

NEWSLETTER

October 2023



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TIP OF THE MONTH

Can a Federal Contractor Propose a “Too Low” Price?

In the world of federal government contracting, it's not uncommon for an offeror to lose a competition to a lower-priced competitor. But what if the winning offeror's price is lower than its cost to perform the work? Contrary to popular belief, when it comes to fixed-price contracts, it's often perfectly acceptable to propose a below-cost price.

The government uses many methods to establish the amount paid to a contractor, but one of the most common methods is called “firm fixed price.” A firm fixed-price contract, as defined in Federal Acquisition Regulation (FAR) 16.202-1 “provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.”

While the rule against adjustments to an “FFP” contract is not quite as ironclad as it sounds (the government, for example, may be liable if the government's action or inaction increases the contractor's costs), a FFP contract, per FAR 16.202-1 “places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.” In other words, barring any exceptions, the government pays the exact price specified in the contract, regardless of whether the contractor makes an enormous profit or suffers an equally-enormous loss.

Because the government's risk ordinarily is no different regardless of the contractor's cost to perform, the government usually has no reason to object if an offeror proposes a seemingly “too low” fixed price – even a fixed price so low that it appears the offeror will suffer a loss. Therefore, when a solicitation seeks a firm, fixed-price contract, the default rule is that there is nothing wrong with proposing a below-cost price.

In fact, the Government Accountability Office has held that, unless the solicitation states

otherwise, a federal agency cannot reject a FFP offer simply because the proposed price appears to be “too low.” In its decisions, the GAO has recognized that there may be viable business reasons to propose a below-cost price.

For instance, in one extreme example, *LCPTracker, Inc.; eMars, Inc.*, B-410752.3 (2015), the GAO upheld an award to a contractor that pledged to do the work for free, when the next-lowest bidder proposed a price of approximately \$450,000. In that case, the winning offeror explained that it felt the \$0 bid was worthwhile because obtaining the contract would allow it to access a new market and build new relationships.

While the default rule for FFP solicitations is that “too low” offers are permitted, agencies may vary from the default. If an agency elects, it may choose to evaluate “price realism,” that is, the question of whether an offeror’s proposed price is so low that it makes the offeror’s bid risky and/or calls into question whether the offeror truly understands the scope of work.

If an agency intends to evaluate price realism under an FFP solicitation, it *must* advise offerors that it intends to do so. If the agency remains silent, the default rule applies, and the agency may expose itself to a successful bid protest if it eliminates an offeror for proposing a too-low price.

NICC APEX ACCELERATOR NEWS YOU CAN USE

New Rule Gives Contractors a Way to Rate the Government

If you are a federal contractor, you’re undoubtedly familiar with the Contractor Performance Assessment Reporting system, in which federal agencies assign past performance ratings to contractors. But, perhaps taking a cue from ridesharing apps and other popular services in which performance reviews go “both ways,” a new FAR provision will encourage contractors to provide performance assessments to the government. [Read more about this rule here.](#)

GOVOLOGY WEBINARS

*Please use the new code **20NICC23** when registering for Govology webinars.*



Funding And Selling Innovative Solutions to Government Agencies

Date: October 12, 2023

Time: 1:00 pm EDT

Presenter: Jerry Hollister, BBC Entrepreneurial Training and Consulting

[Click Here to Learn More](#)



Suspensions, Debarment and Related Ethical Issues for Federal Contractors

Date: October 17, 2023

Time: 1:00 pm EDT

Presenter: Maria Panichelli, McCarter & English

[Click Here to Learn More](#)



How the SBIR & STTR Programs Can Benefit Small Innovative Companies (2023 Update)

Date: October 19, 2023

Time: 1:00 pm EDT

Presenter: Stephanie Amend, govIRG

[Click Here to Learn More](#)



Classifications Under U.S. Export Controls (ITAR and EAR)

Date: October 24, 2023

Time: 1:00 pm EDT

Presenter: Jack Shelton, Aegis Space Law

[Click Here to Learn More](#)



How to Leverage Your GSA Schedule to Win More Government Contracts

Date: October 26, 2023

Time: 1:00 pm EDT

Presenter: Rich Earnest, Earnest Consulting Group

[Click Here to Learn More](#)

RECOMMENDED READINGS

DOE Removes Requirement for “Continuous” SAM Registration

In the July newsletter, we highlighted a federal court decision in which a contractor lost an award because the contractor’s System for Award Management (SAM) registration lapsed – that is, became temporarily inactive – between the date the contractor submitted its proposal and the date of contract award. According to the court, this lapse violated FAR 52.204-7, which requires a contractor to continuously maintain an active SAM registration between the proposal and award dates. Now, the [Department of Energy has issued a FAR deviation](#) to remove the continuous registration requirement. However, the DOE’s deviation doesn’t apply outside of the DOE.

SBA Releases New Small Business Award Data Hub

The SBA has released a new web application that allows users to easily review a great deal of information about the government’s small business awards. Called the “Small Business Data HUB,” this application is free and easy to use. Through the application, users can quickly obtain breakdowns of federal small business spending by socioeconomic category (all small businesses, 8(a), women-owned small businesses, and so on), by state, by agency and funding office, and more. [Read more about the Small Business Data HUB](#) or [visit the Small Business Data HUB](#).

SPECIAL INTEREST

This section highlights items of special interest and importance to the Department of Defense Office of Small Business Programs (DOD OSBP). Please take a moment to visit the sites listed below for additional information. We also suggest you read the latest edition of the [DoD’s Small Business Digest](#) if you want to do business with the Department of Defense.

CMMC / Cybersecurity Compliance Resources

[DoD CMMC Resource Page](#) - Resources to assist government contractors in understanding and complying with CMMC/Cybersecurity requirements.

[Project Spectrum](#) - Project Spectrum is working with APEX Accelerators to assist small businesses in achieving compliance with CMMC/Cybersecurity requirements.

Foreign Ownership, Control and Influence (FOCI) Resources

[FOCI Frequently Asked Questions](#) - FOCI is a status or situation in which a contractor with access to classified information has some foreign investment or association with foreign interest. Learn more about the Federal Government's requirements relating to FOCI.

<https://business.defense.gov/> - The official website of DoD's Office of Small Business Programs website. It contains additional information, news, events, and other items of interest for those interested (or currently engaged) in doing business with the DoD.

CMMC & FOCI News of Note

CSAF Issues Warning of PLA Recruitment of US Air Force Members, Veterans

[The Air Force's Chief of Staff has issued a "stark warning"](#) about attempts by the Chinese People's Liberation Army (PLA) to recruit Air Force members and veterans.

CIRCI, CMMC Inch Closer with Rulemaking Marathons Nearing Crucial Stage

The DoD is "getting closer to making the Cybersecurity Maturity Model Certification requirements a reality," and a [proposed rule may be available for public comment](#) by the end of the year.

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