

THE SAD, YET ILLUSTRATIVE, CASE OF PMO PARTNERSHIP JOINT VENTURE

By

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PMO Partnership Joint Venture (PMO-JV) was a joint venture formed under the laws of the State of Florida for the purpose of submitting a proposal to the Department of Transportation's Federal Transit Administration (FTA) to provide program management oversight services. PMO-JV, a minority-owned small business, had three members: The Allen Group, LLC, Brindley Pieters & Associates, Inc., and EAC Consulting, Inc.² Although PMO-JV's technical proposal was "among the most 'highly rated' technical proposals"³ received by FTA, and although FTA awarded 18 contracts in response to proposals it received, PMO-JV's cost proposal was rejected by the FTA Contracting Officer and the joint venture was not selected for contract award.

PMO-JV protested the Contracting Officer's rejection of its cost proposal to the Government Accountability Office (GAO), and its protest was sustained.⁴ In response to GAO recommendations, FTA had PMO-JV's proposal reevaluated and, once again, the FTA

Contracting Officer rejected PMO-JV's cost proposal. Once again, PMO-JV protested the Contracting Officer's decision; once again, GAO sustained the protest.⁵

Two bid protests and two protests sustained over a two-year period.⁶ What went wrong here? When one looks at these two protests, it is clear that both the FTA Contracting Officer and the Federal auditors made some fundamental missteps in their evaluations of PMO-JV's proposal. But beyond pointing fingers at individuals and agencies, the sad case of PMO-JV presents observers with an opportunity to take a look at what went wrong in this particular evaluation and, perhaps, draw some more general conclusions about how Federal agencies and their auditors might approach things differently the next time a joint venture submits a cost proposal. It's an illustrative story with a moral, and that moral is: we can do better. What's more, given the scrutiny being applied to Federal spending amid cries for efficiency and affordability (and the ever-popular calls for reductions in waste, fraud and abuse), *we must do better*. All of us.

The Competition and the First Protest

On June 26, 2008, the FTA issued RFP No. DTFT60-08-R-00010 "soliciting proposals for PMO services to provide support for select capital projects with continuous review and evaluation of grantee and FTA processes to ensure compliance with statutory, administrative, and regulatory requirements, and to monitor the projects to determine whether the projects are progressing on time, within budget, and in accordance with approved grantee plans and specifications."⁷ The RFP notified offerors that "[a]ward was to be made to responsible offerors offering the best value to FTA, considering the following evaluation criteria, listed in descending order of importance: technical and management, cost/price, and socioeconomic status."⁸

The RFP also required offerors to submit a cost proposal that used a RFP-specific “Contract Pricing Summary” supported by “appropriate back-up material”.⁹ PMO-JV submitted a timely proposal that provided cost details for each of the JV’s members. The JV’s cost proposal “identified the various direct labor rates for required personnel, broken down by the partner from which the employee would be assigned--The Allen Group, LLC, Brindley Pieters & Associates, Inc., or EAC Consulting, Inc.--and calculated a total direct labor cost for each partner. In the ‘Labor Overhead’ section . . . PMO-JV provided a labor overhead rate that was applied to each of the joint venture partner’s total direct labor costs. Additionally, PMO-JV supplied [cost details] for various subcontracted consultant services.”¹⁰

The FTA Contracting Officer sent PMO-JV’s cost proposal to Booth Management Consulting, LLC (BMC), who had been hired to assist the FTA with the procurement. As part of its review, BMC examined PMO-JV’s proposed indirect costs. BMC did not like what it saw and reported to the Contracting Officer that “the cost/pricing data submitted by the offeror are not adequate to negotiate a fair and reasonable contract price for the direct labor, escalation, and indirect cost rates.”¹¹ BMC opined that—

The cost proposal should be for the PMO Partnership Joint Venture Entity and should not list the costs for each partner separately. The PMO Partnership Joint Venture is a separate entity in and of itself and that is how the costs should be presented in the cost proposal.

The cost proposal, submitted by the Joint Venture [JV] does not reflect that the JV is operating as an independent entity, which for Government contracting purposes would list an indirect rate structure that would be unique to the Joint Venture only and . . . was not prepared in all material respects in accordance with the appropriate provisions of the FAR Part 31 and the Transportation Acquisition Regulation. It is also noted that the JV proposal proposed three (3) separate indirect rates that were both unique and specific to each of the 3 JV members.¹²

[Emphasis in original.]

BMC also told the FTA Contracting Officer that—

Indirect cost rates were not projected for the PMO Partnership and used in the cost proposal in accordance with FAR 31.203. Instead the indirect cost rates for each partner were used separately in the cost proposal. A budget should have been developed for the partnership entity and projected indirect rates should have been calculated from the budget and used in the cost proposal. As a result the indirect costs included in the cost proposal are questioned . . .

The contract pricing summary lists Brindley P[i]eters & Associates and EAC Consulting as if they are sub-consultants on the project instead of partners and the Allen Group as if it is the prime contractor instead of a partner. The cost proposal should be for the PMO Partnership Joint Venture Entity and should not list the costs for each partner separately. The PMO Partnership Joint Venture is a separate entity in and of itself and that is how the costs should be presented in the cost proposal. . . .¹³

When it learned of BMC’s position on its proposed indirect rates, PMO-JV tried to point out that the RFP did not provide clear instructions regarding how the pricing for a joint venture was to be prepared. (Indeed, the RFP downplayed the importance of the required “budget summaries,” stating that the offerors’ cost information was required only “to validate that the proposed costs are consistent with the technical proposal, or . . . to help identify unrealistically priced proposals.”)¹⁴

PMO-JV appealed to the FTA Contracting Officer, who apparently verbally directed PMO-JV to prepare indirect rates “specifically for the joint venture.”¹⁵ In an attempt to correct the situation, within 24 hours of receiving that direction PMO-JV provided the FTA Contracting Officer “with a [single] weighted average of the three partner’s individual overhead rates.”¹⁶ However, that new composite indirect rate was not provided to BMC by the FTA Contracting Officer.¹⁷ When PMO-JV followed-up with the Contracting Officer to find out why the new composite rate had not been provided, the Contracting Officer told PMO-JV that it was “too late” to provide clarifications to its proposal, and the new information would not be considered—even though it had been specifically requested.¹⁸ Because PMO-JV had failed to propose a single

overhead rate for its Joint Venture, its proposed costs were deemed to be inadequate for negotiation and award was made to 18 other firms—but not to PMO-JV.

PMO-JV filed a bid protest with the GAO. During arguments, the FTA characterized PMO-JV’s submission of multiple indirect rates (one for each JV member) as a noncompliance with Cost Accounting Standard 401.¹⁹ Because its proposed costs were noncompliant with Cost Accounting Standards (CAS), the FTA Contracting Officer found that PMO-JV’s accounting system was inadequate. BMC provided the FTA with a memorandum supporting the position that PMO-JV’s cost structure was noncompliant with CAS 401. The BMC memo stated—

... the contractor’s proposal did not comply with CAS 401 as the contractor’s proposal failed to identify a unique rate structure, for the [joint venture] which an independent and professionally operated organization would have established in the regular course of doing business. . . . The CAS/FAR noncompliance issue is not the number of indirect rates, [but rather PMO-JV’s] failure to identify its own rate structure for allocating costs to Government contracts.²⁰

Unfortunately for the FTA’s legal position, PMO-JV was classified as a small business concern. Accordingly, it was exempt from the requirements of CAS 401.²¹ As the GAO wrote, “Since PMO-JV is a small business for which CAS does not apply, the agency’s rationale for excluding PMO-JV on the basis of CAS 401 is unreasonable.”²²

In any case, even if PMO-JV had not been a small business—as the GAO went out of its way to point out—there was nothing noncompliant, *per se*, with failing to propose indirect rates of the joint venture if the joint venture was not going to incur any indirect costs. The bid protest opinion stated—

... neither FTA nor BMC has provided any analysis or legal authority as to why the PMO-JV indirect rate structure, which adopts the individual overhead rates of the joint venture partners for PMO-JV’s own use and describes how the rates will be applied, violates CAS 401. Nor is it apparent to our Office why this would violate CAS 401, given that FTA and BMC have not explained why the particular overhead rate structure proposed by PMO-JV would lead to an inconsistency in the application of cost accounting practices or a loss of financial control over costs

during contract performance. In this regard, it is notable that BMC's audit report and FTA's determination and findings supporting the rejection of PMO-JV's proposal because of its unacceptable accounting system did not make any mention of a CAS 401 violation. Moreover, we have found no other authority that explicitly prohibits PMO-JV's proposed rate structure.²³

The GAO acknowledged that the adequacy of an offeror's accounting system was a matter of prospective contractor responsibility. The Federal Acquisition Regulation (FAR) requires that prospective contractors must be determined by the Contracting Officer to be "responsible" as that term is defined in the FAR. In order to be found responsible a prospective contractor must have "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them."²⁴ Moreover, a contractor must have an adequate accounting system in order to receive a cost-reimbursement contract.²⁵ In considering protests of a Contracting Officer's determination of contractor responsibility, the GAO normally defers to the Contracting Officer's discretion. As the GAO wrote—

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer, who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacked any reasonable basis.²⁶

But in this case, the GAO found the FTA Contracting Officer's determination that PMO-JV was not a responsible offeror was unreasonable. In particular, it was not reasonable for the Contracting Officer's to fail to consider the "weighted average" rate provided by PMO-JV in response to BMC's early concerns about the proposed indirect rates. The GAO noted that the Contracting Officer was required to consider new information if there was sufficient time to do so before making the award, saying, "An agency can and should reverse a previous non-responsibility determination based on additional information brought to its attention prior to award."²⁷ The GAO noted that "communicating with an offeror concerning its responsibility,

that is, addressing agency concerns about the offeror’s ability to perform, do not constitute discussions, so long as the offeror does not change its proposed cost or otherwise materially modify its proposal.”²⁸

The GAO sustained PMO-JV’s protest and recommended that the FTA reevaluate the adequacy of PMO-JV’s accounting system.²⁹ The GAO wrote—

If PMO-JV’s accounting system is found adequate, the agency should determine whether PMO-JV’s proposal is otherwise acceptable and in line for award, and if so award should be made to that firm. If PMO-JV’s accounting system is found inadequate and its proposal rejected for this reason, the matter, which involves the responsibility of a small business concern, must be referred to the Small Business Administration for a Certificate of Competency (COC) determination.³⁰

The Second Protest

Less than a year later, PMO-JV was back before the GAO in another protest over the same procurement. This time, PMO-JV was protesting the FTA Contracting Officer’s rejection of its cost proposal because it was “inadequate”.³¹ The Contracting Officer found that PMO-JV’s cost proposal was inadequate because—

... it does not comply with the documentation requirements of FAR [§] 15.408, Table 15-2, Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data are required and also does not provide for an acceptable basis for negotiating a fair and reasonable contract price.³²

According to the GAO’s chronology, after the first protest was sustained, the FTA requested that the Defense Contract Audit Agency (DCAA) perform a review of PMO-JV’s cost proposal. In its request for audit, the FTA Contracting Officer expressly requested that DCAA review PMO-JV’s cost proposal “using the applicable regulatory criteria contained within FAR 15.408, Table 15-2—Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required.”³³ Moreover, the FTA Contracting Officer expressly limited DCAA’s

evaluation to the cost information contained in PMO-JV's cost proposal (which was provided to DCAA on a compact disk)—and limited the auditors' ability to communicate directly with PMO-JV or to seek additional data. Thus, DCAA's "audit" consisted solely of comparing PMO-JV's cost proposal to the format requirements of FAR Table 15-2.

DCAA found various inadequacies in the PMO-JV cost proposal. As the GAO wrote—

For example, the DCAA reported that PMO-JV failed to provide adequate cost or pricing data, or a cost or price analysis, for any of the [deleted] subcontract consultant services included in the Contract Pricing Summary Sheet (Attachment J-6), and concluded that this failure violated the requirements contained in FAR § 15.408, Table 15-2, II.A.(2). The DCAA additionally reported six more 'cost or pricing data' inadequacies, based on its comparison of PMO-JV's cost proposal to FAR § 15.408, Table 15-2, that related to its and its subcontractor's proposed direct labor rates and indirect expense rates.³⁴

The FTA Contracting Officer relied on the DCAA's audit report to find that PMO-JV's cost proposal was not an acceptable basis for negotiating a fair and reasonable price. As it turned out, the GAO found that DCAA had been directed to look at the wrong thing using the wrong regulatory standard, and had, in fact, *never* told the FTA Contracting Officer that PMO-JV's cost proposal was not a suitable basis for price negotiation.

Auditing the Wrong Thing

Importantly, the GAO noted that the FTA's audit request to DCAA did not implement the recommended corrective action from the first bid protest.³⁵ The agency did not request a reevaluation of PMO-JV's accounting system in order to determine whether the offeror was a responsible prospective contractor. The direction from the FTA Contracting Officer to the DCAA auditors, to review PMO-JV's cost proposal, had no apparent connection to an evaluation

of the adequacy of the joint venture's accounting system. In retrospect, it is unclear what the Contracting Officer hoped to accomplish with the audit request to DCAA.

Adequate Competition and "Cost or Pricing Data"

FAR Table 15-2 specifies the format to be followed when cost or pricing data is being submitted (and when the contracting officer directs that the format be used).³⁶ The very name of Table 15-2 itself tells acquisition professionals that its format is to be used only for an offeror's submission of "cost or pricing data." The term "cost or pricing data" has a specific definition in the FAR, found at FAR 2.101. Unfortunately for the FTA and its DCAA auditors, PMO-JV *was never required to submit cost or pricing data* and so the PMO-JV was never required to follow the format requirements of Table 15-2. The GAO found that the RFP expressly told offerors that, "adequate price competition is expected to exist, and this action is therefore exempt from the requirement for submission of cost or pricing data."³⁷

In addition, the RFP informed offerors that "Any information submitted must support the price proposed... Such information is not considered cost or pricing data, and will not require certification in accordance with FAR 15.406-2."³⁸ In fact, once the FTA Contracting Officer determined that adequate competition existed, obtaining cost or pricing data was *prohibited*.³⁹

The FAR was recently revised to redefine the term "cost or pricing data" and related requirements.⁴⁰ Those revised definitions affect the types of cost information an offeror might now be required to submit in response to a solicitation. In addition, DOD has recently issued guidance that make it more difficult for a Contracting Officer to determine that adequate competition exists unless multiple bids are received.⁴¹ None of those changes affected the situation facing PMO-JV; it would still have not been submitting cost or pricing data under the

applicable requirements at the time—nor would PMO-JV be required to follow the format of FAR Table 15-2 even under the revised definitions in effect today.⁴²

In addition, the FAR provides that, even if PMO-JV had been required to submit what is now called “certified cost or pricing data” (which likely would have subjected it to the format requirements of FAR Table 15-2), it would have been excused from such requirements once the contracting officer determined that “adequate competition” existed. As FAR 15.403-4(c) states, “If certified cost or pricing data are requested and submitted by an offeror, but an exception [to the requirements to obtain “certified” cost or pricing data] is later found to apply, the data *must not be considered certified cost or pricing data* as defined in 2.101. ...”⁴³ Glossing over the fact that the solicitation expressly told offerors that they were not submitting cost or pricing data, simply given the fact that the FTA awarded 18 support contracts, it is absolutely clear that there were at least 20 bidders and thus there was adequate competition under any applicable agency guidance—and thus *no offeror* was going to be submitting “cost or pricing data” (certified or otherwise) subject to the requirements of FAR Table 15-2.

As further evidence supporting that viewpoint, the GAO found that none of the other offerors’ cost proposals had been “evaluated for adequacy based on the instructions contained in FAR § 15.408.”⁴⁴ In other words, PMO-JV’s cost proposal had been held to a different, higher standard than the other offerors—and the GAO found that it was an inapposite standard.

Why the FTA Contracting Officer issued direction to DCAA that caused the auditors to evaluate the wrong data, against the wrong regulatory standard, remains a mystery. Another mystery is why DCAA accepted the direction it received from the Contracting Officer, and why it chose to violate its own procedures—as well as Generally Accepted Government Auditing Standards (GAGAS)—by doing so.

Problems with DCAA's Audit Report

The FTA Contracting Officer relied on the DCAA audit report to reject the PMO-JV cost proposal for a second time. But GAO found that the reliance was misplaced. When the GAO looked at the DCAA audit report, it did not find any auditor opinions that stated (or even implied) that PMO-JV's cost proposal was an inadequate basis to negotiate a fair and reasonable price. *The DCAA auditors had never opined on that issue at all.*

Based on the direction it had received from the FTA Contracting Officer, DCAA "qualified" its audit report. It wrote that its effort did "not constitute an audit or attestation engagement under generally accepted government auditing standards (GAGAS)" and that it was not expressing any opinion "on the adequacy of the proposal for price negotiation."⁴⁵ To be clear: instead of expressing an opinion on the suitability of PMO-JV's cost proposal for negotiation purposes, DCAA *expressly disclaimed any opinion whatsoever* on that topic. The DCAA audit report simply could not be used by the FTA Contracting Officer as the sole basis for concluding that the PMO-JV cost proposal was inadequate for negotiations.

Moreover, as DCAA noted in its audit report, in accepting direction from the FTA Contracting Officer, it had strayed from its normal audit procedures. Normally, in evaluating an offeror's cost proposal, DCAA would—

... convey in writing any significant proposal inadequacies to the contractor in order to confirm the availability/existence of additional support data, confirm the existence of any inconsistencies or inaccuracies within the proposal and to solicit the contractor's intent regarding planned corrective action.⁴⁶

In their evaluation of PMO-JV's cost proposal, DCAA auditors did not coordinate with the entity being audited, as would normally be the case.⁴⁷ They simply followed FTA direction and examined the cost data PMO-JV had originally provided to the FTA, comparing it to the

requirements of FAR Table 15-2. DCAA did not follow its normal audit procedures and did not comply with GAGAS. But that's not all.

GAO found that not only did DCAA fail to comply with its normal audit procedures, it also failed to comply with applicable FAR requirements. FAR 15.404-2(d) requires that—

The [administrative contracting officer] or the auditor, as appropriate, shall notify the contracting officer immediately if the data provided for review is so deficient as to preclude review or audit. . . . The contracting officer immediately shall take appropriate action to obtain the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer shall withhold the award . . .

GAO wrote that—

In this case, we think that questions about the adequacy of the submitted cost data should have been a subject of dialogue between the agency (or DCAA) and PMO-JV before that firm's proposal was rejected for this reason, particularly given that the previous awards under this solicitation were made over a year ago.⁴⁸

In addition to the foregoing, it is worth noting that FAR 15.404-2(c)(3) states, "The auditor is responsible for the scope and depth of the audit." In other words, the auditors are responsible for ensuring that their procedures are sufficient to meet audit objectives established by their requestors, and must resist any contracting officer direction that would compromise those procedures. Thus, although the GAO did not take DCAA to task for allowing the FTA Contracting Officer to limit its audit scope and methodology (in violation of applicable FAR and GAGAS requirements as well as normal audit procedures), it certainly could have.

With hindsight, it's not clear why DCAA accepted the assignment from FTA or why it allowed the requestor to compromise its audit procedures. Given DCAA's recent problems with criticism of its audit report quality and its renewed agency-wide commitment to comply with GAGAS, it's a mystery why DCAA chose to issue an audit report with such a limited scope when doing so was in violation of GAGAS requirements.⁴⁹ What is clear, however, is that the

FTA Contracting Officer's problematic direction to the auditors, coupled with a misinterpretation of the audit report, led to an unsupported finding that PMO-JV's cost proposal was not an acceptable basis to negotiate a fair and reasonable price. Meanwhile, 18 of PMO-JV's competitors had a year's worth of work on FTA projects and PMO-JV found itself back before the GAO's bid protest forum.

GAO's Second Protest Decision

Given the foregoing, it should be unsurprising that the GAO sustained PMO-JV's second protest. Among other points, the GAO noted that "An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another." GAO wrote—

In accordance with the terms of the solicitation, PMO-JV did not submit cost or pricing data with its cost proposal, nor did it submit data in the format specified at FAR § 15.408, Table 15-2. PMO-JV instead submitted other than cost or pricing data ... with supporting back-up material, and a budget summary as requested by the RFP.

However, the FTA contracting officer limited DCAA's review of PMO's cost proposal to verifying whether the data was presented as required by FAR § 15.408, Table 15-2. This was improper because the use of these requirements are only appropriate where cost or pricing data is required by the solicitation. We also note that this table was neither referenced nor incorporated into the RFP, and there is nothing in the RFP to put offerors on notice that the agency would evaluate cost proposals against FAR 15.408, Table 15-2; to the contrary, the solicitation expressly stated that cost or pricing data was not required.

As indicated, DCAA's constrained adequacy review found various inadequacies in PMO's cost proposal because supporting data required by FAR § 15.408, Table 15-2 was not included. ... However, the RFP's cost proposal instructions did not indicate that PMO-JV had to conduct and submit such analyses.⁵⁰

The GAO wrote, "Because the RFP expressly provided that cost or pricing data was not required, and because the RFP did not otherwise indicate that the data should be presented in this

format, the agency’s evaluation of PMO-JV’s cost proposal was unreasonable.”⁵¹ In addition, GAO found that FTA had not treated all offerors equally, because out of all the offerors, only PMO-JV’s cost proposal was singled-out for evaluation against the criteria of FAR Table 15-2. The GAO wrote, “It is fundamental that the contracting agency must treat all offerors equally, and therefore it must evaluate offers evenhandedly against common requirements.”⁵²

Based on those findings, PMO-JV’s second protest was sustained. The GAO wrote—

We recommend that the agency re-evaluate PMO-JV’s cost proposal in accordance with the terms of the solicitation and applicable FAR provisions, and have such dialogue with PMO-JV to ensure either that the company provides adequate information for the agency to negotiate a fair and reasonable price or refuses to provide such information. In the event that PMO-JV provides adequate information for the agency to determine that it offered a fair and reasonable price, the agency should make award to that firm if otherwise appropriate.⁵³

The FTA finally got the message and negotiated a contract with PMO-JV. Two years after its competitors had received their contracts, and after it had pursued two protests at the GAO, PMO-JV finally was awarded the contract it had always deserved to win.

Conclusion

What lessons can be learned from this sad tale?

First, it seems that the FTA Contracting Officer (and/or the auditors from BMC) was unfamiliar and perhaps uncomfortable with the joint venture proposed by the three PMO-JV members.⁵⁴ Not all joint ventures must be “populated” and not all joint ventures operate independently of the members.⁵⁵ In this case, each JV member was going to operate as a subcontractor to the JV entity (or to one of the members acting as a general manager of the JV), and that’s how the proposal was submitted. Yet existing regulations and guidance don’t expressly accept that mode of operation. One wonders if the PMO-JV technical proposal clearly

explained how the JV would operate and if, with 20/20 hindsight, the PMO-JV members would propose that same methodology today.

Second, the proper role of auditors in the source evaluation process needs to be questioned. In the first protest, the FTA Contracting Officer seemed to rely on the BMC audit report like a crutch. In the second protest, the FTA Contracting Officer used the DCAA audit report as the basis for finding that PMO-JV's cost proposal was inadequate to form the basis for negotiating a fair and reasonable price—even though DCAA's report clearly stated that it was not expressing any opinion on the adequacy of PMO-JV's cost proposal as a basis for price negotiation. Obviously, there is a trade-off between a contracting officer's use of independent business judgment and the “rubber stamp” acceptance of auditor findings from a review of an offeror's cost proposal. In this story, the FTA Contracting Officer's use of independent judgment appeared to be lacking.⁵⁶

In looking at FAR 15.404-2, it would seem that a contracting officer should first evaluate an offeror's submitted pricing information to determine whether it is sufficient to determine a fair and reasonable price. Only if the submitted information is determined to be insufficient should “field pricing assistance” be requested.⁵⁷ In this instance, it appears that the FTA Contracting Officer automatically looked to the auditors (first BMC and then DCAA) for an evaluation of PMO-JV's cost proposal, without first checking to see whether such assistance was actually required to order to commence negotiations.

Another lesson that might be learned from the sad case of PMO-JV is the importance of communication between all parties. This story is rife with miscommunication, limited communication, and instances of no communication. Had the parties been communicating with each other the two GAO bid protests might never have been necessary.

Recently, the Office of Federal Procurement Policy (OFPP) reemphasized the need for contracting officers to communicate with their vendors, telling them, “Early, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements, including (but not limited to) those for large information technology (IT) projects.”⁵⁸ The OFPP memo discussed ten common “myths” regarding Government/vendor communications, and “busted” each of them. Directly on point with this story of PMO-JV’s two protests, the OFPP told contracting officers that, “Restricting communication won’t prevent a protest, and limiting communication might actually increase the chance of a protest – in addition to depriving the government of potentially useful information.”⁵⁹

Moreover, DCAA recently reemphasized the need for its auditors to communicate, both with those requesting audits and those being audited.⁶⁰ Its September 2010 guidance stated (in part)—

Effective communication with the contracting officer and contractor throughout the audit process is an essential part of performing a Generally Accepted Government Auditing Standards (GAGAS) compliant audit while meeting the requestor’s needs. For example, auditors must communicate with the contractor to gain a full understanding of the contractor’s submission or other areas subject to audit. Auditors also need to communicate with the contractor through-out the audit to ensure that audit conclusions are based on a complete understanding of all pertinent facts and should obtain the contractor’s views of the audit conclusions and recommendations for inclusion in the audit report. Auditors must communicate with the contracting officer/requestor to gain a clear understanding of the requestor’s needs and specific concerns that he/she may have relative to the audit.⁶¹

The sad case of PMO-JV and its two successful bid protests seems to be an object lesson regarding what can happen when the parties fail to communicate. As the result of the lack of communication, scarce audit resources were misused, taxpayer funds were wasted, a small business failed to receive a contract award for which it was qualified to perform, and a Federal agency didn’t receive the services of a very highly rated contractor.

It is said that “a wise man learns from the mistakes of others; a fool by his own.” In the current environment of budgetary pressures, searches for efficiency and affordability, and scrutiny on wasteful practices, perhaps this story can also serve as an object lesson for others to use to improve their processes. Clearly, there is room for improvement.

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² Each individual member of PMO Joint Venture was a minority-owned small business. The JV’s managing partner, The Allen Group, was a women-owned small business, as well. (Source: E-mail from J. Tong, Atty., on file with the author.)

³ GAO B-403214; B-403214.2, Oct. 12, 2010 (hereinafter “GAO Protest 2”), page 2.

⁴ Indeed, not only was this protest sustained, but the GAO recommended that FTA reimburse the protester for the costs of filing and pursuing the bid protest, including reimbursement of the protestor’s attorneys’ fees. This remedy indicated that the GAO found that some aspect of the solicitation, evaluation, and/or award process had violated a statute or regulation. (See 4 CFR § 21.8(d)(1).) The same was true for PMO-JV’s second protest, as well.

⁵ PMO-JV was represented by attorneys from the law firm of Bryan Cave, LLP in its two bid protests. The author wishes to thank Joyce Tong (Associate, Bryan Cave, LLP) for her review of an early draft, and her helpful comments that significantly improved the final article. Any remaining errors are the author’s.

⁶ The situation was actually *worse* than is described in this article. Another offeror, McKissack+Declan JV II (MD-JV), found itself in the same situation as PMO-JV. The DCAA rejected its proposed joint venture indirect costs as well, using much the same rationale as was used by BMC to reject PMO-JV’s proposed indirect costs. Similarly, the GAO sustained MD-JV’s bid protest; see GAO B-401973.2; B-401973.4, Jan. 13, 2010. As happened to PMO-JV, MD-JV’s cost proposal was rejected a second time by the FTA Contracting Officer. However, MD-JV elected not to pursue a second protest.

⁷ GAO B-401973.3; B-401973.5, Jan. 14, 2010 (hereinafter “GAO Protest 1”), page 1.

⁸ *Id.*, page 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ GAO Protest 2, pages 4 – 5.

¹² *Id.*, page 5.

¹³ GAO Protest 1, page 3.

¹⁴ GAO Protest 2, page 3.

¹⁵ GAO Protest 1, page 4.

¹⁶ GAO Protest 2, page 5.

¹⁷ E-mail from J. Tong, Atty., on file with the author.

¹⁸ *Id.*

¹⁹ See 48 C.F.R. § 9904.401, “Consistency in Estimating, Accumulating and Reporting Costs”.

²⁰ GAO Protest 1, page 6.

²¹ See 48 C.F.R. § 9903.201-1(b)(3), which exempts contracts and subcontracts awarded to small business concerns from CAS coverage.

²² GAO Protest 1, page 7.

²³ *Id.*, Pages 7 – 8.

²⁴ See 48 C.F.R. § 9.104(e).

²⁵ See 48 C.F.R. § 16.301-3(a)(1).

26 GAO Protest 1, page 5.

27 *Id.*, page 8.

28 *Id.*

29 The GAO noted that the FTA continued to argue its position vis-à-vis PMO-JV's alleged CAS 401 noncompliance even after, during an outcome prediction Alternate Dispute Resolution (ADR) conference, "the GAO attorney handling this case stated that the agency had not provided a reasonable basis for excluding PMO-JV's proposal from the competition, and had unreasonably failed to consider the single weighted average overhead rate provided to the contracting officer." (GAO Protest 2, page 6.)

30 GAO Protest 1, page 9.

31 GAO Protest 2, page 8.

32 *Id.*, pages 8 – 9.

33 *Id.*, page 7.

34 *Id.*, page 8. (Internal footnote omitted.)

35 *Id.*, page 7, footnote 4.

36 See 48 C.F.R. § 15.403-5(b)(1), giving a contracting officer discretion over the format to be used when cost or pricing data are being obtained. Moreover, § 15.408 clearly limits use of Table 15.2 to submission of what is now called "certified cost or pricing data." ("This document provides instructions for preparing a contract pricing proposal when certified cost or pricing data are required.")

37 GAO Protest 2, page 3.

38 *Id.*

39 See 48 C.F.R. § 15.403-1(b)(1).

40 On August 30, 2010, Federal Acquisition Circular (FAC) 2005-45 implemented FAR Case 2005-036, which significantly revised the definition of "cost or pricing data" and added a new term ("certified cost or pricing data"). See 75 FR 167, pages 53135 – 53153.

41 On November 24, 2010, Shay Assad, Director of Defense Procurement and Acquisition Policy (DPAP), issued a memorandum to DCMA Contracting Officers informing them that, effective immediately, "[t]o maximize the savings that are obtained by competition, contracting officers will no longer use the standard at FAR 15.403-1(c)(1)(ii) or (iii) to determine that the offered price is based on adequate competition when only one offer is received." There is some reason to believe that this guidance was issued at the behest of DCAA.

42 See note 36, *supra*.

43 Emphasis added.

44 GAO Protest 2, page 11.

45 *Id.*, pages 7 – 8.

46 *Id.*, page 8.

47 Indeed, apparently *nobody* ever communicated with PMO-JV during the agency's corrective action taken in response to the first GAO bid protest decision. Neither FTA nor DCAA ever communicated with PMO-JV until the offeror received a letter telling it that, once again, its cost proposal had been rejected. (Source: E-mail from J. Tong, Atty., on file with the author.)

48 GAO Protest 2, page 11.

49 See "Surviving Government Audits: Have the Rules of Engagement Changed?" Nicholas Sanders, 4 GCCPAR 2, March 2009. Also see "The Year of Change for the Defense Contract Audit Agency," Nicholas Sanders, Contract Management, April 2010.

50 GAO Protest 2, page 10.

51 *Id.*

52 *Id.*, page 11.

53 *Id.*

54 It is unknown why this should be the case, since the FAR clearly encourages contractor teaming. See, e.g., 48 C.F.R. § 9.602.

55 See "Accounting, Cost and Pricing Issues in Strategic Alliances and Teaming Agreements," (Aiken, Check, Sanders), Strategic Alliances and Teaming on Government Contracts: Winning Combinations for the Next Century, American Bar Association, 2000.

56 See FAR 1.602-2. (While contracting officers must "request and consider the advice of specialists," they "should be allowed wide latitude to exercise business judgment.") Also see "The Incredible Shrinking Contracting Officer," John S. Pachter, 39 Pub. Contract Law Journal 4, Summer 2010, pages 705 – 740.

⁵⁷ See FAR 15.404-2(a)(1). (“The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The contracting officer shall tailor requests to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.”)

⁵⁸ Memorandum from Dan Gordon, Administrator for Federal Procurement Policy, “‘Myth-Busting’: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process,” February 2, 2011.

⁵⁹ *Id.*

⁶⁰ See DCAA Memorandum for Regional Directors (MRD) 10-PSP-023(R), Sept. 9, 2010. (“[The auditor] should answer the cost analyst’s questions to help him understand the audit conclusions and rationale. Providing such explanations is a normal part of any audit and does not impair your independence or otherwise violate GAGAS. ... On occasion, it may also be appropriate to provide selected working papers which support complex audit computations to facilitate the contracting officer’s understanding.”) Also see MRD 10-PSP-024(R), Sept. 9, 2010, issuing “Rules of Engagement” to its auditors emphasizing the need for communication during audit performance.

⁶¹ DCAA MRD 10-PSP-024(R), “Audit Guidance on Auditor Communications (‘The Rules of Engagement’).”