerors are cautioned that unrealistically low total compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement.

(d) As part of proposal submission, offerors shall submit a total compensation plan setting forth salaries and fringe benefits proposed for all professional employees who will work under the contract. The offeror shall include the substance of this provision in subcontracts exceeding the dollar threshold cited in FAR 22.1103 for all professional employees who will work under the contract. The compensation levels proposed should reflect a clear understanding of work to be performed, be consistent with the proposed technical solution, and should address the capability of the proposed compensation structure to obtain and keep suitably qualified personnel to meet mission objectives for the specific geographic locations for the work to be performed. 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 or similar work should address how the plan will assure program continuity, uninterrupted high-quality work, and the availability of required competent professional service employees. Total compensation plans shall include supporting data, such as recognized national and regional compensation surveys and studies of professional, public and private organizations, used in establishing the proposed total compensation structure. Total compensation plans shall also detail how the offeror intends to maintain the plan to ensure stability over the life of the contract. Proposals must clearly provide unburdened annual salaries (or hourly labor rates with computations used to derive hourly rates from salaries), the composition of fringe benefits offered and the dollar value (or percentage of fringe benefits to labor) contributed by the employer. With the submission of the total compensation plan, offerors are certifying that proposed labor salaries/rates and fringe benefits provided in the total compensation plan are consistent with proposed labor salaries/rates and fringe benefits included in the total proposed price.

(e) The Government will subjectively evaluate the proposed compensation plan to assure that it reflects a sound management approach and understanding of the contract requirements. A compensation plan for professional employees will be sound if it describes and supports the offeror's ability to provide uninterrupted high-quality work, the impact of the compensation upon recruiting and retention, its realism, and its consistency with the proposed technical solution. Furthermore, for proposals envisioning compensation levels lower than those of predecessor

contractors for the same or similar work, the plan will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees. Total compensation for professional employees that is determined unrealistically low or not in reasonable relationship to the various labor categories, may be viewed as evidence of failure to comprehend the complexity of the contract requirements and may constitute sufficient cause to justify rejection of a proposal.

(f) Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.

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